EAST v CAMERIRAO

Supreme Court of the Northern Territory of Australia

O'Leary C.J.

18 November 1986 at Darwin, 16 February 1987 at Alice Springs

Negligence - Liability - Motor vehicle accident - Collision between the defendant's car and plaintiff's motor cycle - Defendant made right-hand turn into carriageway from driveway - Vision obstructed - Whether defendant kept a proper lookout - Whether plaintiff contributorily negligent.

Damages - Assessment - Motor vehicle accident - Personal injuries - Abrasions to face and right lower limb - Laceration of right foot with crushed skin - Exposed extensor tendons - Crushing of extensor digitorum brevis exposing tarso-metatarsal joints 4 & 5 - Crushed outer cortex of cuneiform bones - Pain and limitation of movement of right ankle and foot - Pain and swelling in ankle and foot after exercise, long standing and when in airconditioning and cold weather - Small scar on upper lip and scar on right foot - Plaintiff formerly an active sportswoman - Unable to participate in sport to the same extent or with former ability - General damages for pain and suffering and loss of enjoyment of life: $25,000.

Cases followed:

Trompp v Liddle (1941) 41 S.R. (N.S.W.) 108
Bruehart v Jarman [1964] N.S.W.R. 1210

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IN THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

AT DARWIN

No. 23 of 1985

BETWEEN:

JENNIFER EAST

Plaintiff

AND:

JOSE DE-NASCIMENTO CAMERIRAO

Defendant

CORAM: O'LEARY C.J.

REASONS FOR JUDGMENT
(delivered 16 February 1987)

In this action, the plaintiff, Jennifer East, sues the defendant, Jose De-Nascimento Camerirao, for damages for injuries sustained by her in a motor vehicle accident on the Esplanade, Darwin on 9 February 1984. The plaintiff is employed by Australia Post, and, on the day of the accident, she was delivering mail along the Esplanade. She was riding a 90 c.c. Motor Scooter provided for her by her employer. It was about 10 o'clock in the morning and she had not long started out on her run. Her motor scooter was fully loaded with mail for the day's delivery. It consisted of a leather satchel, a yellow plastic bin, a yellow plastic carrier at the front of the bike, and a small plastic carrier in front of the handlebars. It weighed some 25 kilograms in all.

Having delivered some mail at a Jennings Construction site (the site of the present Beaufort Centre), the plaintiff then proceeded to travel south along the Esplanade towards the Darwin Hotel. She said she was travelling about 30 kilometres an hour, on her correct side of the road, and close to the centre line. There were cars parked on both sides of the road, but no vehicles were coming from the opposite direction. She said she had travelled about 100 yards when she came across a large tray top truck which was double-parked on her side of the road. She proceeded to pass it. She described what then happened in these words;

> "I was about half way along the length of the truck when a small dark vehicle pulled straight out from the end of the truck. I seen it and started to brake, and realised that the distance that I was I wouldn't be able to stop in time, so I tried to go down behind the back of the vehicle to save from hitting it."

The "small dark vehicle" referred to by the plaintiff was in fact a red or cherry coloured Daihatsu van then being driven by the defendant. It had come out from a driveway to a block of units (Granada Court) on that side of the road. The plaintiff went on to say:

> "I wasn't going particularly fast ... as I say I applied my front brakes, and squeezed on the back ones, and with the weight I was carrying I wasn't going to stop; I was too close to stop."

The plaintiff said that the defendant's van was moving when she first saw it, and: "He appeared to jerk as if he'd sort of tried to make up his mind whether he would stop or whether he would keep going, but not actually stopped - he didn't actually come to a stop."

Under cross-examination, the plaintiff elaborated further, saying:

> "The car came out, he looked, he seen me. It was like a panic - 'I'd better go' - and he took off again. He didn't actually stop the vehicle; he came out, looked, seen me, and then took off again."

In the result, the plaintiff's motor scooter collided with the rear driver's side of the defendant's vehicle, throwing her to the ground, and occasioning her the injuries for which she now claims damages. According to Sergeant Bradford who attended the scene of the accident, the damage to the defendant's vehicle was "very slight damage", and the damage to the scooter was also quite minor, the fork of the front wheel being "bent back slightly". Following the collision the plaintiff's bike travelled forward some 1½ metres before coming to rest, and the plaintiff herself was thrown some 1.2 metres further on from the bike.

The account of the accident given by the defendant differs in some important respects from that given by the plaintiff. The defendant said that he had gone into the grounds of Granada Court that morning to collect a parcel. He said he was in the driveway coming out,and intending to turn right into the Esplanade, when he saw a fairly big truck double parked in the Esplanade, and to his right. It was waiting to come into the driveway. He went on to say:

> "I had stopped, waited to see what he wanted to do, and then he more or less acknowledged to me that I could go ahead, so I come to the start of the truck, which was still just - being in the driveway - and I looked to my left first to see that there were not cars coming from the lefthand side of me, and I more or less got a clue from him that I could go in front of him to go into the carriageway to go down towards the Y.M.C.A., the Beaufort."

There then followed these questions and answers in his evidence:

> "What was your visibility like to the right?---To the right? With the car there and the size of the truck, all traffic that would have been behind him; I wouldn't have seen it.
>
> So your vision was obstructed by only the car that was beside him, or by other cars as well that were parked alongside the road?---There were virtually three cars parked along the side of the road, and the truck as well. I couldn't see anything that would have been behind that if they would have been right up behind them.

You had no knowledge of what was coming from the right?---Prior to that, no.

You mentioned that in some way the driver of the truck gave you an indication that you interpreted as being a signal to proceed; that it was safe to proceed, is that right?---Yes; I more or less got a nod from him that I could move forward.

And you recall it was a nod, was it?---Yes.

Did you then proceed to take the car forward?---Yes.

How far did you go?---I went to the edge of the line that divides the road from one side to the other because I'd stopped there because the truck was right up against that line; and then because there was no traffic coming from the left, I veered out to look with - moving the car forward to see if there was anything going around the other side to overtake it - and then I kept proceeding; and as I kept going forward, I was, sort of, moving slowly forward, and there was a motor bike coming towards me, and then ---.

Just stop there for a minute. So you say you came to a stop near the centre line of the road?---Yes.

At that stage, was any part of your vehicle protruding over the centre line?---When I came to stop at the centre line?

Yes?---No. Then I had to slowly move forward to check that there was no-one coming from that side, and at the time that I had looked, there was no-one coming.

How did you go about checking to the right?---Because the car is so short at the front, taking my foot off the clutch and moving the car forward to look around to see---.

You just made a bodily movement; did you lean forward; did you do that on that occasion?---To lean forward to see if

> there was traffic on-coming from behind the truck?
>
> Yes?---Yes.
>
> When you first looked, did you see anything?---No, I didn't see nothing at all.
>
> What did you do then?---Continued to move forward, to move into the carriageway.
>
> Were you just accelerating away, or were you just creeping forward?--- Creeping forward; taking my left foot off the clutch.
>
> Whilst you were engaged in that, did you see something approach from the right?--- On a second look, yes. When I was almost totally into the lefthand side, yes."

The defendant also said in his evidence that when he first saw the plaintiff she was about 35 metres away, and she appeared to be near the centre of the road, meaning by that about midway between the two kerbs. If that be correct, that would place her over the white line, the evidence being that it was closer to the nearside kerb than to the offside kerb. The defendant also said that she was travelling "quite fast"; he said he would not say her speed was "quite up to 60 kilometres (per hour), but it wouldn't have been too far off".

Evidence was also given by the driver of the truck that was double-parked on the road at the time, Stephen John Rendell. He said he had stopped there, and was waiting to go into the driveway to Granada Court. He said the offside

of his vehicle was probably a foot or so from the white line. He also said that when he saw the defendant's vehicle in the driveway coming out, he looked in his rear vision mirror to make sure no one was coming behind him (he said he had good vision through it), and he then waved the defendant to come out. Whereupon, he said, the defendant slowly came out of the driveway in front of his truck. As he got to the edge of it (by that, I take him to mean the offside edge) he said the defendant stopped and had a look himself, leaning over, and then, as he put it, "he proceeded to take off" and go around him to his right into the Esplanade. Mr. Rendell said the next thing he saw was the girl on a bike from his right window, "just a flash" out of his window. He said he thought she was "slightly over the other side of the road". He said the defendant seemed to try to accelerate to get out of her way, but she collided with the rear of his van.

By his Defence the defendant denies that the injuries suffered by the plaintiff in the collision were the result of any negligence on his part, and says that they were the result, partly at least, of the plaintiff's own fault.

In the first place, I think I should say that, having regard to the short distance the plaintiff had travelled before the collision, the kind of bike she was riding, the weight of mail she was carrying and the very

short distance travelled by the bike and herself after the collision, I am quite satisfied she was not travelling at anything like the speed estimated by the defendant. I think she was very likely travelling at about the speed estimated by herself, that is, at about 30 kilometres per hour. Besides being quite consistent with the objective facts, that estimate also accords with the opinion expressed by Sergeant Bradford, a police officer highly experienced in these matters.

Secondly, I am satisfied on the evidence that, in overtaking the double parked truck, the plaintiff was travelling on the other side of the broken white line, that is, on her incorrect side of the road, though I do not think she was much over that line. The probability is, I think, that as she came up behind the truck and proceeded to pass it, she pulled out to her right, and in fact had to move over the other side of the broken line, to pass it.

There is no doubt that the situation that arose when the defendant came out from the driveway, and proceeded to drive on to the road, his view to the right being completely obstructed by two vehicles parked side by side, was one that was fraught with danger to himself, and to anyone travelling along the road. I think the defendant did, as he said, proceed slowly out of the driveway, but I also think that he accepted Mr. Rendell's signal to him as

indicating that it was safe for him to move out in front of the truck and to proceed into the street. Thereafter, he looked to his left, to see that there was no car coming from that direction, and proceeded to move across the front of the truck onto the road. The defendant said that as he came to the offside edge of the truck, he stopped and looked to his right, but saw no-one coming. He said he continued to move forward into the carriageway travelling north, and, when he was almost totally into it, he saw the plaintiff travelling towards him.

According to Mr. Rendell also, the defendant moved slowly out of the driveway and across the front of his truck, and he stopped as he got to the edge of it and looked to his right, leaning over. Mr Rendell went on to say that the defendant then "proceeded to take off", and to go around to his right into the Esplanade. It will be recalled that the plaintiff's account was that the defendant "pulled straight out from the end of the truck", that he looked, saw her - "it was like a panic" - "I'd better go" - and "he took off again" (emphasis mine). It is significant that both these witnesses refer to the defendant's action in terms of "taking off."

Whether the defendant stopped as he got to the edge of the truck and looked to his right, as both he and Mr. Rendell said he did, is, in my view, open to much doubt. I

do not think he stopped in the sense of coming to a complete halt. If he had done so, and waited there until he had a clear view of anything coming from his right (as I think he should have), he would certainly have seen the plaintiff in time to be able to let her pass in front of him. The more likely happening is, I think, that the defendant slowed his vehicle down as he came to the edge of the truck, perhaps had a cursory look to his right, but relying largely on Mr. Rendell's indication that it was safe for him to proceed out onto the road, "proceeded to take off". I think it must have been just as he "proceeded to take off" that he saw the plaintiff, by which time he could do nothing but accelerate to try to get out of her way.

I think if the defendant had been keeping a proper look out as he emerged onto the street he would have seen the plaintiff well before he did, and in not doing so, as well as in proceeding onto the roadway in the circumstances that then obtained, he was negligent.

As to the question whether the plaintiff herself was guilty of any want of care for her own safety, I do not think she was. I do not think she was travelling at an excessive speed in all the circumstances, nor do I think there was any failure on her part to keep a proper lookout; In overtaking the double-parked vehicle on her incorrect side of the road, I think she was doing no more than she was

quite entitled to do in the circumstances. In my opinion, she was quite entitled to expect that a vehicle would not move out onto the road in her path in the way that the defendant did. I therefore do not think there was any contributory negligence on her part: see Trompp v Liddle (1941) 41 S.R. (N.S.W.) 108; Bruehart v Jarman [1964] N.S.W.R. 1210.

Shortly after the accident the plaintiff was admitted to the Royal Darwin Hospital where she was found to be concussed. She awoke in Casualty, the amnesic period having been approximately one hour. She was complaining of a sore face, right elbow and right foot. Examination of her face revealed abrasions over her right eyebrow, right cheek and right upper lip, and a laceration to the right eyebrow. Her right elbow was swollen and painful, and there was limitation of movement and some bruising over the posterior lower arm in the region of the triceps tendon. On her right lower limb there were abrasions of the thigh, knee and ankle. There was also an untidy dirty laceration over the lateral aspect of the foot with crushed skin distally and proximally, and exposed extensor tendons. There was crushing of the extensor digitorum brevis exposing the tarso-metatarsal joints 4 and 5, and crushed outer cortex of the cuneiform bones.

The plaintiff was taken to theatre the same evening, and all the abrasions were scrubbed clean and the laceration in the right eyebrow was sutured. The foot was debrided and the damaged skin edges excised. Ligaments of the joints were closed, as was the extensor retinaculum. It was noted at operation that the anterior tibial nerve and the terminal portion of the lateral cutaneous nerve of the leg were in tact.

The plaintiff remained in hospital until 20 February 1984. She was discharged on crutches, and about a week or two afterwards commenced physiotherapy for her right foot and ankle. She had physiotherapy three times a week for about the next 8 or 9 months. For about 2 months of that time she was using crutches or a walking stick. She returned to work on 2 April 1984, and was given duties as a mail sorter. She has remained doing that work since then.

The plaintiff's facial abrasions, the laceration in the right eyebrow, and the abrasions to her right thigh knee and ankle have healed, leaving only a small scar on her upper lip and a scar on her right foot. The scar on her upper lip does not worry her, but she said that the scar on her foot is sensitive, and she worries about people knocking it.

The significant disability suffered by the plaintiff as a result of the accident flows from the injury to her right foot and ankle. She was formerly a very active person, and before the accident played softball, netball and indoor cricket. She also enjoyed dancing and motor cycle riding.

She was a Territory softball representative for 3 years before the accident, and prior to that had been a Darwin representative, and also a Queensland representative when she lived there. She trained twice a week and played every Saturday. In the netball season, she trained once a week and played once a week. She also played indoor cricket with her work team once a week, and went dancing fortnightly. As a result of her injuries, the plaintiff has been left with a permanent stiffness of the foot and ankle which, although not crippling, nevertheless constitutes a significant disability affecting her sporting and recreational activities. Her right ankle movements compared to the left show a 5° diminished dorsiflexion and 30° diminished plantar flexion. Medial and lateral deviation of the forefoot is minimal as the foot is very stiff. There is an area of flattening over the extensor digitorum brevis muscle, and she has trouble dorsiflexing her toes. These suggest that the extensor digitorum brevis muscle has been denervated and is no longer functioning. In the result the plaintiff experiences pain and swelling in the ankle and

foot after exercise or long standing, as well as when in airconditioning or in cold weather. She has difficulty going downstairs. She went back to playing softball in May 1986, training two nights a week, but she was playing in two grades lower than before. She found she wasn't able to run as fast, nor was she as agile, as before; she couldn't change directions as quickly, nor could he slide into bases properly, her right foot being her lead foot. She has not played netball since, nor does she think she could, since that game requires too much sudden change of direction. She has not played indoor cricket since for the same reason. She has been dancing a few times, but finds that she has to strap her foot up to do so. Even then her foot swells and pains afterwards. She does not ride motor cycles anymore. Since the accident she also has done some gymnasium work, as she did before, but she finds that it jars her foot too much. She is also back to doing some jogging, but also finds that causes her foot to swell and to ache.

In his evidence, Dr. A.G. Noonan, who treated the plaintiff for her injuries, said that the reduction in the range of movement in the plaintiff's ankle is going to put extra pressures on the ankle joint as time goes by, and, he said, "its not inconceivable that she could develop wear and tear osteoarthritis over the years". When it was put to him in cross-examination that there was only "a remote possibility" of this happening, he said that it is "a little

more likely than remote". Dr. A.F. Bromwich, who gave evidence for the defendant, said that he would go so far as to say that it was very unlikely that any osteoarthritic changes would take place. At most he thought it was a bare possibility, based on the possibility that there had been undetected damage to the joint surfaces. There was no X-ray evidence of arthritis or bone damage. The medical evidence as a whole, therefore, leave me quite unsatisfied on the balance of probabilities that there is any likelihood, or even any real possibility, of arthritic changes arising in the ankle joint as a result of the plaintiff's injuries.

For her pain and suffering, past and future, and for her loss of enjoyment of life I award the plaintiff the sum of $25,000, together with interest as from the date of the accident. Of the amount of the verdict, I apportion the sum of $12,500 to the detriment suffered by the plaintiff up to the date of judgment, and I allow interest on that amount at the rate of 6%. That amounts, in round figures, to approximately the sum of $2,260.

Accordingly, there will be judgment for the plaintiff in the sum of $27,260.00 with costs.