# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Breen v Larkin* [2003] QCA 549 |
| PARTIES: | **SHARNEE GAYE BREEN (an infant by her next friend) GAYE KATHERINE BREEN**<br>(plaintiff/appellant)<br>v<br>**MARGARET KAY LARKIN (as personal representative of PAUL KELSALL LARKIN)**<br>(defendant/respondent) |
| FILE NO/S: | Appeal No 4012 of 2002<br>SC No 1438 of 1993 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Personal Injury – Liability & Quantum |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 12 December 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6 October 2003 |
| JUDGES: | McPherson JA, Jones and Holmes JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **Appeal dismissed with costs** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – INJUSTICE – PARTICULAR CASES – OTHER CASES –plaintiff baby injured during her delivery – where lay witnesses gave evidence as to the force applied during delivery – whether trial judge's assessment of this lay evidence was justified<br><br>APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – JUDGE CLEARLY WRONG – PARTICULAR CASES – where plaintiff had relied on the principle of res ipsa loquitur to support the conclusion that excessive force was negligently applied to the plaintiff baby during her delivery – whether trial judge was wrong in rejecting reliance on that principle – whether trial judge was wrong in not applying any inferential process to the whole of the evidence after such rejection<br><br>APPEAL AND NEW TRIAL – APPEAL – GENERAL |

PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – PARTICULAR CASES – CONTROL OVER PROCEEDINGS – ADMISSION OF EVIDENCE – where, pursuant to *UCPR* r 423, plaintiff sought leave on the first day of trial to adduce evidence in support of an amended Statement of Loss and Damage filed out of time – whether such leave should not have been refused

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – DAMAGES INADEQUATE – where general damages assessed without recognition of certain continuing disabilities and without interest – whether sum of general damages should be increased to allow for both; where damages for past care assessed on basis of fewer hours of care per day reducing and without any interest allowance – whether need for care as assessed reasonable – whether interest should be allowed on past care damages sum; where special damages allowed on a global basis as two-thirds of sum claimed – whether one third reduction excessive; where no allowance made for future economic loss – whether such allowance should have been made

*Unjform Civil Procedure Rules (Qld),* r 423

*Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121, discussed
*The State of Queensland And Another v J L Holdings Pty Ltd* (1997) 189 CLR 146, distinguished

COUNSEL: N M Cooke QC, with S Di Carlo, for the appellant
S C Williams QC, with G W Diehm, for the respondent

SOLICITORS: Baker Johnson Lawyers for the appellant
Flower and Hart for the respondent

[1] **McPHERSON JA**: I agree with the reasons of Jones J for dismissing this appeal with costs.

[2] **JONES J:** The appellant was unsuccessful in a claim for damages for injuries she sustained in the course of her birth on 16 December 1992. The appellant, through her mother as next friend, commenced proceedings against the obstetrician responsible for her delivery, Dr Larkin. Dr Larkin died a short time after the trial of the action and his personal representative is now the respondent on this appeal.

[3] The appellant challenges the findings of the learned trial Judge on the issue of liability and his assessment of the quantum of damages. In a further ground the appellant contends that His Honour's discretion miscarried when he refused the appellant leave to call Dr Wainwright to give evidence of a matter not contained in earlier reports or alternatively to adjourn the trial for a short period to permit the giving of more notice of her evidence.

**Background facts**

[4] The birth was a difficult one because, when the baby's head began to enter the birth canal, it was in a right occiput transverse position. That is at right angles to the normal delivery position facing downwards, a position known as occiput anterior. It is not unusual for a baby's head to be in the transverse position at the commencement and then to correct itself as the head descends. The baby could not be born unless the rotation into the anterior position occurred.

[5] That rotation was not achieved during an extended period of supervised labour. Dr Larkin then made the decision to rotate the plaintiff's head into the correct position using the Kiellands forceps. In his evidence Dr Larkin described the procedure which he followed to deliver the baby. This description was accepted by the learned trial Judge but the appellant now challenges that finding in regard to the doctor's description of the amount of force used. It is convenient to set out in full Dr Larkin's description of the delivery, he said:-

> "21. My preferred method of assisted delivery, where it is needed, is the use of the Kiellands forceps with which I am proficient. All methods of delivery involve risk to mother and child. I am capable of performing all methods but if there is no reason why a caesarean section ought be performed in preference to a Kiellands forceps delivery then that is what I will do because of my skill and experience.
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> 22. There was some difficulty with the application of the anterior blade of the forceps and correction of asynclatism. The difficulty with the application of the anterior blade was an inability to apply the blade directly to the left side of baby's head. I used the indirect method of application which entails application of the anterior blade of the forceps over baby's face and then to "wander" the blade to the side until it is applied in the correct position to the side of baby's head. "Asynclatism" indicates that the baby's head was at an angle which required correction. This is done by sliding the forceps over each other until the head is in a level presentation.
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> 23. I then deliberately disimpacted the head slightly to allow rotation. This means the head was pushed back to find a more roomy area in the pelvis, then rotated the head. I used one hand. The use of these forceps requires that only one hand be used, because the forceps are handles designed to slide against each other during the procedure. I would describe the rotation as being like turning a key. If the head cannot be rotated by simple pressure the procedure should be abandoned. The head has to move around easily. In this case it did move easily.
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> 24. The forceps were then removed and the position of the baby's head was checked. I observed that the head was then direct occipito anterior – as required for delivery. The reason I removed the forceps before reapplying traction was to enable me to accurately confirm the position of the baby's head. I then reapplied the Kiellands forceps and delivered the head with two firm pulls. A moderate episiotomy was performed on the mother. The shoulders were a little more

> difficult to deliver, but the anterior shoulder was delivered under the symphysis pubis with one firm pull which lasted 4 to 5 seconds. There was then an easy delivery of the posterior shoulder and the rest of the baby was delivered at 4.57 pm."[1]

[6] During the course of this procedure there was a dramatic fall in the foetal heart rate as was recorded in the hospital notes. The plaintiff suffered high level spinal cord damage as a result of birth trauma. This affected her ability to breath and she required immediate resuscitation and thereafter artificial respiration.

[7] On 18 December 1992 two days after the delivery, Dr Larkin wrote a note to the referring General Practitioner. Relevantly, he described the force used in the following terms:-

> "I therefore elected to deliver the baby by Kiellands forceps. Apart from some difficulty in applying one of the blades of the Kiellands forceps it was a relatively straight forward delivery with easy rotation and one strong pull to deliver the head. Similarly, it required one strong pull to deliver the shoulders."[2]

[8] By her Amended Statement of Claim and the Further and Better Particulars, the appellant alleged negligence against Dr Larkin on a number of grounds including his failure to elect to deliver the child by Caesarean section, his failure to monitor the progress of the delivery and the use of excessive force or undue force during the use of the Kiellands forceps or on the manual extraction procedure.

[9] The learned trial Judge found that the failure to elect delivery by Caesarean section was without foundation. None of the specialist obstetricians who gave evidence suggested that a Caesarean section should have been undertaken, so consequently His Honour's finding was appropriate.[3] This argument was not particularly pursued on the appeal.

**Grounds of appeal**

[10] On the liability issue, whilst a number of grounds are raised in the Notice of Appeal, the argument centred upon two broad points. Firstly, the appellant contends that the learned trial Judge erred in his assessment of the evidence and findings that he made as to credibility. Secondly, the appellant argues that the learned trial Judge erred in law in failing to apply a "common sense deductive process to the proven facts"[4]. In this respect the appellant relies upon the discussion in *Schellenberg v Tunnell Holdings Pty Ltd* [5] about the role of inferential reasoning in determining liability where direct proof of causation is not possible.

[11] It is common ground between the parties that such injury was caused by the application of force. The question for the court was whether the force applied by Dr Larkin was excessive or undue or, in other words, whether there was a negligent application of force.

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1 Affidavit Dr Larkin para 21-24 see record pp 542/3
2 See record p 445
3 Reasons para 41 record p 849
4 Notice of Appeal 2.2
5 (1999) 200 CLR 121

[12] At the trial, the appellant adduced expert evidence from Dr Wilson, consultant obstetrician and Dr O'Duffy, consultant paediatrician. The respondent, additionally, called Dr Keeping, a consultant obstetrician. The learned trial Judge carefully reviewed the evidence of each expert witness in his Reasons for Judgment at paragraphs [16] – [30][6]. Each of the experts expressed the view that such an injury to the spinal cord was most likely to have occurred during the rotation of the baby's head. Dr O'Duffy considered that it might also happen as a consequence of tractional force applied to the baby's head either when the forceps were used to deliver the head or at the time of the manual pull to deliver the baby's trunk.

[13] The learned trial Judge considered the evidence including evidence of the observations of the lay witness (which will be considered later) and made the following findings:-

> "43. The question of excessive force must be approached on two hypotheses. The first is that the injury occurred during rotation: the second that it occurred during traction. On the evidence there is no rational basis for concluding that the injury must have occurred in one or the other. Both Dr Wilson and Dr Keeping had persuasive reasons for concluding in the one case that it occurred during rotation and in the other during traction. Dr Keeping's opinion may be thought the better relying, as it does, on the fact that there is no recorded instance of traction causing such an injury. Dr Wilson, aware of that fact, nevertheless thought it may have occurred in traction.
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> 44. I propose to discuss both possibilities. Dr Larkin's contemporaneous note of the rotation was that there was no undue difficulty in rotation. In his letter to Dr Krause of 18 December 1992 (exhibit 25) and in his affidavit he described the rotation as "easy". In cross-examination Dr Larkin agreed that rotation of forceps should always be gentle and delicate and should stop if difficulty or resistance is met. In re-examination he confirmed that he did not encounter any unusual resistance and that he did not apply a rotational force beyond what was appropriate, that is, reasonable.
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> This is the only evidence on the point. I accept it. Even if I did not there would not be evidence that excessive force was used.
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> 45. The case is no different when one considers the possibility that the injury occurred during traction. There are here, in turn, also two possibilities. One is that the injury occurred when traction was applied by forceps to deliver the head. Dr Larkin said he gave two firm pulls. Dr Wilson agreed that it is sometimes necessary to pull firmly. The resistance was no more than "was to be expected" (T 291.10). The second possibility is that it occurred when Dr Larkin used his hands to deliver the baby's shoulders and trunk. If the injury occurred in traction it may be thought more likely that it was during delivery of the shoulders which proved more difficult. In this case it is impossible to say that excessive force was used. Once the head is delivered the obstetrician must use whatever force is

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6 See record pp 842-847

> necessary to deliver the trunk. A caesarean section is then impossible. The baby will die if not delivered quickly. Mrs Slynco may have observed this part of the delivery and had an impression of an unusually strong pull. She herself denied that the force was excessive though conceding that such a judgment is impossible to make. The amount of force to be applied is a matter for the skilled judgment of the practitioner. Dr. Larkin said he delivered the first shoulder with one firm pull which lasted four to five seconds. He described this part of the delivery as moderately difficult. Dr Keeping explained that the likely injury flowing from an attempt to free the shoulders was a brachial plexus, which the plaintiff did not suffer. There is no evidentiary support for finding that more force was applied than was reasonably required in the circumstances."[7]

[14] I shall deal firstly with the challenge that the learned trial Judge failed to give proper weight to the evidence of lay witnesses - Ms Slynco, Mrs Breen and Mrs Wollins.

[15] When Ms Slynco, an experienced midwife, first entered the delivery room she saw that the baby's head, neck and part of the shoulders were visible.[8] Therefore she only saw what was the manual pull to deliver the baby's trunk. She described that "…the way the baby was delivered was a little bit stronger and longer pull on the baby"[9] and later added "…I thought to myself… that poor little baby's head is going to come off"[10]. She was describing the final manual pull which was made in circumstances of the knowledge that the baby required resuscitation. This evidence was relied upon as a basis for Dr O'Duffy's opinion that stretching of the neck could cause significant spinal cord damage. Ms Slynco, in her statement which was also tendered in evidence, had also made comparisons with the strength of the pull when forceps were used.[11] There appears to be some confusion in the description to which counsel for the respondent pointed as an internal inconsistency, between Ms Slynco's evidence about the manual pull which she observed in the delivery of the shoulders and the effect of forceps being used, when the use of the forceps clearly was not observed. The learned trial Judge made the following findings about Ms Slynco's evidence –

> "In a statement she had given to the defendant's solicitors in 1995 she said the force used in delivery was stronger than she had observed previously when forceps were used but she would not describe the force as excessive, though admitting candidly that it was impossible to judge whether force was excessive. She thought that the duration of the pull she saw was about five seconds. She had no criticism of Dr Larkin whose reputation as an obstetrician was high. I have no doubt that Mrs Slynco gave her honest recollection but her account is not consistent with Dr Larkin's, nor with the expert opinions"[12].

His Honour's findings concerning the evidence of Ms Slynco were explained in his reasons and were completely justified.

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7 See record p 850
8 See record p 252/15; 265/35; 268/1
9 See record p 252/30
10 See record p 253/40
11 Ex 68 see record p 538
12 Reasons para [32] record p 847

[16] Mrs Breen and Mrs Wollins were respectively the mother and grandmother of the plaintiff. The challenged evidence concerned the terms of conversations which Mrs Breen had with Dr Larkin and the content of a sketch which she claimed Dr Larkin made to explain what happened during the delivery. Mrs Wollins was present at that conversation. The appellant argues that the learned trial Judge's comments about the way part of the evidence of that conversation was led were adverse. This came about because Mrs Breen had to be recalled to give evidence after Mrs Wollins had been cross-examined. Further the appellant contends that this fact, together with the claim of privilege in respect of a note made of the alleged conversation, unfairly influenced the learned trial Judge in his findings of credibility.

[17] On behalf of the respondent it is argued that the comments made by the learned trial Judge about the giving of evidence were not adverse and the references to the evidence were correctly stated.

[18] The passage of Mrs Breen's evidence was the alleged comment by Dr Larkin to the effect, "I thought I broke her [the baby's] neck". Presumably this was to invite the inference that excessive force was used. The learned trial Judge in his reasons[13] commented that the witness had twice affirmed the making of that statement and then retracted it. The respondent identifies that Mrs Breen gave evidence that those were the words used[14], accepted that similar words might have been used[15] and then said the words used may have been "spinal injury" rather than "broken neck"[16].

[19] Given that background, the learned trial Judge's comments on evidence (which was at best peripheral to the main issue) were accurate and certainly to not give rise to any unfairness to the witness. The evidence of Mrs Wollins supported the "broke her neck" terminology and added some further information about anaesthetics and about her daughter's aversion to forceps. Neither of these matters were adverted to by Mrs Breen and the information was clearly hearsay. The learned trial Judge commented upon the failure of Mrs Breen to raise these additional topics in the context of assessing the witnesses' reliability.

[20] By the time the matter came on for trial Dr Larkin was terminally ill. He was unable to speak and so his evidence in chief was adduced in the form of an affidavit. He responded to questions by writing answers which were then read into the record. The written responses became exhibit 72. Dr Larkin in his affidavit denied parts of the conversation which Mrs Breen and Mrs Wollins said occurred in the consultation referred to above. In response to a question whether it was possible he might have used the term "broke her neck" he conceded that it was "possible, but I think unlikely"[17]. Mr Cooke of Queen's Counsel for the appellant argues that the learned trial Judge in his assessment of the witnesses did not give sufficient weight to Dr Larkin's concession of the possibility that he may have used the term nor to the fact that the doctor was likely to play down any conduct which might suggest culpability on his part.

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13 Para 34 record p 848
14 See record p 80/50
15 See record p 83/25
16 See record p 83/45
17 See record p 318/60

[21] The learned trial Judge had the opportunity to assess the manner in which Dr Larkin responded to the questions, the extent to which his answers were consistent with contemporaneous records and generally the reliability of his evidence against the background of the expert evidence of procedures which ought to be followed. It was this background, as well as Dr Larkin's experience and the improbability of his use of the terms attributed to him which ultimately persuaded His Honour to prefer Dr Larkin's account of the conversation. His Honour said:-

> "39. I prefer Dr Larkin's account of the conversation which appears in paragraphs 32 to 35 of his affidavit. I accept that he did not say he thought he had broken the plaintiff's neck or that it was too late for a caesarean section. I also accept that the delivery was not long and hard or particularly difficult. It is impossible to believe that Dr Larkin said he had never had to deliver a baby ROT. The evidence from the obstetricians is that babies presenting in a transverse position is very common. An experienced obstetrician would have encountered hundreds of such instances. Dr Larkin himself says that by December 1992 he had delivered hundreds of babies from that position. I am satisfied that Mrs Breen and Mrs Wollins have distorted what Dr Larkin said and given a false account to enhance the plaintiff's prospects of succeeding in the litigation."[18]

[22] It is well established that an appellate Court will set aside a challenged finding of fact if it is shown to be wrong. If the finding depends to any substantial degree on the credibility of the witnesses (as is the case here) the finding must stand unless it can be shown that the Judge failed to use or has palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable. See *DeVries v Australian National Railways Commission*[19]. In my view, for the reasons that he gave, the learned trial Judge was perfectly justified in coming to the view he did about the various recollections of the witness to this conversation.

[23] Reference was also made in argument to the observations of the plaintiff's father who was present at the birth. The force of such evidence is limited by the experience of the observer. This point was sufficiently made by Dr Keeping who said, "Those who are not used to labour ward and forceps deliveries will have a perception that a lot of force was used, even when the experienced accoucheur thinks otherwise"[20].

[24] I can detect no flaw in His Honour's approach to the issue of credibility and no basis for disturbing His Honour's findings. Moreover, the evidence of this kind provides no guide as to the extent of force used and the ultimate resolution of the issue of whether Dr Larkin was negligent.

[25] The second issue concerns the allegations that His Honour failed to use a process of deductive or inferential reasoning and was thus led into the error of accepting Dr Larkin's evidence relying upon it to determine the level of force used. The appellant argues that this resulted from the learned trial Judge's failure to apply

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18 See record p 848 para 39

19 (1992-3) 177 CLR 472

20 Ex 70 see record p 553

correctly the dicta of the High Court in *Schellenberg v Tunnel Holdings Pty Ltd*[21]. Counsel for the appellant invited the Court's consideration of various passages from *Schellenberg* which was specifically concerned with the place of the so-called principle of res ipsa loquitur. At para 22 of the reasons of Gleeson CJ and McHugh J the following passage appears:-

> "Although Australian and English Courts have diverged as to the scope and effect of the principle of res ipsa loquitur, in this country its scope and effect have been decisively settled by a series of decisions of this Court. Those decisions make it clear that the trial judge was correct when he said that the principle is not a distinct, substantive rule of law, but an application of an inferential reasoning process, and that the plaintiff bears the onus of proof of negligence even when the principle is applicable."[22]

Further, at para 24:-

> "What flows from these statements of principle is that, while res ipsa loquitur may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularised a specific claim in negligence or adduced evidence of the cause of the accident. But it does nothing more."[23]

And finally, from para 31, quoting from *Mummery v Irvings Pty Ltd*[24]:-

> "…the requirement that the accident must be such as in the ordinary course of things *does not happen* if those who have the management use proper care is of vital importance and fully explains why in such cases *res ipsa loquitur*."[25]

[26] The learned trial Judge in accordance with the principles of *Schellenberg* rejected the appellant's reliance on the rule of *res ipsa loquitur*. The appellant now contends that the reasoning process ought to have proceeded with the following considerations:-

(i) the injury occurred at some time during the delivery;
(ii) the injury was caused by the application of force;
(iii) the injury sustained by the appellant was not an ordinary or expected outcome of a Kiellands forceps delivery if the instrument was correctly applied and competently used;
(iv) the competent use of Kiellands forceps for rotation of the foetal head required the manoeuvre to be stopped if significant resistance is experienced.

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21 (1999) 200 CLR 121
22 Ibid at pp 132, 133
23 Ibid at p 134; to similar effect from the judgment of Kirby J citing Canadian authority at para 88 p 154
24 (1956) 96 CLR 99 at 116 (emphasis added)
25 *Schellenberg* at p 136

(v) although the assessment of force to be used is subjective the doctor should use no more force than is necessary to deliver the baby safely;

(vi) if excessive force is necessary "…it means that the preparation wasn't right, the baby wasn't in a situation it should have been in…"[26]

[27] The contention is that the delivery of an injured baby is not an expected outcome if the forceps are correctly used. The fact that the baby was injured in this way suggests that more force was used than was necessary. The appellant then argues that the evidentiary onus swings to the defendant to show that the injury could not have occurred without mismanagement.[27] Support for this statement is found in the judgment of Gaudron J in *Schellenberg* at para 73:-

> "Although res ipsa loquitur does not alter the burden or proof, it may operate to impose an evidentiary burden on a defendant."[28]

Mr Cooke for the appellant argued that the respondent had not satisfied that evidentiary onus; that the reliance upon certain studies revealing that this type of injury can be sustained without apparent cause was inconclusive and did not support the proposition that the injury can occur without mismanagement.

[28] The studies referred to in the course of the evidence included one by Canadian obstetricians published in the professional journal *Obstetrics and Gynaecology*, Vol. 86, No 4, Part 1, October 1995[29]. This study identified the frequency of this type of injury occurring at 0.7 per 1000 births and concluded:-

> "We also cannot determine from our cases whether this serious injury can only occur as a result of misjudgment or mismanagement, or whether this injury is an intrinsic risk – albeit very rare – of even a properly performed forceps rotation."[30]

[29] Mr Williams of Queen's Counsel on behalf of the respondent points to the fact that the experts called by the appellant did not suggest that undue or excessive force was used. He points to the evidence of Dr Wilson as being the highest point and he expressed the view simply that this injury cannot be caused "without the application of force".[31] It is conceded that force has to be used, but the question is whether the level of force was negligently applied. Mr Williams referred to the evidence of Dr Keeping which was accepted by the learned trial Judge and which can be summarised in the expression "that such injuries as the plaintiff suffered can occur in ordinary, careful, indeed gentle, deliveries using Kielland forceps".[32] There was ample supporting evidence for Dr Keeping's opinion and for that summation. Dr Keeping made reference to an article in *The Australia And New Zealand Journal Of Obstetrics And Gynaecology* 1998[33] as explaining that there have been noted rare cases where Kielland forceps have been used and injuries have resulted notwithstanding the absence of excessive force in the rotation movement. Dr

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26 Per Dr O'Duffy see record p 188/25
27 Transcript p 16/50
28 *Schellenberg* at p 148
29 See Ex 70, record p 558
30 Ibid p 593
31 See record p 163/20
32 Record p 849
33 Ex 63, see record p 504

Keeping referred also to his knowledge of reported incidents at the Mater Children's Hospital.

[30] The appellant's reliance upon the process of inferential reasoning comes into conflict with the direct findings based on other evidence. The learned trial Judge was, on the evidence before him, entitled to make the findings he did. In short, the learned trial Judge as the trier of the facts weighed the circumstantial evidence with the direct evidence, some of which was based on findings of credibility which were clearly explained. In my view the appellant has not shown any error in the reasoning process undertaken by the learned trial Judge in the detailed reasons for judgment for which he prescribed. The conclusion reached by the learned trial Judge was fully justified and his findings that the plaintiff had not made out her case were fully justified.

**Refusal to accept the evidence of Dr Wainwright**

[31] Dr Wainwright is a paediatric respiratory specialist who first examined the appellant on 8 December 1998 and treated her thereafter. Her reports dated 16 December 1998 and 7 February 1999 were tendered by consent[34]. On the first day of the trial, Monday 8 April 2002, the appellant sought to have admitted a further report by Dr Wainwright dated 5 April 2002[35]. Notice that such a report would be forthcoming was not given until the previous Friday afternoon. The report raised for the first time a suggestion that a lung condition, which had been diagnosed as far back as 1999, was related to the initial injury. This suggestion appeared to be somewhat at odds with other expert opinion which was admitted without objection. However, this part of the claim could not be adequately contested by the defendant without significant factual inquiry and the obtaining of expert opinion. As a result of the disclosure of the report at this stage the appellant required leave, pursuant to r 423 of *UCPR*, to adduce the evidence. But the appellant had failed also to comply with specific directions that copies of medical reports be provided by 15 March 2002. Further, the amended Statement of Loss and Damage which raised this part of the claim for the first time was filed only on the preceding Friday, one week after the deadline set by another court order. These shortcomings had to be assessed against the background of delay in the prosecution of the action. An application to strike out the plaintiff's claim for this reason on 8 February 2002 was unsuccessful but, in lieu, a speedy trial was ordered because of Dr Larkin's illness. Directions were then given to facilitate this early hearing.

[32] When the claim was raised on the first day of the trial, an opportunity was given to the legal representatives for the defendant to investigate the claim, but there was insufficient time to do so before the end of the appellant's case. The learned trial Judge then ruled upon the application for leave by refusing it. He said:-

> "The claim is an important one for the plaintiff. It goes to an ongoing condition which will cause her distress and discomfort, cost and perhaps affect her capacity to earn income, to some extent at least, in the future. The sum of $80,000 is advanced as a claim for the cost of future medical treatment for this aspect of her suffering.

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34 Ex 67A-B, see record p 531 et seq

35 Ex 67C, see record p 534

> It is clearly, as I say, an important part of her case and the Court would be reluctant to prevent her advancing it. The difficulty is, though, that the defendant cannot meet it at the moment. Despite the best endeavours made by the defendant's advisers since the claim was notified to them on Monday of this week they have been unable to obtain the services of a suitable specialist to advise them or to provide a report.
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> The matter is complicated, involving a detailed factual examination of the plaintiff's past history of respiratory conditions and treatment. On information presently available, a report from a suitable specialist would not be available for two weeks.
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> This trial is set down for five days commencing last Monday. I raised during argument the possibility that the trial might be adjourned to conclude this aspect of it one day next week but it has since emerged that the defendant could not be ready to meet this part of the case as soon as that. There are difficulties with my availability beyond next week. That apart, a plaintiff must expect to come to Court to conduct his or her case in the time allotted by the Court when the matter is set down for trial. It is clearly unsatisfactory to suggest that a trial should run for a few days and then adjourn while further evidence is obtained or searched for.
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> In this case, the application of the rule will result in prejudice to the plaintiff. Not to insist upon compliance with the rule will work prejudice to the defendant. It seems to me that it would be unfair to expect the defendant to bear that prejudice when the cause of it is the plaintiff's failure to comply with the rules and with the express order made by the Court in failing to approach Dr Wainwright until after the time fixed by Court for the delivery of reports had expired. The plaintiff may not be without remedy if leave is refused pursuant to rule 423 sub (3). The remedy will not apply against the defendant but against others. I express no more than that on that point.
>
> It seems to me that the justice of the case requires the refusal of leave under rule 423 and I so order."[36]

[33] The appellant contends that the learned trial Judge wrongly exercised his discretion to exclude such an important part of the appellant's case and relied upon the remarks of Dawson, Gaudron and McHugh JJ in *Queensland v J L Holdings Pty Ltd*[37]. The situation in this instance is quite different from that in *J L Holdings Pty Ltd* and the prejudice to the defendant is far more extreme. Any adjournment of the trial would have resulted in a lengthy delay before the hearing judge would again be available. The defendant's life expectancy at the time of the trial was known to be quite limited. The problem arose because of the unexplained disregard for the rules and the Court's directions.

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36 Record p 248-9

37 (1996-1997) 189 CLR 146 at pp 152-155

[34] The applicant does not point to his Honour having regard to any wrong principle or any mistake as to facts or any failure to take into account some material consideration. In those circumstances His Honour was entitled to exercise his discretion as he did and in my view was correct in so doing.

**Damages**

[35] In assessing damages the learned trial Judge made the following allowances:-

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| General Damages | $10,000.00 |
| Past Care | $30,000.00 |
| Special Damages | |
| (Claim $18,000 reduced by 1/3 rd) | $12,000.00 |
| | $52,000.00 |

[36] Leave was given during the hearing of the appeal for the appellant to make further written submissions as to the appropriate quantum of contested allowances and these submissions and the response to them are now to be considered.

[37] As to **general damages**, His Honour's assessment of $10,000 was based on these findings –

> "49. The plaintiff's early difficulties were the result of lowered muscle tone itself a consequence of a damaged spinal cord. She was slow to crawl and walk. For some months feeding was effected by a tube left permanently in place which was a cause of irritation to the plaintiff and anxiety to her parents. By the age of three, as appears from exhibit 15, the plaintiff was performing the tasks expected of a child of that age. She could walk, run, jump, pedal and had good eye hand, and eye foot coordination for catching, throwing, batting and kicking. She had good balance and her speech and language were noted to be good. When the plaintiff was four years and nine months old, in August 1997, she was assessed comprehensively by a physiotherapist and occupational therapist (exhibit 17). She had virtually all the skills expected of a child of her age. She was described as a friendly, talkative, cooperative girl who concentrated well and tried hard during the assessment. Her mother reported that the plaintiff was independent with feeding, dressing and toileting. In terms of neurological signs her muscle tone was within the lower range of normal and she was coping well with a wide range of activities. The only noted area of difficulty was a weakness in lifting her head from the floor when lying on her back. At the time the plaintiff's parents were contemplating moving from the Gold Coast to northern New South Wales. The therapists noted that in view of the plaintiff's "excellent progress no follow up… will be organised following her family's move…and she will be discharged."[38]

His Honour found that the ongoing problems were that the appellant "tires easily and is prone to respiratory infections and vomiting which may have an emotional element to it".[39]

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38 Reasons p 851

39 See record p 852, para [51]

[38] Examinations by Dr Burke, consultant neurologist, in 1994, 1995 and 1998 revealed no neurological abnormality apart from minor weakness on the right side of the neck and altered tone in the left ankle. These did not cause any impairment in everyday activities, but reduced the appellant's capacity to participate in sporting activities and, Dr Burke thought, may give rise to a need to choose a sedentary form of occupation. By 2002, however, Dr Burke did not find any deficits as a result of the birth damage.[40]

[39] As to these findings the appellant argues that sufficient regard was not given to the evidence of Dr O'Duffy and to the reports of Dr Davis which commented upon problems with swallowing, ineffective coughing, vomiting and susceptibility to lower respiratory infections. Dr O'Duffy's evidence was essentially a comment upon the examinations by Dr Davis in 1993.[41] Dr Davis's opinions were expressed in his reports spanning the period 1993-1996. In 1995, Dr Davis said "…she should be regarded as a normal child…"[42] and in his last report (1996) he diagnosed her respiratory problems then as being due to "…unspecified viral pneumonia"[43].

[40] The respondent argues that his Honour's findings in reliance on Dr Burke's examinations were the most appropriate even though he was not called at trial. Dr Burke's report effectively ruled out any causal link between the present respiratory problems and the trauma.

[41] The learned trial Judge commented upon the parents' tendency to attribute to birth trauma all the childhood ills suffered by the appellant. A reading of the medical report confirms some evidence of this. But the issue for his Honour was to determine what disabilities were causally related to the birth trauma and what were the consequences for the appellant of those disabilities. He determined that most of the suffering occurred in the first 12 months of the appellant's life, a period for which she has no memory, and with the reducing disabilities over the next five years.

[42] However, during this period, there were continuing problems with neurologically based weaknesses with vomiting, respiratory problems and these necessitated a visit to doctors, ongoing physiotherapy and care with eating. In the end result his Honour's assessment to which there was no additional allowance for interest seems to me to be too low. I would assess the allowance at $25,000. I would allow interest at 2% on the whole sum for 10 years which computes to an amount of $5,000.

[43] As to **past care**, the learned trial Judge allowed $30,000 without making any specific findings but which apparently was based upon parents' care for four hours per day for the first year ($14,600) and one hour per day for each day of the next four years ($14,600). His Honour then rounded the calculation to $30,000. There was no allowance for interest.

[44] The appellant argues that the need for care to which these disabilities gave rise was much higher than assessed by the learned trial Judge. The appellant contends that, in the four years to the appellant's fifth birthday, four hours per day were needed and that the care needs continued on a reducing rate in the years thereafter.

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40 See record p 499
41 See record p 189-192
42 See record p 481
43 See record p 483

[45] The respondent argues that the appellant's submissions overlook the findings made by the learned trial Judge and the fact that the mother's evidence was based on needs for a variety of ailments other than those causally linked to the birth trauma.

[46] The evidence of Dr Burke, upon which the learned trial Judge relied, was to the effect that, at the age of five, the appellant should be regarded as a normal child. That would, it seemed to me, preclude any allowance for care after that date. The only remaining question, then, is whether the one hour per day allowed for the period between years 1 – 5 is sufficient. Having regard to His Honour's findings as to the exaggeration of symptoms and the relating to the birth trauma of many of the ailments referred to it seems to me that the allowance of one hour per day for every day over that four year period is reasonable. I would expect that there would be many days in the latter years in which no care was needed in respect of any causally related disability. For this reason I would not disturb His Honour's allowance, but it does seem to me that interest should be allowed on that sum for five years at six per centum per annum. This adds a further component of $9,000.

[47] The appellant contends that the learned trial Judge erred in making no allowance for **future care** arguing that care for one hour per day should continue until the appellant is 18 years of age. There is no warrant for any such claim on the medical evidence and his Honour was, in my view, quite correct in making no such allowance.

[48] As to the claim for **special damages** His Honour made a global assessment by allowing two thirds of $18,000 odd dollars claimed. The difficulty facing his Honour was the fact that a number of the expenses detailed in the loss and damage statement[44] related to expenses incurred for treatment and travelling in respect of ailments not related to birth trauma.

[49] The appellant complains that the reduction by one third was excessive and argues that the full amount should still be allowed because the travelling expenses, medical and pharmaceutical expenses were appropriately claimed. If there were to be some reduction the appellant contends that it should be in relation to the miscellaneous list, but that the allowance should not be reduced below $17,000.

[50] The respondent argues that, in circumstances where the appellant did not seek to disentangle the expenses, his Honour's broad brush approach was correct and, indeed, generous.

[51] A quick perusal of the list of special damages shows claims for travelling expenses for the period February 1993 to March 2002 and pharmaceutical expenses covering the same period. It is clear that there is no medical evidence supporting the relating of these expenses to the birth trauma. It is a matter for the claimant to particularise the claim and to provide the evidentiary support for the claim. In respect of this claim the appellant or her advisors have done neither. The approach taken by the learned trial Judge was a reasonable one in all the circumstances with a likelihood of its being more favourable to the appellant given the reducing consequences of the causally connected disabilities after the first 12 months of the plaintiff's life. In my view His Honour's allowance for special damages should not be increased.

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[44] See record p 404 et seq

[52] The appellant argues that there ought to have been allowance for future economic loss. That submission appears to be related to he opinion of Dr Burke expressed in his report in 1998 that she may need to choose sedentary type work. Dr Burke's later report (20 March 2002)[45] he said "Sharnee does not appear to have any neurological deficits as a result of her neonatal problems." His comments in earlier reports indicate that the extent of the disability (altered muscle tone in the left ankle) was quite minor. In the absence of specific evidence as to how this disability would affect the plaintiff, his Honour was quite right in rejecting the assertion that the injury will be productive of economic loss.

[53] In summary therefore I would alter the assessment of damages by making the following allowances:-

| | |
|---|---|
| General Damages | $25,000.00 |
| Interest thereon | $ 5,000.00 |
| Past Care | $30,000.00 |
| Interest thereon | $ 9,000.00 |
| Special Damages | $18,000.00 |
| | $87,000.00 |

[54] I would order that the appeal be dismissed with costs.

[55] **HOLMES J:** I agree with the reasons for judgment of Jones J and the orders he proposes.

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[45] See record p 491