Record award for Tasmania

Grimsey v The Southern Regional Health Board
Southern Regional Health Board v Grimsey
Roger Baker, Hobart

Roger Baker

The plaintiff

Megan was born on the 27th February, 1990 at the Queen Alexandra Hospital at Hobart. Her mother Heather, had previously enjoyed robust good health and the pregnancy was uneventful.

Heather wanted to have a natural childbirth but during the course of labour reconsidered and asked that she be given an injection of pethidine. The injection was prepared but Heather then said she could get through without it. Further down the track Heather asked that she be given the pain killing drug. Tragically, the labour ward sister gave her Syntometrine, a drug routinely administered after childbirth to assist in the expulsion of the placenta from the mother's body and to reduce post-partum bleeding.

Upon the Syntometrine being administered, Heather underwent a single massive contraction. Megan of course was trapped inside, deprived of the normal flow of maternal oxygen. It wasn't until twenty two minutes after the Syntometrine was administered that Megan was born. She was cyanosed, there was only the barest trace of a heart beat and large amounts of clear liquid were aspirated from her throat. It took eighteen minutes for regular aspiration to be established.

The almost inevitable consequence of the asphyxiation was that Megan now suffers from athetoid cerebral palsy. Her body writhes in constant spasticity. Because of the tonicity of her muscles she is strong for her age and size and difficult to handle and manage. Her intellect has probably been left relatively unimpaired but is still difficult to assess because of her almost total loss of physical function.

The best that can be hoped for is that she will be able to communicate with a computer and perhaps operate an electric wheelchair. She will never be able to talk, feed herself, and attend to her own toilet or cope without twenty-four hour one-on-one care. She suffered a loss of life expectancy.

The Trial at first instance

Interlocutory judgment for the Plaintiff had been entered early in the proceedings and the Plaintiff's lawyers proceeded into the trial as an assessment of damages *simpliciter*. Some days into the trial they were surprised when the defence raised the argument that in consenting to judgment the Defendant had not conceded that the Plaintiff had suffered damage beyond *de minimis* as a result of the Defendant's admitted negligence. In particular, they argued, the judgment was not to be taken as a finding that there was any nexus at all between that negligence and Megan's disabling cerebral palsy. There is little doubt that argument had been run to persuade the Plaintiff to accept an offer of in excess of $3 million. The Plaintiff pressed ahead and the Defendant's argument succeeded. Liability for the cerebral palsy was put in issue and the Plaintiff proceeded to recall some of its witnesses on that issue, rather than adjourning to give the Defence the opportunity to muster its own experts.

Judgment at first instance

The trial judge Mr Justice Wright rejected the defence that Megan's catastrophic condition was caused by a pre-existing cerebral defect. He awarded judgment in her favour for $4,109,460.

This was by far the largest award of any kind in the Tasmanian Courts and about three times the size of its runner up. The cost of future care accounted for most of this ($2,145,060) followed by housing with pool and special equipment ($500,000 plus) with $300,000 being awarded for pain, suffering and loss of amenities.

The balance was for special equipment including computer and wheelchair, motor vehicle expenses and various forms of therapy.

His Honour said of Megan "Never have I known a more gravely disabled Plaintiff".

General Damages Award

Whilst the size of the award aroused general interest among the local profession the issue creating the greatest interest was the size of the award for general damages. For once a Tasmanian Court appeared to have adopted a mainland tariff for the assessment of general damages.

Court victory for smoker

A smoker who sued Philip Morris after being diagnosed with inoperable cancer won $US1.5 million ($2.33 million) in the first case to reach trial since California lifted a ban on lawsuits by individuals against tobacco companies.

The compensatory damages awarded yesterday cover medical costs, pain and suffering. The Superior Court jury was expected to return on Wednesday to consider punitive damages, lawyers for the plaintiff said.

In a statement yesterday, Philip Morris said: "Until [the punitive] phase of the case has been completed, Philip Morris will have no further comment on the case or the verdict."

Ms Patricia Henley's case was the first since the repeal of a 1987 tort reform law that banned lawsuits by smokers on the basis that the risks of smoking were well known.

The Australian Financial Review 11/2 1999.
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Rosecrance v. Rosecrance (1995) 129 FLR 310 - $350,000

Burford v. Allan (1993) 60 SASR 428 - $320,000

Lipovac v. Hamilton Holdings (1997) - 136 FLR 400 - $300,000

Santiago v. Hamilton Holdings Ltd (Unrep NSW Court of Appeal 4/7/95) - $240,000

Barnes v. GIO of New South Wales (Unrep Spender J. 17/3/95) - $300,000.

The State of Tasmania, the operator of the Queen Alexandra Hospital, was unhappy with this outcome. It lodged an appeal to the Full Court based on 15 grounds alleging that the trial judge erred in his finding on liability, that the award for general damages was manifestly excessive and that there were a miscellany of other errors of assessment.

The Full Court comprising Cox C.J. and Underwood and Crawford J.J. agreed with the Crown that the award for general damages was manifestly excessive and should be reduced from $300,000 to $175,000 with the attendant care costs being reduced from $2,156,061 to $1,918,590. The judgment was accordingly reduced to $3,746,989. The other thirteen grounds of appeal were dismissed.

One matter of significant principle arising out of this decision was the extent to which a State Court should be guided by the tariff it has established or whether it ought to draw authority from judgments in other jurisdictions. The Full Court in *Grimsey* referred to its general awareness of damages for pain, suffering and loss of amenities, and noted that the award of $300,000 was something in the order of three times the highest amount previously awarded for general damages in this jurisdiction. No reference was made to the interstate authorities as to quantum.

Plaintiff's lawyers in Tasmania have long harboured a concern that their clients have been under compensated for general damages by reference to other States. Many would say that to assert that an award of $300,000 for general damages in the case of a Plaintiff so gravely injured as Megan is "manifestly excessive" is unrealistic and miserly. Coupled with this, Tasmanian plaintiffs have since the *Common Law (Miscellaneous Actions) Act* 1986, been burdened with a seven per cent discount rate, rather than the three or five per cent rates prevailing in other States and the total abolition of *Griffith v. Kirkmeyer* claims, at least for services gratuitously rendered in the past.

An application for special leave to appeal against both adverse findings of the Full Court has been filed with the High Court. It is expected to be heard shortly. The High Court will be urged to reconsider its own decision in *Planet Fisheries Pty Ltd v. La Rosa* (1968) 119 CLR 118 and to find that unless restricted by Parliament, the Courts ought to adopt a reasonably uniform approach nationwide towards the assessment of general damages. ■

The Plaintiff's case was argued at both the trial and the appeal stages by Alan Blow QC of the Hobart bar and by Roger Baker.

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