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IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

No.4 of 1983

BETWEEN:-

JAMIL bin HARUN

Appellant
(Defendant)

-and-

- 1. YANG KAMSI AH 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 RESPONDENTS

1. This is an appeal from a judgment of the Federal Court of Malaysia (Raja Azlam Shah C.J., Syed Othman F.J. and Salleh Abas F.J.) dated 22nd January 1981, allowing with costs the Second Respondent's appeal from a judgment of Vohrah J. in the High Court of Malaysia at Kuala Lumpur dated 18th October 1979 whereby the learned Judge gave judgment against the Appellant and awarded the Second Respondent \$75,000/= as general damages and \$500/= agreed special damages with interest and costs.

RECORD
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2. The Court of Appeal in allowing the Second Respondent's appeal substituted an award of \$129,178.00 for the \$75,000 award of the High Court and ordered the award to be paid to the Public Trustee and to be held in trust for the Second Respondent.

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3. The only issue in this appeal is whether the Federal Court was entitled to substitute a greater award by way of general damages than was made by the trial judge in circumstances where -

- (a) the only issue before the trial judge was the appropriate quantum of general damages to be awarded to the Second Respondent,
- (b) the only witness called at the trial was a Dr. C. Bala Ratnam, a consultant neuro-physician who gave evidence on behalf of the Second Respondent,
- (c) there was no evidence called on behalf of the Second Respondent as to the extent of loss of future earnings or the cost of future care,
- (d) the trial judge saw fit to award a global sum to embrace all relevant heads of general damage rather than awarding the total sums in respect of each head of damage,

(e) the Federal Court reached its conclusion by awarding sums under each relevant head of damage, and

(f) the Federal Court found the global sum awarded by the trial judge in any event so inadequate that it felt it must not hesitate to substitute its own conclusion for that of the trial judge.

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4. The trial took place on 18th October 1979 before Vohrah J.

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(a) There was a statement of agreed facts which included the following:

1. On the 22nd July, 1975, a collision occurred between the [Respondents] and motor bus BA. 7543 driven by the [Appellant]....

4. As a result of the said accident the Respondents sustained the injuries in the medical reports.

(b) Liability was conceded by the Appellant in respect of both Respondents. The First Respondent's claim was settled in the sum of \$1,000/= and the First Respondent has thereafter taken no part in the proceedings.

p. 9 11. 15-16

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- (c) The Second Respondent's special damages were settled at \$500/=. The only issue before the trial judge was the appropriate award in respect of general damages. p. 9 1.26
- (d) The evidence of Dr. C. Bala Ratnam may be summarised as follows:- pp. 10-11
pp. 17-20
- (i) At the time of the trial the Second Respondent was 11 years 5 months old, p.11 11.16-17
- (ii) As a result of the accident she suffered severe and irreversible brain damage. Both hemispheres of the brain were damaged. p. 10 1.15
p. 10 1.42
- (iii) Before the accident she was a healthy bright and cheerful child with all the expectations of a normal life. Despite the accident she would still have a normal life span. p.17 11. 30-31
p.11 11.8-10
- (iv) Her mental age at the trial was between 3 and 5 years but she was further handicapped because she could not communicate. p.11 11 17-19
- (v) She was unable to control her bowel and bladder functions. p. 19 11. 18-19

- (vi) There was unlikely to be further improvement in her mental functions. She would be a liability to her family for the rest of her life as she would be unable to complete her basic education or learn a useful self-supporting trade. p.19 11.23-27
- (e) Upon that evidence the trial judge awarded \$75,000/= as general damages and agreed \$500/= for special damages in respect of the Second Respondent. He further awarded interest at 6% on General Damages from date of service of the writ and 3% on special damages from the date of the accident. p. 14 11.25-33
5. On 30th October 1979 the Second Respondent served notice of appeal to the Federal Court against the quantum of general damages awarded. On 17th December 1979 the trial judge delivered his grounds of judgment. After setting out the whole of the medical report prepared by Dr. C. Bala Ratnam the judge concluded:- p. 21
pp. 16-20
p.18 1.29
- "It was obvious from the evidence adduced that the second plaintiff has suffered very serious brain injury which has turned her into a subnormal child with permanent mental and physical disabilities. I was satisfied that before the accident she was a normal child with all the expectations of a normal life. The accident caused mental retardation resulting, inter alia, in her inability to control her bladder and bowel movements and to benefit from a normal education. It was in evidence that her span of life would be normal and that she would have to be cared for all her life. Counsel p. 19 1.30
p. 20 1.20

for the Plaintiffs submitted that in assessing damages a substantial sum should be awarded separately under each of the three heads, namely, "general damages for pain and suffering, loss of amenities and future loss," "prospective loss of earnings" and "nursing services." The trend of the local authorities quoted to my mind did not admit of such separate awards in the case of children whose earning capacity was not known and where no evidence was adduced to show that outside nursing care was required. The general trend in cases of this sort showed an inclination towards an award of a global sum which would, however, take into account all these three heads. In my view the Court's duty was to reach a figure which was fair and reasonable so far as money could compensate and after anxious consideration of all the relevant factors I considered the global sum of \$75,000/= to be a fair and reasonable sum and gave judgment for that sum as general damages with the usual interest of 6% from the date of the service of the Writ".

6. By Memorandum of Appeal dated 6th February 1980 the Second Respondent's grounds of Appeal were set out as follows:-

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"1. The Learned Judge having accepted the fact that the Second Plaintiff suffered very serious brain injury thus turning the Appellant into a subnormal child with permanent mental and physical disabilities and that her span of life would be normal and that she would have to be cared for all her life, failed to make separate awards under the three (3) heads of

- (i) loss of amenities and future loss;
- (ii) prospective loss of earnings; and
- (iii) nursing services

2. The Learned Judge erred when he failed to consider the case of Morris v. Williams - Kemp & Kemp Volume II, 4th Edition, Page 3201 at 3203 wherein the Court made specific awards under the three (3) headings.

3. The Learned Judge erred in law when he held that the trend of the local authorities quoted were in favour of a lump sum or global award when there were no actual local authorities wherein the Court was asked to canvass awards under the three heads.

4. The Learned Judge failed to consider that a sum of \$75,000/= was not a fair and reasonable sum bearing in mind

- (a) the age of the child;
- (b) the rate at which purchase of money is falling;
- (c) the residual defects of the child;
- (d) the accepted normal life span of the child;
- (e) that she was to be cared for all her life.

5. The Learned Judge erred when he failed to consider the decision in the case of Lim Poh Cheo v. Camden and Islington Area Health Authority (1979) 2 AER 910 wherein the House of Lords awarded under various heads."

7. The Federal Court delivered judgment on the Appeal on p.25 1.30 the 22nd January 1981. In its judgment the Federal Court made two substantial criticisms of the judgment of the trial judge. First it criticised the award of a global sum to take into account pain and suffering and loss of amenities, future loss and the cost of future care. In making the criticism the Federal Court said:-

"A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the Judge had erred on the side of over-generosity or on the side of parsimony. But there is at least one good reason why a global sum should be discouraged.

p.27 1.8-24

It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive. A reasoned judgment must therefore be given by the Judge, following legal principles and precedents. Other awards in other cases should normally be prayed in aid, but consideration must be given where the circumstances differ".

The Federal Court reached the figure of \$129,178.00 by considering the appropriate award under each relevant head of damage and adding the awards together. Thereafter the Federal Court went on to make its second criticism of the trial judge that

"the global sum awarded is so inadequate that we must have no hesitation to substitute our assessment for that of the trial judge".

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8. In this appeal the Second Respondent respectfully submits that the reasons given by the Court of Appeal for varying the award of the trial judge are correct and that in applying the correct approach to the assessment of general damages the Federal Court arrived at the correct result. In particular it is submitted that the trial judge was in error in failing to consider the appropriate award of damages for cost of future care and loss of future earnings apparently on the basis that no evidence was led as to what such cost or loss would actually be. If and in so far as it was accepted that the Second Respondent was entitled to compensation under those two heads of damage, it is submitted that it was incumbent upon the trial judge to award damages in respect thereof by adopting the approach which was in fact taken by the Federal Court.

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9. It is further submitted that taking into account the injuries sustained by the Second Respondent

and the consequences that flowed therefrom the award of damages made by the Federal Court was appropriate to compensate the Second Respondent and that the award of damages made by the trial judge was inadequate.

10. On 2nd November 1981 the Federal Court of Malaysia made an order granting the Appellant final leave to appeal to His Majesty the Yang di-Pertuan Agong. The Second Respondent respectfully submits that the appeal should be dismissed with costs for the following among other

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REASONS

- (1) BECAUSE the trial judge was wrong to award a global sum in respect of the Second Respondent's claims under all heads of damages.
- (2) BECAUSE, on any basis of assessment, the award of the trial judge was inadequate.
- (3) BECAUSE the judgment of the Federal Court of Malaysia was correct and ought to be upheld.

Jonathan Harvie

6th June 1983

