

35/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE STATE OF BRUNEI

B E T W E E N :

TIONG ING CHIONG Appellant
(Defendant)
- and -

10 GIOVANNI VINETTI Respondent
(Plaintiff)

A N D B E T W E E N :

GIOVANNI VINETTI Appellant
(Plaintiff)

- and -

TIONG ING CHIONG Respondent
(Defendant)

(CROSS APPEAL)

CASE FOR THE APPELLANT

20 1. This is an Appeal and Cross Appeal from the
Judgment and Order dated 18th day of October, 1982
of the Court of Appeal of the State of Brunei (The Pp 45-61
Honourable Sir Geoffrey Briggs, P. and Sir Alan
Huggins and Bewley, J. sitting as Commissioners)
whereby the Appeal of the Appellant herein was
allowed in part against the Judgment and Order Pp 27-28
dated the 7th day of December, 1981 of the High
Court of the State of Brunei (Mr. Justice
Penlington). A Cross Appeal by the Respondent
herein against the said Judgment and Order was
30 dismissed. By the said Order of the High Court of
the State of Brunei the Respondent herein was
awarded damages for personal injuries and
consequential loss of \$1,300,792 with consequential
Orders as to costs and interest. Included in the

said sum were sums of respectively \$327,000 for loss of past earnings by way of Special Damages and \$936,000 being loss of future earnings by way of general damages. By the said Order of the Court of Appeal of the State of Brunei the Judgment of the Court below in respect of the Respondent's claim for Special Damages by way of loss of earnings the said sum of \$327,000 was varied to \$233,688.58 with consequential amendments as to interest.

2. Although the issues of liability, contributory negligence and heads of damage other than loss of earnings were in issue in the courts below the Appellant intends to pursue this Appeal only in respect of the issues of loss of past earnings and loss of future earnings. In the circumstances the principal matters that will fall for consideration in this Appeal are 10

(i) whether or not there is sufficient evidence to justify the award of the said sum of \$233,688.58 for loss of past earnings; 20

(ii) whether or not the Respondent's loss of earnings (both past and future) should be calculated in Italian Lire (the currency which his contract of employment provided for his remuneration to be paid) or United States dollars (the currency in which remuneration of underwater divers such as the Respondent is basically calculated) or in Brunei dollars (at all material times the Brunei dollar has been maintained at parity with the Singapore dollar; at the time when the relevant accident occurred it was worth approximately 280 Lire, at the time when the action was heard approximately 520 Lire and at the time of the Appeal to the Court of Appeal of the State of Brunei approximately 700 Lire); and 30

(iii) whether or not the courts below correctly approached the loss of future earnings.

3. The Claim of the Respondent in the courts below arose out of an accident which occurred outside a hospital at Kuala Belait at about 10.10 p.m. on 6th October, 1977. The Appellant now acknowledges that the facts were correctly stated by Sir Alan Huggins in giving the Judgment of the Court of Appeal. 40

P.46
L1.2-9

"The Respondent Plaintiff was riding a motor cycle towards Kuala Belaid when a motor car, driven by the Appellant Defendant, crossed in front of him in the course of a turn from the opposite lane into the hospital entrance. The Plaintiff's motor cycle struck the car and the Plaintiff was injured." 50

4. The Respondent issued a Writ against the Appellant on 27th August, 1980. A Statement of Claim was served with the Writ and by paragraph 4 thereof the Respondent alleged that as a result of the relevant collision he had suffered pain and injuries and sustained loss and damage. In the Statement of Claim the Respondent, in pleading the Particulars of Special Damage gave the following particulars of loss of earnings:-

Pp 1-3

Pp. 4-7

10 "At the time of the accident the Plaintiff was working with Sub Sea Oil Services S.P.A. (hereinafter referred to as "the Company") as a 3rd class deep-sea diver earning B\$8,100.00 per month. Were it not for the said accident, the Plaintiff would have been promoted to a 2nd class deep-sea diver on or about 1.1.1978 earning B\$9,600.00 per month. From 6.10.1977 to 6.1.1979 the Plaintiff was paid B\$870.00 per month. From 20 7.1.1979 he was paid B\$4,300.00 per month, until his services were terminated by the Company on 10.1.1980. The Plaintiff could no longer carry on working as a deep-sea diver because of the injuries he received. From then on, he has been and still is self-employed. He is now a solar energy collector earning about B\$1,800.00 per month. The total loss of earnings from the date of accident up to the date of this Writ (and 30 continuing) is therefore as follows:-

a) \$7,230.00 per month from 6.10.1977 to 31.12.1977 (approx. 3 months) (the difference between \$8,100.00 and \$870.00) \$ 21,690.00

b) \$8,730.00 per month from 1.1.1978 to 7.1.1979 (approx. 12 months) (the difference between \$9,600.00 and \$870.00) \$104,760.00

40 c) \$5,300.00 per month from 7.1.1980 to 10.1.1980 (approx. 12 months) (the difference between \$9,600.00 and \$4,300.00) \$ 63,600.00

d) \$7,800.00 per month from 11.1.1980 to the date of this Writ (approx. 7 months) and continuing, (the difference between 50 \$9,600.00 and \$1,800.00) \$ 54,600.00

Total: \$244,650.00"

Pp. 8-10 5. In his Defence and Counterclaim dated 25th September, 1980 the Appellant pleaded by paragraph 5

P 9 Ll 8-11 "In the premises the Defendant does not admit the injuries, loss or damage suffered by the Plaintiff and puts the Plaintiff to strict proof thereof."

Pp 62-71 6. The action came on for trial before Penlington J. on 7th December, 1981. Medical evidence as to the Respondent's injuries was received from Dr. Hamshere and Dr. Cheng. It appears further that a medical report from Dr. Davidson was admitted by agreement. It is not proposed to summarise the same as, in the submission of the Appellant they are only of marginal relevance to the issues falling for determination in this Appeal. Likewise the evidence as to liability will not be dealt with in this case. 10

Pp 12-13 & 75-81

Pp 74-75

Pp. 13-17 7. The Respondent gave evidence on his own behalf. After dealing with the circumstances of the accident he explained that at the time of the accident he was a diver working for Sub Sea Co. in Kuala Belait earning \$8,000.00 per month. Thereafter he dealt with his personal position following the accident. It is submitted that the Respondent's evidence relating to his employment was very vague. It is proposed to analyse the same in depth in the course of oral submissions, and, as the same does not admit of a convenient precis being made it is not proposed to deal further with the same herein. 20

Pp 20-24 8. Vittoria Majoni gave evidence on behalf of the Respondent. He explained the circumstances in which divers were employed in Brunei and dealt with the position of the Respondent. At page 23 line 13 of the record there is a misprint. It should read "exchange rate in 1977 was L 280 to B\$1." Colin Wilson gave evidence as to the general level of remuneration of divers in Brunei. 30

Pp 24-25

P. 23 Ll 15 9. The Appellant respectfully submits that it is clear from the evidence that the proper law of the contract under which the Respondent was employed was the law of Italy and that accordingly the Respondent's loss should have been assessed in Italian Lire in the first instance. The following matters which emerged from the evidence are, in the Appellant's respectful submission, only consistent with this approach. In the evidence of Vittoria Majoni he said "contract was more (sic - but this must be a misprint for "made") in Italy". That the Respondent's basic salary was paid in Italy in Lire but that he was given a local allowance paid in Brunei dollars therefrom and is made clear by the following passage from Vittoria Majoni's evidence:- 40 50

"A 3rd class diver would be on about \$5000.00 basic (includes \$1,500.00 deep-sea diving bonus), plus \$2,500.00 - 3,000.00 local allowance. The basic salary is paid in Italy." P. 20
L1 25-28

10 Further exhibit "P4" which is the Respondent's salary records (which are not printed in the record but of which photo-copies will be available at the hearing) are calculated in Italian and make reference to various deductions presumably authorised by Italian law. These were explained in the evidence of Vittoria Majoni.

P.22
L1 7-27

20 10. At the conclusion of the hearing the Learned Trial Judge reserved his Judgment until the 9th December, 1981. He commenced his Judgment by dealing with the issues of liability and gave Judgment for the Respondent rejecting the Appellant's plea of negligence by the Respondent. Thereafter the Learned Judge went on to deal with the Respondent's loss of earnings. After recalling that the Respondent had been promoted to a 3rd class diver prior to the accident he stated that the Respondent had said at that time he was earning about \$8,000.00 a month. The Learned Judge failed to state as, in the submission of the Appellant he ought to have done, the date at which such conversion from Lire to Brunei dollars was effected. After briefly recording what had transpired according to the Respondent following

Pp. 28-35

30 the accident the Learned Trial Judge noticed that the Respondent claimed that he would have been promoted to a 2nd class diver on 1st January, 1978. By implication the Learned Judge accepted this evidence. The Learned Judge stated that on the occasion of such promotion the Respondent's salary would have increased to \$9,500.00 per month. Again it is respectfully submitted that the Learned Judge erred in not stating the date at which such conversion was calculated to have taken place. Thereafter the Learned Judge briefly reviewed the Respondent's account of what he had done following his departure from the employment of Sub Sea Limited. Subsequently the Learned Judge calculated the Respondent's loss of earnings to be \$327,000.00. It is respectfully submitted that these calculations are really pure guesswork and are marred by a fatal flaw, namely the failure to take into account the different rates of exchange between the Brunei dollar and the Italian Lire. The Appellant would further respectfully submit that the Learned Trial Judge fell into error in failing to take account of the fact that the Respondent had himself chosen to enter a speculative business. It is respectfully submitted that where a person suffers

P. 30
L1 1-10

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P. 30
L1 20-30

P.30
L1. 31-47

some degree of disability as a result of an accident it is incumbent upon him to seek employment suitable to his reduced abilities. If he should choose not to do this but to enter into business on his own behalf any loss of income that he might sustain beyond the level of income that he would expect to achieve in a job suitable for his reduced ability is not attributable to the tortfeasor. In the instant case there is some evidence that diving companies often employ divers in ancillary roles. It is submitted that the Learned Judge ought to have considered this approach to the assessment of damages.

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Pp. 31-35

11. Thereafter the Learned Trial Judge made his findings as to general damages. The Judge's comments as to pain suffering and loss of amenities do not fall for consideration in this Appeal. In dealing with loss of future earnings the Learned Judge found that the Respondent would never be able to dive professionally again. This finding is not disputed. Thereafter the Learned Judge dealt with the likely position in the future without making any reference at all to the differing levels of exchange rates between the Italian Lire and the Brunei dollar. The Learned Judge noticed that the discrepancy between the forecast in Vittoria Majoni's evidence and that of Mr. Colin Wilson in relation to possible future earnings by the Respondent if he had remained uninjured. Mr. Majoni put it at between \$12,000.00 and \$14,000.00 a month and Mr. Colin Wilson put it at \$8,000.00 per month plus free housing, the usual expatriate benefits, and a bonus of about 20% which would be about \$1,600.00 per month. It is respectfully submitted that such a discrepancy can also be explained by reference to the varying exchange rate. It is respectfully submitted that the finding that at the date of trial that the Respondent would earn \$12,000.00 per month free of tax and the finding that he was likely to continue to do so until the age of 60 is not justified on the evidence. Likewise the Appellant submits that the likely level of future income to be earned by the Respondent in his partially disabled condition to be \$6,000.00 a month is also unjustified. Furthermore it is submitted that the multiplier of 13 applied by the Learned Trial Judge was too high. It is respectfully submitted also that the overall figure for loss of future earnings is so high that it will do much more than provide a fund from which the Respondent could draw the interest and some capital so as to cause the fund to become exhausted by the time he reaches the age of 60.

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P.32
Ll. 2-5

P.34
Ll 38-49

12. The Learned Trial Judge held correctly in the submission of the Appellant that no award should

be made in respect of the loss of retirement benefit. Thereafter the Learned Judge considered the incidence of taxation. It is respectfully submitted that the incidence of taxation can only be disregarded, if, as the Learned Trial Judge did, in holding divers to be "an international breed of men" the loss of earnings are assessed on this premise. On this assumption it is necessary to take the Lire/Brunei dollar exchange rate as at the date of the accident or alternatively to have regard to the US dollar as the medium for paying such persons. The Learned Trial Judge concluded his Judgment by making consequential orders that do not require comment.

P. 35
L1 5-6

13. The Appellant gave Notice of Appeal to the Court of Appeal on 19th December, 1981 and in his Memorandum of Appeal dated 4th March, 1982 raised, inter alia, the following matters:-

P. 35
L1.12-28
Pp.38-39

"The Learned Trial Judge erred in law that he:-

"(1) Failed to appreciate that in awarding damages for loss of future earnings the principle to be applied is that such a sum should be awarded which taking interest into account would be exhausted both as to principal and interest at the end of the time period calculated according to the multiplier selected.

"(2) In awarding the sum of \$936,000 for loss of future earnings, the Learned Trial Judge failed to apply the above referred to principle so that at the end of the time period the Respondent would have been left with his capital untouched and so would have made capital out of his injury.

"(3) In coming to his awards for loss of earnings and loss of future earnings he failed to appreciate that the compensation for cost of living, holiday bonus and other similar allowances ought not to be taken into consideration.

"(4) Failed to appreciate and therefore failed to allow for the fact that at the time when he, the Learned Trial Judge, made his award Brunei \$1 was worth 520 Italian Lire as opposed to 280 Italian Lire which was the exchange rate when the Respondent received part of his salary in Italy.

"(5) Failed to appreciate that the onus was on the Respondent to prove his present and past earnings strictly."

P.40 L 30-
P.41 L 18.

Pp.42-45	14. By Notice of Cross Appeal dated 4th May, 1982 the Respondent gave Notice that he intended to Cross Appeal on various grounds on the basis that the damages awarded were too low.	
Pp. 45-59	15. The Appeal and the Cross Appeal to the Court of Appeal came on for hearing before Sir Geoffrey Briggs, P., Sir Alan Huggins and Bewley, J. sitting as Commissioners and the Judgment of the Court was delivered by Sir Alan Huggins on 18th October, 1982. After reviewing the circumstances in which the claim had arisen and holding that the findings of the Learned Trial Judge were correct as to liability the Learned Commissioner went on to consider the issue of damages. The Learned Commissioner then dealt with the issue of pain, suffering and loss of amenities in respect of which the Respondent sought to Cross Appeal. He held, it is submitted correctly, that it ought not to be interfered with. It is respectfully submitted by the Appellant that it is contrary to the practice of the Board to allow the Respondent to challenge this finding in his Cross Appeal.	10
P. 47 Ll. 2-18		
Pp.47-53	16. Thereafter the Learned Commissioner considered the question of loss of earnings to the date of Trial. It is to be observed that he used the rate of exchange of 280 Lire to the Brunei dollar (the accident date rate). Thereafter the Learned Commissioner held, it is submitted correctly,	
P. 47 L.41- P. 48 L. 3	"Another difficulty which has bedevilled us, as it must the Trial Judge, is the unsatisfactory nature of the rest of the evidence as to damages. For example, it is not entirely clear whether the Plaintiff's company paid him anything when he became unable to work by reason of an accident unconnected with his employment".	30
P. 48 Ll. 10-14 P. 49 Ll. 28-30	This, it is respectfully submitted, is a difficulty of the Respondent's own making. In these circumstances the question posed by the Learned Commissioner as to whether the Respondent's failure to call satisfactory evidence to his actual post accident earnings has prejudiced his claim is indeed pertinent. In asking himself where the burden of proof lay the Learned Commissioner correctly directed himself:-	40
	"In the present case it was for the Plaintiff to prove his loss and, since he sought to compare the pre- and post- accident possible earnings, to show what he was now able to earn in his injured state"	50
	Thereafter the Learned Commissioner erred in stating:-	

"The fact that the evidence of the prospective earnings of his business was far from satisfactory does not mean that the Judge was unjustified in doing his best to arrive at a just conclusion."

P. 49
Ll. 32-36

The Appellant submits that in the absence of evidence it is incumbent upon a Judge to draw inferences adverse to the Respondent. Although in general terms the proposition:-

P. 49
Ll. 36-39

10 "Even though the onus was on the Plaintiff to prove his loss it was open to the Defendant to adduce evidence to refute such evidence as the Plaintiff did provide."

may in general terms be correct it is not applicable here as it could not be said to have been practicable for the Appellant to have adduced any evidence as to what a person with the Respondent's disability could earn in Italy.

20 17. Thereafter the Learned Commissioner analysed the evidence relating to the loss of earnings before the trial. It is submitted that the calculations were generous to the Respondent and the reduction of the award by \$93,311.42 was the minimum applicable. More importantly the Learned Commissioner fell into error in failing to consider what the Respondent might have earned had he actively sought employment.

30 18. The Learned Commissioner then went on to consider the problem of future loss of earnings he held, it is submitted wrongly that the calculation of loss of earnings should proceed on the premise of an annual loss of \$144,000.00. It is submitted that this figure is too high for the reasons adumbrated hereinbefore when dealing with the Judgment of the Learned Trial Judge. Thereafter the Learned Commissioner considered the likely future earnings of the Respondent in his present state. He held it is submitted correctly that he would have no doubt that if he had been trying the case at first instance he would have assessed the probable future profit at a higher figure. However he held that he could not say that the Judge was not entitled to find as he did. The Appellant respectfully submits that having held that the figure was too high the Learned Commissioner ought to have substituted his own figure as this was not an issue that depended on credibility.

P.53-59

P. 54
L. 9

P. 55
Ll. 23-26

50 19. The Learned Commissioner considered, it is submitted correctly that the Learned Trial Judge was correct in holding that no award should be

Pp. 55-56

made in relation to pension loss. It is to be observed that had the Respondent given discovery, his contract of employment would have revealed the true position in relation to this. Thereafter the Learned Commissioner considered the question of tax and held, that the Learned Judge below was justified in ignoring the incidence of taxation in the instant case. Again it is submitted that this approach can only be justified if assessment of damages takes place on the premise that divers should be remunerated in U.S. dollars.

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Pp. 56-58

20. Thereafter the Learned Commissioner went on to consider the question of the appropriate multiplier to be applied to the loss of earning capacity which he had held to be \$72,000.00 per annum. He concluded

P. 58
Ll. 30-44

"If my mathematics are correct, the sum of \$936,000.00 awarded by the Judge would be exhausted in the last month of the 25th year. As I would have continued the payments until the 28th year, this supports the view that the Judge's award was slightly on the low side on his assessment of the probable future profits of the Plaintiff's business, possibly because he made a greater discount for the contingencies of life. Whatever the reason, the award was not so low I am disposed to increase it. Equally I am not satisfied the award is so high that it is out of proportion with the loss sustained."

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It is respectfully submitted that in so holding the Learned Commissioner fell into error. The interest alone on the modest rates available in the local financial centre to Brunei, namely Singapore of 7-8% would produce a yield at least as much as the loss of \$72,000.00 per annum for which this capital sum was awarded to compensate. Thus the fund would not exhaust itself and the overall award under this head is too high.

21. Save that the Appeal was allowed in part in relation to loss of pre-trial earnings the Court of Appeal of the State of Brunei affirmed the Order of the High Court and dismissed the Cross Appeal.

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Pp. 60-61

22. By Order dated 8th December, 1982 the Appellant and the Respondent were granted Leave to bring the instant Appeal.

23. The Appellant respectfully submits that this Appeal should be allowed with costs (to include the costs before the Court of Appeal) and that the Orders below be varied by reducing the sums awarded to the Respondent by way of loss of past earnings

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and loss of future earnings to such sum as may be just or that directions may be given for assessment of the same and that the Cross Appeal of the Respondent herein be dismissed with costs (to include the costs before the Court of Appeal) for the following amongst other

R E A S O N S

- (1) BECAUSE the sums awarded by way of such losses were too great,
- 10 (2) BECAUSE the Courts below failed to calculate the sums payable in respect of such losses on the correct principles of law,
- (3) BECAUSE there was insufficient evidence before the Courts below to justify an award of \$233,688.58 in respect of the loss of past earnings,
- (4) BECAUSE the Respondent's losses should not have been calculated in Brunei dollars in the first instance but in Lire or alternatively
20 in United States dollars,
- and
- (5) BECAUSE the Courts below failed to approach the question of loss of future earnings correctly both as to the probable future earnings of the Respondent and as to the size of a capital sum needed to compensate for such loss.

NIGEL MURRAY

