BR82-080

22/10/1982

GOVERNMENT INSURANCE OFFICE

OF NEW SOUTH WALES

v.

JOHNSON AND ANOTHER

S111/1981

22/10/1982.

JUDGMEN'

(Oral)

MASON A-C.J.

WILSON J.

DEANE J.

GOVERNMENT INSURANCE OFFICE

OF NEW SOUTH WALES

v.

JOHNSON AND ANOTHER

Both appeals by the Government Insurance Office of New South Wales have been brought pursuant to special leave from orders made by the New South Wales Court of Appeal in actions brought by or on behalf of the estates of a deceased husband and wife under s.2(1) of the Law Reform (Miscellaneous Provisions) Act, 1944 (N.S.W.), as amended. There is a cross-appeal by the representatives of the husband's estate.

In the action on behalf of the husband's estate the Court of Appeal increased the award of damages made by the primary judge from $312,587 to $764,811 by adding an amount of $62,635 for damages to the date of trial (which had been inadvertently overlooked by the primary judge) and by calculating loss of future earning capacity without applying any discount rate. In this respect the approach adopted does not conform with the discount rate of 3 per cent approved by this Court subsequently in Todorovic v. Waller

(1981) 56 A.L.J.R. 59. This circumstance provided the chief ground for the grant of special leave.

However, the appellant challenges the assessment of damages on two additional grounds. The first is that the primary judge and the Court of Appeal erred in calculating the deceased's loss of earning capacity by reference to the profits earned to the date of trial and by reference to estimates of future profits to be earned by a sawmilling business owned by the deceased's father. The primary judge found that some time before the deceased's death the father had agreed to make over the business to the deceased on the footing that for the first twelve months after 1 January 1978 the deceased would receive $180 per week and 25 per cent of the profits and thereafter he would become sole owner of the business entitled to all its profits. The business, the capital assets of which exceeded $200,000 in value, prospered - so much so that the primary judge found that its annual profits were and would be of the order of $100,000. He made no attempt to dissect this sum with a view to characterizing part of it as a return on the capital assets employed in the business and part as a reflection of the earning capacity of the deceased as the person who would

have been managing and controlling the business. He simply took the profit figures as a basis for calculating loss of earning capacity and proceeded to deduct his estimate of tax from the profit figures making allowances for vicissitudes and the deceased's probable living expenses.

The appellant submits that this was an erroneous approach, as indeed it was. Generally speaking, we agree with the criticisms which Hutley J.A. made of it in the Court of Appeal. But the fundamental obstacle in the appellant's way is that the point which it now seeks to argue was not raised at the trial. Indeed, the point seems not to have been specifically taken in the appellant's notice of appeal to the Court of Appeal. The Court of Appeal refused to give effect to the point and in all the circumstances we do not think that the grant of special leave should be maintained so as to enable the appellant to raise the point here.

We take a similar view of the other additional ground of appeal which the appellant seeks to argue. It relates to items of property damage amounting to $17,061 which were included in the damages awarded in each action. These amounts related to damage to a motor vehicle belonging

to a partnership between the deceased husband and wife. The appellant, with some modifications, seeks to submit that we should adopt the views expressed by Hutley J.A. in the Court of Appeal. In substance they are that the appellant should not have been joined to represent the estate of the late Victor Edward Everson, the original defendant in the actions, who died during the proceedings, in respect of the property damage claim. The fact is that the appellant consented to be joined as the defendant in the actions by orders made under Pt. 8 r.16 of the Supreme Court Rules at a time when the respondents had indicated an intention to seek leave to amend the proceedings, then confined to the personal injury claim, so as to include the property damage claim. At the trial, the appellant did not object initially to their amendment. A subsequent attempt to have the amendment disallowed was rejected by the trial judge.

It should be mentioned that, in revoking special leave other than as regards the Todorovic point, we have not been unmindful of the position of the estate of the late Victor Edward Everson. That estate has not been independently represented at first instance, in the Court of Appeal or in this Court, notwithstanding that it is suggested

that it is liable, without indemnity, in respect of so much of the damages awarded as is attributable to damage to property. At this stage, however, the position has been reached where the appeal must be disposed of as between the parties to the litigation on the basis of the manner in which it has been conducted in the courts below. It may be that the Government Insurance Office is estopped from denying its liability to indemnify Mr Everson's estate by reason of its consent to an unqualified order that it be appointed to represent the estate of Mr Everson in circumstances where it had already been advised that it was proposed to include a claim for property damage and its subsequent failure to object either when evidence as to property damage was led at the trial or when an amendment to the statement of claim to claim such damages was allowed (see, Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 C.L.R. 305). That is not, however, a question which has been raised or can be dealt with in the present proceedings.

Having reached the conclusion that special leave should be confined to the Todorovic point we indicated to senior counsel for the respondents at the conclusion of the

appellant's address that we had this course in mind. He thereupon stated that the respondents were prepared to abandon their cross-appeal.

All that remains is for us to adjust the assessment made in the action brought on behalf of the husband's estate so as to give effect to Todorovic. There has been dispute as to the manner in which the discount rate of 3 per cent should be applied to the assessment of damages in favour of the estate of the deceased husband. We accept the appellant's submissions on this point and fix the damages at $539,005 made up as follows:

1.	Property damages	$17,061
2.	Interest on property damages	2,275
3.	Past economic loss	62,635
4.	(a) Interest up to 30 June, 1980 on $62,635.00 at 5% for 2 2/3rds years	12,527
	(b) Interest up to 31 December, 1980 on $25,000 @ 10% for 6 months	1,250
5.	Assessment for loss of future earning capacity	442,059
6.	Funeral Expenses	1,198
		$539,005

The orders of the Court should be:

In matter No. 111 of 1981 order granting special leave revoked. Appellant to pay the respondent's costs.

In matter No. 112 of 1981 order granting special leave varied so as to limit the appeal to argument on the ground that a discount rate of 3 per cent should be applied in the assessment of damages. Appeal allowed. Order that there be substituted for the amount of $764,811 in the judgment of the Court of Appeal the amount of $539,005. Cross-appeal dismissed.

KENNETH EDWARD JOHNSON AND CARYL AMY JOHNSON

JUDGMENT

MURPHY J.

GOVERNMENT INSURANCE OFFICE OF NEW SOUTH WALES

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I agree. The New South Wales' Parliament has legislated by the Law Reform (Miscellaneous Provisions) Amendment Act 1982 (No. 4) to prevent future claims such as this by estates of deceased persons for loss of earning capacity or earnings. The right to claim in this case lacked any social justification and is anomalous. The Compensation to Relatives Acts, in general, deal adequately with the consequences of death where damages are met by insurance or a fund. Perhaps an extension to cover those dependents of the deceased who are not relatives may be desirable. But the right to claim in circumstances as in this case is socially indefensible, and if estates can still do so in other States or Territories, this should be drawn to the attention of the legislatures.

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JUDGMENT BRENNAN J.

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I agree with the orders proposed and the reasons for judgment of the Acting Chief Justice and Wilson and Deane JJ., but I should wish to state my reasons for revoking the grant of special leave to argue the question of property damage.

The appellant became the defendant upon the record when its solicitors and the solicitors for the respondents, by consent, sought and obtained an order by the Master of the Supreme Court that "The Government Insurance Office of New South Wales be substituted as defendant in and for the purposes of the said proceedings herein in lieu of the said Victor Edward Everson".

A Master has jurisdiction to make an order by consent under par.5 of Pt 3 of Sch D to the Rules of the Supreme Court. The order was made in purported pursuance of Pt 8, r.16 of the Rules of the Supreme Court. That rule provides for the making of a representative order where the estate of a deceased person is interested in a matter in

question in the proceedings and there is no personal representative. An order made under sub-rule (1) of r.16 and any judgment or order subsequently entered binds the estate of a deceased person to the extent specified in sub-rule (2).

Sub-rule (3) empowers the Court to require notice of an application for an order under the Rule to be given to such (if any) of the persons having an interest in the estate as it thinks fit. No discretion was exercised by the Master under this Rule. It seems surprising that an order could be made under this Rule to expose an estate to liability to suffer a binding judgment without notice being given to the person entitled to a grant of administration or to any of the persons who may be interested in the estate.

Whether or not the late Mr Everson's estate became exposed in these proceedings to liability to be bound by a judgment for property damage as the result of the consent order, an appeal against the award of property damage ought not be entertained pursuant to a grant of special leave. The respondents for their part are content with the judgment which they have recovered, and we are not called upon now to decide upon the effect of that judgment as between the respondents and the estate. And the appellant's conduct in

consenting to the making of the Master's order and in not objecting timeously to the amendment of the statement of claim was the procedural cause of including in the judgment an award for property damage. The appellant should not be entitled in these circumstances to agitate on appeal the inclusion of that award in the judgment.

This page and the preceding 2 pages comprise my reasons for judgment in Government Insurance Office of New South Wales v. Kenneth Edward Johnson & Anor.