

19/81

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT
SOUTH AUSTRALIA

BETWEEN:

LEON STEWART PAUL and (Defendants)
PERCIVAL JAMES GEORGE EARLE Appellants

- and -

ANTHONY HOWARD RENDELL (Plaintiff)
Respondent

10

CASE FOR THE RESPONDENT

RECORD

HISTORY OF THE MATTER

1. The respondent suffered personal injury loss and damage on the 1st day of March 1975 in a road collision.

2. The respondent (then plaintiff) issued proceedings out of the Supreme Court of South Australia on the 8th day of October 1976.

p. 1-2

3. The respondent claimed in tort alleging negligence against both appellants (then defendants).

4. The action came on for trial on the 5th day of July 1978 before the Honourable The Acting Chief Justice Mr. Justice Hogarth. At the outset of the hearing both appellants admitted liability and the case proceeded as an assessment of damages only.

p. 8

p. 8 11
22-24

5. The trial concluded on the 6th day of July 1978 and judgment was reserved.

p. 101

6. The learned Trial Judge delivered his reasons for judgment on the 4th day of August 1978 and judgment was entered for the respondent for \$141,664.24 together with costs to be taxed.

p. 112

20

RECORD

p. 113-114	7. Against this judgment the appellants appealed to the Full Court of the Supreme Court of South Australia (hereinafter referred to as the Full Court)	
p. 115	8. The appeal came on for hearing on the 5th day of October 1978 before the Full Court constituted by the Honourable The Chief Justice Mr. Justice King The Honourable Mr. Justice Walters and The Honourable Mr. Justice White.	
p. 120 112-44	9. On the hearing of the appeal the Full Court acceded to the invitation of the respondent to exercise its powers under Order 58 Rule 14 of the Rules of the Supreme Court. This rule deals with the power of the Court on appeal to reverse or vary a decision under appeal in favour of a respondent without there being a cross appeal	10
	10. Before the Full Court the following were the issues and the decisions relevant thereto:	
p. 119 1131-43	(i) Pain and suffering and loss of amenities said by the appellants to be excessive - Rejected	20
	(ii) Future effects of loss of earning capacity:	
p. 126 1113-15	(a) said by the appellants to be excessive - Rejected	
p. 126 1113-16	(b) said by the respondent to be inadequate - Agreed to	
p. 126 1117-22	(iii) Special damages said by the respondent to be inadequate - Agreed to	
p. 127 1118-20	(iv) Interest said by the appellants to be excessive - Agreed to	30
p. 115	11. The Full Court delivered its reasons for judgment on the 25th day of October 1979 and substituted for the judgment of the learned Trial Judge (\$141,464.24) the sum of \$143,110.00.	
p. 128 p. 12	12. A breakdown of the awards and a comparison of the Judgments of the learned Trial Judge and the Full Court can be expressed as follows :-	

<u>HEAD OF DAMAGE</u>	<u>LEARNED TRIAL JUDGE</u>	<u>FULL COURT</u>
(i) Pain and suffering and loss of amenities	\$50,000.00	\$50,000.00
(ii) Future effects of loss of earning capacity	\$70,000.00	\$80,000.00
(iii) Special damages		
(a) pre trial loss of earning capacity	\$2,850.00	\$2,850.00
(b) Medical and other out of pocket expenses	\$1,410.49	\$4,260.49
(iv) Interest	\$17,403.75	\$6,000.00
TOTAL	<u>\$141,464.24</u>	<u>\$143,110.00</u>

13. The appellants take no issue now in regard to the award for pain and suffering and loss of amenities of \$50,000.00.

14. The appellants suggest that the Full Court was mistakenly informed by Counsel that the learned Trial Judge had made an error in regard to special damages and pre trial loss of earning capacity. The respondent submits that no such mistake was made by Counsel and that the Full Court was correctly informed by Counsel of the true position. There has been no error by the Full Court.

REMAINING ISSUES

15. The only issue raised by the appellants now remaining is whether the assessment of the Full Court of \$80,000.00 for the future effects of loss of earning capacity was excessive.

16. The respondent raises two further issues :

- (i) that the award of \$80,000.00 for the future effects of loss of earning capacity was inadequate;
- (ii) that the allowance of interest was inadequate.

CONTENTIONS AND SUBMISSIONS OF THE RESPONDENT

THE 'GOURLAY' PRINCIPLE

17. At the time the appeal was heard by the Full Court the

judgment of the High Court of Australia in ATLAS TILES V. BRIERS (1978) 52 ALJR 707 was binding upon it. That case laid down that in assessing damages for the future effects of loss of earning capacity regard should be had to gross wages and no regard should be had to the incidence of income tax on that gross wage.

18. The decision in ATLAS TILES V. BRIERS (supra) was delivered after the judgment of the learned Trial Judge.

10

19. After the decision of the Full Court in the case at bar the High Court of Australia delivered judgment in CULLEN V. TRAPPELL (1980) 54 ALJR 295. This decision reversed that part of the decision in ATLAS TILES V. BRIERS (supra) referred to above and laid down that in assessing damages for the future effects of loss of earning capacity regard should be had to the incidence of income tax.

INCOME TAX ON INTEREST FROM THE INVESTMENT OF DAMAGES

20

20. The High Court in CULLEN V. TRAPPELL (supra) further laid down that allowance ought to be made for the notional income tax on the income derivable from the investment of the sum awarded for future effects of loss of earning capacity.

(i) In regard to this statement of the law authority, both before ATLAS TILES V. BRIERS (supra) and since CULLEN V. TRAPPELL (supra), is to the same effect.

30

See - TAYLOR V. O'CONNOR [1971] A.C. 115
HALSBURY 4th Ed. Vol. 12 Par. 1156
DIBATTISTA V. MOTTON [1971] V.R. 565
SUNDERLAND V. MACCO-PALMER [1972]
3 S.A.S.R. 314
BENEKE V. FRANKLIN [1975] 1 NSWLR
571
TRAECEY V. CHURCHILL [1980]
1 NSWLR 442
SAUL V. MENON Unreported decision
of the NSW Court of Appeal
dated 18/8/1980
JACKA V. HORSTEN (1980) 88 LSJS 419
FOX V. WOOD (1980) 88 LSJS 486
PEIPKORN V. KENT Unreported

40

decision of the Full Court of S.A. dated
24/12/1980.

(ii) The respondent submits that this statement of the law is sound for a number of reasons including the following:

10 (a) to the extent that the lump sum assessed for the future effects of loss of earning capacity depends upon some estimation of the annual sum that it is considered will be required in the future to compensate the plaintiff for lost earning capacity, that annual sum will, to the extent to which it comes from income from investment be subject to income tax at current rates;

(b) if a Court takes into account the income tax payable on the wage earned by an injured person to enable the present value of the future loss to be determined then a misleading result will occur unless notional income tax on the income derivable from the investment is also taken into account.

20 THE DISCOUNT RATE

21. The appellants challenge the discount rate selected by the Full Court.

22. The appellants contend that other than in the exceptional case no regard should be had to the incidence of taxation on the notional income which might be derived from the investment of the award. The respondent submits that this contention is not open to the appellants. No issue as to this matter was raised or taken before the learned Trial Judge.

30 23. The choice of an interest rate is in the discretion of the judge; See - HAWKINS V. LINDSLEY (1975) 49 ALJR 5. It is a decision of fact in relation to only one step in the ultimate assessment. Such a decision should not be interfered with unless it is manifestly erroneous.

40 24. Interest rates of the order of 5% are now commonly used in Australia; See - CULLEN V. TRAPPELL (supra) TRAECEY V. CHURCHILL (supra) JACOBS V. VARLEY (1975) 21 ALR 166 MEADWELL V. BARBER & ANOR Unreported decision of Gallop J. SAUL V. MENON (supra)

25. The appellants suggest that the taking of judicial

RECORD

notice of certain matters by the Full Court was incorrect and further that the Full Court erred in taking into account inflation.

p.124 1142-47

26. As to judicial notice the Full Court said "In selecting a rate of interest, the judge may take judicial notice in accordance with established principles of such knowledge as he possesses in common with other members of the Community as to general economic trends the effects of inflation, prevailing rates of interest and returns on investments".

10

The submission of the respondent is that the Full Court was correct in so stating. The respondent further submits that :

(i) The matters relevant to the selection of a discount rate are primarily:

(a) the levels of post and present inflation and interest;

(b) the extent to which correct rates of interest upon relevant classes of investment e. g. bond rates, represent a cover against the expectation of future inflation;

20

(ii) the matters referred to above fall into a class of matter which is one of common knowledge.

See - WIGMORE ON EVIDENCE 3rd Edition
S2580

HALSBURY 4th Edition Vol. 17 P. 79

HOLLAND V. JONES (1916-1917) 23

CLR 149;

30

(iii) judicial knowledge of inflation has been taken in a number of authorities.

See - NATIONAL TRUSTEE EXECUTORS
& AGENCY CO. OF AUSTRALIA
LTD. V. ATTORNEY GENERAL
OF VICTORIA [1973] V. R. 610
SAUL V. MENON (supra)

27. As to the taking into account of inflation the Full Court said in the passage previously quoted "... the judge may take judicial notice ... of ...

40

the effects of inflation ...". The submission of the respondent is that the Full Court was correct in so stating. The respondent further submits that :

(i) Judicial views have been expressed that for various reasons, the use of a low rate of interest in capitalising a loss is justified;

10

(ii) The reasoning behind these views is permissible if it is that the present high rates of interest are the product of inflation for example because they are produced by market expectations concerning future inflation, and, that a lower rate devoid of the influence of future inflation should be selected for capitalisation;

See - SAUL V. MENON (supra)
BENEKE V. FRANKLIN (supra)

20

(iii) The proper approach is to select a rate of interest suitable for use when there is to be a gradual resort to capital, and one uninfluenced by inflationary forces such as expectations concerning future inflation;

See - MALLET V. McMONAGLE [1970] AC 167
SHARMAN V. EVANS (1977) 138 CLR 563
BENEKE V. FRANKLIN (supra).

30

(iv) When stating "the judge may take judicial notice of...the effect of inflation" the Full Court was addressing itself to past and present inflation in a proper and acceptable manner. Authorities to the effect that inflation should be ignored relate to the question of future inflation not past or present inflation.

THE ASSESSMENT IN THE CASE AT BAR

40

28. The Full Court assessed the future effects of loss of earning capacity on the basis of the respondent's gross wage. The Full Court correctly followed ATLAS TILES V. BRIERS (supra) which was binding upon it. In view of CULLEN V. TRAPPELL (supra) this is not now the correct approach. However, it does not follow that that assessment of \$80,000.00 in respect of this head of damage is excessive.

29. The respondent submits that the assessment of \$80,000.00 was then and is now inadequate for the following

RECORD

reasons:

- (i) that the Full Court in assessing damages for the future effects of the respondent's loss of earning capacity applied a discount that was too high;
- (ii) the respondent submits that the Full Court was in error in stating "there is also a significant residual earning capacity whether it is exercised with his present employer or on the labour market";
- (iii) the respondent submits that the Full Court was in error in impliedly rejecting the learned Trial Judge's finding that the adverse contingencies of life were balanced by the prospects which the respondent would have of advancing himself if there had been no accident.
- (iv) the respondent submits that the finding and approach of the learned Trial Judge was correct when he said that he was approaching the assessment on the basis that within 12 months of trial the respondent would cease to be employable except on the odd job market; and even employment of that nature would be highly unlikely except in a sheltered workshop, and then discounting to make allowance for the possibility that the respondent would be able to continue in his employment with his present employers or if not that he would have some small residual earning capacity even if only in a sheltered workshop.
- (v) this finding was impliedly accepted by the Full Court when The Chief Justice said "I agree in substance with what the learned Judge has said about the residual earning capacity..."
- (vi) given this finding to discount the respondent's loss by approximately 39.3% was to discount at too great a rate;
- (vii) the respondent submits that when income tax is taken into account both in regard to the level of earnings and in regard to the notional income tax payable on the income derivable from the investment in accordance with CULLEN V. TRAPPELL

p.126 118-9

p.111 11 11-15
p.125 - 126

p.111 11 1-11

p.126 11 10-15

(supra) the award of \$80,000.00 is grossly inadequate.

INTEREST AWARDED ON THE DAMAGES ASSESSED

30. The respondent submits that interest should run on the following components of the award :

1. The full assessment of damages for pain and suffering and loss of amenities.
2. The full amount of special damages.
- 10 3. On the full amount of pre-trial loss of earning capacity.

31. The relevant legislation is set out in and has been considered by the Privy Council in THOMPSON V. FARAONIO (1979) 54 ALJR 231. That case specifically left open the question of whether or not interest should run on damages for pain and suffering and loss of amenities without regard to what were pre trial and post trial effects.

20 32. The respondent submits that interest should run on the full amount to compensate the plaintiff for being kept out of the money to which he was entitled.

See - COOKSON V. KNOWLES [1979] A.C. 556
RUBY V. MARSH (1975) 132 CLR 642
PICKETT V. BRITISH RAIL ENGINEERING LTD.
[1978] 3 WLR 955
FIRE & ALL RISKS INSURANCE CO. LTD. V.
CALLINAN (1978) 52 ALJR 637
CULLEN V. TRAPPELL (supra)

30 33. It was said as to interest "This Court departs from its previous decisions only when they are shown to be clearly wrong. I see no reason why the Court should depart from its previous decision in PAULL V. GLOEDE".

34. PAULL V. GLOEDE (1979) 21 S.A.S.R. 526 was a decision of the Full Court of the Supreme Court of South Australia. That case laid down that in regard to damages assessed for non economic factors that interest should only run on the amount representing pre trial effects and not the amount representing post trial effects. The respondent submits that this statement is wrong.

40 35. The respondent submits that the traditional

RECORD

theory of law in Australia in respect of the non economic components of pain and suffering and loss of amenities is that they are suffered once and for all on the happening of the event which causes the injury.

CONCLUSION

36. The respondent respectfully submits that their Lordships humbly advise Her Majesty that judgment should be varied by increasing the damages assessed and the allowance made for interest.

10

T. A. GRAY

IN THE PRIVY COUNCIL No. 3 of 1980

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT SOUTH AUSTRALIA

B E T W E E N :

LEON STEWART PAUL and
PERCIVAL JAMES GEORGE
EARLE

(Defendants)
Appellants

- and -

ANTHONY HOWARD RENDELL (Plaintiff)
Respondent

CASE FOR THE RESPONDENT

EGERTON, SANDLER, SUMMER & CO.,
17-18 Dover Street,
London W1X 4QQ

(Reference GD/MF)

Agents for the Respondent