Privy Council Appeal No. 29 of 1978

Christopher Bernard Thompson – – – – – *Appellant*

v.

Karan Faraonio – – – – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 4TH APRIL 1979

Present at the Hearing:

LORD DIPLOCK
LORD MORRIS OF BORTH-Y-GEST
LORD HAILSHAM OF SAINT MARYLEBONE
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON

[*Delivered by* LORD FRASER OF TULLYBELTON]

The question raised in this appeal is whether, when a sum of damages is awarded for the future effects of loss of earning capacity to a plaintiff who has suffered personal injury, interest on that sum should normally be awarded. There are no exceptional features in the instant case to distinguish it from the normal case of personal injury claims so far as concerns interest on damages.

The respondent, who was the plaintiff in the action ("the plaintiff"), was a passenger in a motor car near Torrensville in South Australia on 11th May 1974 when it was involved in an accident with another car. She sustained personal injuries for which she claimed damages from the driver of the other car, who is the appellant in the appeal ("the defendant"). He admitted liability. The action went on in the Supreme Court of South Australia for assessment of damages and on 7th December 1977 Hogarth J. awarded damages of $64,698·80 made up 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

His honour also awarded the lump sum of $3,750·00 for interest under section 30c of the Supreme Court Act, 1935 (South Australia), and accordingly he gave judgment for a total sum of $68,448·80. In his Reasons for Judgment Hogarth J. said simply

"I make an allowance of $3,750 for interest (calculated at 10%)."

He did not say for what period or on what portion of the award he was allowing interest. The defendant appealed to the Full Court of the Supreme Court of South Australia against the award of damages. The plaintiff cross-appealed against the assessment of interest. The appeal was successful and the Full Court reduced the general damages for pain, suffering and loss of amenities by $10,000 from $35,000 to $25,000. The total award was thus reduced to $54,698·80. After judgment had been given on the appeal the cross-appeal was heard separately by a specially convened Full Court of five judges. The main question for that Court was whether interest should run on the sum awarded for future effects of loss of earning capacity, that is, item 2 of the damages awarded by the learned judge. The Full Court held that interest should be awarded on that item, and against that judgment the appeal to this Board has been taken.

The cross-appeal also raised a second question as to the date from which interest should run. The Full Court held that it should run from the date of the issue of proceedings and not from the date of service of proceedings; their decision on that point has not been appealed and no question on it is before this Board.

The relevant legislation in force at the time of the accident and throughout these proceedings was section 30c of the Supreme Court Act 1935, (South Australia). That was a new section introduced by the Supreme Court Act Amendment Act, 1972, and was itself amended by the Supreme Court Act Amendment Act, 1974. The section, as amended in 1974, so far as directly material for the present purpose provides as follows:—

"30c (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.

(2) The interest—

(*a*) shall be calculated at such rate of interest as may be fixed by the Court;

(*b*) . . .

and (*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.

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

Subsection (3) in the form just quoted was introduced by the Act of 1974 and it replaced the subsection introduced by the 1972 Act which had provided as follows:—

"(3) No interest shall be awarded in respect of—

(*a*) damages or compensation in respect of loss or injury to be incurred or suffered after the date of the judgment; or

(*b*) exemplary or punitive damages".

The effect of the 1974 amendment, so far as relevant to the instant appeal, thus was to delete the express prohibition against awarding interest in respect of loss or injury to be incurred or suffered after the date of the judgment. There is a similar prohibition in section 79A of the Supreme Court Act 1958 (Victoria) but none of the Acts to which their Lordships' attention was drawn applying to other States in Australia contain any express prohibition against awarding interest on damages for what may be conveniently called "future economic loss". Nor is there such a prohibition in section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 which regulates the matter in England or in the amending provisions of section 22 of the (English) Administration of Justice Act 1969. Yet there are authoritative decisions on the laws of Australian States other than Victoria, and on the law of England, against awarding interest on damages for future economic loss.

The judgment of the specially convened Full Court in the cross-appeal was pronounced on 19th May 1978. It was to the effect that interest should normally be awarded on damages for future economic loss as well as on other components of the judgment. The case was treated as a typical claim for personal injuries and Bray C.J. explained that it had been referred to a Full Court of five judges in order to consider certain previous authorities and

> "generally to clarify the law and the practice of the court with regard to certain problems arising out of the provisions of section 30c of the Supreme Court Act, 1935, as amended with regard to the allowance of interest on judgments for damages in accident cases".

The learned Chief Justice concluded the part of his Opinion dealing with this point by saying that

> " . . . interest should normally, and subject to the discretion of the court, run on the sum awarded for the future effects of loss of earning capacity".

Before the date of the judgment the present question had been considered by the High Court of Australia in *Ruby v. Marsh* (1975) 132 C.L.R. 642. That was a claim by the dependants of a man who had been killed in an accident and the High Court held (by majority) that an award of damages in a fatal accident case did not include any amount in respect of "compensation for 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) and that therefore interest should be awarded on the whole sum awarded for loss of support. The decision was by a majority of three to two and one of the learned judges constituting the majority (Gibbs J. at p.659) said that the principle on which damages were awarded in a dependants' claim, such as *Ruby v. Marsh,* was "quite different from that governing the award of damages for personal injury" and in effect he agreed with the two members of the minority that awards of damages in personal injury claims usually included an element of future economic loss and that, under the Victorian legislation, interest could not be allowed on that element. There was thus a majority opinion to that effect, but it was of course obiter, and Bray C.J. in the present case was right in saying, as he did, that in *Ruby v. Marsh* there was no majority opinion compelling the Full Court to decide that interest ought not to be awarded for future effects of loss of earning capacity.

But there is a later decision of the High Court in a personal injury case directly on this point. It is *Fire and All Risks Insurance Co. Ltd. v. Callinan* (1978) 52 A.L.J.R. 637 where the High Court held that the Full Court of the Supreme Court of Queensland had been correct in remitting the case to the trial judge to enable him to itemise the elements

of his award of general damages so that he could properly exercise his discretion in relation to awarding interest in the light of temporal considerations. The High Court in their joint Opinion said this:—

> " In the case of loss of earning capacity, interest should, [the Full Court] concluded, be allowed only on that part of the damages awarded under that head which represents 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. . . . [That conclusion] accurately reflect[s] the application to the Queensland legislation of the principles enunciated by a majority of this Court in *Ruby v. Marsh* ".

In their Lordships' opinion the application of those principles to the South Australian legislation leads to the same result. In *Atlas Tiles Limited v. Briers* (1978) 52 A.L.J.R. 707 (an appeal from Victoria) the High Court applied the same principles in awarding damages for wrongful dismissal and held that no interest should be allowed on post-judgment damages. The question of interest arose under section 79A of the Supreme Court Act 1958 (Victoria) and the High Court founded their decision partly on *Ruby v. Marsh*—see especially Barwick C.J. at p.713 and Jacobs J. at p.723. These decisions are exactly in line with the decision of the House of Lords in *Cookson v. Knowles* [1978] 2 W.L.R. 978. That was a case concerned with damages in fatal accident claims, but in so far as it dealt with questions of interest on damages it was expressly said to apply in principle to claims for personal injuries—see *per* Lord Diplock at p.987 G,H. *Cookson v. Knowles* was decided on 24th May 1978 and the report in " The Times " of 25th May 1978 was referred to by Jacobs J. in *Atlas Tiles Ltd.* (*supra*), which was decided on 5th October 1978.

In the face of that formidable array of authority the decision of the Full Court in the instant appeal cannot stand unless either the South Australian legislation can be distinguished from the legislation that was being considered in the other cases, or the decisions in those cases can be shown to be erroneous. Their Lordships are of opinion that neither of these conclusions is possible. So far as concerns distinguishing the South Australian legislation, the effect of the amendment made in 1974 is that the South Australian Act is the same, in the respect relevant to the present question, as the legislation in Queensland which was being considered in the *Callinan* case and the same as the English Act being considered in *Cookson v. Knowles*, neither of which contained an express prohibition against awarding interest on damages for future economic loss. It was suggested that some distinction might fall to be drawn because of the legislative history of the matter in South Australia, but in the opinion of their Lordships the deletion in 1974 of the prohibition which had been contained in subsection (3) of section 30c of the South Australian Act of 1972 did not carry any implication that interest should be awarded as damages for future economic loss. Its effect was simply to leave the point resting on principle, as it does in the other jurisdictions, including Queensland and England, where there never had been an express prohibition.

Their Lordships are further of opinion that the decision in *Callinan* and the observations on this point in *Cookson v. Knowles* are well founded in principle. They agree with the dictum of Jacobs J. in *Ruby v. Marsh* at p.667 (and now applied in *Atlas Tiles Ltd., supra*) that section 79A(3)(*b*) of the Supreme Court Act 1958 (Victoria)

> " refers not to the juristic concept of damages but to the practical concept that a plaintiff receives damages by way of compensation in respect of loss or damage incurred or suffered up to the date of trial

> and verdict and in respect of loss or damage (if any) which he will incur or suffer in the future. When the consequence of the compensable infringement of his legal rights is actually felt by him materially or physically he incurs or suffers the loss or damage to which the paragraph refers".

In personal injury claims for economic loss, with which alone this appeal is concerned, there is normally no difficulty in calculating the pre-trial damages and the damages for future economic loss separately, and there are good practical reasons for doing so. Separation enables the court to calculate the rate of earnings being lost by the plaintiff by reference to ascertained facts up to the date of the trial, instead of having to reply on hypothetical forecasts as at the date of the accident. This is just one application of the normal rule that the court takes account of events that have occurred between the date of the accident and the date of the trial; for example actual improvement or deterioration in the medical condition of the injured person is taken into account and it would be carrying theory to absurd lengths if such medical history had to be disregarded in favour of prognosis made immediately after the accident.

If damages for economic loss are calculated in two parts—as compensation for pre-trial loss and for post-trial or future loss—it cannot be right to award interest on the part awarded for future loss. The reason for awarding interest is to compensate the plaintiff for having been kept out of money which theoretically was due to him at the date of his accident. But the amount of damages that would have been awarded to him at the date of the accident in respect of economic loss would not have been the same as that awarded to him at the trial, because it would have been discounted to the earlier date. This has nothing to do with inflation, although inflation makes the difference between the two awards larger and more striking. Their Lordships think it right to refer to the explanation of this point given by Lord Diplock in *Cookson v. Knowles* (*supra*) at p.986 E to G as follows:—

> "Once it has been decided to split the damages into two components which are calculated separately, the starting point for the second component, for future loss (which I will deal with first), is the present value not as at the date of death but *at the date of the trial* of an annuity equal to the dependency starting then and continuing for the remainder of the period for which it is assumed the dependency would have enured to the benefit of the widow if the deceased had not been killed. To calculate what would have been the present value of that annuity at the date of death, its value at the date of trial would have to be discounted at current interest rates for the $2\frac{1}{2}$ years which had elapsed between the death and trial. From the juristic standpoint it is that discounted amount and no more to which the widow became entitled at the date of her husband's death. Interest on that discounted figure to the date of trial would bring it back up to the higher figure actually awarded. To give in addition interest on that higher figure would be not only to give interest twice but also to give interest on interest".

Accordingly their Lordships are of opinion that the decisions in *Callinan* and in *Atlas Tiles Ltd. v. Briers* proceeded upon sound principles.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be allowed. Their Lordships were informed by Counsel that they had agreed that, in the event of the appeal succeeding, the amount of interest to be awarded should be $8,811 for interest on damages of $32,905 at 10 per cent per annum from 1st September 1975

to 4th May 1978. 4th May 1978 was the date of the Order of the Full Court allowing the appeal from the judgment of Hogarth J. and their Lordships would draw attention to the fact that that is not the correct date to which interest should be calculated. The proper *terminus ad quem* for calculating interest is the date of the judgment of the court of first instance, because from that date interest on the award will normally run in any event. But as the dates have been agreed in the instant case their Lordships will humbly advise Her Majesty that effect should be given to the agreement. The judgment of the Honourable Mr. Justice Hogarth, in so far as it adjudged that the plaintiff be awarded the sum of $3,750 for interest, should therefore be varied and in lieu of such award there should be substituted an award of $8,811 for interest (being the interest on damages of $32,905 at 10 per cent per annum calculated from the First day of September 1975 down to the Fourth day of May 1978). The respondent must pay the costs of the Appeal and the Cross-Appeal to the Full Court and of the Appeal to this Board.

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In the Privy Council

CHRISTOPHER BERNARD THOMPSON

v.

KARAN FARAONIO

DELIVERED BY
LORD FRASER OF TULLYBELTON

Printed by HER MAJESTY'S STATIONERY OFFICE
1979