*Privy Council Appeal No. 54 of 1985*

**Graham John Dair** *Appellant*

v.

**(1) Gregory Allan Butler and**
**(2) State Government Insurance Office (Queensland)** *Respondents*

*(and Cross-appeal of the second Respondent)*

FROM

# THE SUPREME COURT OF QUEENSLAND

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH JULY 1986

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*Present at the Hearing:*

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD MACKAY OF CLASHFERN
LORD ACKNER
LORD GOFF OF CHIEVELEY

*[Delivered by **Lord Griffiths**]*

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On 29th April 1980 the appellant, who was then aged 34, received catastrophic injuries in a motor car accident. He suffered multiple fractures of his right leg and arm and head injuries of the utmost gravity. He received prolonged treatment in various hospitals in between which he was for short periods at home until in February 1982 he was finally discharged to be cared for at home by his wife. As a result of irreversible damage to the frontal lobes of the brain he requires constant care and attendance and his behaviour is seriously antisocial. His wife was unable to cope with him at home and on 6th December 1982 he was admitted to the Penrose Unit of the Baillie Henderson Hospital. The Penrose Unit is a small intensely staffed unit that has been established to treat and rehabilitate young persons who have suffered serious brain damage. The appellant was in the Penrose Unit at the time of the trial in June 1984.

[36] As a result of the injuries to his limbs the appellant has lost 70% of the function of the right

leg and 10% of the function of the right arm. The result of the brain injury was described in the numerous medical reports and in the oral evidence. It will suffice to quote a passage from a report of Dr. Unwin dated 18th June 1984 to give a picture of the devastating effect of the damage:-

> "Mr. Dair is suffering from brain damage and shows many features found in frontal lobe syndromes. He has gross deficits in judgement, wisdom, mood and social skills. His personality change has been gross so that he no longer resembles the person he was before. He has troubles with his thought processes and memory functions. He has special problems in the area of fire setting and in the areas of eating, toilet and social behaviour he is childlike."

In a later passage describing his discussion with Mrs. Dair he said:-

> "She lists the problems as fire setting, some urinary incontinence (although improved), poor memory, voracious appetite which is never satisfied, poor balance, snoring at night, fitful sleeping, lack of personal hygiene, sexual problems, stealing behaviour (often from rubbish bins) and his general lack of motivation. My observations would tend to agree with her statements."

It should be added that the appellant also suffers from epileptic fits, his speech is slurred and he has no sense of smell. His life expectation is however almost normal.

Liability was not in issue and the principal contest affecting damages centred on the future care of the appellant. It was common ground that no private nursing home could be found to accept the appellant as a permanent patient. The majority of the doctors who gave evidence said that the appellant would require institutional care and could not be managed at home. The Penrose Unit did not normally keep a patient for more than two years and the expectation was that the appellant would have to leave that Unit in about six months. The only alternative State institutions to which he could be sent for future care were mental hospitals which provided a very unattractive prospect, for many of the patients would be even more seriously afflicted than the appellant.

During the course of the trial there was an adjournment and during that adjournment the appellant was examined for the first time by Dr. Unwin whose report has already been quoted. In that report Dr. Unwin dealing with the prognosis said:-

> "Hospitalisation with breaks at home and ultimately a hostel situation is a likely outcome."

However in his oral evidence Dr. Unwin somewhat modified that view. He said that he could arrange for the appellant's admission to the Belmont Hospital, a private nursing home, where he would with the assistance of therapists institute a training programme to improve the appellant's behaviour. He was hopeful that if a slight improvement could be achieved it might be possible to manage the appellant at home provided a trained nurse was employed upon a full-time basis to assist in his care. It would also be necessary, he said, to train the wife and the two children who were then aged 15 and 11 in the therapy techniques necessary for the appellant's management.

Dr. Unwin did not however suggest that there was any certainty that such a programme would succeed. It was dependent in the first place upon achieving a further improvement in the appellant's present behaviour. The methods by which it was hoped to achieve this were described by Dr. Unwin in his evidence and were said by Dr. Urquhart who had responsibility for the treatment of the appellant in the Penrose Unit to be the same as those methods which were currently being used in that Unit. Unfortunately, Dr. Unwin had never seen the Penrose Unit and was unaware of their methods, which of course made it the more difficult for him to assess the prospects of achieving further improvement at the Belmont Hospital. This plan was also dependent upon the wife, and the children so long as they remained at home, being able to tolerate the strain that would inevitably be imposed upon them.

Dr. Unwin did not suggest that his plan was certain to succeed and acknowledged in his evidence that caring for the appellant at home would be difficult and that if it was successful it would be an exceptional case.

Vasta J. however concluded that the appellant would be managed at home. He said:-

> "... I think that damages for future care should be assessed on the basis of that the plaintiff will be managed partly at home and partly at the Belmont Private Hospital. The most likely course of events will be that the plaintiff will remain at the Baillie Henderson Hospital until January 1985. Thereafter, the plaintiff will be admitted to Belmont Hospital where he will remain for a period of six months. During this time Dr. Unwin will be able to train the wife and children in the future management of the plaintiff. After this period of six months the plaintiff will

remain in Belmont for approximately two weeks of every month and spend the other two weeks at home. This should continue for the next six months after which time I would expect him to be managed permanently at home with the assistance of an enrolled nurse.

The cost of the six months stay in Belmont would be $43,000 after making allowance for board.

The cost of his care at Belmont for two weeks in every month and two weeks at home with assistance, would be approximately $11,000 calculated on thirteen weeks at $833 per week (again allowing for board) plus thirteen weeks at $740 per week, namely $9,620. This makes a round figure total of $21,000.

Thereafter, the permanent management of the plaintiff at home for 35 years would be approximately $614,000. After discounting for some general contingencies, I award $500,000.

The care of the plaintiff at home requires some modification to the house and that cost is $22,500."

The judge awarded a total of $1,177,863 made up as follows:-

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| 1. | Special Damages | $68,063.00 |
| 2. | Pain, Suffering and Loss of Amenities | $50,000.00 |
| 3. | Past Voluntary Care | $50,000.00 |
| 4. | Future Voluntary Care | $65,500.00 |
| 5. | Future Economic Loss | $300,000.00 |
| 6. | House Alterations | $22,500.00 |
| 7. | Future Care | $500,000.00 |
| 8. | Allowance Tax Payments | $1,200.00 |
| 9. | Interest | $26,600.00 |
| 10. | Public Trustee Charges | $30,000.00 |
| 11. | Care for next twelve months | $64,000.00 |

The respondents appealed to the Full Court against the following items of damage:-

(a) Past voluntary care - $50,000

(b) Future voluntary care - $65,500

(c) House alterations - $22,500

(d) Future care - $500,000

(e) Care for the next twelve months - $64,000.

The Full Court allowed the appeal reducing the amount of the judgment by $337,500 to $840,363. They dealt with the particular items of damage as follows:-

(a) Past voluntary care - not disturbed

(b) Future voluntary care - increased by $31,500

(c) House alterations - not disturbed

(d) Future care - reduced by $350,000

(e) Care for the next twelve months - reduced by $19,000.

In this appeal the appellant submits that there were no grounds upon which the Full Court could legitimately interfere with the trial judge's assessment of the evidence relating to the future care of the plaintiff and that his award should be restored. The respondents submit that the Full Court erred in making too great an allowance for future care and that the sum of $150,000 allowed under this head should be substantially reduced. The respondents also submit that no sum should be allowed for altering the plaintiff's house and the sums awarded for past and future voluntary care should also be reduced.

The Full Court concluded that it was reasonable that the appellant should have the opportunity of being treated in Belmont Private Hospital. This is not challenged by the respondents. But after a careful review of all the medical evidence Andrews S.P.J. held that the judge was not justified in holding that the likelihood was that the appellant could be cared for at home for the rest of his life. He expressed his conclusion in the following language:-

> "All of this material must be regarded, in my view, as casting doubt upon the likelihood that the plaintiff will remain at home supported by his wife and children indefinitely. I have thought it necessary by way of emphasis to refer to this material having regard to my view that the learned trial judge's approach to the plaintiff's problems was erroneous.

> In view of what Dr. Unwin himself has forecast of the prospects of the programme which he would set up and what I regard as the speculatory nature of his forecasts, I think that the other evidence clearly establishes the likelihood that at the end of about five years from January 1986 (twelve months after the plaintiff's entering Belmont), the plaintiff will need to be supported in an institutional setting.
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> I give weight to medical evidence and to that given by Mrs. Dair as to the desirability and likelihood of the plaintiff's being managed at home. The selection of a definite period of time for this is somewhat arbitrary, yet to reflect my views it must be limited and at the same time fairly extended. I think that to select five years is to give practical effect to those views."

Both Kelly and Shepherdson JJ. agreed with this assessment of the evidence.

Their Lordships are satisfied that the Full Court's assessment of the plaintiff's future prospects are to be preferred to that of the trial judge. Dr. Unwin was the only medical witness who advanced any real hope that the appellant might be manageable at home other than for short weekend visits. But even Dr. Unwin's plan, as he frankly acknowledged, depended in the first place upon managing to achieve an improvement in the appellant's condition which he could not forecast with any certainty because he had not had the advantage of knowing the treatment which the appellant was currently receiving and, secondly, upon the ability of the appellant's wife to sustain the great emotional and physical burden of caring for the appellant even allowing for the assistance of a nurse. Humanity demanded that an attempt be made to see if the plan would work; but their Lordships have been driven to the conclusion that the reality of the matter is that it was highly improbable that such a plan would succeed. In these circumstances the cost of future care has to be valued by evaluating the chance that the plaintiff could be cared for at home in the future. Expressed in percentage terms their Lordships would not have thought there was a better than 25% chance that Dr. Unwin's plan might prove successful. The Full Court approached the assessment by a different route. They allowed for five years' future care. By either route the same figure is arrived at, namely $150,000, which their Lordships consider to be as generous an estimate of the damages for future care as was open on the evidence in this case.

The respondents have not persuaded their Lordships that $150,000 was too generous an assessment of this

head of damage or that there are any grounds for interfering with the other adjustments to the award of damages made by the Full Court consequent upon their decision on the main issue in the appeal, namely the future care of the plaintiff. The sums involved are all small in the context of the size of this award and the basis upon which they are assessed is fully supported in the reasoning of Andrews S.P.J. Nor have their Lordships been persuaded that the Full Court erred in refusing to interfere with the award of $50,000 for past voluntary care by Mrs. Dair and the cost of the house alterations which would be necessary to accommodate a professional nurse during the attempt to care for the appellant at home.

For these reasons their Lordships will humbly advise Her Majesty that the appeal and cross-appeal should be dismissed. The appellant must pay the costs of the appeal and the second respondent the costs of the cross-appeal.