

IN THE SUPREME COURT OF
QUEENSLAND

Plaint No. 98 of
1978.

ROCKHAMPTON

BETWEEN:

KIM INA MAREE HUNTER (an infant by her next Plaintiff.
friend BARBARA JOAN PRICKETT) of 137
Woodstock Street, Maryborough in the State
of Queensland.

AND

INA HELENA MICHELLE HUNTER of Lae, Papua
New Guinea First
Defendant.

AND

ROBERT DAVID HUNTER of Lae, Papua New
Guinea Second
Defendant.

AND

FRANK REGINALD GARRETT of 57 See Street,
Bargara in the State of Queensland Third
Defendant.

AND

WESTERN TRANSPORT CONSOLIDATED a company
duly incorporated in the State of Defendant.
Queensland and having its registered office
at Montague Road, Brisbane in the said
State. Fourth

JUDGMENT - DEMACK J.

Kim Hunter was born on 25th September, 1972. She was injured in a motor vehicle accident on 29th November, 1972. Liability is not in issue.

Following the accident, she was taken to the Bundaberg Hospital, and then transferred to the Maryborough Hospital the next day.

Her obvious injury was a haematoma involving the left eye. Associated with a prolapsed conjunctiva, was a

laceration involving the inner canthus of the left upper lid. The transfer to Maryborough took place because the visiting ophthalmologist to the Bundaberg Hospital, Dr. Kelly, practised in Maryborough.

On 22nd December, 1972, she was re-admitted to the Bundaberg Hospital. On that day a malrotated three week old fracture of the left femur was revealed on x-ray. There is no doubt that this was sustained in the accident. She was placed in a gallow splint.

The femur has long since healed without any residual disability. The left eye is another story.

Kim has lost 95% of the effective sight in the left eye. For most purposes she has adjusted well to this. She does sometimes bump into furniture and other objects on her left side. She is, of course, very vulnerable if she ever sustains any injury to her right eye.

In addition she has a marked cosmetic disability. Her left eye lid has a marked droop. Her left eyebrow is very arched because the muscle underlying it is attempting to raise the eyelid.

In the past there has been a paresis of the left superior rectus muscle, and although there was good lid closure, there was a poor left Bell's Phenomenon. There has been some improvement in this over recent months.

It is possible that surgery will improve the appearance of the eyelid, but it will never be without apparent blemish. The operation has attendant risks with the possibility of corneal exposure during sleep. One specialist says he would perform the operation. Another says the possible benefits do not outweigh the risks. Mr. Hunter says he would leave the decision to Kim and the doctors. It is not suggested that the surgery could be performed for a number of years.

Kim is, of course, 8½ years old now. She has pleasant even features, and the cosmetic effect of the sagging eyelid and arched eyebrow is very obvious. She attends school at Lae where her father works. He is a

fitter and turner, and her mother has done office work. She has two siblings aged 11 and 5. Her schoolwork demonstrates average ability. Her headmaster reports that she is very self-conscious about her eye and does not participate easily in group or oral activities. From her brief appearance in the witness box, I could not form any view contrary to that, so I accept that evidence as a reliable indication of what is, predictably, the major difficulty, a loss of confidence.

I would expect that the loss of confidence will be most marked in the teenage years, and continue into the early twenties. It may have some impact upon her ability to obtain employment, and it could restrict the types of employment open to her. It will have some effect upon her social life, but I do not find that it will have any serious effect on her prospects of marriage.

I shall allow the sum of \$500 against the possibility of a future operation.

In summary then, Kim is an eight and a half year old girl who has lost 95% of the sight in her left eye, and has a marked cosmetic disability associated with her left eye.

It is not possible to divide the award up in any meaningful way. The pain she suffered is all long forgotten, but the loss of self confidence in social interaction is real and will remain.

I assess general damages at \$20,500.

There will be judgment for the plaintiff against the defendants for \$20,500 together with costs to be taxed.

Order that the plaintiff's costs be taxed as between party and party, and as between solicitor and client.

Order that from the sum of \$20,500 the defendants pay to the next friend of the plaintiff the difference between party and party costs and solicitor and client costs.

Order that the balance of the said sum of \$20,500 be paid to the Public Trustee of Queensland, whose receipt therefor shall be insufficient discharge.

Order that the Public Trustee hold the said sum in trust for the plaintiff until she shall attain the age of eighteen years.

Liberty to apply.

IN THE SUPREME COURT OF QUEENSLAND

No. 98 of 1978

CIVIL JURISDICTION

BEFORE MR. JUSTICE DEMACK

BRISBANE, 15 APRIL 1981

BETWEEN:

KIM INA MAREE HUNTER (an infant by her next Plaintiff friend Barbara Joan Prickett)

- and -

INA HELENA MICHELLE HUNTER First Defendant

- and -

ROBERT DAVID HUNTER Second Defendant

- and -

FRANK REGINALD GARRETT Third Defendant

- and -

WESTERN TRANSPORT CONSOLIDATED Fourth Defendant

JUDGMENT

HIS HONOUR: This action was heard by me at Bundaberg on Thursday 26 February 1981. I am informed by counsel that the matter was set down for hearing on that date at a call-over on 2 February 1981. I delivered judgment at Rockhampton on 6 March 1981. Unfortunately, the judgment I delivered that day cannot stand. Due to my oversight, I did not include in the judgment an amount of special damages. This has been the subject of agreement between the parties. The judgment therefore must be vacated and judgment given for the sum of \$21,617.65.

A further difficulty arises with the orders I have made previously because I was not aware when I made them that there had been a payment into court. \$25,000 was paid into court by the defendants on 4 February 1981.

Mr. Byrne who appeared for the defendants has submitted that I should make the following orders: that the defendants pay the plaintiff's costs of the action up to 4 February 1981 and such costs that the plaintiff would have incurred in a successful application made to a judge in Chambers within 14 days of the said 4 February 1981 for an order pursuant to section 59 of the Public Trustee Act for a sanction of acceptance by the plaintiff of the moneys paid into court to be taxed, and further that the plaintiff by her next friend pay to the defendants their costs of the action from and after 4 February 1981 to be taxed.

He submits that such an order provides full protection for the next friend who could apply to the Court under section 59 of the Public Trustee Act for sanction of the acceptance of the payment into court. He referred to the decision of the Full Court in *Lauchlan v. Hartley* 1979 Queensland Reports, p. 305, that where the defendant has paid money into the court which has not been taken out and which exceeds the sum awarded to the plaintiff, the defendant is a successful party and is entitled to be paid his costs as from the date of payment in, with the absence of some good ground for exercising the discretion against him.

He submitted that the fact that the plaintiff was an infant did not constitute a good ground because of the availability of the procedure under section 59 of the Public Trustee Act. He referred to Broadhurst v. Millman, 1975 V.R. p. 181 and Caw v. McCawley 1976, 11 A.C.T. Reports, 29.

I accept that in itself the fact that a plaintiff is an infant would not constitute good ground for exercising the discretion against the defendant. However, here there are other factors which add considerable weight to the fact of infancy. The plaintiff sues her parents who are the first and second defendants. The evidence showed that she lived with her father, the second defendant, at Lae in Papua New Guinea. Her mother was not mentioned in the evidence. A very substantial part of the damages concerned a cosmetic disability. Some medical treatment had been given in Lae, some in Bundaberg and some in Maryborough where the next friend lives. Medical opinion and advice from Brisbane specialists had been sought in the eight years that had passed since the incident. Mr. Crooke for the plaintiff submitted that it was impractical, nay, virtually impossible to assemble the plaintiff with up-to-date medical reports, before counsel who could advise on an application under section 59 within the 14 days limited by Order 26 rule 3.

There is considerable weight in Mr. Crooke's submission. However, it seems to me that when the substance of the submission is realised it cannot constitute good ground. The substance of the submission is that the state of preparation of the plaintiff's case was such that the possibility of applying under section 59 could not be considered. I do not think that that can be allowed to constitute good ground. There are always substantial obstacles to the preparation of a case for trial. However, the plaintiff by her next friend chose the court out of which to issue process, and by that must be taken to have accepted the responsibility of conducting the litigation according to the rules that apply to that Court.

I shall therefore make the orders that Mr. Byrne suggested. I should indicate that the bulk of the plaintiff's costs for trial would probably be involved in the preparation of the successful application under section 59, but this is ultimately a matter for the Taxing Master. For convenience I shall vacate all the orders previously made and make in lieu the following orders:

There will be judgment for the plaintiff against the defendants for \$21,617.65.

Order that the defendants pay the plaintiff's costs of the action up to 4 February 1981 together with such costs as the plaintiff would have incurred in a successful application made to a judge in Chambers within 14 days of 4 February 1981 for an order pursuant to section 59 of the Public Trustee Act for the sanction of an acceptance by the plaintiff of the moneys paid into court to be taxed.

Further order that the plaintiff by her next friend pay to the defendants their costs of the action from and after 4 February 1981 to be taxed.

Further order that the defendants shall be at liberty to set off the amount of the costs ordered in their favour against the costs payable to the plaintiff, and to pay the balance to the next friend of the plaintiff.

Further order that the plaintiff's costs be taxed as between solicitor and party, and that the difference between solicitor and party costs and the amount of costs payable by the defendant to the next friend of the plaintiff be paid by the defendants to the next friend of the plaintiff out of the said sum of \$21,617.65.

Order that the balance of the said sum of \$21,617.65 be paid to the Public Trustee of Queensland whose receipt therefor shall be sufficient discharge.

Order that the Public Trustee hold the said sum in trust for the plaintiff until she shall attain the age of 18 years.

Order that the amount of money paid into court, together with accretions, if any, be paid out to the solicitors for the defendants. Liberty to apply.
