MULLADAD v PALMER

Supreme Court of the Northern Territory of Australia

Rice J.

14 April 1987 at Alice Springs and 5 May 1987 at Darwin.

Damages - assessment - motor vehicle accident - pain and suffering and loss of amenities of life - fracture of left femur and ruptured left lobe of the liver - operative treatment - possibility of future arthritis but unlikelihood of further surgery - plaintiff full-blood Aborigine alleging loss of standing in his community - $30,000 general damages. Motor Accident Compensation Act s.5(2)

Cases considered:

Dixon v Davies (unreported 17.11.82)
Napaluma v Baker 29 SASR 192
Weston v Woodroofe (unreported 9.7.85)

Cases applied:

Snoxell v Dorcon Constructions Pty Ltd (unreported 9.7.86)

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IN THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

No. 681 of 1984

BETWEEN:

STANISLAUS MULLADAD

Plaintiff

AND:

VICTOR PALMER

Defendant

CORAM: RICE J.

REASONS FOR JUDGMENT
(delivered 5 May, 1987)

This is an action for damages for bodily injury arising out of a motor vehicle accident which occurred on 28 July 1983 when the vehicle, in which the plaintiff was a front seat passenger, failed to take a turn whilst travelling on a dirt road approximately ten kilometres east of Santa Teresa. Liability was admitted by the defendant and the matter proceeded before me as an assessment of damages only.

The plaintiff is limited in his claim to damages for pain and suffering and loss of amenities of life, having regard to the provisions of s.5, sub-section (2) of the Motor Accident Compensation Act as it existed prior to the amendment in 1984.

The plaintiff is a single man aged 39 years, having been born on 8 December 1947. He is an initiated full-blood Eastern Aranda Aborigine who, at the time of the accident, was employed as a gardener by the Santa Teresa Progress Association. He had previously worked for many years as a stockman on cattle stations in the Northern Territory.

The plaintiff was evidently thrown from the vehicle as it rolled over. He was taken by ambulance to the Alice Springs Hospital and was found to have sustained multiple abrasions over both legs, the left thigh, the abdomen and chest. His major injuries were a supercondylar fracture of the left femur and a ruptured left lobe of the liver. Initially he was admitted to Intensive Care where he was given intravenous therapy and oxygen. His condition deteriorated and he was subsequently taken to theatre later that night and his ruptured liver was treated by packing and oversewing. The fractured femur was placed in skeletal

traction and the patient was returned to Intensive Care. He was treated there for a considerable, but unstated, period and later returned to a ward. A bile leak occurred from the liver wound but after some weeks this closed up without further intervention. The plaintiff remained flat on his back with his left leg in traction for almost three months when it was discovered by a visiting orthopaedic surgeon, Mr. A.M. Ingman, that there was mal-union of the femur. It was then decided to transfer the plaintiff to Adelaide on 24 October 1983 to have corrective surgery carried out. This involved open reduction and internal fixation of the left femur just above the knee. At operation the fracture was exposed, callus divided, and the bone fragments replaced in normal position and held with a condylar blade plate. The plaintiff was nursed with his leg on a passive mobilising machine to prevent any stiffness. Ninety percent of knee flexion was obtained and he was allowed up, using a caliper and crutches, on 12 November 1983. He was discharged from the Royal Adelaide Hospital on 18 November 1983 for follow up by Mr. Ingman on his next visit to Alice Springs.

In reporting upon the plaintiff's condition and prognosis at that stage, Mr. Ingman, in his report dated 6 February 1984, considered that the bony alignment was well

restored and ultimate function should be quite good although some knee stiffness would result. He also considered that there would be only a mild increase in the risk of future degenerative arthritis and that the removal of the metal plate would be desirable about one year after the operation.

The plaintiff said in evidence that he experienced pain, both in his abdomen and in his left leg, throughout the time he was in the Alice Springs Hospital and in the Royal Adelaide Hospital. He found the need to go to Adelaide a frightening experience especially as he was without friends and relatives, and realized that the operation would involve having his leg cut open. In addition, he found the mobilising machine a painful experience especially as it operated both by day and by night and his sleep was badly affected.

When the plaintiff was transferred back to the Alice Springs Hospital where he was required to go into an isolation ward for two days to avoid the danger of any cross-infection that may have originated from his stay in the Royal Adelaide Hospital. He was finally discharged from the Alice Springs Hospital on 23 November 1983, thus taking his overall stay in hospital to nearly four months. He remained on crutches for approximately a further month;

and for three to four weeks he had physiotherapy on a daily basis. This involved weight lifting and passive mobilisation. Throughout this latter time he continued to use crutches, but after the physiotherapy concluded he was able to discard them. Apart from medico-legal examinations, the plaintiff has not undergone any further treatment, whether active or rehabilitative, since then.

He said that the pain associated with his liver injury had ceased by the time he left the Royal Adelaide Hospital although he claims that he continues to suffer pain in the liver area intermittently, especially after consuming alcohol which he has tried to minimize but with what success I am not entirely clear.

The plaintiff's main residual disability is his left leg. He walks with a slight limp and says he is troubled by a feeling of weakness in the leg which he claims restricts him in his ability to walk any great distance without experiencing pain in the region of his left knee and outer thigh. The pain is particularly marked in cold weather. The plaintiff says the combination of pain and muscle strength is such as to prevent him from lifting anything heavy or climbing hills, both of which he claims he was able to do before the motor vehicle accident. As well,

he claims that his ability to participate fully in traditional tribal activities is significantly reduced, especially his ability to participate in ceremonies which include dancing. He says that he is now confined to the role of a passive onlooker, he is unable to squat or stand for any great period of time and cannot run as he used to be able to do. Before the accident he says that he was a keen hunter, particularly of euros. He claims that this was a pleasure and a traditional activity which is now denied to him because of his inability to climb on rocks. In addition, he claims that his leg weakness and limited mobility mean that he is now unable properly to defend himself in the event of fights in the community and that he is restricted in his activity in communal gatherings. He says that he is no longer able to collect large logs but instead sits back with the women and children and now feels like an old man. In consequence, it was claimed on his behalf that he has given up any thoughts of finding a woman to marry.

I might mention that in the course of her opening address, I asked counsel for the plaintiff whether any of these matters had been pleaded or particulars given, especially as the allegations seemed to centre about the consequential effect of the plaintiff's physical injuries

upon what was termed his self-image. I was assured by counsel that no psychological reaction to the injuries was alleged and that evidence of these consequential effects would simply be led to support the claim for loss of amenities of life. I found the plaintiff to be prone to self-pity and unreliable in giving evidence of his limitations.

Before the accident, the plaintiff and three other gardeners were engaged in growing vegetables for the whole community there. Although this work was much lighter than the stock work which the plaintiff had been engaged in since his mid teenage years, he claimed that he was not able to resume his work as a gardener, and indeed he has been in receipt of an invalid pension over some unspecified period since the motor vehicle accident.

It is perhaps not without significance that the plaintiff's treating surgeon, Mr. Charles Butcher, in his report to the plaintiff's solicitors of 6 March 1984, stated that since the plaintiff's discharge from the Alice Springs Hospital on 23 November 1983, arrangements had been made for him to be reviewed in the fracture clinic on two occasions since then, but he failed to show up for further treatment.

Mr. Ingman, in a report to the plaintiff's solicitors on 14 June 1985, referred to the fact that he saw the plaintiff on 13 June 1985 concerning his fractured left femur. At that time the plaintiff had no complaints in regard to the leg. He had recovered full knee movements and the only abnormality was some mild wasting of the thigh muscles and the operation scar on the lateral side of his thigh. His femur was seen to be soundly united on further x-rays taken on 13 June 1985. Mr. Ingman concluded that treatment of the plaintiff's fractured femur was then complete and it was not intended to remove the metal plate. He concluded by saying, "He has recovered virtually normal function in the leg but there is probably some slight increase in the risk of future degenerative change in the knee and there would be some minor weakness in the leg as a whole. I would assess disability on a percentage basis at 10% loss of use of the left leg as a whole."

In his report to the defendant's insurer dated 19 November 1986, however, Mr. Ingman reported that he had examined the plaintiff in Alice Springs on 13 August 1986. At that examination the plaintiff complained of pain occasionally and particularly after prolonged walking, but generally he considered the symptoms to be tolerable. He had received an Invalid Pension since the accident.

Examination revealed a moderate effusion in the left knee with some minimal quadriceps muscle wasting, and there was a flexion range of 0 to 110°. There was mild crepitus in the knee with movement but there was no instability or tenderness. In giving his opinion and prognosis, Mr. Ingman reported as follows:-

> "His condition has now stabilised and treatment is complete. There is a significant amount of permanent disability, as indicated by the presence of a continuing effusion in his knee and some crepitus with movement, and there is now some mild stiffness. A significant amount of degenerative arthritis is now likely to develop in future years. This will cause some increased aching and stiffness when he is in his 50's. He may then require some form of arthritis surgery such as a knee joint replacement, although this is not certain. I assess residual disability on a percentage basis at 15% loss of use of his left leg."

Mr. Ingman was not called to testify and his reports were tendered with the consent of both parties.

The plaintiff was finally examined for medico-legal purposes by Dr. Charles Butcher on 7 April 1987 and his report to the plaintiff's solicitor of 9 April 1987 simply describes the plaintiff's condition, and the result of Dr. Butcher's examination and prognosis as follows:-

> "On questioning this man I understand he has made a good recovery considering the severity of his injuries. With regarding (sic) to the injury of his left leg he has no pain at rest and only occasionally gets a dull ache, perhaps worse in the cold weather. The only

problem at present is that he does still not trust himself because he feels as though the left leg is a little weak. He will not run, carry heavy weights or climb over rocks or up ladders because of this inability to trust himself. He is able to sit on the ground, squat and do most things that he needs to do.

With reference to his abdominal injury. As you know this was a simple tear of the liver and these are usually uncomplicated. He has no abdominal pain and on discussion he has no food aversions or indigestion that can relate to the liver failure. His appetite is good and his weight has remained steady with a more than adequate weight at present.

Examination

Abdomen.

His abdomen is obese and there is a midline scar from the xiphisternum to just below the umbilicus. This scar is flat and is stretched and easily noticeable. In the middle of this scar there is a small incisional hernia that is totally asymptomatic. This hernia is easily reduced and I understand it has not increased in size over the years nor has it caused his any symptoms at any time.

Left leg.

Scar is noted over the lateral side of the knee joint and lower thigh and this is flat and hardly noticeable. Full range of movements of the knee is noted and the knee is stable. Slight wasted (sic) of the quadriceps is noted. He is able to stand on his toes on both feet. Squat, although he is a little awkward.

Prognosis

Overall his prognosis is good. With reference to the abdomen there is unlikely to be any long term sequelae from the injury to his liver. He has a small incisional hernia and hence there is small possibility of developing a bowel obstruction if a loop of bowel herniates through this. If he required it, it would only be a small operation to close this defect. With reference to his left leg Mr. Ingman has answered this very well. As he has a full range of movement and good leg control, he has only a very minor disability. He

has a moderately increased possibility of developing arthritis in the long term, but at present there is a little evidence that this is developing. I agree with Mr. Ingman's assessment that he has a 15% loss of function of the left leg as a result of this accident." (My emphasis)

Dr. Butcher testified before me and confirmed the opinion he expresses in his report. He produced records from the Alice Springs Hospital which he was permitted to peruse without objection. He related that the plaintiff had been admitted to that hospital on 5 March 1978 and was discharged eleven days later on 16 March. The reason for his admission on that occasion was that a horse had rolled on him and as a result he had suffered a small intracerebral bleeding and that some burr holes had been made as there was a small dural bleed that was causing some of his trouble.

Dr. Butcher did not consider that the plaintiff's liver injury of that nature would be likely to affect the plaintiff's metabolism of alcohol and subsequent pain, although he recognised the possibility of a person with a liver injury getting pain from adhesions to the small bowel but that that was a fairly uncommon event. He considered that the possibility of the plaintiff developing such a bowel obstruction would be something in the region of 1 or 2 or 3%. Accepting as I do the evidence of Dr. Butcher on this topic, I find that the plaintiff is no longer suffering from the effects of his liver injury.

Dealing with the leg injury, Dr. Butcher considered that there was some crepitus and that he had omitted referring to that in his report. In commenting upon Mr. Ingman's opinion that degenerative arthritis is likely to develop in future years, Dr. Butcher considered that when the plaintiff is in his fifties that would be a likely outcome which would give rise to some increased aching and stiffness in the left leg. He considered that the chances of a knee joint replacement being required in the future, however, were between 30 to 50% but said that was no more than a clinical guess. I find such an operation remains a possibility only. Dr. Butcher considered that the plaintiff would be unable to perform the normal duties of a stockman without difficulty and with safety. He also considered that the plaintiff would experience fairly significant trauma to his knee if he were to participate in tribal ceremonies involving hard thumping of his feet on the ground in the course of dancing.

Under cross-examination, Dr. Butcher indicated that in giving his assessment of 30 to 50%, he related those chances to the development of significant arthritis and not to surgery. He also conceded that as there had been no direct knee joint involvement in the initial injury, there was in effect less likelihood of significant arthritis

developing later. Dr. Butcher also could see no physical reason why the plaintiff could not do gardening work still, especially if he undertook physiotherapy to strengthen his leg and mobilise the knee more than at present. In consequence, the plaintiff would be able to do gardening work without too much difficulty. He further considered that attempts at rehabilitation would be worthwhile in the case of the plaintiff although his own experience had led him to believe that attempts to rehabilitate Aborigines had been fairly unrewarding.

The plaintiff's claim for loss of amenities may be categorised as:-

1. Loss of enjoyment of future employment as a stockman on cattle stations or as a gardener at Santa Teresa.
2. Inability to participate in tribal ceremonies.
3. Inability to hunt for euros over hilly country.
4. Being unlikely to marry.
5. Inability to participate in the gathering of logs for the communal camp fire.

Dealing with each of these in turn, I find:-

1. That in consequence of an accident he suffered in 1978 involving a runaway bull while mustering which caused

his horse to roll on him, the plaintiff required hospital treatment for injury to his head. As a consequence, he lost confidence in his ability to ride and so took on work as a gardener at Santa Teresa. After a subsequent trial as a stockman on Mr. Barkly Station, he decided against stock work because his legs were "too shaky" and he then resumed work as a gardener.

2. That the tribal ceremonies are, on the plaintiff's own admission, carried out but once a year; and that he is so over-anxious about the possibility of injury to his left leg that he has chosen to assume the role of a bystander instead of an active participant as a dancer. He is inspired with the fear that his leg will snap, a fear which is not justified on the evidence.

3. That his hunting before the car accident was on week-ends with a rifle and that he made some of those trips on a Toyota motor vehicle and some on the garden tractor and not as a stalker of game over hilly terrain with spear and boomerang, and that his participation in shooting euros is still open to him as his ability to use a rifle is not impaired although he would be restricted somewhat in his ability to climb over rocks.

4. He candidly and freely admitted in evidence that he really had no intention to marry, quite independently of any physical limitations due to his injuries.

5. I am not prepared to accept the uncorroborated evidence of the plaintiff that his inability to gather heavy logs diminishes his status in the eyes of the tribal community.

In my opinion, the evidence in this case falls far short of the evidence relating to the plaintiff's alleged loss of standing in his community which was accepted in the following cases, namely:-

Napaluma v Baker 29 S.A.S.R. 192
Dixon v Davies (unreported - 17.11.82)
Weston v Woodroofe (unreported - 9.7.85)

Overall, I find that the plaintiff has been left with a 15% loss of function of the left leg, that there is less than an even chance that arthritis may develop in his fifties but that this is unlikely to require surgical intervention by way of a knee joint replacement.

In making my assessment of the plaintiff's damages, I have made some allowance for the plaintiff's loss of amenities of life, having regard to the fact that he will be unable to indulge in communal dancing and hunting to the extent that he formerly did, but I consider that he had long ago abandoned work as a stockman and chose the relatively easier work of a gardener, a pursuit which he could still follow if he wished. What he lacks is confidence in himself which he lost in consequence of the mustering accident.

I see no reason, however, to make separate assessments for pain and suffering on the one hand, and loss of amenities of life on the other. I shall not repeat what I said on this topic in Snoxell v Dorcon Constructions Pty. Ltd. (unreported) 9 July 1986, but the same principles apply here as in that case.

Taking all matters into account, I assess the plaintiff's damages for pain and suffering and loss of amenities of life at $30,000; and there will be interest on one half of that sum for past detriments at the conventional rate of 6% since the date of the issue of the writ, namely 23 November 1984. In round figures, this amounts to $2,175. Accordingly, there will be judgment for the plaintiff in the sum of $32,175.