Dyg Julia Bte Moksin	**…**	**1st Appellant**
Awang Zaini Bin Hj Abdul Rahman	**…**	**2nd Appellant**

AND

Saurabh Bir Gurung (an infant, suing by his father and next friend, GANGA GURUNG)	**…**	**Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 14 of 2007)

Power, P; Mortimer and Davies, JJ.A.
25th November, 2008.

Plaintiff aged 9 years a passenger in motor vehicle accident. Severely injured causing serious life long disability. No evidence from which the judge could infer that he was not wearing seat belt. In any event inappropriate to find contributory negligence against child of this age. Future lifetime loss of earnings award not too speculative. Since Wells v Wells in H of L 18 years multiplier not too high. Child now settled in UK from Nepal. Future loss on U K scale appropriate. Tax ought to have been taken into account but judge could not do so in the absence of evidence. Future cost of care from mother not overlapped with general award for future care. Failure to plead particulars under Order 18 r 11 as required but defendant not taken by surprise and not prejudiced. Award of interest on special damages at 3% and on general damages for pain and suffering and loss of amenity at 6% from time of accident to date of judgment affirmed in this jurisdiction. *Jefford v Gee* considered. Appeal against judge's award dismissed.

Mr. Kelvin Lim Boon Khai of Messrs. K. Lim & Company for the Appellants.
Mr. Vincent Joseph and Ms Subrina Tan of Messrs. Sandhu & Co. for the Respondent.

Cases cited in the Judgment:

British Transport Commission v Gourley [1956] AC 185.
Moeliker v A.Reyrolle [1977] 1 All ER 9 (CA).
Page v Sheerness Steel Company PLC.
Thomas v Brighton Health Authority [1999] 1 AC 345.
British Transport Commission v Gourley [1956] AC 185
Paul v Rendell [1981] 34 A.L.R. 569.
Jefford v Gee [1970] 2 Q.B. 130.
Tobishima Corporation Sdn Bhd v Ernesto Gualisto Pellogo Jr [2002] BLR 317 (CA).

O.18 r.11 (1B) (b) RSC

Mortimer, J.A.:

A preliminary point

At the outset of the hearing counsel for the appellant asked to be allowed, when presenting his argument, to have a computer link to Singaporean counsel who was sitting behind him in the body of the court. The intention was that Singaporean counsel would assist him in presenting his case. We rejected this request to be allowed to have such a link as it was, we were told, with counsel who had been refused admission to appear in this matter. To allow it was, we are satisfied, in breach of the spirit of the order refusing him leave to appear in this appeal.

The decision below

The plaintiff was 9 years old when on 20 December 2000 he suffered the most serious injuries as a passenger in a motor accident. He sues by his father and next friend Ganga Gurung. The plaintiff was sitting in the rear near side passenger seat in a car driven by the third defendant along the Seria to Muara highway. At the junction with the road leading to Tutong the third defendant pulled into the offside lane ready to turn right to Tutong. He was following another car driven by a friend. When the traffic lights turned in their favour he followed the other car by turning right across the oncoming highway. The defendant, who was driving along the oncoming highway, continued across the junction against the lights and struck the third defendants car on the near side where the plaintiff was sitting.

The plaintiff's injuries

The plaintiff sustained the most severe injuries which have left him with massive disability. On these the judge's undisputed findingswere as follows:

> *"The Plaintiff's Injuries*
>
> *As a result of the collision, the plaintiff suffered severe head injuries, including post traumatic hydrocephalus, a fracture of the left ulna and the radius, a fracture of the right clavicle, third nerve palsy with papillary involvement, extropia and ptosis of the eye, with consequent disfigurement, diplopia of the eye in all directions and loss of vision,; 80% of the left eye and 10% of the right.*
>
> *As a result of his injuries, he walks with a limp and a clumsy gait. He is unable to squat or stand on one leg alone easily. He had left spastic hemiparesis; pronounced weakness in the left upper and lower limbs, especially the left forearm and wrist and fingers with a limited range of motion in the lower and upper limbs. His brain injuries have resulted in diminution of his cognitive, memory, speech and motor skills. He suffers from neck pain and tender trigger points in the neck shoulders and temples.*
>
> *The evidence that I accept is that the plaintiff is suffering from severe depression and that this condition is likely to persist. Mr Lee submits that it is likely that, if the plaintiff had received treatment as recommended for his*

depression, it might not have developed. The evidence is that this might have helped; one cannot say. The fact of the matter is that the plaintiff and his parents had a great deal to cope with in trying to help the plaintiff recover and they concentrated on the plaintiff's physical problems. I cannot say that they were wrong to adopt this approach. No doubt, the plaintiff's depression was linked to his physical disabilities and, if these could be alleviated, this would have helped his mental condition.

The plaintiff did not give evidence but I spoke to him briefly. It was obvious that he walked awkwardly and had a pronounced weakness of his left side. I could see that the dropping of his left eye gave him an unfortunate appearance.

The evidence that I accept is that the plaintiff is doomed to an unfulfilling life of depression, joylessness and apathy. The plaintiff's injuries have resulted in this condition being more or less permanent. He will be unable to look after himself, requiring lifelong supervision and care."

This is the background to the judge's award.

Liability and quantum

The judge held both drivers liable. The first defendant was held liable to the extent of 95% and the third defendant 5%. The judge made no finding on the allegation of contributory negligence against the plaintiff for his failure to wear a seat belt.

The judge awarded substantial damages to the plaintiff under the following heads:

Heading	***Award***
General damages for pain and suffering and loss of amenities arising out of the head injury, on the basis of Keasberry v Rahman (1995) 1 JCBD, where the injuries were a little less serious	*$160,000*
Third nerve palsy	*$14,000*
Fracture of the left ulna and radius	*$25,000*
Fracture of the right clavicle	*$16,000*
Loss of vision	*$60,000*
Diplopia, ptosis, squint and disfigurement	*$25,000*
Multiple scarring	*$15,000*
Severe depression	*$50,000*
Total	***$365,000***

Additionally, he was awarded damages for loss of earnings, loss of future care, his mother's loss of employment to care for him, as well as various other sums by way of special damage. The various totals are as follows:

Heading	***Damages***
Loss of earnings	*$2,445,365*
Cost of future care	*$514,332*

General damages	*$365,000*
Loss of Income	*$80,000*
Agreed special damages	*$4775*
Cost of travel	*$6594*
Total	***$3,416,066***

The Appeal

The first defendant appellant does not challenge liability but appeals the following:

1. The failure to find contributory negligence for the plaintiffs failure to wear a seat belt and consequently for failing to reduce the total damages by about 15%.
2. The award for future loss of earnings.
3. The award of $80,000 for his mother's part in caring for the plaintiff in the future.
4. The award of interest. The defendant submits that the interest on general damages ought to have been awarded from the date of the Writ and not from the date of the accident.

We turn to consider these issues.

Contributory negligence

It is well settled that a failure to wear a seat belt which results in more severe injuries amounts to contributory negligence with a conventional reduction of 15% in the total damages awarded.

However in this case there was no evidence whether the plaintiff was wearing a seatbelt at the time of the accident. But Mr. Lim, who appears for the defendant, says the judge ought to have inferred that he was not wearing a belt from the injuries he received. We are unable to accept this submission. The plaintiff was a back seat passenger sitting near the point of impact. No medical expert nor any other witness was able to infer from these injuries whether or not a seat belt was worn. For the judge to infer that it was not being worn would be quite unsafe. We are unable to accept this submission.

Mr. Lim goes further. He suggests that a passage in counsel for the plaintiff's closing submissions accepts that the plaintiff was not wearing a seatbelt. The passage relied upon reads:

> *"it is humbly submitted that given the fact that the infant plaintiff was a passenger in the third defendant's,…. car and he had played no part in the manner in which the car in which he was a passenger was driven at the time of the said collision, he was thus an "innocent passenger" and thus entitled to claim on 100% liability against the first defendant notwithstanding the fact that the third defendant may also have been guilty of some negligence contributing into the accident…"*

We are unable to construe any relevant admission in this passage.

This ground of appeal must fail. There was no evidence from which it could be implied that the plaintiff was not wearing a seatbelt and the judge was amply justified in making no reference to this allegation.

Loss of future earnings

Mr. Lim takes a number of separate points. In the first he submits that this award is too speculative having regard to the plaintiff's age. He contends therefore that no award of this kind should be made. The proper approach he suggests is to compensate the plaintiff for his future loss of earning capacity.

At trial the plaintiff was sixteen years old. On the judge's finding that he would not have started earning until he was 21. No authority has been put before the court to support the above contention whereas there are many decided cases where future loss of earnings have been awarded to children much younger than the plaintiff. See for example: *Thomas v Brighton Health Authority* [1999] 1 AC 345. (See *Wells v Wells* and the two other appeals decided at the same hearing.)

We are unable to accept that the plaintiff's loss should be compensated by an award for 'loss of future earning capacity' as we understand Mr. Lim's use of the term. Different jurisdictions apply different meanings to "loss of future earning capacity". Often the term includes compensation for loss of future earnings but Mr. Lim uses the term in the way understood in the English courts. See *Moeliker v A.Reyrolle* [1977] 1 All ER 9 (CA). In this sense the award is made where a plaintiff continues in the same employment after his injury because of the disability is no longer as competitive in the labour market, so that if he loses his employment in the future he is likely to have difficulty in obtaining new employment. Because of the uncertainties involved in this situation the awards are usually modest. Such an award in this case would not properly compensate the plaintiff who is unemployable and will suffer a lifetime's loss of earnings.

There is no doubt that an award for future loss of earnings is an appropriate and proper way to compensate a plaintiff who has been seriously injured as a child.

In any event that Mr. Lim contents that the 18 year multiplier selected by the judge is too high. Such a multiplier over compensates the plaintiff, he says, because it does not properly take into account the many future uncertainties involved in assessing the level of employment which the plaintiff would have attained in the absence of the accident. Also, it fails to take properly into account the five years accelerated payment of this future loss.

Mr. Joseph, appearing for the plaintiff, suggests that the 18 year multiplier is modest in the particular circumstances of this case. He cites the House of Lords' decision in *Wells v Wells* to which we have referred. For many years lump sum awards for future loss were discounted for accelerated payment in the English courts by between 4% and 5%. The aim is to provide a lump sum which, if invested without risk and drawn down (both interest and capital) continuously for the period of the loss, will be exhausted at the end of that period. The House of Lords decided that in present circumstances the 4% to 5% discount led to under compensation and it reduced the

conventional discount to between 21/2% and 3%. The practical effect is that since 1999 the courts apply higher multipliers of up to 26 years in appropriate cases.

The two cases decided at the same hearing with *Wells v Wells* provide useful examples. In *Thomas v Brighton Health Authority* and plaintiff was 6 years old when injured with a life expectancy to the age of 60. The appropriate multiplier was held to be 26.58. In *Page v Sheerness Steel Company PLC* the plaintiff was 24 years old. A 24 years multiplier was held to be correct in his case. He had normal life expectancy but because of the dangerous nature of his work there was a substantial risk that he would not have been able to continue working in that job until he was 62.

In the instant case the plaintiff has a normal expectation of life so account had to be taken of an additional acceleration of payment over the five years before he would have started earning. If compensation for his anticipated loss in the United Kingdom is appropriate, it must also be appropriate to discount the lump sum at 3%. If this is done the 18 years multiplier does not overcompensate the plaintiff when compared with recent awards *Wells v Wells* included. It represents a modest award.

The United Kingdom or Nepal

At the time of the accident the plaintiff was living Nepal. He was in Brunei on a visit. When he had recovered sufficiently he returned to Nepal where he lived until shortly before the trial. By the time of the trial however his family had moved to live in the United Kingdom. His father had retired as a sergeant in a Gurkha Regiment in the British army. As such he and his family have the right to live and work in the U.K.

As the plaintiff was living in Nepal at the time of the accident and for a considerable time thereafter, Mr. Lim submits that the damages for future loss should be assessed on the basis that the plaintiff will earn and live in Nepal. If this is correct the low wages and inexpensive living in Nepal would result in a much smaller award for future loss.

There is no suggestion that either the plaintiff or his father chose to move to the UK in order to increase the potential loss which could be claimed. It is not in dispute that the plaintiff intends to stay in the UK and, in the absence of the accident, would have pursued a career there. No doubt until shortly before trial the defendants anticipated that the loss would be calculated on a scale appropriate to conditions in Nepal. Now that it is clear that he lives in the UK and that his loss will be sustained there, to calculate the damages on any other basis would be unjust. The plaintiff is entitled to be compensated for the actual loss he is able to prove which is on the U.K. scale. The defendants' argument to the contrary cannot be sustained.

However, Mr. Lim advances two more related arguments. He submits that the plaintiff should not be permitted to pursue his claim on the UK basis first, because the defendant was taken by surprise at trial on the point, and secondly, because the loss of future earnings in the UK is not pleaded.

The failure to plead future loss of earnings. Was the defendant taken by surprise?

Order 18 r 11(c) and (1c) provides:

> *"(1A) Subject to paragraph (1B), a plaintiff in action for personal injuries shall serve with his statement of claim –*
>
> *(a) a medical report; and*
> *(b) a statement of the special damages claimed.*
>
> *(1B) Where the documents to which paragraph (1A) applies are not served with the statement of claim, the Court may –]*
>
> *(a) specify the period of time within which they are to be provided; or*
> *(b) make such other order as it thinks fit (including an order dispensing with the requirements of paragraph (1A) or staying the proceedings).*
>
> *(1C) For the purposes of this rule –*
>
> *"medical report" means a report substantiating all the personal injuries alleged in the statement of claim which the plaintiff proposes to adduce in evidence as part of his case at the trial;*
>
> *"a statement of the special damages claimed" means a statement giving full particulars of the special damages claimed for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights)."*

Without question this rule requires that particulars of future loss of earnings to be both pleaded and particularised unless an order to the contrary is made under O18 r11 (1B) (b). It was not particularised in this case. What is the effect of the failure now?

Turning first to Mr. Lim's contention that he was taken by surprise by the fact that the plaintiff was then residing in England and claiming for loss at the UK level, we are surprised by this contention because, as has been pointed out by Mr. Joseph, on 23rd July 2007 the plaintiff's solicitors wrote to the defendant's solicitors informing them that *"our client is currently in the United Kingdom".* This was followed on 16 August 2007 by a further letter saying *"our clients are permanently based in the United Kingdom"*. In the meantime on 8 August 2007 the plaintiff had filed a hearsay notice including a document setting out average earnings in the U K. On 18th August 2007 the defendants agreed the relevant part of the hearsay notice.

Lastly on this point, on 23rd August 2007 the advocates for each party signed a document of agreed facts. Under *"loss of future earnings"* the parties agreed that *"as a result of these injuries and disabilities, he had suffered loss of the future earnings, the quantum of which is to be determined by the court."*

As the trial did not start until 27 August 2007 we are satisfied that the defendant was not taken by surprise by the allegation of future loss of earnings or the fact that the plaintiff was residing in the UK and would suffer his future loss of earnings there.

At trial no objection was taken by counsel for the defendants either on the basis of surprise or the failure to particularise future loss. Nor was any objection taken to the document specifying average loss of earnings when it was put in front of the judge for his consideration. Bearing in mind this history we are satisfied that it is not open to counsel for the defendants to complain at this stage of being taken by surprise, nor has he established that his clients were in any way prejudiced by the failure to properly plead the future loss as required under O.18 RSC.

The question remains however as to what action, if any, this court should take for the failure to plead the loss in accordance with the rules. We do not in any circumstances condone laxity in pleading. The rules of pleading are there to be obeyed and serve the vital purpose of informing the other party of the allegations and identifying the issues to be tried. Pleadings may be amended at any stage of the trial including if necessary during appeal.

However, we note the provision in O.18 r.11 (1B) (b) which permits the court in certain circumstances to dispense with these particulars. As we are satisfied that the defendants have not been prejudiced by the plaintiff's failure and that ordering that the particulars be dispensed with (as we would be inclined) or ordering an appropriate amendment to comply with the rules would waste costs and serve no purpose we will take no further action. Consequently this is not a matter on which the defendants can succeed.

The effect of taxation on future loss

The defendants next submit that the judge's award was excessive because he failed to take into account the effect of taxation. In England it is well settled that loss of future earnings is calculated on estimated wages net of estimated taxation and deductions. See *British Transport Commission v Gourley* [1956] AC 185. As the Privy Council remains the final court in this jurisdiction we would normally follow English authority. Nevertheless we note that in England, as well as elsewhere, the difficulties occasioned in the practical application of the principle in *Gourley*'s case have been widely debated. The English approach has not found favour in some other jurisdictions including Australia and Canada.

Some of these difficulties were discussed by the Privy Council in *Paul v Rendell* [1981] 34 A.L.R. 569. If the multiplicand for loss of earnings is taken net of income tax Lord Diplock giving the advice of the Committee pointed out

> *"That logic requires that if the pre-accident earnings used for the purpose of calculation are net earnings after deduction of tax, and the notional income from the notional investment needed to produce the notional annuity should also be treated as subject to income tax on the interest element involved, the notional income left after deduction of that tax should alone be treated as available to replace the pre-accident earnings."*

These considerations may require examination by this court at sometime in the future but do not arise in the instant appeal. No submissions on the incidence of taxation were made to the judge, nor was any evidence put before him which he could take into account in his assessment.

It is quite impossible for a judge to take into account the incidence of tax in these circumstances in the absence of evidence and assistance from counsel. Although it cannot be known, the overall effect upon the proper award may not be great. In this context a passage in the advice of Lord Diplock in the above case is worth noting:

> "*To undertake detailed mathematical calculations in which nearly every factor is so speculative or unreliable in order to assess the capital sum to represent what is only one of several components in a total award of compensation for personal injuries, is, in their Lordships view, not only not worthwhile but, worse than this, it has a tendency to mislead."*

For these reasons the judge's assessment cannot be disturbed for failing to take tax into account.

The award for future care provided by the plaintiff's mother

Mr. Lim challenges this award first, on the basis that this claim, although pleaded in the statement of claim was not particularized under Order 18 r11, secondly, because it provided double compensation for the plaintiff, as it overlapped with the award of $514,332 for future care, and thirdly, he contends that the multiplier of eighteen years is too high.

Again, there is no doubt that the cost of future care provided by the mother ought to have been pleaded. Again, there is no doubt that this issue, including the level of wages the mother was losing, was in front of the judge and known to the defendants. See the statement of claim and the document suggesting agreed facts provided on the plaintiff's behalf. The details were not agreed by the defendants but are clearly set out in the document.

No objection was taken to this evidence at trial and the defendants were not prejudiced by the failure to plead further particulars in any way. For these reasons we would be prepared to make an order dispensing with this pleading under rule (1B) (b) of Order 18 r 11 but at this stage such would serve no useful purpose.

The award of over $500,000 for future care was calculated on the basis of it being provided for three hours per day. This immediately begs the question concerning the care to be provided for the plaintiff for the balance of each 24 hours. This is provided by his mother and is not compensated for in the other award. It is not an overlap nor is the plaintiff being overcompensated.

Turning to the eighteen years multiplier, no doubt it can be argued with some force that if this simply were compensating for the loss of mother's wages it would be too high. But that is not to the situation. The plaintiff requires care for the rest of his life, and serious though the injuries are, his life expectancy is unaffected. In all the circumstances $80,000 is a modest sum with which there is no reason to interfere. If the time comes when mother can no longer provide this day long care it must still be provided.

Interest on general and special damages. From the date of the accident or the date of the service of the writ?

The judge awarded interest on the special damages at 3% and the general damages for pain suffering and loss of amenities at 6% from the date of the accident until the date of the judgment. Thereafter he awarded interest on the judgment debt at the judgment rate.

Mr. Lim submits that this is wrong. The judge should have awarded interest not from the date of accident but from the date of the issue of the writ. He cites *Jefford v Gee* [1970] 2 Q.B.130, the English authority which has been followed there for many years, and invites us to follow it.

The principle for the award of interest is not in dispute. Interest is awarded from the date when a party has been kept out of his money. This is not always easily ascertained and views can differ. The passage he relies upon is at page 174:

> "When *the compensation payable to a plaintiff is not for actual pecuniary loss but for continuing intangible misfortune, such as pain and suffering and loss of amenities (which cannot fairly be measured in terms of money) then he should be awarded interest on the compensation payable. But such interest should not run from the date of the accident: for the simple reason that these misfortunes do not occur at that moment, but are spread indefinitely into the future; and they cannot possibly be quantified at that moment, but must of necessity be quantified later. It is not possible to split those misfortunes into two parts; those occurring before the trial and those after it. The courts always awards compensation for them in one sum which is by its nature indivisible. Interest should be awarded on this sum as from the time when the defendant ought to have paid it, but did not: for it is only from that time that the plaintiff can be said to have been kept out of the money. This time might in some cases be taken to be the date of letter before action, but at the latest it should be the date when the writ was served…… from that time onwards it can properly be said that the plaintiff has been out of the whole sum and the defendant has had the benefit of it. Speaking generally, therefore, we say that interest on this item (pain and suffering and loss of amenities) should run from the date of service of the writ to the date of trial."*

These are powerful reasons for determining the appropriate date when the plaintiff has been kept out of his money and suggest that interest should commence at the date of service of the writ. For only then has the claim been quantified and notified to the defendant. The desirability of unanimity of approach in common law jurisdictions is recognized but local circumstances may dictate otherwise.

Jefford v Gee was considered by this court in *Tobishima Corporation Sdn. Bhd. v Ernesto Gualisto Pellogo Jr* [2002] BLR 317 (CA). But, in two respects this court differed from the English case. First, interest should be awarded upon general damages for pain and suffering and loss amenities as well as upon special damages from the date of the accident or injury rather than the service of the writ. Secondly, that these awards should be to the date when judgment is delivered rather than the date of trial.

In the latter case Cons JA, with whom the other members of the court agreed, said at page 321 H to 322 A :

> *"……. Jefford v Gee [1970] 2 QB 130 remains of great persuasive authority and for my part I find sufficient force in the reasons propounded by Lord Denning for his conclusion as to special damages to persuade me that it should, as a general rule, be adopted here. I see nothing in local circumstances to make me think otherwise. But I would, with due respect, add one small refinement, that the interest should run until the date of judgment rather than the date of trial. There is, on occasion, a not inconsiderable time between the commencement of the trial and the date when judgment is actually delivered.*
>
> *The position is different with regard to interest upon damages for pain and suffering and loss of amenities. Social conditions in Brunei Darussalam are not the same as those in England. Moreover we understand that, in particular with regard to victims of traffic accidents, who must comprise a large proportion of those who claim for personal injuries, there are substantial difficulties in ascertaining the identity of the potential defendants. In my view it would therefore be appropriate here to accept, as a general rule, that interest under this head should be awarded from the date of the accident to the date of judgment."*

Brunei courts have generally followed this practice since and we have heard no suggestion that local conditions have changed which would justify this court in reviewing its earlier decision. There is considerable benefit to practitioners and parties alike to have the present certainty in the periods for awards of interest. There is, therefore, no good reason to disturb the present practice and we decline to do so.

Conclusion

For the reasons we have set out this appeal is dismissed.

Order

1. The appeal is dismissed.
2. There shall be an order nisi that the appellants pay the costs of the appeal to be taxed if not agreed. The said order to become absolute at 9.00 am on Thursday 27 November unless application is made to the court.

Power, P.

Mortimer, J.A. **Davies, J.A.**