Privy Council Appeal No. 3 of 1982

Ponnampalam Selvanayagam – – – – – *Appellant*

v.

The University of the West Indies – – – – *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY 1983

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD SCARMAN
LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD TEMPLEMAN

[*Delivered by* LORD SCARMAN]

The appellant is the plaintiff in an action for damages for personal injuries brought in the High Court of Trinidad and Tobago against the respondent, the University of the West Indies. He established liability, rebutted a defence of contributory negligence, and recovered judgment for $77,527.92 damages: interest was awarded from date of writ at the rate of 6% p.a. on the sum of $1,534.67, which was the agreed amount of special damage accrued at the date of the statement of claim. The respondent appealed on the issues of contributory negligence and quantum of damages: the appellant cross-appealed on the issue of damages. The Court of Appeal allowed the appeal and dismissed the cross-appeal. The Court found that there was contributory negligence and apportioned the appellant's share of the blame for the accident at one-third. The Court further held that the appellant had unreasonably refused to undergo an operation which, if successful, would have probably regained for him within a few months some 80% of his mobility, thereby enabling him to resume his working life as a highly qualified professional engineer. Accordingly the Court re-assessed the damages on the basis that, had he acted reasonably, he was likely to have completely recovered his earning capacity within six months of his accident. They then reduced the total of their assessment by one-third to give effect to their finding on contributory negligence and gave judgment for $31,001.95 with appropriate interest.

Pursuant to his right under section 109 of the Constitution (Act No. 4 of 1976) the appellant appeals to the Judicial Committee of the Privy Council. He takes three points:—

(1) that the Court of Appeal erred in law in substituting its view for that of the trial judge on the issue of contributory negligence;

(2) that the judge's finding that he acted reasonably, alternatively that the respondent has not shown him to have acted unreasonably, in refusing the operation, should not be disturbed;

(3) that the Court of Appeal was wrong to dismiss his cross-appeal on damages: for the trial judge made so great an error in estimating his loss of future earnings that on accepted principles an appellate court should have intervened and made its own assessment.

If he should succeed on his third point, he asks this Board to make the assessment on the basis of the facts found by the trial judge.

In 1975 the appellant was the professor of civil engineering appointed and employed by the respondent. On 5th August of that year he was walking along a passage-way in a building on the campus of the University when he fell into a trench which extended across the width of the passage. The time was 11.15 in the morning. But the light in the passage was not good because of the nature of the structures then surrounding it. Building work, the detail of which it is unnecessary to describe, was then in progress. Conflicting evidence as to the degree of light was given by the plaintiff and his witness, a Mr. Suite, on one side and by Mr. Bruce, the University's Assistant Dean of the Faculty of Engineering, on the other. The trial judge accepted the evidence of Mr. Suite that the hole was unguarded, that the light in the passage was bad ("very dark" was the judge's description) and that artificial light (of which there was none) was needed to see the works associated with the hole—a sight of which could have alerted the appellant to his danger.

Counsel for the University at the conclusion of the evidence conceded negligence. Thereafter the issue on liability was as to contributory negligence on the part of the appellant. The case against him was that he failed to keep a proper look-out. The trial judge delivered a very long judgment notable for an extended recital of the evidence: nevertheless he stated his conclusion pithily enough:—

> "I find in all the circumstances of the present case that the hole constituted an unusual danger and that mere inattention on the part of the plaintiff would not render him contributorily negligent."

This was a finding of fact which, in the opinion of their Lordships, was upon the evidence open to the trial Judge to make. The Court of Appeal, however, after directing themselves correctly as to the role of an appellate tribunal when reviewing findings of fact and degree reached at first instance, criticised the judge for omitting to make specific findings fundamental to the issues in the case. The criticism is, in their Lordships' view, misplaced. There was a very substantial conflict of evidence as to the appellant's knowledge of the state of the passage-way and as to the degree of light available. It is understandable that the Court of Appeal may have felt disposed to criticise the judgment at first instance as unstructured and prolix. But it is abundantly clear that the judge had the evidence—all of it—very much in mind. It is, of course, not necessary for a trial judge to make explicit findings on every disputed piece of evidence. If it is clear that he has the evidence in mind, it suffices for him to state his final conclusion, as the trial judge did in the passage already quoted. Only the plaintiff could give evidence as to the accident: for he alone was there. There were conflicts of evidence, which the judge had well in mind, between the plaintiff and Mr. Bruce as to the plaintiff's previous knowledge of the state of the passage-way; and between Mr. Bruce and Mr. Suite as well as the plaintiff as to the degree of light in it. After referring to these critical questions, he stated

his finding that the circumstances were such that " mere inattention " would not render the appellant contributorily negligent. Had he reached a different conclusion, he could not have been challenged, as the Court of Appeal has demonstrated. But that is not the issue. The question is:— was there evidence upon which the trial judge could properly reach the conclusion which he did? And the answer must be:— abundant evidence, if he chose to accept it. And it is plain from his finding that he did accept it.

Their Lordships now turn to the second point in the appeal. Was the Court of Appeal right to reverse the judge's finding that the appellant acted reasonably in refusing an operation to his neck?

The appellant suffered severe and painful injuries to his left foot and ankle, his neck, and his left shoulder, elbow and hip. He called two doctors. Mr. Lalla, a consultant orthopaedic surgeon, treated him for his injuries both in hospital and later as an out-patient. In a report of 11th October 1975 he found the movements of the ankle joint limited in all directions and expressed the opinion that the ankle injury would lead to osteo-arthritis of the sub-talar joint which might become progressive. A year later he reported that the arthritis was becoming progressive. At trial he expressed doubt as to the value of surgery on the ankle, and commented that, as the appellant was a diabetic, there might be complications of infection. In his opinion surgery on the ankle would be ill-advised. There is, however, no indication in the evidence that Mr. Lalla gave any such advice to the appellant. He certainly gave no advice as to whether surgery was to be recommended for the neck injury.

Mr. Lalla referred the neck injury to Dr. Ghouralal, a consultant neuro-surgeon. He found a serious condition:— two herniated (in layman's language " slipped ") discs and diabetes (a random blood sugar count of 240 mg%). The diagnosis of the neck condition, which was confirmed in later reports, was cervical spondylosis giving rise to pain and stiffness of movement. Dr. Ghouralal believed that surgical therapy to the neck would help. If there were no operation, the neck would get worse, in his opinion. It would be a major operation but " not very risky " (the judge so noted his evidence). Chances of success would be " quite good "—movement increasing after about 6 months to 80% of normal. He, therefore, did recommend in 1975 an operation, and was of the opinion that some 6 months later the appellant would have been fit to resume his professional work.

At the very end of his evidence, in re-examination, Dr. Ghouralal added that the appellant knew of the risks of infection which a diabetic would run and that " it is for the patient to decide on whether he should have the operation or not " (judge's note of his evidence). At a later stage counsel for the appellant applied for leave to lead new evidence in respect of the refusal to have an operation in 1975 and, in particular, to recall Dr. Ghouralal so that he might ask him whether he had informed the appellant of the risks involved. Counsel for the respondent objected. The judge refused leave, saying that Dr. Ghouralal's evidence was clear on the point.

In dealing with Mr. Lalla's evidence the judge made a mistake. He spoke of Mr. Lalla's positive advice against an operation. But Mr. Lalla gave no such advice, though it was his opinion that an operation to the ankle was not to be recommended and that diabetes presented a complication if surgery should be carried out. The mistake was unfortunate but is, in their Lordships' opinion, of no consequence: for the judge fully understood Dr. Ghouralal's evidence and appreciated its significance. The judge's refusal to allow the doctor to be recalled

indicates two things. First, he had formed a view that Dr. Ghouralal's opinion in the light of the diabetes complication was that the decision whether to operate or not was best left to the patient. This, their Lordships think, was a very fair appreciation of what the doctor was saying. Secondly, the judge could not in the circumstances have refused leave, unless he had concluded, the medical evidence being then complete, that the appellant had established the reasonableness of his decision not to have the operation.

Their Lordships do not doubt that the burden of proving reasonableness was upon the appellant. It always is, in a case in which it is suggested that, had a plaintiff made a different decision, his loss would have been less than it actually was. The point was succinctly made in an admiralty case of collision at sea by Lord Merriman P.: *The Guildford* [1956] P. 364, 370. Their Lordships would add a further comment on the law, well established though it is. The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based upon the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage. Their Lordships respectfully agree with the opinion expressed on the point by the High Court of Australia in *Fazlic v. Milingimbi Community Inc.* (1981) 56 A.L.J.R. 211, at page 214, to which they were helpfully referred by counsel for the appellant. The question is one of fact and, as already mentioned, the burden of proof is on the plaintiff. In *Richardson v. Redpath, Brown & Co. Ltd.* [1944] A.C. 62, at page 68, Viscount Simon said that the material question is "whether the workman [*i.e.* the plaintiff] who refuses to be operated upon is acting reasonably in view of the advice he has received". Their Lordships would, with respect, put the question in more general terms. Though the advice received will almost always be a major factor for consideration, the true question is whether in all the circumstances, including particularly the medical advice received, the plaintiff acted reasonably in refusing surgery. Their Lordships note that in *Fazlic's* case (*supra*), at page 213, the High Court of Australia took the same view.

For these reasons, their Lordships are of the opinion that the Court of Appeal was wrong to reverse the judge. He was right to treat the question as one of fact and to put the burden of proof upon the appellant. And there was evidence upon which he could properly conclude that the appellant had discharged it.

Their Lordships now approach the third question in the appeal on the basis that the appellant has established liability, rebutted the defence of contributory negligence, and has shown that he acted reasonably in refusing operative treatment for his neck. The appellant's submission is that by failing to itemise the various heads of general damages the trial judge was led into a gross under-estimate of his loss of future earnings (or earning capacity). The appellant was 55 at the date of trial (54, when he suffered the accident), of high standing in his profession and of considerable international experience. He was earning at the time of the accident $46,605 p.a.: but his employment was due to end on 31st December 1975. It had been his intention to return to his native country, Sri Lanka, where he believed he could earn as a consultant something between $60,000 and $75,000 p.a. He had a genuine prospect of obtaining an appointment in an agency of the United Nations Organisation, in which event he would be able to earn a salary of $60,000 p.a. free of tax. The judge expressed himself as sanguine in his belief that the appellant, but for his accident, would have established a consultancy practice in Sri Lanka, and was not prepared to disregard the possibility of a United Nations appointment. The accident left the appellant virtually unemployable: certainly not capable of establishing

a consultancy practice or obtaining a United Nations post. In these circumstances, although the judge made no express finding, it would be reasonable to infer that at the time of the accident the appellant could have looked forward to some 5 to 6 years of remunerative employment or practice. This prospect he has totally lost.

The judge awarded $75,000 to take care of all the general damage: pain and suffering, loss of amenities, and loss of the pecuniary prospects outlined above. He recognised the appellant's pain and suffering as " intense ", he accepted that the taking of analgesics would be necessary for the rest of his life, and that the pleasures of gardening, dancing, swimming and social activities would be denied him. On any view of the case, a substantial sum should have been awarded the appellant under this head. A sum of $25,000 would not have been unreasonable. If so, can the balance of the general damages awarded, *i.e.* $50,000, be a proper compensation for the loss of the earning prospects of this well qualified and experienced professional man aged 54? Or—perhaps more accurately—can an award of $75,000 properly compensate him for his pain and suffering, his loss of amenities, and the loss of his earning prospects?

It is obvious that the award represents a gross under-assessment of the true loss. On the judge's findings the loss of future earnings alone cannot be less than a figure of $150,000: and it could be much higher. Counsel asked the Board to assess a figure and suggested a sum of $288,000 for loss of earnings to which would have to be added a substantial sum for the other items of general damage.

Their Lordships clearly have the power to substitute their assessment of damages for the erroneous award made by the trial judge: section 109(7) of the Constitution (Act No. 4 of 1976). But they think it would be very unwise to do so. They lack the knowledge that a judge of the High Court would have of social and economic conditions in Trinidad and Tobago and the scale of awards in other comparable cases: they lack the knowledge which a trial judge has of the character, personality and attitude of the claimant: and it would be contrary, as their Lordships understand it, to the practice of the Judicial Committee to make an assessment. Their Lordships have in mind what was said by Lord Diplock delivering the judgment of the Board in the Australian appeal *Paul v. Rendell* (1981) 55 A.L.J.R. 371, at pages 376G and 377G, as to the risks inherent in the Board's lack of knowledge of local circumstances. Their Lordships, therefore, have decided that the question of general damages must be remitted for assessment by a High Court judge on the basis of the rulings given by the Board in this appeal. Nothing, however, that their Lordships have said on matters of fact relevant to the issue of damages is to bind the judge on the re-hearing other than that he must proceed on the basis that liability has been established, contributory negligence negatived, and that the appellant acted reasonably in refusing operative treatment.

Their Lordships are concerned at the delay imposed by the protracted period over which this simple case has been allowed to run. The accident was on 5th August 1975, and finality has not yet been achieved. On 17th December 1976 the trial judge in giving judgment stayed execution upon payment within 28 days of the special damages $2,527·92, and of $25,000 on account of general damages. Under Order 29 r.12 of the Rules of the Supreme Court if a plaintiff has obtained judgment for damages to be assessed, the Court may, if it thinks fit and subject to certain specified conditions, order an interim payment not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered.

It was not suggested that the Judicial Committee does not have the power to order an interim payment. Indeed, it plainly has under the Constitution: section 109(7). Their Lordships' decision on the appeal is in effect a judgment for damages to be assessed. They are of the opinion that the sum of $77,527·92, which was the total of the judge's award less interest, would be a reasonable sum to order by way of interim payment and that, as $27,527·92 has already been paid, a further sum of $50,000 ought to be paid to the appellant.

Accordingly, their Lordships allow the appeal, quash the judgment of the Court of Appeal, and direct (a) that judgment be entered for the appellant for damages to be assessed and (b) that the University pay to the appellant $50,000 within 14 days of their Lordships' order being filed in the Court of Appeal. The appellant is to have his costs here and below to date. The costs of the assessment of damages will be in the discretion of the judge who takes the case.

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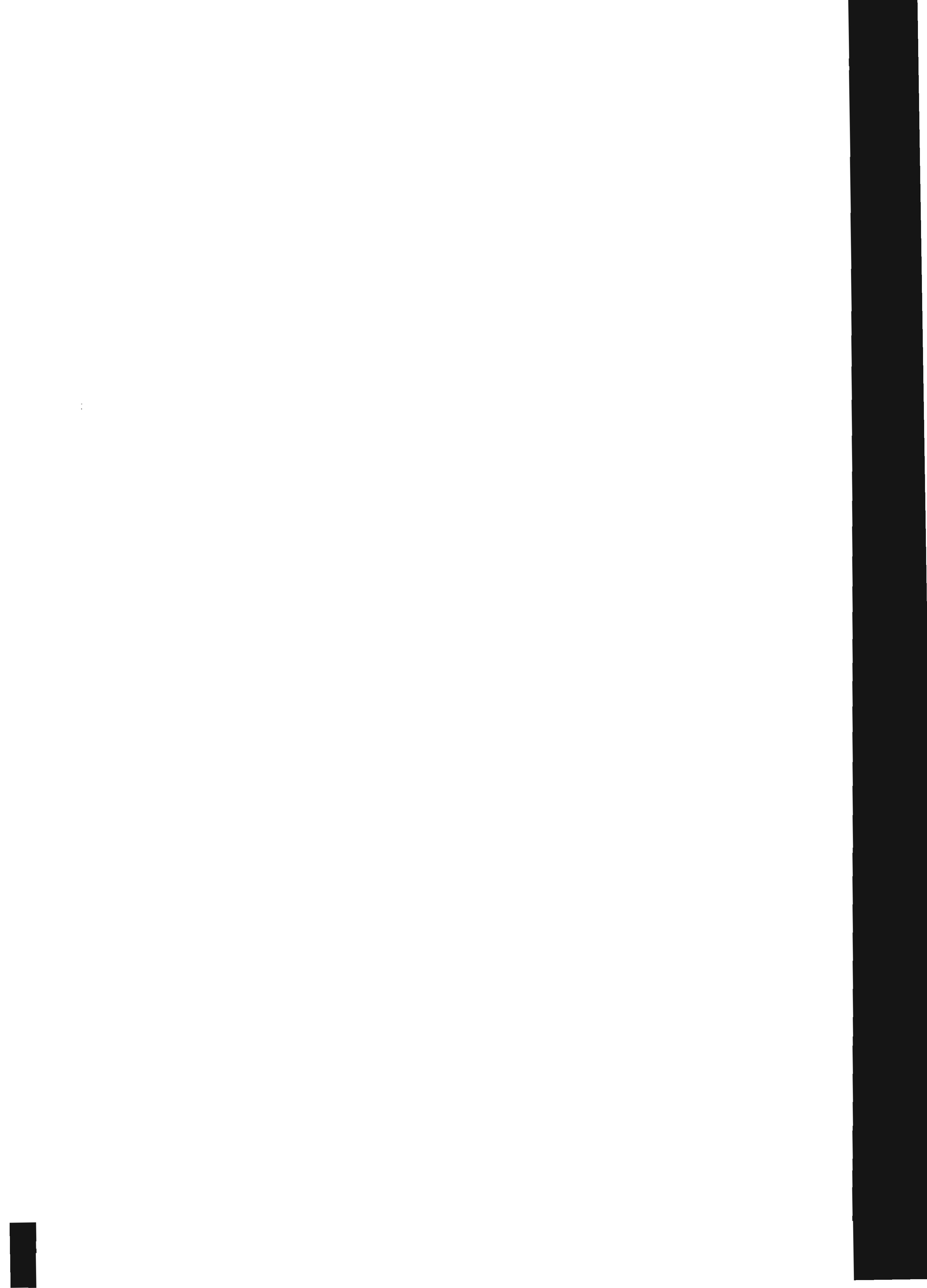

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