

AUSTRALIA / JUDGMENT

McLEAN v ROWEKAMP [1995] NSWCA 287

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McLEAN v ROWEKAMP

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

GLEESON CJ, PRIESTLEY JA and COLE JA

10, 17 August 1995

[1995] NSWCA 287

DAMAGES — Personal injuries — no issue of principle.

Gleeson CJ. I have had the benefit of reading in draft form the judgment of Cole JA.

I agree with the orders proposed by his Honour, and with his reasons for those

orders.

Priestley JA. I agree with Cole JA.

Cole JA. This is an appeal from a decision by Grove J delivered on 6 April 1995 in which his Honour awarded the plaintiff respondent Renata Rowekamp damages in the sum of \$60,374 together with costs on an indemnity basis from 14 December 1994. At the hearing liability was not in issue. The award of damages was made up as follows:

Out of pocket expenses: \$ 1,759.00 Non economic loss: \$25,900.00 Economic loss: \$25,000.00

Interest: \$ 1,715.00 Total: \$60,374.00

On this appeal the appellant defendant has challenged the sum of \$25,000 for economic loss which comprised \$7,000 for past economic loss and \$18,000 for future economic loss. In addition it has challenged the awarding of \$1,715 interest. The integrity of the award of indemnity costs depends upon the outcome of the appeal in respect of the above matters.

ECONOMIC LOSS

The appellant was injured on 5 November 1991, suffering a ligamentous whip lash injury. She was then aged 47 years, had four adult children and had been divorced in June 1991. She was 51 at the trial.

Grove J implicitly found that the respondent was incapable of performing part-time work in consequence of her injuries suffered in the accident. The major issue at the trial, and on the appeal, was whether the diminution in her earning capacity was or may be productive of financial loss, it being argued by the appellant that she had not established that her work capacity was saleable. It is clear that to recover damages for diminished earning capacity it is necessary for

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a plaintiff to prove that that diminution is or may be productive of financial loss!. As was said in *Medlin v State Government Insurance Commission*², a plaintiff is not entitled: To be compensated for diminution in earning capacity as a distinct additional head of economic loss in circumstances where the diminution has had and will have no adverse effect on actual earnings and will be productive of no economic loss.

The working capacity and actual work of the respondent may be briefly summarised. Prior to the accident she had no disabilities which disqualified her from full-time work as a shop assistant or in a restaurant. However prior to the accident she had in recent years worked only intermittently. The evidence was clear that in the tax

year ended June 1989 she had earned \$2,405 doing part-time work as a shop assistant. That is equivalent to approximately \$46 per week. In the year ended 30 June 1990 she had earned only approximately \$1,000 in a similar capacity. In the year ended 30 June 1991 she was not employed. The accident occurred in November 1991, and in the five months from June 1991 she had been unemployed. She had not obtained any employment post accident.

In the years preceding the accident she had lived in Newcastle. After her divorce in June 1991, and prior to the accident, she had been seeking employment. She had registered with the Commonwealth Employment Service and gave evidence that:

They sent me to different interviews and my age was sort of held a little bit against the chances of getting a job³

During the weekend prior to the accident she moved from Newcastle to the Central Coast thinking that, if she was unable to get work in Newcastle, 'I might be able to get something down there'⁴. The accident immediately after her move inhibited her endeavours to seek employment on the Central Coast. There was no evidence of the availability of employment for a person of the respondent's age and experience on the Central Coast, nor any evidence that her prospects of obtaining employment in that area were greater or less than those in Newcastle.

That the respondent intended to work in employment if it could be obtained in order to support herself after her divorce was clear from her evidence:

Q. * ... Assuming you had not been injured would you still have been looking for work to keep yourself?' A. 'Oh yes.'⁵

The trial judge recorded the submission of the respondent that he should infer that, post divorce and absent accident, she was likely to seek to exercise her earning capacity, and obviously accepted that submission.

The trial judge's findings were as follows:

It is significant in my view that she did not elaborate that she went to the Central Coast looking for any particular work or specifically for fulltime work. Her pattern of part-time work in the past suggests to me that she would have been looking for something of a casual, permanent nature, of something in the order of perhaps 4 to 5

1. Graham v Baker (1961) 106 CLR 341 at 347; Medlin v State Government Insurance Commission (1995) 182 CLR | at 3.

(1995) 182 CLR 1 at 4.

Appeal Book, p.11W.

Appeal Book, p.12J.

Appeal Book, p.20P-Q.

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hours a day for perhaps 2 to 3 days per week. The sum of \$10 per hour seems to be the lowest that she had worked for and I note that on occasions she received up to \$14 per hour.

It has to be said — and I am not criticising the plaintiff in this regard — that her work pattern and her search for future work was at the most somewhat desultory. Nevertheless, I am satisfied that there has been an interference with her earning capacity which in the past and in the future was and is likely to be productive of loss. This must in some fashion be translated into an ingredient of the damages.

If one were to take the postulation that I earlier mentioned of something in the order of 4 to 5 hours per day for perhaps 2 or 3 days a week as something between \$10 and \$14 per hour, it would not be inconsistent to hypothesise an earning capacity reflected by that of something in the vicinity of \$160 per week. Evaluation of the loss of the chance at one-quarter of that seems to me to be as reasonable an approach as any. This would produce a factor figure of \$40 per week. I emphasise that I am not finding that this is an actual loss but I use it to apply to round figures in order to establish some damages for the plaintiff. Broadly that loss over the past 3 and a half years would come to a figure near enough to \$7,000 and that should be included in the damages.

She is now in her 51st year and on the 5 per cent tables a factor of 529.3 would be applied to \$40, giving a capitalised sum of \$21,172. Against that I would deduct 15 per cent for the supposed preponderance of adverse over favourable vicissitudes. That leaves a calculated figure of \$17,996, which I would round to \$18,000. That would give an ingredient for economic loss past and future of \$25,000."⁶

It was submitted by the appellant that there was no evidence to support the finding that 'There has been an interference with her earning capacity which in the past and in the future was and is likely to be productive of loss'.

The appellant relied on the evidence of the Doctors Isaacs, Khan and Professor Kerridge all of whom expressed the view that she was fit for her pre-accident work, sometimes with some restrictions. However the learned trial judge preferred the

evidence of Doctor Plowman. His report of 15 February 1993 set forth the various disabilities from which, in his opinion, the respondent was suffering. He concluded that 'present disabilities have not improved sufficiently yet for her to be able to take on work as shop assistant, or work requiring heavy, prolonged or repetitive use of her arms'.⁷ His later report of 14 September 1994 restated the complaints from which she was then suffering, complaints worsened by particular activities. He found that she was still restricted with 'Heavy housework and heavy shopping' and that 'The neck pain is constant and made worse by various activities which she described'. Whilst he did not in the later report state that she remained unfit for work, the complaints and disabilities which he recorded were similar if not identical to those in the previous report in which he had found that incapacity. The trial judge found:

I find that the plaintiff does have symptoms and difficulties of the type which are consistently scheduled in Doctor Ploughman's reports, but to my judgment his descriptions somewhat magnify the levels.

6. Appeal Book, p.90I-91R.

7. Appeal Book, p.42U.

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It seems tolerably clear that, implicitly, if not explicitly, Grove J has accepted a continuing disability to perform the intermittent shop assistant's work to which she referred. Had he not done so there would have been no cause to consider at least future economic loss. No submission was put that this Court should or could reverse that finding so as to prefer the views of the other medical practitioners to whom I have referred.

Much depends in this appeal upon the manner in which one reads the judgment of Grove J. The appellant has analysed the judgment upon the basis that, as Medlin and other cases indicate, it is necessary for the plaintiff to show not only diminution in earning capacity but that that diminution will reflect in economic loss. That is undoubtedly so and his Honour found that:

There has been an interference with her earning capacity which in the past and the future was and is likely to be productive of loss.'⁸

It is clear from the passage quoted that his Honour did not make any error of principle. The difficulty with which his Honour was faced was an evidenciary one in that whilst, pre-accident, it was found the respondent had a capacity for work full-time, she had not so worked for some time, only working part-time, and further that the accident inhibited her seeking such part-time work in the new area to which she moved, being injured immediately after the move. There were thus no precise figures available which would permit the trial judge to calculate with any precision any past economic loss between accident and trial, or future economic loss. Indeed there was the prospect to be taken into account that she may have been unable to find work at all either pre-accident or post accident. This was recognised by his Honour who emphasised that he was 'not finding that this is an actual loss?'. Rather, he adopted the alternative submission advanced to him by the appellant that, at least in respect of the future there should be awarded 'a small cushion'. If such a cushion should be awarded for the future, it is difficult to see why, in respect of the past when precise figures of loss of earnings are not available, his Honour should not make, as best he could, an assessment of the loss of the chance or opportunity which the respondent had of obtaining employment and earning income. It was that evaluation which his Honour made stating:

Evaluation of the loss of the chance at one quarter of that seems to me to be as reasonable an approach as any.'¹⁰.

There was evidence available to him that, pre-accident, although for some years she had not exercised it, the respondent had an earning capacity of at least \$160 per week had she worked 4 to 5 hours per day for 2 or 3 days per week. He assessed the

loss of the chance of earning income both pre-trial and post trial at approximately one quarter of that sum.

Where, because of the accident, precise calculation of past economic loss or future economic loss flowing from diminution of earning capacity resulting from the accident and thus reduction in the opportunity or prospect of obtaining employment and thus converting that opportunity or prospect into monetary loss is not available, in my opinion calculation of a cushion for each of past and future economic loss in the manner undertaken by his Honour is appropriate. It accords

8. Appeal Book, p.90U-W.

9. Appeal Book, p.91G.

10. Appeal Book, p.91D.

with principles enunciated in *Malec v J C Hutton Pty Limited*¹ and with the approach of this Court in cases such as *Younie v Martini*² and *Manuel v Government Insurance Office of New South Wales*³. The grounds of appeal relating to past and future economic loss thus fail.

In the alternative it was contended that any mathematical approach to calculation of the cushion for economic loss flowing from diminution of earning capacity reflecting in monetary loss required a significant discount. In my opinion nothing has been advanced to render inappropriate the assessment made by his Honour of the lost opportunity to earn income in consequence of the accident.

THE PERKISS V CRITTENDEN⁴ POINT

The appellant contended that his Honour had failed properly to direct himself regarding an aspect of the evidence in accordance with the principles enunciated in *Perkiss v Crittenden*. It was contended that his Honour wrongly had, imposed a burden of proof upon the defendant. The appellant contended that the disabilities.

suffered by the respondent at the trial were due to one or more of three incidents which affected her neck region, those incidents being described as the clothes line incident, the grandchild incident and the moving incident. His Honour's findings in this respect were as follows:

It was submitted that the motor vehicle accident was but one of a series of aggravations of an underlying condition. In particular, reference was made to the three so-called incidents. These can be identified as the clothes line incident in May 1993, the protection of the plaintiff's sister's grandchild; and the moving of boxes during a house move. I am not satisfied that the effects of the motor vehicle accident ceased at any point between November 1991 and the present. I accept that her perception of symptoms had improved, as she herself said, when the clothes line incident occurred, but in my view the defendant falls short of showing that this or the other incidents mentioned were themselves causative of subsequent symptoms.

In my opinion the passage does not infringe the principles enunciated in *Perkiss v Crittenden*. The finding of 'non-satisfaction' that the effects of the motor vehicle accident had ceased between its date and the hearing implicitly involve a finding that the trial judge was satisfied of continuation of the effects of the accident to date of trial. That establishes acceptance by the trial judge of a *prima facie* case that incapacity flowed as a result of the defendant's negligence. To overcome that finding it was necessary for the appellant defendant to displace that consequence by establishing to the appropriate level of satisfaction that intervening trauma, or pre-existing trauma were, in truth, responsible for the respondent's condition at trial. His Honour was not satisfied that that onus had been discharged by the appellant defendant. In my view his Honour's approach accords with that in *Perkiss v Crittenden*⁵.

This ground of appeal fails.

INTEREST

The remaining ground of appeal was that his Honour had awarded interest contrary to the provisions of s 73(4) Motor Traffic Act 1988, and in circumstances where the respondent had not established the prerequisites required by s 73(4).

11. (1990) 169 CLR 638.
12. (Unreported) Court of Appeal 21 March 1995.
13. (Unreported) 11 August 1992 Court of Appeal.
14. (1965) 114 CLR 164 at 167-168.
15. (1965) 114 CLR 164 at 168.

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Section 73(4) provides:

- (a) Interest is not payable (and a court cannot order the payment of interest) on such damages unless:
 - (i) information that would enable a proper assessment of the plaintiff's claim has been given to the defendant and the defendant has had a reasonable opportunity to make an offer of settlement (where it would be appropriate to do so) in respect of the plaintiff's full entitlement to all damages of any kind but has not made such an offer; or
 - (ii) the defendant has had a reasonable opportunity to make a revised offer of settlement (where it would be appropriate to do so) in the light of further information given by the plaintiff that would enable a proper assessment of the plaintiff's full entitlement to all damages of any kind but has not made such an offer; or
 - (iii) if the defendant is insured under a third-party policy or is the Nominal Defendant, the insurer has failed to comply with its duty under section 45(2) and (2A); or
 - (iv) the defendant has made an offer of settlement, the amount of all damages of any kind awarded by the court (without the addition of any interest) is more than 20% higher than the highest amount offered by the defendant and the highest amount is unreasonable having regard to the information available to the defendant when the offer was made.

It was said that no material to satisfy those subsections was placed before the Court.

This point was not taken below and should not be permitted to be argued on appeal.

At the conclusion of the substantive reasons, but prior to making any orders, his Honour said:

Accordingly, unless there is some submission which persuades me that interest is unavailable, the judgment figure would be \$60,374, and again unless there is some reason in the Rules or by reason of the operation of the Statute why it should be otherwise, I would propose to order the defendant to pay the plaintiffs costs of action.

The defendant's legal representative remained silent. An offer of compromise was handed to his Honour which his Honour then noted. He then made the following orders:

I direct entry of judgment for the plaintiff for \$60,374. I order the defendant to pay the plaintiff's costs of action, those costs to include costs on an indemnity basis after 14 November 1994.

It is apparent that, by silence, that the appellant accepted that the circumstances necessary to entitle his Honour to make the order for interest contemplated existed. Having not raised any objection to absence of any necessary proof at that time the point may not be taken on appeal.

In my opinion the appeal should be dismissed with costs.

Orders accordingly.

Counsel for the appellant: J Poulos QC Solicitors for the appellant: Abbott Tout Counsel for the respondent: P Little

Solicitors for the respondent: Geoffrey Edwards and Co

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