HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, CRENNAN, KIEFEL AND BELL JJ

TIAN ZHEN ZHENG APPLICANT

AND

DEJU CAI RESPONDENT

Zheng v Cai [2009] HCA 52
9 December 2009
S67/2009

ORDER

1. *Special leave to appeal granted.*

2. *Appeal treated as instituted and heard instanter and allowed with costs.*

3. *Set aside orders 1, 2, 3 and 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 25 February 2009 and in place thereof order that:*

   (a) *the judgment at trial in favour of the appellant be set aside and in place thereof judgment be entered in favour of the appellant in the sum agreed pursuant to order 4 of these orders and with costs in her favour calculated accordingly;*

   (b) *the respondent pay the costs of the appellant of the appeal in the Court of Appeal; and*

   (c) *otherwise the appeal to the Court of Appeal be dismissed.*

4. *Within 28 days of the date of these orders the parties file agreed proposed orders implementing order 3(a) of these orders.*

On appeal from the Supreme Court of New South Wales

Representation

S Norton SC with M Fraser for the applicant (instructed by Brydens Law Office)

S G Campbell SC with S E McCarthy for the respondent (instructed by McLachlan Chilton Solicitors)

CATCHWORDS

Zheng v Cai

Tort – Negligence – Damages – Motor vehicle accident – Personal injury – Assessment – Economic loss – Regular payments made by church to applicant following motor vehicle accident – Whether benevolent payments should be taken into account when calculating damages – Whether intention of giver of benevolent payments determinative – Where collateral benefit exists for giving benevolent payments – Relevance of public policy in disregarding benevolent payments in assessment of damages.

Appeal – Issue not raised at trial – Motor vehicle accident – Personal injury – Economic loss – Issue at trial whether plaintiff an employee – Issue on appeal concerned real intent behind benevolent payments – Where applicant would have objected to admissibility of evidence or called further witnesses if issue raised at trial – Whether party bound by presentation of case at trial – Prejudice.

Words and phrases – "assessment of damages", "benevolent payment", "gift", "intention", "public policy", "volunteer work".

1 FRENCH CJ, GUMMOW, CRENNAN, KIEFEL AND BELL JJ. On 4 September 2009, Gummow and Bell JJ referred for hearing by an enlarged Bench two grounds upon which special leave is sought to appeal from the decision of the New South Wales Court of Appeal (Giles and Basten JJA and Hoeben J), and dismissed the balance of the special leave application.

2 At trial in the District Court, Judge Garling entered a verdict for the applicant for $300,681 in damages for the injuries she suffered on 11 May 2000 in an accident at Chatswood between a taxi and the car driven by the respondent and in which she was a passenger. She suffered significant injuries to her back and neck and experienced chronic depression. The respondent had admitted breach of his duty of care. The Court of Appeal set aside that verdict and entered judgment for the applicant in the sum of $17,447.91. For reasons not presently material, the applicant accepts that the verdict should have been reduced to $144,886 plus interest.

3 The difference between the parties which remains as to the recovery of $144,886 rather than $17,447.91, is encapsulated in the first of the two grounds argued before the enlarged Bench of this Court. These grounds are that the Court of Appeal erred: (a) in reducing the damages by taking into account certain payments of a benevolent nature made to the applicant; and (b) by making for itself findings of fact in response to a new argument raised by the respondent.

4 For the reasons which follow, special leave should be granted and the appeal allowed with costs.

The facts

5 The applicant was born in China in 1956. She arrived in Australia in 1990 and has limited proficiency in the English language. Her evidence at the trial was given through an interpreter. The applicant's accountancy qualifications were not recognised in Australia and she worked in Sydney as a sewing machine operator for a cushion manufacturer. She is a member of the Christian Assembly of Sydney ("the Assembly"), which has a church at Roseville ("the Church"). The Assembly was incorporated on 1 November 2001 as a not-for-profit association and is accepted by the Australian Taxation Office as a charitable institution. The Church has a congregation of about 200. There are no employees and all offices and functions are performed by volunteers.

6 Some time before the accident the applicant had applied to attend a bible college in Singapore to obtain the degree of Bachelor of Theology. She left

Sydney and attended the college between July 2001 and June 2005 and, after graduating, returned to Sydney.

7 In his reasons for judgment, the primary judge remarked that what seemed a straight forward assessment of damages became complicated when, in a lengthy cross-examination, the respondent's counsel put to the applicant that she was not telling the truth and challenged her credibility. Counsel for the respondent had told his Honour that one of the precious few issues was whether the applicant was an employee of the Assembly and that her reliability and honesty was "a central theme in the case".

8 However, the primary judge found that the applicant was a satisfactory and acceptable witness. His Honour found that the applicant cannot do work which requires a lot of sitting or standing or heavy lifting and cannot work as a seamstress. Her limited English is a handicap to employment in a clerical capacity.

9 Following her return to Sydney in June 2005, the applicant performed voluntary work for the Church for about 20 hours per week. She worked on most days but without set times. The volunteer work, which was continuing at the time of the trial, included answering the telephone, speaking to people interested in the Church and, at times, the applicant did some preaching. Her efforts were limited by her disabilities.

10 Between 26 June 2005 and 24 April 2006 the applicant received fortnightly payments into her bank account at an average of $580 per week. The payments were continuing at a slightly increased rate at the date of trial in August 2007. The primary judge found that the payments were made by the Assembly from donations to the Assembly, to assist the applicant with her rent and living expenses. His Honour held that the applicant was not an employee and, in so doing, rejected the case put by the respondent that moneys were received on account of the applicant's employment.

The decision of the Court of Appeal

11 In his grounds of appeal to the Court of Appeal, the respondent submitted that the primary judge erred in failing to characterise "the exertions of the [applicant] within [the Assembly] from July 2005 to the date of trial as employment" and the receipts as income gained through her personal exertion.

12 However, that was not the basis upon which the Court of Appeal allowed the appeal. The Court of Appeal accepted the respondent's submission that the

"real intent behind the payments was to enable the [applicant] to perform volunteer work more effectively for the Church". The applicant submits to this Court that in so concluding the Court of Appeal allowed the respondent to succeed upon a new case.

13 The Court of Appeal referred to a letter signed by the Public Officer and Treasurer of the Assembly, under its common seal, dated 1 May 2006, in response to a subpoena to produce documents at the trial. The text of the subpoena is not in evidence but it appears to have been seeking documents to support the respondent's case that the applicant was an employee of the Assembly. The letter included the statement that the Assembly had "provided financial support to [the applicant] for her daily living and accommodation expenses *to allow her to function more effectively as a volunteer worker*". (emphasis added)

14 The Court of Appeal set out a passage from the reasons of Windeyer J in *The National Insurance Co of New Zealand Ltd v Espagne*[1]:

> "In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) *they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages*. The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had

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1 (1961) 105 CLR 569 at 599-600; [1961] HCA 15. See also *Redding v Lee* (1983) 151 CLR 117 at 136-138; [1983] HCA 16.

paid for, and in the other by the intent of the person conferring the benefit. The test is by purpose rather than by cause." (emphasis added)

15 The Court of Appeal referred to the words from the letter of 1 May 2006, emphasised above, as indicative of "the real intent" of enabling the applicant to perform more effectively her volunteer work, thereby taking the payments outside the second category identified in *Espagne* and rendering them more analogous to payments for services.

16 The Court of Appeal noted that the only evidence of the intent of the Church came from the letter. But in this Court the applicant properly submits that, had this been an issue at trial, it would have been open to her to object to the tender of the letter and, if that had failed, to call evidence on the issue. The respondent should have been bound by the presentation of his case at trial and the departure from that course in the Court of Appeal has so prejudiced the applicant's position as to call for remedy by this Court[2].

The nature of the payments

17 Further, even if regard properly be had to the letter of 1 May 2006 and the issue of the benevolent nature of the payments to the applicant was to be determined upon the record before the Court of Appeal, the applicant should have succeeded there on that issue.

18 In *Parry v Cleaver*[3] Lord Wilberforce remarked that the decision not to make a deduction from damages for receipts from voluntary funds had been put either on public policy or the intention of the subscribers. His Lordship referred to what had been said to that effect by Andrews CJ in *Redpath v Belfast and County Down Railway*[4]. But these considerations are not discrete; rather, it is the policy of the law which informs the importance of the wishes of those providing the benefaction.

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2 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8; [1986] HCA 33; *Water Board v Moustakas* (1988) 180 CLR 491 at 497; [1988] HCA 12.

3 [1970] AC 1 at 39.

4 [1947] NI 167 at 170.

19 This is apparent from the treatment of the subject by Windeyer J in *Espagne*[5]. His Honour began with the propositions that damages for personal injuries are not to be assessed by constructing a profit and loss account and that the compassion, kindness and sympathy of friends and the gifts of charitable persons cannot be weighed against pain and suffering caused by the wrongdoer, such that the balance of account favours that wrongdoer. From that basis his Honour reasoned that voluntary gifts should not diminish damages because "they are given for the benefit of the sufferer and not for the benefit of the wrongdoer"[6].

20 The "intent" of the donor thus assumed great importance, but it was an intent of a particular character, contrasting an intention to benefit the wrongdoer with an intention to benefit the victim. Thus, Windeyer J said[7]:

> "If, out of sympathy for a man unfortunately responsible for a motor accident, someone gives money to the victim, stating that he does so in the interest of the tortfeasor and to diminish the damages he must pay, effect must be given to his intention. If, on the other hand, the donor's expressed intention is that the injured man shall enjoy his bounty in addition to whatever rights he may have to recover damages from the tortfeasor, effect must in my opinion, be given to that intention. And if nothing be said, the intention of the giver may be inferred from the circumstances."

To that there may be added the observation by Professors Harper, James and Gray in their treatise upon United States tort law[8]:

> "Often of course the intent was never even thought out by the donor, certainly not expressed. In these cases of private generosity the best solution seems to be a rule of thumb that would give greatest scope to the donor's generosity and to the adjustment of moral obligations within the more or less intimate relationships that usually bring such generosity into play. The gift should be disregarded in assessing damages."

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5 (1961) 105 CLR 569 at 598.

6 (1961) 105 CLR 569 at 598.

7 (1961) 105 CLR 569 at 598-599. See also *Kars v Kars* (1996) 187 CLR 354 at 362-363; [1996] HCA 37.

8 *The Law of Torts*, 2nd ed (1986), vol 4, §25.22 at 663.

21 It is here that the decision of the Court of Appeal encounters well-founded complaints of error. The leading judgment was delivered by Hoeben J. Speaking of the letter of 1 May 2006, his Honour said:

> "That letter makes it clear that the payments were intended *not merely* to benefit [the applicant] insofar as her daily living and accommodation expenses were concerned, but to enable her to function more effectively as a volunteer church worker." (emphasis added)

22 The letter is to be read as a whole and, if this be done, it is apparent that the Assembly was anxious to counter any argument that the applicant worked as its employee, rather than as a volunteer.

23 The critical question, on the respondent's case, was whether the payments by the Assembly were intended by it to operate in the interest of the respondent and to diminish the damages he otherwise would be liable to pay. The conclusion expressed by Hoeben J does not address this consideration. Rather, his Honour concluded that the intention was to benefit the applicant in her circumstances after the accident, but denied the legal consequence which *Espagne* would attach to that conclusion by finding in the Assembly an additional intention with respect to voluntary work.

24 The presence of a collateral benefit of this kind to the Assembly could not substitute for the necessary intention on its part to benefit the respondent by diminishing his liability for damages at the expense of the award recovered by the applicant, the object of the bounty provided by the Assembly. Reducing the applicant's award without finding such an intention would defeat rather than advance the policy of the law in this area.

25 It may be added that the applicant's evidence was that she welcomed the opportunity to assist at the Church as an activity to fill her time and a response to the kindness which had been shown to her by members of the Church. Situations such as this emphasise the justice and wisdom of the statement by Professors Harper, James and Gray set out earlier in these reasons.

26 Hoeben J went on to refer to the decision in *Marinko v Masri*[9] as supporting the classification of the payments to the applicant as "a form of compensation for her inability to obtain employment". In this Court, counsel for

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9 (2000) Aust Torts Reports ¶81-581.

the respondent supported that classification as akin to the treatment of unemployment benefits in *Evans v Muller*[10].

27 Those benefits were provided pursuant to the *Social Security Act* 1947 (Cth) and, as later emphasised in *Manser v Spry*[11], in such cases the ascertainment of whether the statutory benefit is to be enjoyed independently of and cumulatively upon the right to damages requires attention to the intention of the legislature. It will be apparent that this use of "intention", with examination by the judicial branch of government of the subject, scope and purpose of the text enacted by the legislature, differs from that discussed earlier in these reasons which deals with private benefaction by a donor such as the Assembly in the present case.

28 It has been said that to attribute an intention to the legislature is to apply something of a fiction[12]. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor[13]. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[14], the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

29 What these situations, whether or not arising under statute, have in common is the need to answer the ultimate question, framed by Mason and Dawson JJ in *Redding v Lee*[15] as being:

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10 (1983) 151 CLR 117.

11 (1994) 181 CLR 428 at 436; [1994] HCA 50.

12 *Mills v Meeking* (1990) 169 CLR 214 at 234; [1990] HCA 6; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339-340; [1991] HCA 28.

13 *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [159]; [2004] HCA 43.

14 (2002) 123 FCR 298 at 410-412.

15 (1983) 151 CLR 117 at 137.

> "Was the benefit conferred on [the plaintiff] independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?"

In *Evans v Muller* (reported with *Redding v Lee*) their Honours, who were part of the majority, concluded that unemployment benefits provided by the federal law had the character of a partial substitute for wages[16]. But that holding does not support the denial by the Court of Appeal that the private benefaction conferred upon the applicant by the Assembly was to be enjoyed by her independently of redress against the respondent.

30 Nor does *Marinko v Masri*[17] assist the respondent. In that case, the Protective Commissioner had the administration under the *Protected Estates Act* 1983 (NSW) of the estate of the seriously incapacitated wife of the plaintiff husband. The Court of Appeal held[18] that in an action for nervous shock sustained by the husband at the time of the injury to his wife, the payments made by the Protective Commissioner to the husband should be treated as reducing the economic loss suffered by the husband and that his damages should be reduced accordingly. However, Handley JA, who gave the leading judgment, emphasised that the payments were not made to the husband as gifts from motives of charity or benevolence, and thus normally intended to benefit the recipient not any tortfeasor; the payments were made pursuant to the statutory power to apply the estate to the benefit of the family of the wife.

Conclusion and orders

31 The conclusion is that, special leave being granted, the appeal to this Court should be allowed with costs. Orders 1, 2, 3 and 4 of the orders of the Court of Appeal should be set aside. In place of order 3, the applicant should have her costs of the trial calculated as if judgment had been entered in her favour in the amount now to be entered as a result of the appeal to this Court plus the amount of $155,795.09, being the amount by which the damages were reduced by the Court of Appeal pursuant to s 151Z(1)(e) of the *Workers Compensation Act* 1987 (NSW); a matter raised by the respondent late in the

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16 (1983) 151 CLR 117 at 145.

17 (2000) Aust Torts Reports 81-581.

18 (2000) Aust Torts Reports 81-581 at 64,208.

appeal to that Court. With respect to order 4, the applicant should have her costs of the appeal to the Court of Appeal.

32 A difficulty arises with respect to order 2 and the calculation of the amount for which judgment should now be entered for the applicant.

33 The parties should have 28 days within which to bring in an agreed proposed order disposing of the appeal to this Court. In default of agreement the appeal should be listed by the Registrar for further directions by a single Justice.