N307

PAPUA NEW GUINEA

IN THE NATIONAL COURT)
)
OF JUSTICE)

CORAM: MILES, J.

Tuesday,
30th June 1981

W.S. 187 of 1980

BETWEEN: HUGH JAMES HASSARD

Plaintiff

AND: BOUGAINVILLE COPPER LIMITED

Defendant

Assessment of damages for personal injuries - distinction between rules of practice and rules of law - rules of practice in other countries not binding in Papua New Guinea - need for simplicity consistent with justice.

Calculation of present value of future economic loss - use of "actuarial" method preferred to multiplier method.

Future inflation - whether to be taken into account in assessing damages.

Notional investment of damages at discount rate of interest - whether rate to be reduced or disregarded to compensate for future inflation - the Barrell case (H.C. of A) not followed - remarks of Lord Diplock in Mallett v. McMonagle (H.L.) followed and applied.

Notional tax on notional investment of damages awarded - whether to be taken into account in fixing award - near impossibility of assessment without agreed arithmetical tables - Cullen v. Trappell (H.C. of A), Taylor v. O'Connor (H.L.) not followed.

Cases referred to:-

Bodil Guma v. The Independent State of Papua New Guinea	Unreported National Court Judgment N262 dated 28th November 1980
Pennant Hills Restaurants Pty. Limited v. Barrell Insurances Pty. Limited	(1981) 55 A.L.J.R. 258
Mallett v. McMonagle	(1970) A.C. 166
Taylor v. O'Connor	(1971) A.C. 115
Lim Poh Choo v. Camden and Islington Area Health Authority	(1980) A.C. 174
O'Brien v. McKean	118 C.L.R. 540
Mitchell v. Mulholland and Another	(1972) 1 Q.B. 65
Fletcher v. Autocar and Transporters Ltd.	(1968) 2 Q.B. 322
Cookson v. Knowles	(1979) A.C. 556
Todorovic and Anor. v. Waller	Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
Brazel v. Annis-Brown	Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
Muller v. Evans	Unreported Supreme Court of Queensland Judgment dated 27th March 1981
Cullen v. Trappell	54 A.L.J.R. 295
John Cybula v. Ninos Agencies Pty. Ltd.	Unreported National Court Judgment N290 dated 22nd April 1981

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Plaintiff

AND: BOUGAINVILLE COPPER LIMITED

(W.S. 187 of 1980)

Defendant

1981
May,
6, 7, 8
KIETA,
NORTH
SOLOMONS
PROVINCE

June,
30
WAIGANI,
NATIONAL
CAPITAL
DISTRICT

MILES, J.

The plaintiff was injured whilst employed by the defendant as a boilermaker/welder. The injury was sustained on 12th October 1978 in a lubrication bay near the pit workshop at the Panguna mine site. The defendant admits liability and the case is limited to assessing damages.

(His Honour proceeded to outline the evidence and after making findings in relation to general damages, out of pocket expenses and loss of income to the date of trial, went on to consider the question of damages for lost earning capacity. The plaintiff who had returned to his home in Tasmania was found to be permanently unfit for fulltime work in his pre-injury trade of boilermaker/pipewelder but fit for lighter work not involving prolonged or heavy lifting or prolonged bending.)

As to future economic loss, Mr Molloy for the plaintiff has produced figures applicable to persons employed under the Australian Metal Trades Award which was tendered in evidence. He has taken the wages payable to a tradesman boilermaker as a guide to what the plaintiff would have earned but for his injury and the wages payable to a storeman as a guide to what the plaintiff could earn assuming he could get work commensurate with his disability. I will not set the figures out in detail. If the need arises the document in which they are set out can be regarded as part of this judgment. In summary they show the differences in three hypothetical situations. First where no overtime is allowed for, the difference is K14.00 per week. Second where twelve hours per week overtime is calculated for both boilermaker and storeman, the difference is K21.00 per week. Third where twelve hours per week is calculated for boilermaker and no overtime for storeman, the difference is K62.00 per week.

The significance of the twelve hours overtime is that the plaintiff claims that this is the likely amount of overtime he would have been able to work as a boilermaker in northern Tasmania if he had not been injured. There is no evidence to support that claim. On the other hand, I am prepared to accept that there is a likely shortage of skilled tradesmen in his area which will make overtime more likely to be available to those with appropriate skills. I am also prepared to accept that in times of relative recession such as the present and immediate future, there is an over-supply of unskilled labour so that the likelihood of unskilled workers being asked to work overtime is reduced. Accordingly I fix the future and continuing wage loss based on present wage rates at K40.00 net per week. Given an expected working life of sixteen years the appropriate tables can be utilised to produce a figure which will represent the present money value of K40.00 per week over sixteen years in the future.

At the time of the commencement of these proceedings the method of assessment was easily applied by choosing a rate of interest (generally five or six percent) and applying that to the estimated periodic loss for the projected future term in accordance with tables which are to be found for instance in 33 Australian Law Journal 28, 40 Australian Law Journal 243, 45 Australian Law Journal 159 and Kemp & Kemp "Quantum of Damages" (Third edn., London, 1967, p.51). I myself recently favoured a rate of seven percent in the belief that that was a more accurate reflection of current market interest rates than the lower rates which had been used in previous cases : Bogil Guma v. The Independent State of Papua New Guinea (1).

This has been the method used in Australia and hitherto in Papua New Guinea for calculation of the present value of future loss. It is inevitably called into aid in cases brought by dependent relatives of a deceased person but it is not restricted to those claims and is utilised in all cases including those like this one where it is necessary to award a sum now in money paid at present values to cover periodic loss to be suffered over a future term. It involves choosing an interest rate at which the damages to be awarded can be invested so that when capital and interest are drawn on progressively at the given rate of loss the damages will be exhausted at the end of the term. The rate of interest so chosen has in recent years become known as the discount rate. The method of calculation (being similar to the calculation of the present value of an annuity) has sometimes been inaccurately referred to as the "actuarial" method but it

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(1) Unreported National Court Judgment N262 dated 28th November 1980

is really an arithmetical process applied to figures of rate and term of expected loss which the trial judge will arrive at on the evidence. The arithmetic necessary to be used is highly complex and so the tables are widely accepted and in common use.

In February 1981 this method of "discounting" was in effect abolished at least for Australia by the decision of the High Court in Pennant Hills Restaurants Pty. Limited v. Barrell Insurances Pty. Limited (2) and Mr Molloy has asked me to follow the principles enunciated in this decision. We will in this country of course regard decisions of the High Court with great respect but they are not binding on us. If we are to apply the common law as part of the underlying law, we are obliged to apply the common law as it existed in England at Independence, unless it conflicts with custom or a statute or is inappropriate to the circumstances of the country : Constitution Schedule 2.2. As custom has not been shown to have any relevance and the matter is not covered by statute, we should turn to see what was the common law as at Independence on this question of the assessment of present value of future loss.

In England, at least until recent years, the discounted interest approach has not found favour. In that country a somewhat simpler method is used whereby the expected periodic loss (called the "multiplicand") is multiplied by the number of years purchase considered appropriate to bring about a just result (called the "multiplier"). The selection of the multiplier has tended to become a matter of precedent and seldom exceeds 16. There are some signs that in England reservation is held as to the suitability of the multiplier method in some cases. In Mallett v. McMonagle (3), a rare case of the House of Lords being called upon to consider the quantum of a jury's verdict, Lord Diplock by the use of mathematics showed convincingly that the damages awarded if properly invested would yield without touching the capital, an income twice the value of the dependency. In Taylor v. O'Connor (4) Lord Pearce thought that at least in the case of high income earners the multiplier method should give way to arithmetical calculations having regard to inflation and investment rates.

The principles to be applied in assessment of damages are partly rules of law and partly rules of practice : Lim Poh Choo v. Camden and Islington Area Health Authority (5) and the rules of practice can only be justified if they give effect to the

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(2) (1981) 55 A.L.J.R. 258
(3) (1970) A.C. 166
(4) (1971) A.C. 115
(5) (1980) A.C. 174

dominant principle of law that a defendant is liable to make good the financial loss incurred and to be incurred by the plaintiff. We are not bound in any way in Papua New Guinea to follow English rules of practice. Whether we use the multiplier method or the interest discount method for calculation of present value of future loss is, I think, a rule of practice. Although it is convenient to use a multiplier method in simple factual situations (for instance the recurrent future cost of braces as calculated earlier in this judgment), I think it is preferable to continue with the interest discount method for long-term loss of income or income earning capacity. The method is well known in this country, and has been afforded a glimmer of recognition in England in recent years. The use of the interest discount method does not offend the dominant principle of compensation and should be regarded as a rule of practice which we are free to utilise or reject bearing in mind the constitutional duty to develop a coherent and consistent system of jurisprudence for Papua New Guinea.

The question is what rate of interest is to be applied. The Barrell case (6) established that on the evidence given in that case, long term inflation in Australia required either the application of a very low rate of interest (two percent was chosen by three judges) or no interest at all, in order to avoid the erosion of the value of the verdict. In reaching this conclusion the High Court (or a majority of its members) in effect reversed its previous stand that future inflation was not to be taken into account in the assessment of damages : O'Brien v. McKean (7), maintaining that the one basic principle of the law that could not be cut down in any way was that damages are to compensate the plaintiff for the actual loss suffered so far as that is possible.

In England on the other hand, at least at the time of Independence which is our starting point for Papua New Guinea, the principle appears to be that an award of damages was not to be adjusted upwards in order to allow for future inflation : Mallett v. McMonagle (8) despite dictate to the contrary in Taylor v. O'Connor (9) and Mitchell v. Mulholland and Another (10).

This is not to say that the prevailing view ignored inflation. In a series of illuminating judgments Lord Diplock has dealt with the question of the calculation of future loss and inflation. In Fletcher v. Autocar and Transporters Ltd. (11) whilst a member of the Court of Appeal, he said:

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(6) (1981) 55 A.L.J.R. 258
(7) 118 C.L.R. 540
(8) (1970) A.C. 166
(9) (1971) A.C. 115
(10) (1972) 1 Q.B. 65
(11) (1968) 2 Q.B. 322 at 348

> "The calculation is an arithmetical one made upon the basis that the social and economic structure of the country and the value of money will remain unchanged throughout the period of 10 years. Plainly this will not be so, and it is often suggested, as it has been in the present appeal, that sums awarded for loss of future earnings should be increased to allow for future inflation. But one cannot isolate the factor of inflation from national income policy, tax rates and structure, and interest rates. All are inter-related. Nationalisation, equalisation of incomes, other social and economic changes - all are on the cards. All of these may affect - and not in the same way - an invalid in his sixties possessed of capital and a quantity surveyor in private practice without any savings. I do not think it practicable for the courts to base awards of compensation upon speculation about general future or economic trends or about any single factor, such as inflation which may or may not form part of them ..."

In Mallett v. McMonagle (12), a judgment from which I resist the temptation to quote at length, Lord Diplock went on to add a rider to the above, namely that because current investment rates and capital appreciation of property would largely compensate for the fall in the value of money invested, a relatively low discount interest rate would in effect make up the difference :

> "In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4 per cent to 5 per cent should be adopted."

The same approach was maintained in Cookson v. Knowles (13) and has been expressed by the textwriter Lunz ("Assessment of Damages for Personal Injury and Death", Chatswood, 1974, p.140) as one of the two alternatives available :

> "If one assumes that inflation will continue in the future, one may calculate the present value of those future sums by assuming that the actual dollar earnings in the future will be the same as at present and then discounting by the lower interest rate obtainable on an investment which guards against inflation; or one may assume that the dollar earnings will go up and then discount these higher figures by the higher interest rate obtainable on an investment in which the capital is itself subject to erosion by inflation. The former method may accord better with the loss of earning capacity theory; the latter with the loss of earnings theory. If proper allowance is made for inflation one ought to come out with the same answer whichever way one does the calculation. However, in the second method there may be greater scope for error of prediction. Otherwise the theory adopted should not affect the result."

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(12) (1970) A.C. 166
(13) (1979) A.C. 556

A prime reason why the courts both in England and Australia had declined to take inflation into account was that the level of inflation could not be predicted with any certainty and evidence on the subject was regarded as somewhat speculative. Cookson v. Knowles (14) in England and Barrell (15) in Australia both acknowledge the existence of present inflation and the virtual certainty of future inflation of such magnitude that prudent investment is not a sufficient hedge against the erosion of value of an award of damages. I think that even without the benefit of expert evidence we can expect that inflation will be a fact of life in Papua New Guinea into the indefinite future.

Whether the principle that inflation is not to be taken into account in assessing the level at which future loss will be incurred is a rule of law or a rule of practice, I think that there are a number of compelling reasons why we should not seek to follow the Barrell case (supra) here in Papua New Guinea. It was after all not a case of personal injuries at all. It involved an attempt to assess the loss sustained by an employer whose insurance broker had negligently forgotten to renew a workers compensation insurance policy. Australian courts bound by the decision of the High Court in Barrell (supra) have felt compelled to extend the principles laid down in that decision to cases of personal injury. The difficulty is to identify the principle or principles laid down in Barrell (supra). There were seven separate judgments. All I think but that of Barwick C.J. were in agreement that at least in the instant case the principle that inflation was not to be taken into account should in effect be abandoned. Of the six judges three were in agreement that - again at least in the instant case - a proper discount rate was two percent. The other three judges took the view that no discount should be applied at all.

The courts in the Australian States have not been able to agree on the effect of Barrell (supra). The New South Wales Court of Appeal took the view that it should follow the reasoning of Stephen J. to support the principle that no discount should be allowed : Todorovic and Anor. v. Waller (16), Brazel v. Annis-Brown (17). According to press reports the same attitude has been taken in Victoria. On the other hand Connolly J. in the Supreme Court of Queensland in Muller v. Evans (18) rejected the New South Wales judgments, for reasons which he did not state, appearing to take the view that Brazel (supra) affirmed O'Brien v. McKean (19) to the effect that inflation should generally not be taken into account but that in exceptional cases like Brazel (supra) itself,

(14) (1979) A.C. 556
(15) (1981) 55 A.L.J.R. 258
(16) Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
(17) Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
(18) Unreported Supreme Court of Queensland Judgment dated 27th March 1981
(19) 118 C.L.R. 540

the general rule will yield to special circumstances. For what it is worth, I think that the New South Wales Court of Appeal is correct in its interpretation of what Brazel (20) means to a court which is bound to follow it. On the other hand where we do not have to follow it, its persuasive value must be reduced by reason of the absence of clearly identifiable ratio.

The decision of all the judges in Brazel (supra) (except Barwick C.J.) took into account the expert evidence that was given in the case on the subject of future inflation. The rate of inflation in Australia is not necessarily the same as that in Papua New Guinea. As Lord Diplock pointed out in the passage quoted above from Fletcher v. Autocar and Transporters Ltd. (21), inflation is not the only factor affecting the value of money. In addition to the other matters referred to by Lord Diplock, there would be for Papua New Guinea such factors as world commodity prices, capital importing levels, international borrowing rates, the devaluation or revaluation of the kina and the like. The rate of increase in costs of medical and nursing care may outstrip the rate of inflation. To require expert evidence of the type given in Barrell (22) may be expecting too much, given the legal and professional resources of Papua New Guinea at the present time. The assessment of that evidence by Stephen J. necessitated the culling of information from such diverse and remote sources as the Washburn Law Review and the O.E.C.D. Economic Outlook indexes as well as the application of judicial precedent discovered in judgments of the courts in Alaska. Again it may be too much to expect such erudition from the courts and lawyers of this country. It is not as though we have time on our hands.

If justice can be achieved with relative simplicity then let it be. The English approach to inflation as expounded by Lord Diplock at least has the advantage of simplicity and has not yet been condemned as productive of injustice in that country. Should the attitude there change in line with the thinking in Brazel (supra) or indeed if in a particular case in Papua New Guinea evidence is brought to bear on these difficult matters of projected inflation rates, market and "real" investment rates and so on, we can reassess the situation.

The final point needs to be considered as to whether the award for future economic loss needs to take into account the notional tax that a plaintiff will be liable to pay on the interest earned on the award when it is notionally invested. As a matter of strict principle, it should : Taylor v. O'Connor (23),

(20) Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
(21) (1968) 2 Q.B. 322 at 348
(22) (1981) 55 A.L.J.R. 258
(23) (1971) A.C. 115

Cullen v. Trappell (24). The difficulty lies in assessing the amount of notional tax. As it is to be paid on the sum to be earned as interest, it is necessary first to ascertain or predict that rate of interest. Does one apply a market rate, or the discount rate itself, assuming a discount rate is applied? Having fixed the rate of interest, how does one then fix the rate of tax having regard to other sources of income which the taxpayer may derive and also to tax deductions to which he will be entitled? Is the tax to be taken into account by adjusting the discount rate of interest, or by some other means? These are practical questions to which I think it is fair to say that no court, at least in Australia or England, has given a satisfactory answer. Until recently tax on notional interest was ignored in those countries. Stephen J. in Barrell (25) suggested that the difficulties, which are fundamentally arithmetical, could be overcome by the use of tables acceptable to the parties and to the courts. If such institutions as the Law Reform Commission or the Institute of Applied Social and Economic Research saw fit to produce such tables, that would be a possible answer as far as this country is concerned. For the time being however it is expedient and not unjust to disregard tax on notionally invested awards of damages.

The following extract from Todorovic and Anor. v. Waller (26) coincides with the law for Papua New Guinea:

> "Future inflation is to be disregarded in estimating the level at which future expenditure and future wage losses will be incurred. But it is proper to take it into account in determining the rate at which a present lump sum compensating for such future expenditure and future losses should be discounted ... It is the overriding principle that the plaintiff should so far as possible be fully compensated for his loss which dictates that regard should be paid to the future purchasing power of sums now awarded when fixing any rate of discount."

I propose to apply the principles espoused by Lord Diplock in Mallett v. McMonagle (27) (similar to the first of the two alternatives suggested by Lunz) and, recognising that inflation is a fact of life in Papua New Guinea for the indefinite future, apply a discount rate of interest that is somewhat below market investment rates available in Papua New Guinea (see Bocil Guma v. The Independent State of Papua New Guinea (28)). The plaintiff, if he chooses to do so, has the opportunity to invest the damages in Papua New Guinea (or possibly abroad) in such a way as to

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(24) 54 A.L.J.R. 295
(25) (1981) 55 A.L.J.R. 258
(26) Unreported N.S.W. Court of Appeal Judgment dated 13th March 1981
(27) (1970) A.C. 166
(28) Unreported National Court Judgment N262 dated 28th November 1980

counteract the effect of inflation to some extent. I fix the rate to be applied at five percent, which applied to K40.00 per week for sixteen years gives a figure of about K22,500. This will be further discounted for the conventional contingencies to K20,000. No allowance is made for the fact that the plaintiff is an Englishman, nor (except to the extent indicated elsewhere in the judgment) for the fact that he appears to have his home in Australia. Damages are calculated in accordance with the principles of the law of Papua New Guinea.

The award of damages is thus:

Pain and suffering and loss of amenities		K14,000.00
Out of pocket expenses -		
Agreed to date	K 370.00	
Physiotherapy to date	1,185.00	
Future	756.00	2,321.00
Loss of income : Past		
12.10.78 - 3.10.80	K 3,672.33	
4.10.78 - 3. 7.81	11,340.00	15,012.33
Loss of income : Future		20,000.00
		K51,333.33

To this is to be added interest under the Law Reform (Miscellaneous Provisions) Act 1962, s.62, a discretionary matter to be exercised according to law. I follow the decision of Kearney D.C.J. in John Cybula v. Nings Agencies Pty. Ltd. (29) and fix a rate of four percent for both economic and non-economic loss calculated from the date of issue of the writ to today, as follows:

Past pain and suffering etc.	K 6,000.00	
Past out of pockets	1,555.00	
Past loss of income	15,012.33	K22,567.33
4 percent thereon - 6.3.80 - 3.7.81		K1,200.00

There will accordingly be a verdict of K52,533.33 from which by agreement is to be deducted K995.00 already paid under the provisions of the Workers Compensation Act.

There will be judgment for the plaintiff for K51,538.33.

I order the defendant to pay the plaintiff's costs.

Application has been made on behalf of the plaintiff for a certificate for overseas counsel. The only ground advanced in support of the application is that liability was in issue at the time of delivery of the brief. This is an insufficient ground and the application is refused.

(29) Unreported National Court Judgment N290 dated 22nd April 1981

Solicitor for the Plaintiff	:	Warner Shand Wilson & Associates
Counsel	:	I. Molloy
Solicitor for the Defendant	:	Young & Williams
Counsel	:	M. Challinger