
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

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CASE FOR THE APPELLANTS

Record

1. This is an appeal from a judgment of the Full Court of the Supreme Court of South Australia comprising The Honourable The Chief Justice Mr. Justice King, The Honourable Mr. Justice Walters and The Honourable Mr. Justice White, delivered on the 25th day of October 1979. Leave was given by the Full Court of the Supreme Court of South Australia to appeal to Her Majesty in Council, final leave having been granted on the 6th day of December 1979.

p.128
p.134
p.133
p.134

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2. The points for consideration and decision in this appeal are :-

(i) Whether the Full Court was right to assess damages for the future effects of loss of earning capacity without regard to the known fact that the respondent's earnings would have been liable for the incidence of income tax.

p.121 ll.44-49
p.122 ll.1-10
p.125 ll.26-29

(ii) Whether the Full Court was right in holding that "it must be difficult to justify the use of a rate higher than 5%" as the appropriate rate of interest to be applied in the actuarial calculation relating to the future effects of loss of earning capacity, having regard to the evidence.

p.125 ll.15 & 16

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Record

p. 124 ll. 41-47

(iii) Whether the Full Court was right in saying that a judge may take judicial notice of the effects of inflation, when selecting a rate of interest.

p. 125 ll. 24-26

(iv) Whether the Full Court was right in adopting a rate of interest of 5.5% (that being the lowest rate of interest for which evidence of the appropriate annuity value was available) having regard to the circumstances of this case, the investment opportunities available to the respondent and the prevailing rates of interest.

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LEGISLATION

3. There is no legislation directly relevant to the appeal.

HISTORY

p. 1

4. The respondent was injured in a road accident on the 1st day of March 1975. The action was commenced by Writ of Summons in the Supreme Court of South Australia on the 8th day of October 1976. The respondent sued the appellants for damages by reason of their negligence in the driving and management of their respective motor vehicles. The trial of action was heard by the then Acting Chief Justice The Honourable Mr. Justice Hogarth on the 5th and 6th days of July 1978.

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p. 8 ll. 21-23

At the commencement of the trial the appellants admitted liability and thereafter the matter proceeded as an assessment of damages. His Honour delivered judgment on the 4th day of August 1978. The learned trial Judge assessed the total of the respondent's damages at \$124,260.49 made up as follows :

p. 111 ll. 19-32

(a)	special damages proper	\$ 1,410.49	30
(b)	loss of wages suffered to the date of trial	\$ 2,850.00	
(c)	future economic loss	\$ 70,000.00	
(d)	elements of general damages other than economic loss	\$ 50,000.00	

p. 111 ll. 40-42

He included the sum of \$17,403.75 being interest on the judgment pursuant to Section 30c of the Supreme Court Act 1936 as amended.

The total amount ordered to be paid by the appellants was \$141,664.24 and it was further ordered that the appellants pay the respondent's costs to be taxed.

10 The appellants being dissatisfied with the amount assessed appealed by way of Notice of Motion dated the 15th day of August 1978 to the Full Court of the Supreme Court of South Australia. The appellants complained of the amount awarded for economic loss, non-economic loss and interest on the judgment pursuant to Section 30c of the Supreme Court Act.

p.113

20 The respondent did not cross appeal. At the hearing of the appeal before the Full Court on the 5th day of October, 1979, the respondent contended that not only was the award not excessive but that it ought to be increased. The respondent contended that, even in the absence of a notice of cross appeal, the Full Court had power to increase the award pursuant to Order 58 Rule 14 of the Supreme Court Rules. The appellants did not and do not now contend that the Court did not have power to increase an award without the filing of a cross appeal.

pp.118-121

30 The judgment of the Full Court was delivered on the 25th day of October 1979. Reasons for judgment were delivered by The Chief Justice Mr. Justice King. Mr. Justice Walters and Mr. Justice White concurred with the reasons of the Chief Justice. In the judgment delivered and orders made by the Full Court, the Court ordered that there be substituted the sum of \$143,110.00 in lieu of the sum of \$141,664.24 ordered to be paid by the learned trial Judge. It was further ordered that the appellants pay the respondent's costs of the appeal.

p.128

The Full Court dealt with the components of the award as follows :

- (a) The figure awarded for special damages proper of \$1,410.49 was not complained of and not interfered with.
- 40 (b) The sum of \$80,000.00 was substituted for the figure of \$70,000.00 awarded by the learned trial Judge for future economic loss.
- (c) There was no alteration to the figure of

p.126 ll.13-16

p.119 ll.41-42

Record

\$50,000.00 awarded by the learned trial Judge for elements of general damages other than economic loss.

p. 127 ll. 21-22

(d) The sum of \$6,000.00 was substituted for the sum of \$17,403.75 for interest on the judgment.

p. 126 ll. 17-21

(e) There was an additional figure allowed of \$2,850.00 for past loss of earnings which the Full Court was mistakenly informed by Counsel had been omitted by the learned trial Judge. There had in fact not been any error on the part of the learned trial Judge. The error is to the disadvantage of the appellants. As the matter was conceded before the Full Court no issue arises for consideration by the Board.

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The appellants take no further issue in this appeal on the award of \$50,000.00 for the elements of general damages other than economic loss. The appellants do not consider it a proper matter to bring before the Board.

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REASONS FOR JUDGMENT OF THE FULL COURT

5. The Full Court held :

p. 121 ll. 44-49
p. 122 ll. 1-10

"The judgment appealed from was delivered on the 4th August 1978, that is, prior to the delivery of the judgment of the High Court in Atlas Tiles Ltd. -v- Briers (1978) 21 A.L.J.R. 129. It may be assumed, and both counsel assumed, that His Honour assessed damages on the basis of the net earnings of the respondent after tax. In the light of the decision of the High Court just referred to, the assessment was therefore made upon a wrong principle. The error is significant because the evidence shows that the respondent's gross weekly wage at the date of trial was \$180 and his net weekly wage after tax \$133. It follows that the learned judge's assessment in respect of economic loss cannot stand and that this Court must make its own assessment."

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p. 125 ll. 19-29

The Full Court calculated the respondent's loss of earning capacity by reference to his gross weekly wage viz. \$180, without having regard to the tax that would have been payable on that wage.

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It is submitted that the Full Court was wrong. The Full Court should not have used gross wages as a basis for its assessment, having regard to British Transport Commission -v- Gourley (1956) A.C. 185 and Cullen -v- Trappell (1980) 54 A.L.J.R. 295; 29 A.L.R.1, a decision of the High Court of Australia, delivered on the 1st day of May 1980.

6. The Full Court held :

10 "Under current conditions, and bearing in mind the extent to which the rate of interest on long term Government loans is influenced by inflationary expectations, and the current yield on sound equity stocks which might be thought to provide some limited protection against erosion of the value of the investment by inflation, it must be difficult to justify the use of a rate higher than 5%". p.125 ll.7-16

20 (The Court used a rate of 5.5% in making its calculations, that being the lowest rate of interest for which evidence of the appropriate annuity value was available). p.125 ll.24-26

The appellants contend that the above is incorrect in four particulars :

Firstly The Full Court failed to have sufficient regard to the evidence of Mr. P.D.C. Stratford contained in his certificates dated the 30th day of June 1978 - Exhibit P5 - which were tendered as part of the respondent's case. p.146

30 Secondly The authorities referred to by the Full Court in support of that finding are not apposite to this case.

Two of the authorities (Armstrong v Rudd (1978) 21 A.L.R. 166 and Meadwell v Barber and others) (an unreported judgment of the Supreme Court of the Northern Territory of Australia delivered 5th April 1979) dealt with plaintiffs who had suffered catastrophic injuries and who were thereby limited in the management use and enjoyment of their award. p.125 ll.1-7

40 The other authority (Jacobs v Varley (1976) 9 A.L.R. 219) was a Lord Campbell's Act case in which the plaintiff was compensated on an annuity basis.

Record

Thirdly in earlier saying :

p. 124 ll. 41-49

'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, '

and in the further finding above the Full Court erred in taking into account the effects of inflation should not be taken into account.

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O'Brien v McKean (1968) 118 C.L.R. 540 per Barwick C.J. at 547-548; per Windeyer J. at 558-559.

Cookson v Knowles (1979) A.C. 556 per Lord Diplock at 571-572; per Lord Fraser of Tullybelton at 576-577.

Lim Poh Choo v Camden and Islington Area Health Authority (1980) A.C. 174 per Lord Scarman at 193-194.

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p. 125 ll. 7-16

Fourthly In so far as the Full Court only had regard to discounting the rate of interest on long term Government loans and relying on the yield on sound equity stock it erred. It failed to take into account the opportunities for investment and use of the capital sum of the award that would be available to the respondent.

7. (a) The appellants submit, for the reasons expressed in paragraph 6 hereof, that the Full Court erred in its application of the principles applicable to the assessment of damages for the future effects of loss of earning capacity.

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(b) It is further submitted that the amount awarded for the future effects of loss of earning capacity requires re-consideration.

The Full Court found as facts :

p. 118 ll. 6-7

(i) The respondent was 26 years of age at the date of the accident and unmarried.

p. 120 ll. 48-49

(ii) The respondent was educated at a High

School and left after the second year.

(iii) The respondent's working life had been in manual occupations. At the time of the accident he had improved his position, undertaking some managerial functions in conjunction with his labouring duties.

p. 121 ll. 8-13

(iv) The respondent's employment after the accident was precarious. There had been a decline in the employer company's share of the market in the three years which had passed before trial.

p. 121 ll. 19-30

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(v) The respondent was earning \$180 per week gross and \$133 per week net (after tax) at the date of trial.

p. 122 ll. 4-7

(vi) The respondent did not have any great prospects of advancement.

(vii) The usual adverse contingencies were emphasized by the precarious economic position of his employer.

p. 126 ll. 3-7

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(viii) The respondent had a significant residual earning capacity which, whether exercised with his employer or on the labour market, had to be taken into account.

p. 126 ll. 8-13

(ix) That by using a rate of interest of 5.5% the value of an annuity of \$180, would calculate at the sum of \$141,660. From that figure should be deducted the amount that he would have earned in the year following trial leaving a balance of \$132,000.

p. 125 ll. 24-27

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Save for paragraph (ix) the appellants do not complain about the findings of fact.

(c) The Full Court allowed the sum of \$80,000 'for the future impact of his impaired earning capacity' which is almost exactly 60% of the figure which would have represented his total loss of earning capacity.

p. 126 ll. 13-16

(d) The appellants submit that in the assessment of damages for the future effects of loss of earning capacity, the following principles, inter alia, should be applied :

Record

- (i) The loss should be calculated with reference to net earnings not gross earnings,
British Transport Commission v. Gourley
(1956) A.C. 185
Cullen v Trappell (Supra)
- (ii) Inflation should not be taken into account,
O'Brien v McKean (1968) (Supra)
Cookson v Knowles (1979) (Supra)
Lim v Camden Health Authority (Supra)
- (iii) Actuarial evidence is no more than a guide, 10
Arthur Robinson (Grafton) Pty. Ltd. v
Carter (1968) 122 C.L.R. 649 per Barwick
C.J. at 658
- (iv) In the selection of the appropriate rate of interest in the use of actuarial evidence, regard should be had to the opportunities for investment and use of the capital sum which would be available to a plaintiff,
Arthur Robinson (Grafton) Pty. Ltd. v
Carter (Supra) per Barwick C.J. at 659-660. 20
Lim v Camden Health Authority (Supra)
per Lord Scarman at 193.
Crown v Alyta (1970) 44 A.L.J.R. 341 per
Barwick C.J. at 344.
Mallett v McMonagle (1970) A.C. 166 per
Lord Diplock at 175.
Cookson v Knowles (Supra) per Lord
Diplock at 570.
- (v) 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. It is submitted that this case is not exceptional, 30
Taylor v O'Connor (1971) A.C. 115.
Cookson v Knowles (Supra) per Lord Fraser
of Tullybelton at 577-578.
Petroleum and Chemical Corporation
(Australia) Ltd. v Morris (1973) 47 A.L.J.R.
484 per Menzies J. at 485-486.
Contra: Cullen v Trappell (Supra) 40

8. The appellants respectfully submit that the appeal should be allowed and the judgment and order of the Full Court varied for the following among other

R E A S O N S

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- (1) BECAUSE the decision of the Full Court is inconsistent with decisions of the House of Lords and the High Court of Australia.
- (2) BECAUSE the Full Court applied the wrong principles in assessing damages for the future effects of loss of earning capacity.
- (3) BECAUSE in assessing damages for the future effects of loss of earning capacity the Full Court erred in the application of principles.
- (4) BECAUSE the decision is wrong.

BRUCE LANDER

T.A. WORTHINGTON

IN THE PRIVY COUNCIL

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CASE FOR THE APPELLANTS

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