HAS ANYTHING CHANGED IN 30 YEARS?

WESLEY EDWARDS JABANARDI v AMP FIRE AND GENERAL INSURANCE CO. LTD & ORS

by Neil Rees

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CASE NOTE

Personal Injuries—Assessment of damages for Aboriginal boy previously following a traditional lifestyle.

WESLEY EDWARDS JABANARDI (an infant by his next friend Polly Edwards Naburula) v AMP FIRE AND GENERAL INSURANCE CO. LTD & ORS

Supreme Court of the Northern Territory at Alice Springs (Forster CJ); 19 November 1980.

The plaintiff, a 9 year-old Aboriginal boy, received severe injuries in a motor vehicle collision. He suffered brain damage, has no use of his limbs and was described 'as seriously disabled as a person could be without being killed or in a permanent coma'. Liability was admitted and the matter came before the court for assessment of damages.

Prior to the collision the plaintiff was following a traditional life style. Forster CJ estimated that he had a life expectancy of a further twenty years. In determining this figure the following comments were made—

> All aspects of damages in this case are affected by the plaintiff's expectation of life which are plainly diminished but assessment of the exact extent of this dimunition is fraught with difficulties. To begin with, he is, as I have said, a full-blood Aboriginal native and it is an unhappy fact that living in a tribal state the life expectancy of such a person is less than that of a white man. This is my firm opinion and it is supported by the evidence of Dr Reid, the Deputy Secretary of the Northern Territory Department of Health. If the plaintiff continues to receive, as he does at present, skilled and devoted care and attention from doctors, nurses and paramedical staff, it may be that his expectancy is little, if at all, below that of a tribal man. It may be even greater.

When considering a figure for future economic loss Forster CJ stated—

> The question of economic loss is also a vexed one being fraught with uncertain factors. Employment for Aboriginal men at Warrabri is difficult to find. A small proportion of the men gain employment as stockmen on nearby station properties where on average they work for six months of the year, the length of the season depending on a number of factors, principally the weather. Such men earn as stockmen $150 gross per week while working, a figure of $75 per week throughout the year. There is a limited amount of local Council work and Health Department work at Warrabri itself where overall earnings are greater because the work continues throughout the year. Had the plaintiff continued with his schooling, which must be uncertain, he might have been able to take advantage of one of the schemes for Aboriginal advancement and eventually qualify for employment as a clerk or clerical assistant in the Northern Territory Public Service. The plaintiff has entirely lost his capacity to earn even at the most rudimentary task in the sheltered workshop. Assuming employment commencing at age 15 and ending at age 50, and using an interest rate of 6% and making due allowance for income tax, $100 per week will provide a figure of $64 700, $150 per week produces a figure of $93 740, $200 per week produces a figure of $123 750. The plaintiff undoubtedly would have had but for his injuries a capacity to earn, but how great these earnings might have been and how much, if at all, he would have chosen to exercise that capacity, I am entirely uncertain. There is evidence of efforts being made to increase employment opportunities for Aboriginal men but how successful these efforts may be in the future is also entirely uncertain. One of the plaintiff's brothers has worked as a stockman which may increase the chance that the plaintiff would have sought and obtained such work. He had attended school to some extent which at least puts him in a somewhat more favourable position than some of his fellow Aborigines and he was in the class where it would have been expected that a boy of average capacity of his age would be found.
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> In this sea of uncertainty I must do my best to make a fair assessment of damages attributable to the plaintiff's undoubted loss of earning capacity. Ignoring for the moment the component in these damages attributable to feeding, clothing and housing the plaintiff, and taking into account all considerations now known to me, I fix a figure for loss of earning capacity at $55 000.
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> The 'keep' component of the plaintiff's damages which must in fairness be deducted causes further difficulty . . . To avoid doubling up, something must be deducted from the assessment of the damages for the cost of accommodation which the plaintiff will not have to pay. The housing at Warrabri is simple and I assume it is very cheap or free. The food eaten by the people is also simple and inexpensive. If the plaintiff had earned nothing he would probably not be permitted to starve nor would he be required to live entirely in the open. On the other hand, if he earned money no doubt he would be expected to pay for some food and probably something for lodging, depending on its nature. The calculation is imprecise but I consider that in all the circumstances a fair assessment for the deduction to be made with respect to the food, lodging and other things which the plaintiff will not now have to pay for will be $30 000. The figure for loss of earning capacity must therefore be reduced to $25 000.
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> Judgment was entered for the plaintiff in the sum of $362 238. This was calculated as follows: pain and suffering, loss of amenities and enjoyment of life—$25 000; future medical expenses—$230 000; loss of earning capacity—$25 000; special damages—$79 738; loss of expectation of life—$2500.

N.R.

PERSONAL INJURIES-ASSESSMENT OF DAMAGES FOR ABORIGINAL BOY PREVIOUSLY FOLLOWING A TRADITIONAL LIFESTYLE.

Supreme Court of the Northern Territory at Alice Springs (Forster CJ)

19 November 1980

The plaintiff, a 9 year-old Aboriginal boy, received severe injuries in a motor vehicle collision. He suffered brain damage, has no use of his limbs and was described 'as seriously disabled as a person could be without being killed or in a permanent coma'. Liability was admitted and the matter came before the court for assessment of damages.

Prior to the collision the plaintiff was following a traditional life style. Forster CJ estimated that he had a life expectancy of a further twenty years. In determining this figure the following comments were made:

> All aspects of damages in this case are affected by the plaintiff's expectation of life which are plainly diminished but assessment of the exact extent of this dimunition is fraught with difficulties. To begin with, he is, as I have said, a full-blood Aboriginal native and it is an unhappy fact that living in a tribal state the life expectancy of such a person is less than that of a white man. This is my firm opinion and it is supported by the eivdence of Dr Reid, the Deputy Secretary of the Northern Territory Department of Health. If the plaintiff continues to receive, as he does at present, skilled and devoted care and attention from doctors, nurses and paramedical staff, it may be that his expectancy is little, if at all, below that of a tribal man. It may be even greater.

When considering a figure for future economic loss Forster CJ stated

> The question of economic loss is also a vexed one being fraught with uncertain factors. Employment for Aboriginal men at Warrabri is difficult to find. A small proportion of the men gain employment as stockmen on nearby station properties where on average they work for six months of the year, the length of the season depending on a number of factors, principally the weather. Such men earn as stockmen $150 gross per week while working, a figure of $75 per week throughout the year. There is a limited amount of local Council work and Health Department work at Warrabri itself where overall earnings are greater because the work continues throughout the year. Had the plaintiff continued with his schooling, which must be uncertain, he might have been able to take advantage of t•ne of the schemes for Aboriginal advancement and eventually qualify for employment as a clerk or clerical assistant in the Northern Territory Public Service. The plaintiff has entirely lost his capacity to earn even at the most rudimentary task in the sheltered workshop. Assuming employment commencing at age 15 and ending at age 50, and using an interest rate of 6% and making due allowance for income tax, $100 per week

provides a figure of $64 700, $150 per week produces a figure of $93 740, $200 per week produces a figure of $123 750. The plaintiff undoubtedly would have had but for his injuries a capacity to earn, but how great these earnings might have been and how much, if at all, he would have chosen to exercise that capacity, I am entirely uncertain. There is evidence of efforts being made to increase employment opportunities for Aboriginal men but how successful these efforts may be in the future is also entirely uncertain. One of the plaintiff's brothers has worked as a stockman which may increase the chance that the plaintiff would have sought and obtained such work. He had attended school to some extent which at least puts him in a somewhat more favourable position than some of his fellow Aborigines and he was in the class where it would have been expected that a boy of average capacity of his age would be found.

In this sea of uncertainty I must do my best to make a fair assessment of damages attributable to the plaintiff's undoubted loss of earning capacity. Ignoring for the moment the component in these damages attributable to feeding, clothing and housing the plaintiff, and taking into account all considerations now known to me, I fix a figure for loss of earning capacity at $55 000.

The 'keep' component of the plaintiff's damages which must in fairness be deducted causes further difficulty ... To avoid doubling up, something must be deducted from the assessment of the damages for the cost of accommodation which the plaintiff will not have to pay. The housing at Warrabri is simple and I assume it is very cheap or free. The food eaten by the people is also simple and inexpensive. If the plaintiff had earned nothing he would probably not be permitted to starve nor would he be required to live entirely in the open. On the other hand, if he earned money no doubt he would be expected to pay for some food and probably something for lodging, depending on its nature. The calculation is imprecise but I consider that in all the circumstances a fair assessment for the deduction to be made with respect to the food, lodging and other things which the plaintiff will not now have to pay for will be $30000. The figure for loss of earning capacity must therefore be reduced to $25000.

Judgment was entered for the plaintiff in the sum of $362 238. This was calculated as follows: pain and suffering, loss of amenities and enjoyment of life-$25 000; future medical expenses-$230 000; loss of earning capacity-$25 000; special damages-$79 738; loss of expectation of life-$2 500.

Mary 'O' The Cross
Teena McCarthy

Oil on canvas
304 mm x 304mm

This painting depicts Mary McKillop as an Aboriginal nun referencing her work within Aboriginal communities.