

Lawson & Lawson v Pham

SA District Court 12 Mar 1996

Negligence

Rukmi Sen, South Australia

Factual background

A recent judgment of his Honour Judge Worthington of the District Court of South Australia, should be of interest to plaintiff lawyers in that damages were awarded for the loss of wages occurring from the raising of children born after the death of the plaintiff's daughter.

The case involves damages for nervous shock awarded to Mrs Tracey Lawson after a car accident which claimed the life of her daughter and injured her husband and son. It was held that the serious psychiatric disorder that Mrs Lawson suffered from occurred in the aftermath of the accident.

Further, it was established that s35a (1)(c) of the South Australian Wrongs Act 1936 is not a code for the cause of action of nervous shock, but limits its availability. Mrs Lawson was still required to fulfil common law requirements to recover damages.

When the accident occurred, Mrs Lawson was at home some kilometres away. She had fallen asleep while waiting for husband, four year old son and seven year old daughter Ashley to return home by car. At 1.00am in the morning Mrs Lawson was woken to the news that her family had been in an accident, and that although her husband and son were alive, her daughter was dead.

Mrs Lawson was then taken by a police vehicle to the hospital where her husband and son had been taken. At one point in the journey, Mrs Lawson became aware that they were passing very close to the location of the accident. In fact, she was able to see yellow, white, blue and red lights in the sky above where she knew Ashley had been killed.

At the hospital, Mrs Lawson saw her husband lying on a stretcher bed covered in blood, with their young son behind him. In looking at her husband, Mrs Lawson's mind turned to the condition her daughter must be in, given that her husband was in such a bad state.

About one week after the accident, Mrs Lawson and a friend prepared Ashley for burial. Mrs Lawson was warned to be careful of her daughter's head and in particular that she should not touch "that soft spot on her head". In the course of dressing her, there

was an emission of blood from Ashley's nose. Mrs Lawson suffered an anxiety attack.

On a day around the time of the funeral, a policeman visited the family home to take a statement from Mr Lawson. In the course of this, the policeman showed Mr and Mrs Lawson 22 photographs, 14 of which were taken on the night of the accident and showing the scene lit up with a number of close ups showing the horrific damage to both cars involved in the accident.

In 1993 Mrs Lawson was diagnosed by Dr William Lucas, psychiatrist, as suffering from acute post traumatic stress disorder with markedly depressed mood.

After the accident Mrs Lawson experienced recurring nightmares, including one of Ashley flying through the air before hitting the ground, with an accompanying sound of breaking bones. Mrs Lawson blamed herself; if only she had taken Ashley shopping she would still be alive.

Mrs Lawson could not bear to be at home during the day surrounded by memories of her daughter; within a week of the funeral she returned to work in an effort to overcome her preoccupations. However, she was unable to participate in any activities that she associated with her daughter.

It became evident to Mr and Mrs Lawson that Mrs Lawson's condition was not improving and, in fact, seemed to be aggravated by memories of their daughter. They finally decided to move house, and eventually decided to have another child (this necessitated a reversal of a prior vasectomy).

In 1994 Mrs Lawson became pregnant and her condition markedly improved when she discovered that at least one daughter was indicated. The pregnancy seemed to be a turning point in her recovery and twin girls were born on 18 November 1994.

SA Wrongs Act 1936 - Section 35a

The common law applicable to nervous shock claims has been set out by the High Court in *Jaensch v Coffey* (1983-1984) 155 CLR 549.

It was submitted by counsel for the plaintiffs, that s35a of the Wrongs Act 1936 codifies the law relating to the assessment of damages for injuries caused in motor accidents, with the result that Mrs Lawson may recover damages for her psychiatric condition, notwithstanding that she may not comply with the requirements set out in *Jaensch*. It was not conceded that Mrs Lawson did not qualify under *Jaensch*, but simply that it was not necessary for her to do so.

Worthington DCJ was of the opinion that s35a (1)(c) does not interfere with the common law requirements necessary to qualify for damages for nervous shock. He did not consider that the provision affects the common law, except insofar as it limits the right to damages to certain classes of person or to circumstances of geographical proximity.

It was pointed out that as there is nothing in the Wrongs Act to indicate otherwise, the term "nervous shock" or the whole phrase "mental or nervous shock" must be read as referring to the compensable cause of action referred to in the authorities.

For it to be compensable, that mental or nervous shock must comply with the requirements and limitations imposed by the common law. He held that s35a (1)(c) does not define the elements of the cause of action for nervous shock, but only confines its limits.

It was held that Mrs Lawson qualified for damages for nervous shock. She was subjected to the sort of sensory perception referred to in *Jaensch* during the aftermath of the accident. It was held in *Jaensch* that the "aftermath" includes events at the scene after the accident, in taking an injured person to hospital for treatment and persisting for so long as the relevant persons remain in the state produced by the accident, including post accident treatment.

There was no doubt that Mrs Lawson suffered recognisable psychiatric injury in the form of post traumatic stress disorder and clinical depression. The evidence showed that the events which caused her nervous shock were part of the aftermath of the accident, being partly what she was told by the police officer at her home, partly by what she saw on the way to hospital, and at the hospital itself.

Jaensch makes it clear that the aftermath of the accident includes what is observed at the hospital and the judge saw no reason to exclude it even though it was her injured husband and son that Mrs Lawson saw at the hospital and not the body of her daughter.

Applying what was said by Dawson and Dean JJ, Worthington DCJ stated that the fact that the events during the aftermath giving rise to the shock were a combination of what she was told and what she saw for herself, does not preclude her from recovering damages.

Dr Lucas had defined the parameters of the period during what the damage given lies to her psychiatric injury was done, as being from when she was woken by the telephone, up until and including, her experience after arrival at the hospital.

It is clear from *Jaensch* that the phenomenon inducing psychiatric illness does not need to be a single event. It may consist of more than one element, as it does here.

Ordinarily, the duty of care is predicated on the assumption that the plaintiff has a normal susceptibility to psychiatric illness but in Worthington DCJ's opinion, here it was reasonably foreseeable that the events constituting the perception by Mrs Lawson on that night, could induce a psychiatric illness, given that she was the mother of both the seven year old girl who was killed and the four year old boy who was injured, and the wife of the husband who was injured. That relationship is relevant.

She went to bed confident of the safety of her family and was woken to devastating news. She then passed close enough to the scene of the accident to identify what it was, and to be aware that she was looking at the lights marking the place where her child had just been killed. She then saw her husband and son at the hospital, particularly Mr Lawson with blood on him and was faced with the immediate and perfectly understandable thought that if he looked like that, how much worse must her daughter be to look at.

Worthington DCJ was of the opinion that it was reasonably foreseeable that a mother and wife faced with those sensory perceptions could suffer a psychiatric illness as a result. The judge conceded that it may well be that the illness was made worse by reason of matters learned later and the trauma of preparing her daughter for burial, but that this did not detract from Mrs Lawson's right to damages.

It was not accepted that the onset of the psychiatric illness was caused by a series of events extending beyond the aftermath of the accident. It was accepted that the traumatic perceptions of the night of the accident accounted for Mrs Lawson's disorder.

Assessment of Damages

Mrs Lawson's claim for damages included a claim for loss of wages for the time spent in looking after her twin daughters until they started school. It was established that had it not been for the births, Mrs Lawson would have eventually returned to work even though she had originally left work to spend more time with her son who was displaying behavioural problems.

It was mentioned by Worthington DCJ that were it not for Ashley's death, it would have been most unlikely that the plaintiffs would have had more children. Overall, the evidence showed that it was Mrs Lawson's severe psychiatric disorder that lead

them to plan another child in the hope it would ameliorate her condition.

It was accepted that the "twin therapy" was beneficial. The plaintiffs' action which resulted in the birth of twins (including the reversal of the vasectomy) was reasonable in that it avoided further loss and detriment to Mrs Lawson, which would not have been recoverable from the defendant. The twins could therefore attract compensation.

The award made by the court took into account Mrs Lawson's lost wages from the month prior to the birth of the twins extending it to the point at which the twins were of an age to begin kindergarten. The award was based on a sliding scale to take into account the fact that Mrs Lawson could work part-time during the final year before the twins began school.

It was questioned whether account should be taken of the significant long term benefits to the Lawson family from the birth of the infants other than the improvement of Mrs Lawson's mental and emotional condition.

It was held that although there was a betterment factor, the collateral benefit to Mrs Lawson was non-pecuniary in the mitigation of her loss, Mrs Lawson had to and will continue to have to forego earnings.

To the extent that she received a benefit from the children in her general state of well being, this was reflected in the award for non-economic damages.

Account was taken of contingencies which may have interrupted Mrs Lawson's employment regardless of the accident, such as her son's needs and those of Ashley had she lived. To take account of other contingencies, the original figure for the loss of wages was reduced by approximately 13.5%.

The State Government Insurance Commission, as insurers for the defendant, have appealed the judgment to the full bench of the Supreme Court of South Australia. The matter is listed for hearing before the Full Court in the first week of September 1996.

Editor's note:

Angela Bentley, of Angela Bentley and Associates, acted for the plaintiffs.

She will be delivering a paper "Secondary Claims by Family Members for Nervous Shock" at APLA's National Conference at Noosa in October.



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