GOW v. MOTOR VEHICLE INSURANCE TRUST.

Recoverability of travelling expenses by the parents of an injured party in a negligence action.

The problem of whether or not parents can recover the cost of travelling expenses incurred in visiting their critically injured infant son in hospital, having been put there by the defendant's negligence, confronted Negus J. in the recently reported case of *Gow v. Motor Vehicles Insurance Trust.*[1]

Michael Gow, a nineteen year old farmer, was seriously injured in a motor accident near his farm, and was removed to hospital in Albany. Because of the likelihood of his death ensuing, the need for parental consent to any necessary operative procedures and the necessity for family support during convalescence, his medical advisers suggested that his parents come to his bedside. At the time Mr and Mrs Gow were living in Melbourne where the father was employed. Michael's parents travelled by air to Perth and then by hire car to Albany. Later it was necessary for Michael to be transferred from Albany Hospital to Royal Perth Hospital, and on this occasion Mr Gow paid his wife's air fare to Perth from Albany so that she could accompany Michael. Still later, the father drove his son's car from Albany to Perth with Michael to visit a Perth hospital for special treatment and then returned to Albany, Michael then being unable to drive.

In the action there were two claims, first that of Michael for general and special damages and second that of his father, the adult plaintiff, for special damages to recompense him for the expenses he had incurred in the fares, hire charges and other travelling costs mentioned above.

In the treatment of the adult plaintiff's claim the only items of special damage allowed were the cost of hiring the car to Albany, his wife's air fare to Perth from Albany and her board during the period spent then in Perth, less a deduction to allow for the amount normally required by the adult plaintiff for his wife's expenses. The cost of air fares from Melbourne and the husband's expenses in travelling between Albany and Perth were disallowed. The reason for this is interesting because Negus J. applied the test of foreseeability to the adult plaintiff's claim. The law was stated thus:

> I think it clear that according to the principles of common law a parent as such cannot recover damages caused to him as a consequence of an injury to his nineteen year old son caused by a wrongdoer unless they are reasonably foreseeable expenses. The

[1] [1967] W.A.R. 55.

> expenses must be such that a parent is legally or morally obliged to pay them.[2]

Dicta of Lord Kinloch in *Allan v. Barclay*[3] and of Lord Atkin in *Donoghue v. Stevenson*[4] were cited to establish this rule, and in analyzing it further it was said:

> I do not think Lord Kinloch's words should be construed as meaning that the wrongdoer could never be held liable for what he described as secondary injuries; but only if they were not foreseeable.[5]

Apparently by "secondary injuries" is meant financial or economic loss done to persons holding relations with the individual, or injuries in the nature of loss of services as opposed to physical injury. By this statement of the law it was clearly assumed that, as long as "secondary injuries" were foreseeable, the loss they caused was recoverable by a parent who was legally or morally obliged to pay them for his injured child.

In the instant case, as a finding of fact it was held that, although it was foreseeable that Michael's parents (or wife, if he had one) should travel from somewhere within Western Australia to his bedside, it was not foreseeable that they would have to come from Melbourne. Hence the air fares were disallowed. Also it was held that although the father acted naturally in leaving Melbourne and later in resigning his job there and taking less remunerative employment in W.A., he acted impetuously in doing so, and his actions could not have been reasonably foreseen. For this reason no allowance was made to the father for loss of wages as general damages.

Interest lies in the assumption mentioned above that a parent can recover for travelling expenses in these circumstances if they are foreseeable. Since *Kirkham v. Boughey*[6] it has been considered that a parent can recover damages for his injured child's medical expenses, but considerable difficulty has been experienced in formulating the legal basis of such recovery.[7] Travelling expenses incurred by the necessity, for medical reasons, to visit an injured infant would appear

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2 Id. at 56.
3 (1864) 2 M. (S.C.) 873.
4 [1932] A.C. 562.
5 [1967] W.A.R. 55, 56.
6 [1958] 2 Q.B. 338.
7 See (1965) 39 A.L.J. 203, where in a note it was mentioned that as a possible basis of recovery there was a choice between (a) an injury to a relational interest—loss of servitium, and (b) action in negligence. Despite certain dicta to the contrary, the per quod servitium amisit type of action was regarded as a more consistent explanation of recovery.

to be in the same category as medical expenses. The prime condition appears to be that the presence of the parents at the bedside was required as part of the medical treatment and not merely a reasonable step which might be foreseen as natural for the parents to take.

It is at this point that *Gow v. M.V.I.T.* represents a different outlook on the law. In *Timmins v. Webb*[8] a somewhat similar situation occurred. Because of an accident caused by the defendant's negligence a severely injured child was shifted from Port Augusta to hospital in Adelaide. The family shifted their home to Adelaide, and the child's stepfather gave up work in N.S.W. and went to Adelaide where he worked at a reduced wage. The stepfather recovered the expense of shifting house, because it was necessary for the child's recovery that his mother visit him frequently and the most economical way of doing so was to shift house. However, the stepfather failed to recover the loss in wages. It was expressly stated that his action in giving up work in N.S.W. was reasonable in the circumstances, but to succeed in his claim he would have to show some legal duty owed by the tortfeasor to himself. This he could not do.

On the other hand, *Gow v. M.V.I.T.* seems to indicate that as long as the loss is foreseeable, that fact itself creates the duty and then all foreseeable damage which may ensue as a result of the tortfeasor's negligence may be recovered by the injured party even if the damage is indirect or secondary in the sense described above.

Care must be taken in analyzing these comments, for they apply only within the sphere of the rather anomalous right of a parent to recover expenses which are necessary as part of his child's medical treatment. Perhaps the difficulty is more easily displayed if this question is posed—what is the nature of the loss for which the parent claims recovery? Essentially it is an economic loss, and as far as he personally is concerned it is not parasitic upon any physical injury to himself or his belongings. By what factor does a parent recover for economic loss? It is no answer to say that foreseeability of financial loss is the test for liability for financial loss, because that wide proposition is met squarely by the decision in *Weller & Co. v. Foot & Mouth Disease Research Institute.*[9] This raises again the problem of

[8] [1964] S.A.S.R. 250.

[9] [1966] 1 Q.B. 569. In this case it was held that, although the purely financial loss caused to the plaintiffs was foreseeable, they could not recover unless they could show that they had a proprietary or possessory interest in something which could foreseeably be physically damaged by the defendant's negligence.

the correct explanation for the legal foundation of the right to recover such expenses, and further illustrates that because there is a special relationship between parent and child this right of recovering expenses is different to the general law.[10]

For this reason it is necessary to treat with caution any interpretation of these remarks which suggests that liability for secondary injury may be determined by foreseeability. These comments were uttered in relation to a special circumstance where not only foreseeability of loss but the existence of a paternal-filial obligation gave rise to liability.

When it came to assessing the claim by the infant plaintiff, Michael, Negus J., following *Wilson v. McLeahy,*[11] included the sum of $200 in the assessment of general damages to enable him to reimburse some of the adult plaintiff's expenses to which he was under a 'filial obligation' to make some contribution. The problem here is that the expenses were not actually incurred by the plaintiff, Michael, and hence he had no loss of which he could complain. Rather than establish a constructive loss as was done in *Schneider v. Eisovitch*[12] by demanding from the plaintiff an undertaking that he will repay his parent these expenses, the decision in *Wilson v. McLeahy* directs that such expenditure should be taken in account when assessing general damages, and that the claim should not be quantified merely by taking the precise amount of expenditure incurred. This practice has not escaped criticism.[13] If in circumstances similar to those in *Gow v. M.V.I.T.* the infant sues by his guardian ad litem and the parent sues in his own right, there seems to be little reason why the parent himself cannot recover the precise amount of the travelling expenses if he can establish that the presence of one or both parents was necessary and foreseeable as part of the medical treatment of the child. If this were possible it would point strongly to the conclusion that the action is

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10 For authority for the proposition that, apart from the action per quod servitium amisit, a party cannot recover for economic loss or injury to an economic interest or expectancy suffered by him as a result of physical injury or damage done to some other by the defendant's negligence, see Simpson v. Thompson, (1877) 3 App.Cas. 279; Société Anonyme v. Bennetts, [1911] 1 K.B. 243. And for a discussion of the effect, if any, of the decision in Hedley Byrne v. Heller, [1964] A.C. 465, on liability for economic loss see Atiyah, *Negligence and Economic Loss,* (1967) 83 L.Q.R. 248.

11 (1961) 106 C.L.R. 523—a decision of a single judge, Taylor J., exercising the original jurisdiction of the High Court.

12 [1960] 2 Q.B. 430.

13 (1965) 39 A.L.J. 203.

founded on a loss of servitium[14] or alternatively on the moral responsibility and obligation of a parent for his child and also would avoid the problem of making an allowance to a person who has suffered no loss.

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[14] That the action per quod servitium amisit, which is criticized by some as being an anachronism, should be called in aid to remedy an anomaly in the modern law may cause surprise, but that same action was defended in another context on grounds equally compelling here. J. G. Fleming in (1959) 22 M.L.R. 682 said of it: '. . . A legal rule may earn its claim to survival, long after the disappearance of the social order which gave it birth, provided it continues to be responsive to current, if novel, needs.'

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BOOK REVIEWS

THE LAW OF THE SEA AND AUSTRALIAN OFF-SHORE AREAS. By R. D. Lumb. Queensland University Press, 1966. Pp. 86. $2.85, paperback edition.

The discovery of natural gas in the area of the Bass Strait, and the presence of oil in the Australian continental shelf have spurred a deeper interest in the law applicable to Australian off-shore maritime areas, particularly the matter of rights of jurisdiction in these areas.

In this book, Dr Lumb has rightly recognized from the outset that the crux of the matter is the precise current legal status of the sea-bed, in the light of recent developments in international law, when examined in relation to the traditional principles of the common law and Admiralty law applying to the sea-shore and to coastal waters. At the same time, upon this there impinge difficulties both of definition and of delimitation so far as concerns the constitutional powers of the Commonwealth and of the States, individually and *inter se*, with regard to the Australian territorial sea and off-shore areas beyond territorial sea limits. Certain of these difficulties appear at first sight almost insoluble in any intelligible sense, and could not have been forseseen when the Commonwealth Constitution was originally drafted in the era of the sacerdotal maintenance of the three-mile territorial sea belt. There have been fundamental changes as a result of the Conventions concluded at the Geneva Conference of 1958 on the Law of the Sea, recognizing *inter alia* that the coastal State has sovereign rights of an exclusive nature for the purpose of exploring and exploiting the natural resources of the continental shelf, and may have certain rights of control in a contiguous maritime zone up to a limit of twelve miles from the baselines from which the breadth of the territorial sea is measured.

Particular problems arise with regard to the reconciliation of the jurisdiction of the Australian States at common law with the new rules of international law governing the exploration and exploitation of the sea-bed.

The first part of the book is devoted to the international law position concerning the law of the sea, considered in close relation