

AUSTRALIA / JUDGMENT

CASSON and ANOR v BARTLETT [1996] NSWCA 93

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CASSON v BARTLETT

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

GLEESON CJ and POWELL JA 8 December 1995, 25 June 1996

[1996] NSWCA 93

DAMAGES — Measure of damages — Personal Injuries — Causal relationship between motor vehicle accident and alleged disabilities — Acceptance of plaintiff's evidence as to development of symptoms — Acceptance of opinions of plaintiff's medical witnesses — No question of principle.

Gleeson CJ This is an appeal from a decision from his Honour Judge Craigie QC in the District Court, awarding to the respondent damages in the sum of \$54,194.

The respondent sued the appellants for damages for personal injuries allegedly suffered as a result of a motor vehicle accident. Liability was not in issue, and the inattention came before Craigie DCJ for the assessment of damages.

The motor vehicle accident in question which occurred in late December 1992, involved a rear-end collision. A vehicle driven by the respondent was stationary at an intersection, and the appellants' vehicle ran into the back of it.

At the time of the accident the respondent was aged thirty-three. She was employed as a house maid at a motel. She lived with her husband and their three children. Up until the time of the accident, in addition to her work as a house maid, she engaged in relatively strenuous physical activity around the home, including regular lawn mowing and painting. She was a healthy, reasonably active, woman with no significant disabilities.

Immediately following the accident the respondent felt soreness in her neck and left arm. She consulted her general practitioner, and he recommended her to a physiotherapist.

The respondent, who needed the money, continued in her employment as a house maid until June 1993, when she could no longer work in that occupation. Over the whole of that period, however, she said that she was experiencing difficulty in carrying out her normal duties, and she gave evidence that her fellow employees covered for her, in particular by making low beds.

There was no suggestion at the trial, and no evidence, that the respondent suffered any other trauma, or was involved in any other occurrence, that might have caused injury to her back, between December 1992 and June 1993, when she gave up her job.

One of the important issues of fact which Craigie DCJ had to determine, and the question which has formed the central issue in this appeal, was whether there was a causal association between the motor vehicle accident in December 1992 and the disabilities from which the respondent was suffering in June 1993, which caused her to give up her employment. The argument which the appellants advanced at the trial, and on this appeal, was that it was lower back pain which made it impossible for the respondent to continue with her employment, and that her lower back pain was not the result of the motor accident. His Honour resolved that issue favourably to the respondent, and it is this finding which is challenged on appeal.

2 UNREPORTED JUDGMENTS

In her particulars of claim the respondent made the following assertions:

"(1) The plaintiff was born on 16 April 1959.

(ii) The plaintiff sustained injury in this particular accident on 22 December 1992.

(iii) At the time of the injury the plaintiff was employed as a house maid and worked at Cumberland Motor Inn, Cumberland Road, Cessnock. This position had been held for a period of some twelve months. The plaintiff was employed on a permanent casual basis.

(iv) The plaintiff, following the accident, returned to work and continued to work until June 1993 when, due to the injuries sustained in the accident, the plaintiff was unable to carry out her duties and subsequently left the said employer."

The particulars of injuries suffered in the accident were given as follows:

"(a) Soft tissue injury of the cervical spine.

(b) Soft tissue injury of the dorsal spine.

(c) Soft tissue injury of the lumbar spine.

(d) Neck pain.

(e) Pins and needles in the left arm extending to fingers."

The particulars of continuing disabilities asserted included pain in the back of the neck, pain in the middle of the back, and pain in the lower back.

As is usual in these cases, his Honour had before him a large number of medical reports written by persons none of whom gave oral evidence. These reports included accounts of the history which the respondent gave to various medical practitioners and a diagnosis based on that history. The medical reports are discussed at considerable length in the reasons for judgment of Craigie DCJ. It suffices for present purposes to say that, assuming the truth of what the respondent told

her doctors, their medical opinions supported her claim that, in June 1993, she was suffering lower back pain (and other pain) which was causally related to the accident.

The respondent herself gave the following evidence, which the trial judge accepted.

The respondent said that prior to the accident she was a healthy, active woman, who did her job as a house maid without any difficulty, and in addition, did a good deal of physically demanding work around the home. Prior to the accident she never had any trouble in carrying out her work at home or her work as a house maid.

The respondent said that immediately following the collision her neck felt strange and she was getting a tingling feeling down her left hand into her fingers. She had never experienced that sensation prior to the accident. She went to see her general practitioner, Dr Tolhurst, who gave her some medication, arranged for x-rays, and told her to go to a physiotherapist.

The respondent was then asked about returning to work following the accident. She gave the following evidence:

"Q And what did you notice about yourself when you went back to the Cumberland Motor Inn?

AI found it very difficult to make the beds and do the vacuuming mainly.

Q Particularly with the beds what did you notice was the problem doing these?

A Well the bending down and having to lift the mattresses up to trick the sheets and things in, and putting the blankets on, because they were very heavy, and you had to use your arms a fair bit, and your shoulders a fair bit for that.

Q What did you find when you did that what problems did you experience?

URJ CASSON v BARTLETT (Gleeson CJ) 3

AI did a lot of aching...

Q When you said there was a lot of aching whereabouts was the aching?

A In between my shoulder blades and my shoulders into my neck.." The respondent then described painkillers which she was given, and the therapy she received. She gave the following evidence:

"Q Just in relation to the heat therapy what part of your body were you getting that treatment to?

A Neck, shoulders, middle of my shoulder blades, all around that area."

She said that the other house maids were covering for her and doing the beds. She then gave evidence that her back was aching. She said:

Q When you say back aching, whereabouts was the aching?

A Across, on the tops of my shoulders, in between my shoulder blades and underneath all in the central area of my back."

The respondent said that she could not do the mowing or other household activities to which she had been accustomed, and that driving a car was painful.

The respondent gave the following evidence about consulting a chiropractor:

"Q No, just before hand, when you went to see him what were the problems that you were experiencing when you initially went to see him?

A Still the headaches, violent headaches, and still the aching in my back and shoulders.

Q And whereabouts in the back was that aching?

A Still the same area, but what I'd found through the course of, and my lower back was getting really sore as well, it had been sore.

Q The lower back?

A Yeah.

Q When did you first notice that the lower back was starting to become sore?

A Just before I finished work.

Q That's in June 1993?

A That's right.

Q And when you say the lower back perhaps you could stand up and show his Honour where you mean with the lower back?

A Here, base of my back here..

Q And now prior to that, you say it was up between your shoulder blade in the middle of your back?

A That's right.

Q Now when you saw Christopher Kay, the chiropractor, what part of your body was he working off? A My neck and shoulder, and lower back in the end."

The general effect of the evidence of the respondent appears to have been that, following the accident, and the treatment which she undertook, the centre of the pain, which had originally been located in the neck and shoulder area, and the middle back, had moved to the lower back.

The respondent gave the following evidence in cross-examination:

"Q Well is it the position that the reason you gave up at the Cumberland Motor Inn was because of the trouble you were having with your low back?

ANo.

Q And yet, that is the trouble with your low back occurred only a couple of weeks was it?

A (Not transcribable)

Q Before you finally gave up your job there is that right?

A Yes. Q And that's just a coincidence is it?

A It was just the final straw."

4 UNREPORTED JUDGMENTS

Dr Plowman, an orthopaedic specialist whose opinion was relied upon by the respondent, said, in a report dated December 1993:

"OPINION

1 In this accident she appeals to have suffered soft tissue injuries of the cervical, dorsal and lumbar spine. In the cervical spine there is associated pain referred to the left arm, which could indicate some damage to a cervical disc, though this has not been checked or confirmed by an appropriate CT scan.

2 Since she was hurt she has had a constant degree of aching/discomfort in the neck, middle and lower back. As a result, though she can do most things she cannot do them for long periods. Associated radiologic and clinical abnormality is minimal, so that one is dependent on her as to the extent of her problem.

3 Fitness - with these disabilities she remains unfit for her pre-injury employment and for prolonged heavy domestic and cleaning work. She is fit for other work and activity."

The first observation to be made about the argument that has been advanced on behalf of the appellants is that it depends upon an artificial attempt to separate the respondent's lower back pain from the other pain in her neck, shoulders, and back, and to isolate the lower back pain as the sole reason why she gave up her employment in June 1993. This does not accord with her evidence, which the trial judge was perfectly entitled to accept. Its sole evidentiary foundation lies in a report of one of the medical practitioners relied upon by the appellants, but Craigie DCJ expressed a preference for the medical opinion of the practitioners relied upon by the respondent.

Additionally, the contention that his Honour was in error in finding that the respondent's lower back problems were causally connected with the motor accident must also be rejected. The respondent's account, in her evidence, of the development of her symptoms was consistent with the conclusion at which his Honour arrived. No other explanation of the cause of her lower back pain, other than, perhaps, coincidental degeneration, was advanced.

The challenge to his Honour's factual findings has not been made good.

The appeal should be dismissed with costs.

Powell JA

At the conclusion of counsel's submissions on the hearing of this appeal I was inclined to the view that Mr GR Petty, who appeared for the Appellants, had made good his challenge to the finding by Craigie DCJ that the lumbo-sacral pain from which the Respondent suffered, and which was the principal cause of her disability to continue in her former employment, was casually related the motor vehicle accident in which the Respondent had been involved.

However, having had an opportunity to re-read, in detail, both the evidence given by the Respondent on the hearing before Craigie DCJ, and the various medical reports which were tendered on each side on the hearing, I have concluded that, as his Honour accepted the Respondent's evidence as to the time of the onset, and the nature, of the lumbo- sacral pain from which she claimed to suffer, that evidence provided a sufficient basis for the opinions - as, for example, that of Dr Kleinman (see Appeal Book at 78) - that there was a causal relationship between the accident and the pain of which the Respondent complained, which opinions were, in their turn, accepted by Craigie DCJ and formed one of the bases for his Judgment.

For these reasons, and for the reasons more fully set out in the Judgment of the Chief Justice, I agree that the appeal should be dismissed with costs.

URJ CASSON v BARTLETT (Powell JA)

Appeal dismissed with costs.

Counsel for the appellants: GR Petty Solicitors for the appellants: BD Dooley Counsel for the respondents: Abbott Tout

Solicitors for the respondents: Cleaves Mallik Gibbs

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