5/84

No. 4 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

JAMIL bin HARUN — Appellant (Defendant)

- and -

1. YANG KAMSIAH bte. MEOR RASDI

2. YANG SALBIAH bt. MEOR RASDI both infants suing by their father MEOR RASDI & RASHIDI bin JAMALUDIN — Respondents (Plaintiffs)

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Raja Azlan Shah, C.J., Syed Othman, F.J., and Salleh Abas F.J.) dated the 22nd January, 1981, which allowed an appeal by the Respondents from the Judgment of the High Court of Malaya in Kuala Lumpur (Vohrah,J.) dated the 17th December 1979. [pp.25-33] [pp.16-20]

2. The sole question in this appeal is whether the Federal Court was right to interfere with the quantum of general damages awarded to the Second Respondent as compensation for injuries sustained in an accident on the 22nd July 1975. Liability for the accident was conceded by the Appellant before the learned trial Judge and a statement of agreed facts appears in the record herein. [p.9] [p.8]

3. The particulars of the injuries of the Second Respondent who was 7 years old at the time of the accident are set out in the Appellant's statement of claim, and her condition was summed up by the Federal Court as "now little better than a vegetable" with hardly any prospects of improvement but with a full life span. She had poor control of her bodily functions. The only witness to give evidence at the trial was the Respondents' medical expert, Dr. Ratnam, who gave evidence that the Second Respondent though in fact over 11 years old had a mental age of between 3 and 5 years, and that there would be extremely slow, [p.5] [p.26] [pp.10-11]

if any, assimilation with age.

The only other evidence before the learned trial Judge (apart from the statement of agreed facts) were medical and school reports. In particular it is submitted that the learned trial judge was correct to conclude "that no evidence was adduced to show that outside nursing care was required."

pp.35-42

p.20

4. The learned trial Judge held, it is respectfully submitted correctly, that a global award of $75,000/- was a fair and reasonable sum with interest at 6% from the date of the service of the writ. 10

5. The Respondents appealed to the Federal Court on various grounds inter alia that the learned trial Judge had erred in failing to make itemised heads of awards including separate awards for nursing services and for prospective loss of earnings, and that the award was too low.

pp.23-24

6. No fresh evidence was called before the Federal Court and on the 22nd January 1981 the Respondents' appeal was allowed and an itemised award totalling $129,178 was substituted for the said global award, made up as follows: 20

(1) $70,000/- for pain and suffering and loss of amenities with interest at 6% from the date of service of the Writ.

(2) $25,362 for cost of future care

(3) $33,816 for loss of future earnings.

7. It is respectfully submitted that the Federal Court was wrong to award $25,362 for the cost of future care since that head of claim was not pleaded and no evidence was called to support such a claim. As regards the loss of future earnings it is submitted that such a loss is wholly speculative - see Benham v Gambling (1941) AC 157 at 167 per Viscount Simon L.C. and Pickett v British Rail Engineering (1980) A.C. 136 per Lord Scarman at p.169 F-G and p.170 B-C. It is submitted that the principles applied in the decisions on earnings during the 'lost years' are of equal application in the instant case. 30 40

8. It is submitted with respect that the Federal Court was wrong in relying upon and applying the principles enunciated in Lim Poh Choo v Camden and Ishington Area Health Authority (1979) 2 All E.R. 910 when those principles were

wholly inapplicable to the facts of the instant case

9. It is respectfully submitted that while in the case of an adult Plaintiff itemised awards are desirable (not least because of the computation of interest) in the instant case any element of loss attributable to future earnings would merely have been a factor to be taken into account in assessing the level of general damages, and there 10 is no evidence that the learned trial Judge failed to do this. Had he separated the item then it would have been detrimental to the Respondent since, as a future loss, no interest would have been awarded on it: Cookson v Knowles (1979) AC 556; Thompson v Faraonio (1979) 1 WLR p.1157. In any event the sum involved would have been "minimal and could therefore be disregarded" (per Lord Salmon in Pickett v British Rail Engineering (1980) AC 136 at p.156 A-B). 20 Alternatively, in the case of a young child no award at all would be made since "neither present nor future earnings could enter into the matter" (per Lord Wilbeforce, ibid., at p.150 E). It is further submitted that the Federal Court erred in adopting a multiplier/multiplicand in any event: Joyce v Yeomans (1981) All E.R. 549.

10. It is respectfully submitted that the Federal Court also fell into error in interfering with the learned trial Judge's award since it was 30 not shown to be wholly erroneous Davies v Powell Duffryn Collieries (1942) AC 601 and finally in citing an award in an English case at page 29 line 38 of the Record for the apparent purpose of arriving at an award in the instant case. It is submitted that to use for the purposes of comparison awards in other countries is wrong and misleading (see for example Tan Chwee Lian v Lee Ban Soon (1963) 29 MLJ p.149 where the Singapore Court of Appeal held that it was necessary to 40 exercise caution before following too closely the English decisions, though in that case the Court of Appeal increased the trial judge's award).

11. The Appellant gave Notice of Motion to appeal from the Judgment of the Federal Court on the 5th October 1981 and on the 2nd November 1981 was granted Final Leave to appeal to His Majesty, the Yang di-Pertuan Agong.

12. The Appellant respectfully submits that this appeal should be allowed with costs and the 50 Judgment of the Federal Court quashed for the following among other

R E A S O N S

(1) BECAUSE the trial Judge was right to make a global award in the circumstances of the case.

(2) BECAUSE the award of the trial Judge was right.

(3) BECAUSE the Federal Court was wrong to award a sum for nursing services or future care in the absence of evidence that such services would be required. 10

(4) BECAUSE the Federal Court was wrong to award a sum or a substantial sum for loss of future earnings in the case of a child.

(5) BECAUSE the Federal Court was wrong to interfere with the award of the learned trial Judge as the award was not unreasonable.

(6) BECAUSE the Federal Court wrongly used an award in an English Case as a guideline in Malaysia. 20

G. SRI RAM

GEORGE WARR

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Respondents (Plaintiffs)

CASE FOR THE APPELLANT

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