

**Kilisimasi v Malani & Tonga Telecom**

Supreme Court, Nuku'alofa

Lewis J

10 C.44/90

29, 30 April, 19 July 1996

*Negligence - damages - head injuries - nursing care - loss of earning capacity  
 Damages - head injuries - loss earning capacity*

20 This case involved the assessment of damages on a verdict of negligence against the defendants in favour of a (at trial) 86 year old man who sustained inter alia a closed head injury which gave rise to an organic mental disorder diagnosed as amnesic syndrome (with impairment in short and long term memory).

Held:

1. Damages are recoverable for any recognisable psychiatric illness caused by the breach of duty of the defendant.
2. Damages should be awarded for assistance given by the family to the plaintiff while he was hospitalised, for pain and suffering (\$4000); for loss of future earning capacity (for 4 years, from age 79) (\$3800); the family's nursing assistance after hospitalization (\$9000 - the proper and reasonable cost of supplying that need); together with interest on the various awards.

30 Cases considered : Hinz v Berry [1970] 2 QB 40  
 McDermott v Ramadanovic Est (1988) 27 BCLR (2d) 45  
 Rhodes v Canadian Nat. Railway (1990) 75 DLR (4th) 248  
 Donnelly v Joyce [1974] QB 454  
 Roach v Cates [1938] 1 KB 256  
 Housecraft v Burnett [1986] 1 All ER 332  
 40 Jefford & anor v Gee [1970] 1 All ER 1202

Statutes considered : Civil Law Act ss. 3 & 4

Counsel for plaintiff : Mr Niu

Counsel for defendants : Mr W Edwards

### Judgment

The Plaintiff in this action successfully appealed a verdict recorded by the trial judge in favour of the defendants. The appellate court ordered that the matter be remitted to this court for assessment of damages and reversed the verdict recorded by the trial court concerning liability. The Plaintiff has a verdict against both defendants with no order of contributory negligence.

The claim arises out of a collision between a van owned by the second defendant and being driven by the first defendant. The plaintiff is now approximately 86 years of age. he was seriously injured in the collision. His principal source of difficulty arises from the closed head injury, (now stable) he sustained which is an "organic mental disorder" diagnosed as "amnesic syndrome." - (Dr Puloka Exh. P<sup>2</sup>).

The essential feature of the syndrome is impairment in short and long term memory that is attributed to a specific organic factor. A person with an amnesic syndrome has both an ongoing inability to learn new material and an inability to recall material that was known in the past. Events of the very remote past are better re-called than more recent events.

Associated features of the syndrome, disorientation and confabulation, (the recitation of imaginary events to fill in gaps in memory) are often observed but tend to disappear with time. Apathy, lack of initiative and emotional blandness are common. Although the person is superficially friendly and agreeable his or her affect is shallow. Impairment in occupational or social functioning is usually moderate to severe.

Among other causes amnesic syndrome may result from any pathological process for example head Trauma. -[Diagnostic and statistical manual of mental disorders (third edition revised) - Sub-nom "DSM 111R\*].

In the present case the plaintiff presented to Dr. Puloka with a history of having been in a vehicular collision in which he suffered a severe closed head injury, rendering him unconscious for about one week. When he regained consciousness he demonstrated loss of memory. There was no evidence of bony fractures and the plaintiff was discharged after 25 days of hospitalisation.

No issue is taken with the diagnosis of Dr. Puloka by the respondents nor is issue taken with the factual consequences attributable to the syndrome in the patient. I am satisfied that the plaintiff suffered a closed head injury as a direct consequence of the negligent driving of the first defendant who struck and knocked the plaintiff from his bicycle. As a consequence I am satisfied that the plaintiff suffered shock and associated pain and was rendered unconscious for a period of about one week and was hospitalised for some 25 days. It is the sequel of events following the plaintiff's discharge from hospital from which most differences arise between the parties.

I take the law to be that "damages are ..... recoverable for ..... any recognisable psychiatric illness caused by the breach of duty by the defendant" - *Hinz v Berry* [1970] 2 QB 40 per Lord Denning M.R. The decision, or more accurately the dictum cited, supra, has been the subject of adverse judicial comment and commentators' dissent in a number of cases - see : *McDermott v Ramadanovic Estate* (1988) 27 BCLR (2d) 45 at 53, per Southin J and *Rhodes v Canadian National Railway* (1990) 75 DLR (4th) 248 at 289. However I am satisfied that the diagnosis of amnesic syndrome in the present case amounts to a psychiatric illness which was caused by the negligence of the defendant on any view of the evidence.

**ASSISTANCE GIVEN THE PLAINTIFF BY HIS FAMILY WHILE HE WAS HOSPITALISED**

The Plaintiff's son and other members of the family visited hospital on a daily basis bringing with them sustenance for him and clean clothing. The defendant takes the point that since he was unconscious there was no need for their attendance.

In my opinion there was justification in their attendance. No-one was able to say when or whether the plaintiff would regain consciousness. They had made clothing and sustenance available for such an event and his clothing would have to be changed whether he was conscious or not.

The evidence supports the inference that what the son and relatives did was reasonable arising as a direct result of the injury the plaintiff sustained because of the negligence of the defendants.

I allow \$12 per day for visits by the plaintiff's son on 25 days i.e.  $12 \times 25 = \$300.00$ . I further allow \$15 per day for a family member to be present during every 24 hour period in case the plaintiff awoke or was in difficulty beyond those difficulties which held him in hospital, e.g. falling from bed. The evidence is that there was a need (beyond the regular nursing staff) for the plaintiff to be walked regularly and for people to talk with him on his regaining consciousness. I allow 5 days at \$15 per day i.e. \$75 under this head.

**PAIN SUFFERING**

That the plaintiff suffered pain as a consequence of the injuries inflicted upon him by negligence of the defendant is proved beyond any doubt. This Court is entitled to infer that pain was a natural consequence of the injuries of the plaintiff. The loss of consciousness of the plaintiff is also compensable as suffering of the plaintiff for a period of 5 days. If there were to be any doubt about that then the unconsciousness is in my view compensable as being a loss of the amenity of enjoyment of life. The evidence of Poasi Kilisimasi is that the plaintiff was moaning with pain from time to time, was given tablets for pain time to time and that the plaintiff still appears to suffer pain at the time of trial. Prior to the collision the plaintiff was a healthy man who suffered no infirmity.

The quantification of general damages for pain and suffering is a matter for the proper exercise of the discretion of the court.

In approaching the assessment of general damages (those awarded for pain and suffering and loss of amenity,) I have taken into account the good health enjoyed by the plaintiff prior to the collision, the severity of the closed head injury he sustained and its consequences and in particular that at least to the date of trial and on the probabilities until his death the amnesic syndrome will continue to disaffect the plaintiff. I award him \$4000.00

**ECONOMIC LOSS**

**LOSS OF FUTURE EARNING CAPACITY**

When the plaintiff was injured he was employed. The expectation on all sides is that he would have continued to have been employed had it not been for the injury which he sustained in the intervening collision. At the date of the collision he was earning TOP\$25, per week. The almost imponderable questions are:- for how long would this elderly man continue to be employed and on what terms and would his wage vary and is so would his wage be increased or decreased?

The wages loss of the plaintiff to the date of this judgment is easily calculated. It amounts to \$25 multiplied by the number of working weeks from the date of the collision

The evidence is that the plaintiff has not been employable since the collision. Laupele Tupou spoke of the plaintiff's earnings and his duties. He said the plaintiff earned \$25.00. I infer that \$25 was the plaintiff's weekly earning. Tupou searched for documentary evidence of the earnings but was unable to find any. I accept the weekly earnings were \$25. There is no evidence as to whether this is a gross or net sum - (ie before or after tax). I assess it as a net sum therefore.

150 Counsel for the plaintiff urges that the evidence of the former good health of the plaintiff together with some other factors raise the likelihood of his continuing in gainful employment with the then employer Gateway Enterprises Limited for a period of some 5 years had he not been injured.

Doing the best I can from the evidence I would allow the plaintiff (79 years old at the date of collision) 4 further years employment at \$25 per week, ie 4 years at \$1200 per annum totalling \$4,800.00. It reflects his retirement on his attaining the age of 83 years.

THE CLAIM FOR NURSING ASSISTANCE BY THE FAMILY OF THE PLAINTIFF AFTER HIS DISCHARGE FROM HOSPITAL.

160 Relatives of an incapacitated person may provide him with regular care and attendance and so save him the expense of a paid nurse and like care. The Plaintiff in this assessment is such a person and the evidence has been that in the first year of his incapacity and to a somewhat reduced amount in later years his son and daughter in law have had the disruptive and trying obligation of caring for his needs.

The loss claimed is the plaintiff's loss and his loss is the existence of the need for a nursing service the value of which - for the purpose of damages - is for the purpose of the ascertainment of the amount of his loss - is the proper and reasonable cost of supplying that need; Donnelly v Joyce [1974] Q.B. 454 at 426A per Megaw L.J.

170 There is evidence which I accept that the plaintiff lost the control of his bladder and bowels following the injury sustained in the collision. I accept the opinion of Dr. Puloka that there was such a possibility.

The evidence of Dr. Puloka coupled with the evidence from the family of the plaintiff of such occurrences persuades me that the bowel and bladder incidents are directly attributable to the injuries of the plaintiff in the collision and not to declining health with progressing years.

180 In the year following the collision I find that there were 4 or 5 incidents of wetting and/or soiling by the plaintiff per day and the son and daughter in law of the plaintiff chose to clean up after the incidents, that method being the less expensive option. There is a claim for sheeting and clothing the point being that the increased frequency of laundering caused the plaintiff's son and his wife a necessity to replace worn out sheets and clothing more frequently.

The defendants argue that the wetting/soiling evidence is speculative and unreliable. Taking into account the whole of the evidence and the submissions of counsel I make an allowance for the increased burden placed upon the son and daughter in law of the plaintiff. They found it necessary to expend sums towards keeping the plaintiff and his environment clean and in so doing were forced to expend monies they would not have spend had the plaintiff not been injured. The claim is not that of the son and his family. It is that of the plaintiff.

190 The expenditure of cleaning materials toilet paper etc. and the wear and tear on sheeting and clothing are properly items of the plaintiff's claim. I treat them as such and

compensate accordingly.

What is a fair amount in all the circumstances for the expenditure by the plaintiff's son and daughter in law at Vaotu'u both in money terms and in terms of their physical efforts on the plaintiff's behalf?

The law to be applied is that of the common law of England and the statutes of general application (Civil Law Act 25 ss.3 and 4). The law, as I am presently advised commences with the decision of the Court of Appeal in Roach v Yates [1938] 1 KB 256 (CA) and later in Donnelly v Joyce [1974] Q.B. 454 (C.A.) and more recently in Housecroft v Burnett [1986] 1 All E.R. 332 (C.A.).

The latter is a case where there was a catastrophic injury to a young girl of 16 years who it was anticipated would need care for the rest of her life expectancy aided by her mother and some hired outside care. O'Connor LJ said in respect of the sum assessed in respect of her mother's care:-

"Once it is understood that this is an element in the award to the plaintiff to provide for the reasonable and proper care of the plaintiff and that a capital sum is to be available for that purpose, the Court should look at it as a whole and consider whether on the facts of the case, it is sufficient to enable the plaintiff among other things to make reasonable recompense to the relative. So in cases where the relative has given up, gainful employment to look after the plaintiff I would regard it as natural that the plaintiff would not wish the relative to be loser and the court would award sufficient to enable the plaintiff to achieve the result ....."

In the present case the defendant argues that the claim for nursing aid which the relatives claim they have sustained ought to be struck because the method of assessment must be speculative and in any event the evidence does not support it.

It must necessarily be that any assessment must be based on evidence. The evidence presently is that after his discharge from hospital the plaintiff now had a serious disorder and needed constant attention from relatives. Whereas before the collision the plaintiff had a bicycle and travelled freely about the place, following the collision he was unable to manage his own affairs nor provide for himself and became dependant on relatives for food clothing lodging and hygiene.

Counsel for the plaintiff submits that at least during the first year the choices open to his relatives were either to hire a nurse 24 hours a day or bear the costs of having him with them and an allowance for caring for him. So it should be.

I award the plaintiff a sum for the care provided to him by his son and daughter in law and I assess the plaintiff's loss under this head at \$9,000.00

#### INTEREST

Having considered the submission of counsel referring as they have to the judgment of Lord Denning M.R. in Jefford and Another v Gee [1970] 1 All E.R. 1202 I will fix interest and itemise it against the particular awards of damages made.

#### SUMMARY

I assess damages as follows:-

1. General Damages For Pain Suffering and Loss of Amenity  
\$4,000.00 - plus interest to be calculated at 4% from the date of the service of the writ 30 May 1990.
2. Economic Loss

A loss of earnings at the rate of \$25 per week from the date of the injury until 5 December 1992 - \$3,800.00 plus interest at the prevailing bank rate for investment return on \$3,800.00 from the 30 May 1990 until paid.

3. Assistance given by Family during Plaintiff's Hospitalisation

1. The Plaintiff's Son

I allow 25 days @ \$12 per day travelling expenses, \$300.00

2. Other Family Members

I allow \$15 per day for 7 days for the 24 hour presence of a person during Plaintiff's hospitalisation while unconscious plus interest at 4%.

4. Care Provided by Relatives in Lieu of a paid Nurse 5.12.88 to present

I allow \$9,000.00 plus interest @ 4% from the date of service of the writ ie 30 May 1990 to the present.

5. Special Damages

Expenditure by relatives on sheeting and cleaning etc. I allow a sum but which is from 1.1.89 until the present. To be calculated by Counsel plus interest @ 2% until 9 August 1996, until paid.

Costs of this assessment to be those of the Plaintiff to be taxed or agreed.