12/79

IN THE PRIVY COUNCIL No. 29 of 1978

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

BETWEEN:

CHRISTOPHER BERNARD THOMPSON — Appellant (Defendant)

- and -

KARAN FARAONIO — Respondent (Plaintiff)

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CASE FOR THE APPELLANT

Record

1. This is an appeal pursuant to leave granted by the Full Court of the Supreme Court of South Australia, final leave having been granted on 13th day of June 1978, from an order of the Full Court of the Supreme Court of South Australia (Bray C.J., Bright, Zelling, Jacobs and King JJ.) made on 19th May 1978 upholding an appeal by the Respondent (the original Plaintiff) from that part of the Order of the Honourable Mr. Justice Hogarth made on 7th December 1977 as concerned the amount of interest to be awarded to the Plaintiff on a judgment for damages arising from injuries caused by the Appellant's negligent driving of a motor car.

pp.90-93

pp.86-87

20 pp.22-23

2. The Respondent was injured in a collision between two motor cars, on 11th May 1974. By action commenced in the Local Court of Adelaide by summons issued on 1st September 1975 and served on the Appellant on 16th September 1975, the Respondent claimed damages against the Appellant alone. The Appellant admitted that the accident was due to his negligence. By Order of the Honourable Mr. Justice Walters made on 17th September 1976 it was ordered that the proceeding be tried in the Supreme Court of South Australia as if commenced there; that interlocutory judgment be entered for the Respondent; and that the Respondent be at liberty to enter the action for assessment of damages. The matter was heard by Hogarth J. on 14th and 15th November 1977 and his Honour delivered judgment on 7th December 1977.

pp.1-7

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pp.7-9

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Record

pp.9-22 — 3. Hogarth J. assessed the Respondent's damages at $64,698.80 as follows:

(1)	Loss of wages until trial	$ 7,580.00
(2)	Loss of earning capacity after trial	$21,500.00
(3)	Household help	$ 325.00
(4)	Other special damages, agreed at	$ 293.80
(5)	General damages for pain and suffering and loss of amenities	$35,000.00
		$64,698.80

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p.23 l.3 — p.23 l.8 — His Honour also awarded the sum of $3,750.00 for interest pursuant to section 30 c of the Supreme Court Act 1935 (South Australia), and accordingly gave judgment for the Respondent in the sum of $68,488.80 and ordered that the Appellant pay the Respondent's costs to be taxed.

1.9 — p.24 — The Appellant being dissatisfied with the assessment of damages appealed by Notice of Appeal dated the 16th of December 1977 to the Full Court of the Supreme Court of South Australia.

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pp.25-26 — The Respondent being dissatisfied with the assessment of interest cross appealed by Notice dated the 28th day of February 1978 to the Full Court of the Supreme Court of South Australia.

The Appeal and Cross Appeal came on for hearing before the Full Court (Bray C.J. Zelling and Jacobs JJ.) on the 12th day of April 1978.

The Appellant's appeal proceeded and the Court reserved judgment thereon.

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On the Appellant's Counsel stating that he intended to argue that certain cases previously decided in the Supreme Court of South Australia as to the awarding of interest were in error, the Respondent's Cross Appeal was adjourned to be referred to a specially convened Full Court of the Supreme Court of South Australia consisting of five judges.

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4. Judgment in the Appellant's appeal was delivered on 4th May 1978. The Court reduced the damages for pain and suffering and loss of amenities from the figure of $35,000.00 awarded by Hogarth J. to $25,000.00, thus reducing the total award of damages from $64,698.80 to $54,698.80. That result is not in issue in these proceedings and is relevant only as regards quantification of interest. — pp.37-39

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5. The Respondent's Cross Appeal came on for hearing before the specially convened Full Court comprising Bray C.J., Bright, Zelling, Jacobs and King JJ. on the same day, namely 4th May 1978.

6. At the trial of the action neither Counsel had addressed argument to Hogarth J. on the question of interest.

7. In his reasons for judgment, Hogarth J. said simply:

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> "I make an allowance of $3,750 for interest (calculated at 10%)." — p.22 l.11

What that calculation (if any) was, Hogarth J. did not say; nor has either party been able to suggest a calculation giving that result.

8. The issues before the specially convened Full Court (hereinafter referred to as "the Full Court") were formulated by Counsel for the parties, and adopted by the Full Court, as follows:

"(a) It is submitted by counsel for the defendant (Appellant) to which counsel for the plaintiff (Respondent) demurs that no interest should run on the sum awarded for future effects of loss of earning capacity.

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(b) It is submitted by counsel for the defendant (Appellant) to which counsel for the plaintiff (Respondent) demurs that interest runs from the date of service of proceedings rather than the date of issue of proceedings." — p.42

9. At the hearing of the Cross Appeal it was agreed by Counsel as follows:

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"(1) That interest runs from either the date of issue of the summons being 1st September 1975 or the date of service of proceedings that date agreed as 16th September 1975.

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(2) That interest runs on items (1) (3) and (5) namely

Loss of past earning capacity	$ 7,580
Household help	$ 325
Pain and Suffering	$35,000

(3) That the rate of interest would be at the date of assessment of damages 10%.

(4) That if the Full Court should reduce His Honour's award for pain and suffering that interest should run on the lesser amount." — pp.41-42 — 10

10. It was held by the Full Court that in the circumstances of this case the appropriate date under Submission (b) in paragraph 8 above was that of the issue of the proceedings, namely 1st September 1975. No issue now exists between the parties as to that matter. The sole issue arising in this appeal is under Submission (a) in paragraph 8 above.

11. In relation to Submission (a) it was held by the Full Court that interest should normally run on the sum awarded for the future effects of loss of earning capacity, and that accordingly interest should here be awarded at the agreed rate on the whole of the damages awarded, $54,698.80, less only the sum of $293.80 special damages, item (4) in paragraph 3 above. The Full Court accordingly ordered that the Plaintiff (Respondent) be awarded $14,547.74 for interest (being interest at the rate of 10% per annum on damages of $54,405.00 from the 1st September 1975 to the 4th May 1978.) — pp.86-87

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THE FACTS

12. The essential facts have been stated. It was an action for damages for personal injuries received in a motor car accident brought about by negligence. There was nothing unusual about the type of injuries suffered. Action was brought within a proper time and was duly prosecuted. There were no features about the case to distinguish it from the general run of cases for injuries suffered as a result of negligence in the driving of a motor car.

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13. The case was so treated by the Full Court. Bray C.J. held the case to be one for what "should normally" be the rule. So did King J. None of the — p.59 l.27

other judges suggested that there was anything to take this case out of the ordinary run of such cases.

Record p.83 l.8

THE LEGISLATION

14. The legislation in force at the time of both accident and judgment was section 30 c of the Supreme Court Act 1935 (South Australia), as amended, introduced into that Act by the Supreme Court Act Amendment Act 1972 and further amended by the Supreme Court Act Amendment Act 1974. The most relevant portions of section 30 c were as follows:

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> "30 c (1) Unless good cause is shown to the contrary, the court shall, upon the application of a party in favour of whom a judgment for the payment of damages, compensation or any other pecuniary amount has been, or is to be, pronounced, include in the judgment an award of interest in favour of the judgment creditor in accordance with the provisions of this section.

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> (2) The interest --
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> (a) Shall be calculated at such rate of interest as may be fixed by the court;;
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> (b) shall be calculated --
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> (i) where the judgment is given upon an unliquidated claim-- from the date of the commencement of the proceedings to the date of the judgment;
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> ...
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> or in respect of such other period as may be fixed by the court;
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> and
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> (c) shall be payable in respect of the whole or any part of the amount for which judgment is given in accordance with the determination of the court.

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> (3) Where a party to any proceedings before the court is entitled to an award of interest under this section, the court may, in the

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> exercise of its discretion, and without proceeding to calculate the interest to which that party may be entitled in accordance with sub-section (2) of this section, award a lump sum in lieu of that interest."

It is necessary to add that the Supreme Court Act Amendment Act 1974, among other changes, inserted the present section 30 c (3) in place of a provision which read: 10

> "(3) No interest shall be awarded in respect of--
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> (a) damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment;
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> or
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> (b) exemplary or punitive damages."

THE DECISIONS TO THE CONTRARY

15. Three cases decided since the decision of the Full Court, one in the House of Lords and two in the High Court of Australia, make it convenient to preface an analysis of the judgments in the Full Court by the statement of the basic contention that the decision of the Full Court is wrong because inconsistent with the decision of the House of Lords in Cookson v Knowles (1978) 2 W.L.R. 978, and with views earlier expressed in the High Court of Australia in Ruby v Marsh (1975) 132 C.L.R. 642 and given effect to in decisions of the High Court in Fire and All Risks Insurance Co. Ltd. v Callinan, judgment delivered 8th August 1978, so far reported only in (1978) 52 Australian Law Journal Reports 637, and Atlas Tiles Ltd. v Briers, judgment delivered 5th October 1978 so far reported only in (1978) 78 Australian Tax Cases 4536. 20 30

16. It is respectfully submitted that there is no relevant distinction between section 30 c of the Supreme Court Act and section 3 of the United Kingdom Law Reform (Miscellaneous Provisions) Act 1934 as amended by section 22 of the Administration of Justice Act 1969, considered by the House of Lords in Cookson v Knowles (1978) 2 W.L.R. 978. 40

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In particular:

(a) Both provisions apply to litigation generally. The fact that the Supreme Court Act specifies particular cases in which interest is not to be awarded does not affect this similarity in any relevant way.

(b) In both cases the rate of interest is such rate as may be fixed by the court.

(c) In both cases interest may be awarded on the whole or such part of the damages as the court thinks fit.

(d) The apparent direction in section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 as amended to award interest in fatal accident cases is left subject to the discretion of the court. It was said in Jefford v Gee (1970) 2 Q.B. 130 that the introduction of that element of compulsion "does not alter the principles which the court should apply in awarding interest": (1970) 2 Q.B. at p.143 per Lord Denning M.R. delivering the judgment of the Court. That was presumably obiter but it is confirmed by the statements in Cookson v Knowles (again strictly obiter, but clearly authoritative) that so far as regards claims for loss of earning power (or future earnings) the position would be the same in personal injury cases as in fatal accident cases: see (1978) 2 W.L.R. at p. 987 per Lord Diplock (Viscount Dilhorne and Lord Scarman concurring, and Lord Salmon "broadly concurring"), and at p. 992 per Lord Fraser of Tullybelton.

(e) In both cases the legislation gives no guidance as to the way in which the court shall exercise its power to award interest.

(f) In respect of both provisions the propriety has been recognised of appellate courts laying down guidelines: Cookson v Knowles (1978) 2 W.L.R. per Lord Diplock at p.981 and per Lord Fraser of Tullybelton at p.992. Lord Scarman's warning at p.993 as to the limits on the application of such guidelines does not challenge, and indeed his Lordship's other remarks endorse, the propriety of laying down such guidelines. As regards the Supreme Court Act, the Full Court laid down what "should normally" be done, which if not a guideline is certainly an indication.

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17. It is respectfully submitted therefore that unless there is some other relevant distinguishing factor, it should be decided that the relevant guidelines under the Supreme Court Act would be the same as those under the Law Reform (Miscellaneous Provisions) Act 1934.

18. The question therefore arises whether there is any basis for evolving different guidelines under this Act, applying to the people and litigants of South Australia, in the Australian economy, than in the case of the English people, and English litigants, in the English economy. 10

19. None of the relevant cases suggests that the guidelines established in Cookson v Knowles depend on some special attribute of human nature in England, or that the guidelines laid down in South Australia depend on some special attribute of human nature in South Australia. Nor that either rule depends on habits of litigants or the established conduct of litigation peculiar to either place. 20

20. There appear for what relevance and use their Lordships decide, figures showing the rates of inflation in Australia over the last twenty years, and the rates of interest for Commonwealth Government securities. Although the details differ the general picture is not unlike that of England.

21. It is respectfully submitted that for no reason apparent in the judgments, the Supreme Court of South Australia has evolved guidelines that differ markedly from those laid down by the Court of Appeal and approved in the House of Lords in relation to legislation not relevantly distinguishable. 30

22. There are then the two decisions in the High Court. It is necessary to mention first the earlier case of Ruby v Marsh (1975) 132 C.L.R. 642.

23. Ruby v Marsh concerned a claim for interest on an award made pursuant to Part III of the Wrongs Act 1958 (Victoria), which is fatal accidents legislation of an orthodox type. Section 79A. (3) (b) of the Supreme Court Act 1958 (Victoria) compulsorily excludes from entitlement to interest under section 79A. (1) of that Act -- 40

"loss or damage to be incurred or suffered after the date of the award". Record

24. It is sufficient to say of Ruby v Marsh at this point that:

(a) The final decision was a unanimous one, but two members of the Court, Stephen and Jacobs JJ. reached their result solely on the facts of the case: see sub-para (c) below. They expressly disagreed with the basic reasoning of the remaining three members of the Court (Barwick C.J., McTiernan and Gibbs JJ.).

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(b) Barwick C.J. McTiernan and Gibbs JJ. held that in the case of a claim by a dependant pursuant to Part III of the Wrongs Act 1958 (Victoria), the whole of the plaintiff's loss is suffered at the moment of the death, and none of it is compulsorily excluded by section 79A.(3)(b) of the Supreme Court Act 1958 (Victoria).

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(c) Stephen and Jacobs JJ. held that section 79A.(3)(b) refers not to the juristic concept of damages but to the "practical" concept of when the consequence of the compensable infringement of legal rights is actually felt; that there was therefore in the award an element for damage to be incurred or suffered after the date of the award; but that where the manner of calculation of the award was such that that element could not be quantified, s. 79A.(3)(b) could not operate.

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(d) A majority of the judges (Gibbs, Stephen and Jacobs JJ., Barwick C.J. and McTiernan J. contra) said that in the case of a personal injuries claim interest on the award of damages for loss of future earning capacity would be excluded under section 79A.(3)(b).

(e) A majority of the judges (Barwick C.J., McTiernan, Stephen and Jacobs JJ., Gibbs J. contra) said that the position was the same in fatal accident cases as in personal injury cases(though as stated above, these four judges were split two-two as to what that position was).

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25. The proposition that the Appellant submits is important to this appeal is the proposition

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enunciated in paragraph (d) above, in that a majority of the judges in the High Court said that in the case of a personal injuries claim that element in the award of damages representing future effects of loss of earning capacity is "loss or damage to be incurred or suffered after the date of the award", within section 79A.(3)(b) of the Supreme Court Act 1958 (Victoria).

26. The decision in Fire and All Risks Insurance Co. Ltd. v Callinan (1978) 52 A.L.J.R. 637 was given in August 1978, prior to the arrival in Australia of reports of the decision of the House of Lords in Cookson v Knowles (1978) 2 W.L.R. 978 (published in the Weekly Law Reports on 16th June 1978). The case arose under section 72 of the Common Law Practice Act 1878-1972 (Queensland), which is similar to section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (United Kingdom). The action was a common form action for damages for personal injuries suffered as a result of the negligent driving of a motor vehicle. One element of the award of damages related to loss of earning capacity. The trial judge made an award of interest on the whole award. On appeal, the Full Court of the Supreme Court of Queensland remitted the matter to the trial judge to itemize the elements in the total award, so that a proper award of interest could be made. On further appeal to the High Court (Stephen, Mason, Jacobs, Murphy and Aickin JJ.) their Honours in a joint judgment said:

> "The claim for general damages contained elements of loss of earning capacity, pain and suffering and loss of amenities. Each of these represented detrimental consequences, some of which had already been borne by the plaintiff before the trial and others of which he would bear in the future. To allow interest on the award of general damages without discernible regard for the temporal distinction was wrong, and this for the reasons stated by the Full Court.
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> It is enough to refer to the conclusions to which the members of the Full Court arrived in relation to the various heads of general damages. In the case of loss of earning capacity, interest should, they concluded, be allowed only on that part of the damages awarded under that head which represents

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compensation for those detriments the practical impact of which, in terms of economic loss actually incurred, has already, at the date of judgment, been experienced by the plaintiff. In the case of pain, suffering and loss of amenities it was said that they too "should have a time differential applied to them for the purpose of giving interest on damages within the terms of s. 72". These conclusions accurately reflect the application to the Queensland legislation of the principles enunciated by a majority of this court in Ruby v. Marsh (1975) 132 C.L.R. 642.

52 A.L.J.R. at pp. 638-639.

The Court referred to Jefford v Gee (1970) 2 Q.B. 130 as showing the need for such itemization.

27. It is respectfully submitted that the decision under appeal is directly inconsistent with the decision in Fire and All Risks Insurance Co. Ltd. v Callinan.

28. Atlas Tiles Ltd. v Briers (1978) 78 A.T.C. 4536 concerned a claim for damages for wrongful dismissal. The trial judge awarded interest on the whole of the damages, representing the plaintiff's economic loss both up to and after the date of judgment. Power to award interest was derived from section 79A. of the Supreme Court Act 1958 (Victoria), the provision involved in Ruby v. Marsh. As stated earlier, section 79A.(3)(b) provides that interest shall not be allowed on so much of the award as represents "compensation for loss or damage to be incurred or suffered after the date of the award". The High Court reduced the award of interest to reflect inter alia the exclusion from the computation, damages for compensation in respect of the period after the date of the judgment. Jacobs J. said:

> "Thus part of the damages represented compensation for loss to be incurred after the date of the judgment. No interest should have been awarded in respect of that part of the damages. See Ruby v Marsh (1975) 132 C.L.R. 642 per Gibbs, Stephen and Jacobs JJ. See also Cookson v Knowles (House of Lords, The Times 25th May 1978.")

78 A.T.C. at p. 4559

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Barwick C.J. expressed as his own view that the trial judge's award of interest was correct; but his Honour continued:

> "However, having regard to the views expressed by other Justices, and to the decision of a majority of Justices in Ruby v Marsh, and my brother Jacobs' adherence to it in this case, I should agree in the circumstances to the order proposed by my brother Jacobs."
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> 78 A.T.C. at p. 4545.

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Murphy J. agreed: 78 A.T.C. at p. 4561. Gibbs and Stephen JJ. did not concur in that order, since their order would have been to remit the matter to the trial judge in relation to the quantum of damages. But each stated that the trial judge should calculate the interest in accordance with the principle enunciated by Jacobs J.: 78 A.T.C. per Gibbs J. at pp. 4549-4550 and per Stepehen J. at pp. 4554-4555.

29. It is submitted therefore that in the case of claims in respect of personal injuries suffered as a result of negligence there is compelling authority, in both England and Australia, showing that the decision of the Full Court was wrong.

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THE JUDGMENTS APPEALED FROM

30. Bray C.J. said:

(a) In Sager v Morten and Morrison (1973) 5 S.A.S.R. 143 the Full Court of the Supreme Court of South Australia held that in personal injury cases damages for future effects of loss of earning capacity were excluded as interest-bearing under the old section 30 c.(3)(a) of the Supreme Court Act as being "in respect of loss or injury to be incurred or suffered after the date of the judgment".

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It is submitted that Sager v Morten and Morrison was on any view wrongly decided, because inconsistent with Cookson v Knowles, Ruby v Marsh, Fire and All Risks Insurance Co. Ltd. v Callinan, and Atlas Tiles Ltd. v Briers.

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p.50
l.42-

(b) "But the old subsec.(3)(a) has gone and, as I have said, there is no statutory

Record p.51 l.9

compulsion on us to divide the award into one interest-bearing component in respect of the past effects and another in respect of future effects of the accident as at the date of judgment. The questions before us, as I see it, are, first, whether Ruby v Marsh compels us to make any such dissection notwithstanding the disappearance of the old subsec. (3)(a) and, secondly, whether, if it does not, we should nevertheless undertake it on general principles."

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In both formulations the question is mis-stated. There was no question of the Full Court having to "divide the award". The trial judge had already done that. The question was whether, that dissection having been carried out, interest ought to have been allowed on that portion of the damages representing future economic loss. Cookson v Knowles, Ruby v Marsh, Fire and All Risks Insurance Co. Ltd. v Callinan, and Atlas Tiles Ltd. v Briers say it should not.

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(c) That one could not find in Ruby v Marsh a majority opinion compelling the Full Court to decide that interest ought not to be awarded on a sum awarded for future effects of loss of earning capacity.

p.51 l.38.44

Nor, it is submitted, could there have been, because Gibbs, Stephen, and Jacobs JJ. had no need to consider any question of exercise of discretion. They were dealing with a statute which, in the specified case, compelled its own answer. However Ruby v Marsh did provide persuasive authority so far as personal injuries claims are concerned and is on all fours with Cookson v Knowles which lays down how courts ought to proceed where there is discretion. The significant thing for this case, was not that Stephen and Jacobs JJ. held that the Victorian Act applied a "practical concept", but that their Honours went on to say that applying that test the relevant loss was suffered after the making of the award. In this they were in agreement with what Lord Diplock said in Cookson v Knowles, as to the matter when "looked at realistically". (1978) 2 W.L.R. at p.983. And in Fire and All Risks Insurance Co. Ltd. v Callinan the High Court further provided the compelling authority which Bray C.J. found lacking in Ruby v Marsh.

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(d) That s. 30 c contemplates that interest may be awarded on the whole of the amount of the judgment. If "future elements" are always to be excluded, very rarely will interest be payable on the whole of the damages in a personal injuries claim.

p.54 l.9-23

The fact may be admitted; but its significance is denied. There are three reasons:

(i) Section 30 c equally contemplates that interest may be awarded on "part" of the judgment. Personal injury claims almost invariably have a future element. If future elements carry interest in those claims in the normal case, it will be equally rarely that interest is awarded on "part" of the judgment in a personal injuries claim. 10

(ii) More fundamentally, section 30 c is intended to apply to <u>all</u> judgments for "damages, compensation or any other pecuniary amount", whether in contract, tort or otherwise. There is no warrant for thinking something is amiss, if in relation to one class of claims interest is virtually invariably given on the whole or virtually invariably on part of the award. 20

(iii) The point is equally applicable to the English Act, and therefore cannot stand with either <u>Cookson v Knowles</u> or <u>Fire and All Risks Insurance Co. Ltd. v Callinan</u>.

In sum, this "important consideration" is without force. 30

p.54 l.24-25

(e) That the "traditional theory" of the law is the "conceptual approach".

This is the matter "looked at from a juristic standpoint": <u>Cookson v Knowles</u> (1978) 2 W.L.R. per Lord Diplock at p.983. The question is whether the "realistic" or the "juristic" approach gives the best guide to the practical exercise of a discretion. <u>Cookson v Knowles</u> says the former. Moreover the High Court of Australia in <u>Atlas Tiles Ltd. v Briers</u> recognised that "the juristic approach" has not found favour with the majority of that Court when considering the question of interest on damages for personal injuries. Indeed in <u>Fire and All Risks Insurance Co. Ltd. v Callinan</u> a unanimous 40

High Court applied the "realistic" test. Therefore it is respectfully submitted that Bray C.J. has erred.

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(f) That what Stephen and Jacobs JJ. said in Ruby v Marsh was "conditioned by their construction of the language of the Victorian legislation". p.55 l.6-17

This confuses two different matters. Stephen and Jacobs JJ. did hold that the Victorian legislation adopted the "practical" test. They also said that on that test the loss of future earnings had not yet been suffered. In saying the latter, their Honours adopted a test inconsistent with the "conceptual" approach. And it is apparent from Fire and All Risks Insurance Co. Ltd. v Callinan and Atlas Tiles Ltd. v Briers that the High Court does not regard what Stephen and Jacobs JJ. said in Ruby v Marsh as limited to the Victorian legislation.

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(g) That inflation does not make it unjust to allow interest on the amount of the award.

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This may be admitted, without the contrary being thereby proved. Inflation does not make it just to award the interest. It leaves the matter where it is. c.f. the remarks of Lord Diplock in Cookson v Knowles as to future inflation: (1978) 2 W.L.R. at p. 985.

(h) That damages for loss of earning capacity and damages for pain and suffering ought to be treated in the same way. p.56 l.33-35

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This point does not arise in this case. It is unnecessary and seems inappropriate, for the Appellant to make any submission on this point, which was left open in Cookson v Knowles: (1978) 2 W.L.R. at pp. 987-988. It is observed that in Fire and All Risks Insurance Co. Ltd. v Callinan the High Court did extend the same principle to future pain and suffering; but in the opposite manner to that envisaged by Bray C.J.

(i) That there is no reason to distinguish between fatal accident claims and personal injury claims. p.56 l.40-42

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The balance of authority certainly supports this, though it has not been unanimous; In Jefford v. Gee it was pointed out that the usual fatal accident calculation did not distinguish between

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pre-trial and post-trial loss; (1970) 2 Q.B. at p. 148. In Ruby v Marsh, Gibbs J. held the two positions to be different.

But it is a misuse of the doctrine of precedent, to say that if one majority in Ruby v Marsh adopts a rule for fatal accident cases, and another majority says that the rule is the same for fatal accident cases and personal injury cases, that therefore that case compels decision of a personal injury case contrary to what yet a third majority says is the position in personal injury cases. Bray C.J. confusingly runs together three distinct situations, where it would have been sufficient for His Honour to have followed the majority on the question of interest on personal injury claims. 10

p.64
l.11-40

31. Bright J. said that the proper mode of assessment is by a process of discounting back to the date of the accident, and that unless that is done the probability is that when interest is added the plaintiff will be excessively compensated. His Honour does not say why that principle leads him, as it apparently did, to award interest where the process of discounting has not been taken back to the date of the accident, but only to the date of the award, and the awarding of interest does lead to the excessive compensating of the Respondent. His Honour's reasons ought to have led to a decision contrary to that he in fact came to. 20 30

32. Zelling J. said:

p.70
l.17-20

(a) That "the judgment" in Ruby v Marsh did not govern this case.

It is difficult to know what "the judgment" in Ruby v Marsh is. If his Honour is referring to the decision, then certainly it did not govern this case. Nor did the Appellant argue that it did. If what is referred to is what was said in the three judgments as to the position in personal injury cases, what was there said was relevant here; see Point (c) in para. 30 above. 40

p.71
l.13-25

(b) That the basis of the right to interest is the having been kept out of money which ought to have been paid earlier. "She was not paid then and she has been kept out of her money from that date".

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The principle may be admitted. It was so stated in Jefford v Gee (1970) Q.B. at p.146; and the principle was endorsed in Cookson v Knowles (1977) 2 W.L.R. per Lord Fraser of Tullybelton at pp. 991-992. But the principle is here applied fallaciously. It is plain from what the trial judge said, that he took the "present value", i.e. as at 14th November 1977, of the plaintiff's lost future earnings. In other words, he discounted them back to that date. What the Respondent was "kept out of", in respect of those earnings, was a sum which, if estimated at the commencement of the proceedings, would have been, because discounted to that earlier date, a smaller sum. That sum rose steadily during the period up to the hearing, reaching at that date the sum found by the trial judge. To allow interest on that, was to ignore the fact that the shortening of the period of discounting as the Respondent waited for the trial, progressively increased the amount of the judgment figure. The point is dealt with by Lord Diplock in Cookson v Knowles (1978) 2 W.L.R. at p.986; it is submitted, unanswerably.

(c) That *qua* her loss of earning capacity the Respondent on the date of the accident ceased to be a wage earner and became an investor; and she ought to be treated as an investor for the purpose of interest, as well as for the purpose of the calculation of the principal sum. p.71 l.39

But what Zelling J. does is to treat her as an "investor" of a sum which, had she got it earlier, would have been the same sum. In fact it would have been a smaller sum. The increase in the "investment" sum compensates for the delay in quantifying and awarding it. To give the Respondent interest as well is to doubly compensate her.

(d) That in "turning her into an investor", the law imposes on the Respondent substantial disadvantages, as well as the advantage of having a capital sum. Therefore, "justice does require that the investor concept be carried rigorously through the whole of the award making process." p.72 l.5-9 p.75 l.1-6

Again the argument seems to involve that to "treat her as an investor" justifies giving her the same sum twice: once by a reduced amount of discounting,

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the other by interest during the period she has been kept out of her money. No reason for doing this is advanced; nor could there be.

Four of the alleged disadvantages warrant comment. They are:

p.72 l.17 etseq.

(i) An alleged injustice resulting from the application in Australia of British Transport Commission v Gourley (1956) A.C.185

The High Court has now held that the principles underlying that case do not apply in Australia: Atlas Tiles Ltd. v Briers (supra). 10

p.73 l.1-8

(ii) That income tax is payable on the whole of a purchased annuity.

In fact section 26AA of the Income Tax Assessment Act makes the capital element of a purchased annuity not taxable.

p.73 l.24-27

(iii) That the law makes the "astounding assumption" that there will be no future inflation.

There is of course no such astounding assumption. There is a rule that generally the law will assess 20 damages without regard to the "risk" and even the "likelihood" of future inflation: c.f. Mallett v McMonagle (1970) A.C. 166 per Lord Diplock at p. 176C, Young v Percival (1975) 1 W.L.R. 17 at pp. 27-29, and Cookson v Knowles (1978) 2 W.L.R. per Lord Diplock at p. 986 and Lord Fraser of Tullybelton at pp. 990-991. Nor is the rule as ill-founded as Zelling J. thought: c.f. particularly the remarks of Lord Fraser of Tullybelton. Nor does Zelling J. explain why the existence of that rule is to be 30 countered by use of the power to award interest.

The principle underlying the awarding of interest is that of compensation for having been kept out of the money; not that of compensation for real or imaginary defects in the system of assessing damages. And interest is a particularly inapt tool to remedy this suggested defect. The longer the period from accident to award, the greater the extent to which post-accident inflation will have operated to raise wage rates at the date 40 of the award, and the smaller the extent to which post-accident inflation will remain post-award inflation. Yet that is where Zelling J. would give the most interest.

(iv) That the Plaintiff, by being turned into an investor, loses the benefit of tax deductions earlier involved in earning his income. Record p.74 1.7-10

As the right to a deduction arises only if the expense is actually incurred, Zelling J. is in effect saying that it is a disadvantage to receive the income without incurring the expenses earlier involved in earning it. This is not self-evident.

33. Jacobs J. said

10 (a) That the Full Court should not depart from the principles entrenched in its own judgments unless compelled by authority. p.79 1.40-44

It is submitted that there is now compelling authority to that effect.

(b) That Ruby v Marsh was decided on legislation significantly different from the present form of the South Australian legislation. p.79 1.34-38

Quite apart from the decision in Cookson v Knowles, it is now apparent that the High Court regards the 20 relevant statements in Ruby v Marsh as not limited to the Victorian legislation but as relating generally to the question whether damages of the kind concerned are in respect of loss or injury to be suffered after the date of the award. That point being decided, Cookson v Knowles and Fire and All Risks Insurance Co. Ltd. v Callinan indicate how a judicial discretion given by a statute expressed in general terms ought normally to be exercised.

30 (c) That the legislative history of section 30 c. of the Supreme Court Act (South Australia) afforded ground for distinguishing Pheeney v Doolan (No. 2) (1977) 1 N.S.W.L.R. 601. p.80 1.5-11

It is submitted that to repeal a provision prohibiting the awarding of interest on damages in respect of loss or injury to be incurred after the date of the judgment, is not to show an intention that interest shall normally be awarded on such damages. And except on that assumption the 40 legislative history is irrelevant.

34. King J. agreed with what Bright J. had said as to the computation of damages, and no separate comment is required.

Record

JUDGMENTS IN OTHER STATES

35. Although no further citation of authority seems necessary, it is to be observed that in other States the Cookson v Knowles position has been adopted. In Pheeney v Doolan (No. 2) (1977) 1 N.S.W.L.R. 601 the Court of Appeal of the Supreme Court of New South Wales held that Ruby v Marsh did not compel the adoption of the "conceptual approach" in relation to section 94 of the Supreme Court Act 1970 (New South Wales), a provision based on section 3 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 (United Kingdom), even in relation to a fatal accident claim. In Bennett v Jones (1977) 2 N.S.W.L.R. 355 the same court held, in a personal injuries case, that both damages for pain and suffering and damages for economic loss should be divided into pre-award and post-award elements, and that there was no discretion under section 94 of the Supreme Court Act 1970 (New South Wales) to award interest on those post-award elements. 10 20

36. The Appellant respectfully submits that the appeal should be upheld for the following among other

R E A S O N S

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 there is no satisfying reason, in the legislation or outside it, for the position in South Australia to be held to be different from the position elsewhere. 30

3. BECAUSE in matters affecting insurance, there is clear advantage in uniformity of interpretation throughout a federation.

4. BECAUSE the decision is wrong.

BRUCE LANDER

IN THE PRIVY COUNCIL No. 29 of 1978

O N   A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

B E T W E E N :

CHRISTOPHER BERNARD THOMPSON — Appellant (Defendant)

\- and -

KARAN FARAONIO — Respondent (Plaintiff)

CASE FOR THE APPELLANTS

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