PARTIES:	FORD, Douglas Kenneth
	v
	RASANAYAGAM, Ronald Thuraisinigham (also known as RONALD RASA)
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT (NT)
FILE NO:	98 of 1990
DELIVERED:	Darwin 14 January 1993
HEARING DATE:	14 December 1992
JUDGMENT OF:	Martin J.

CATCHWORDS:

Negligence - Negligence of particular parties and as between parties in particular relationships - Medical negligence - Negligent treatment by eye specialist -

Damages - General Principles - Assessment of -

Negligence - Apportionment of responsibility and damages - Assessment of damages for future effect of injury - To do so in terms of degree of probability of those events occurring -

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 at 643, applied.

Damages - General Principles - Assessment of damages for future effect of injury - To do so in terms of degree of probability of those events occurring -

Malec v J C Hutton Pty Ltd (1990) 169 CLR 638 at 643, applied.

REPRESENTATION:

Counsel:
Applicant: J Reeves
Respondent: -

Solicitors:
Applicant: David Francis & Associates
Respondent: -

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 98 of 1990

BETWEEN:

DOUGLAS KENNETH FORD
Plaintiff

AND:

RONALD THURAISINIGHAM RASANAYAGAM (also known as RONALD RASA)
Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 14 January 1993)

The plaintiff claims damages from the defendant for negligence arising from the defendant's treatment of the plaintiff's left eye during late 1989 and early 1990. Shortly before the dates fixed for hearing, the solicitors for the defendant were given leave to cease to act on his behalf, his last known address then being in Saudi Arabia. There is evidence clearly showing that the defendant was aware of the dates which had been set down for the hearing. The matter proceeded in his absence.

The defendant admits by his defence that at all

material times he was a legally qualified medical practitioner carrying on his practice at Darwin and that he held himself out as an eye specialist offering and providing specialist surgical procedures for members of the public. He further admits that he was retained by the plaintiff in November 1989 in his capacity as an eye specialist for reward to provide the plaintiff with proper advice regarding the necessity or otherwise for the plaintiff to undertake surgical procedures to remove a pterygium growth from his left eye. He also admits that on 11 December 1989 he carried out surgery to excise pterygium growth on the plaintiff's left eye at his surgery, but denies all allegations of negligence made by the plaintiff in respect of that surgery, and denies that he further operated on the same eye on 20 December 1989 and early January 1990. It is clearly established on the evidence of the plaintiff that those subsequent operations did take place.

The expert medical evidence contained in the report of Mr David Crompton, specialist ophthalmic surgeon of Adelaide, describes pterygia as being lesions of the cornea which sometimes grow across from the nasal side, but not often encroach on the visual axis. When they do so, they may affect vision and thus excision of pterygium is sometimes necessary to try and avoid visual loss. According to Mr Crompton, pterygium is a lesion best left alone unless there is some very good reason to interfere. There was nothing to suggest that the plaintiff's vision had been

effected by any pterygium which may have grown in his left eye. The following particulars of negligence are made out upon the expert opinion contained in the report of Mr Crompton, and in reports of Mr Mahmood an ophthalmic surgeon of Darwin:

1. The first operation was not warranted at the time because the pterygium growth was not of a sufficient size to require surgical removal and because there was no reasonable expectation that the pterygium growth would in the immediate future grow to a sufficient size to warrant its removal.

2. The incision made by the defendant during the first operation was too deep, thereby causing a severe keratectomy resulting in distortion of the surface of the plaintiff's left cornea.

3. The second operation was unnecessary and recklessly undertaken by the defendant as was the third.

The following particulars of negligence are made out upon the combination of the evidence of the plaintiff and of the specialists.

1. The operations were performed by the defendant whilst he was so under the influence of alcohol or

some other drug that he was incapable of exercising proper care and skill whilst performing the operations.

2. Whilst performing the operations the defendant was in an agitated state such that he was unable to perform the operations in a proper and professional manner.

3. The defendant failed to perform the operations in an expeditious manner thereby causing the plaintiff unnecessary pain and suffering.

4. The defendant failed to commence the operations within a reasonable period after the application of pain killing medication to the plaintiff, thereby causing him unnecessary pain and suffering.

There is no doubt that the defendant acted negligently towards the plaintiff. He carried out surgery on his left eye which was unnecessary and performed that surgery and related procedures badly, such that the plaintiff suffered much pain and suffering during the course of the surgery on each occasion, lacked sufficient vision in his left eye thereafter as to cause him to lose his income for a period of over five months and leave him with a disorder which may require attention in the future.

The plaintiff is now almost 41 years of age, spent some early years in Melbourne, Adelaide and New Zealand, returning to Australia when he was 18. He did not progress beyond third year at high school. In late 1972 he obtained his first permanent job as a miner and has been in that field of industry continuously since. He has always worked underground and has developed expertise in the use of explosives in mining operations underground over the past 20 years. He obtained his current employment in 1988 at a mine south of Darwin. Underground working conditions are not good with diesel fumes, dust, high humidity and body sweat making life fairly uncomfortable. For all that, the plaintiff does not wear glasses or goggles and it is rare to see anybody else do so because of the difficulty coping with the perspiration.

Prior to January 1989, the plaintiff had no relevant heath problems or disabilities except for the occasional foreign objects in his eyes for which he had occasionally been to a doctor to have them removed.

His general practitioner in Darwin first referred him to the defendant in 1988 when the defendant carried out some minor procedures on the plaintiff's right eye which were quite successful. In late 1989 the plaintiff returned to see him again and was advised that there was a pterygium in his left eye which should be removed. The first operation for that purpose was undertaken at the defendant's

surgery on 11 December 1989. Drops were placed in his eye; he understood that to be for the purposes of anaesthetising it, but it was a considerable time before the operation on the eye commenced. In the meantime the defendant and his wife had been visibly agitated and arguing amongst themselves and it seemed to the plaintiff that the defendant was affected by alcohol or drugs. By the time the defendant commenced the procedure the effect of the drops had worn off. He put more drops in the plaintiff's eye and then proceeded to inject it, but that was very painful and the plaintiff says that he was in extreme pain during the whole course of the operation. He said that he thought he was "going to die" and that it was "like torture". After the surgery to the eyeball, the defendant proceeded to cauterise the wound. The plaintiff was again in much pain, told the defendant to stop, but he would stop and go ahead and did that on a number of occasions. The plaintiff described the pain as being terrible and intense and said that he became hysterical. After the procedures were all completed his eye was bandaged, he was given a prescription for ointment to go on it, and for pethidine for the pain. The pain continued, and after removing the pad which had been placed on his eye some hours later, he could see nothing out of it.

The plaintiff returned to see the defendant on the following day and told the defendant that he was unable to see, but the defendant replied that he was unable to understand why that should be so. He received no

explanation prior to the operation as to what risks might be involved and in particular he said that he had not been told about the possibility of his losing his sight. He returned again within a day or two when the defendant carried out a further operation. Drops were placed in the plaintiff's eye, he did not have to wait so long for the procedure, but the plaintiff observed that the defendant still smelt as if he had alcohol on his breath and that he appeared to be agitated. The wound was cauterised again and the plaintiff found that to be very painful as well, although it only lasted for a short time. That procedure availed the plaintiff nothing and he returned a little later and underwent a third operation much the same as the second and with the same result, pain and no improvement in vision.

The plaintiff then went to see Mr Mahmood in Darwin who carried out a number of tests on his eye and told him what was wrong with it. He went back to see the defendant, who still indicated he could not understand why the plaintiff had no vision in his eye. After the plaintiff had informed the defendant that he had been to see Mr Mahmood, the defendant carried out some of the tests which he had not carried out previously, but which seemed to be similar to those undertaken by Mr Mahmood, and then said that he could see what had gone wrong and expressed himself confident that the eyesight would be restored. The plaintiff then saw a number of people to whom he was referred with a view to improving the vision in his left

eye. There were suggestions that he should wear contact lenses with a view to correcting the astigmatism which was induced by the negligently performed operation. The left cornea was rendered irregular and thin in places. In all, the plaintiff was absent from his employment from 11 December 1989 to 20 May 1990, during which time his sight was gradually restored. His complaints at the time of the hearing were that it seemed to him to be rough and that made it difficult for him to remove foreign objects from it and his tear ducts did not seem to perform their function as they did before. The eye gets bloodshot and it hurts in strong sunlight. Swimming pool water causes the eye to sting. He presently puts drops in the eye every day and night and sees Mr Mahmood every six months. He may or may not need to have further surgery to the eye, that depending upon whether or not his vision deteriorates, and the experts are unable to say at this stage what is likely to happen. He had planned to keep working as a miner until aged 60, but that would not be possible if he lost the sight in his eye. His time off work does not seem to have inhibited his progress with his current employer as he has been promoted since returning.

As to his loss of earnings, the plaintiff worked regular shifts which over a period of four weeks returned him an average of $3,765.55. For the period of his absence from work, 11 December 1989 to 20 May 1990, his loss of income amounts to $21,651.91. By his own estimation he has

also been out of pocket for the following items:

To attend at Brisbane causing loss of wages for examination by Professor Hirst, at the request of the defendant	$ 900
Attending at Adelaide to be examined by Dr Crompton and obtain the doctor's report:	
airfares	$ 645
taxis	20
accommodation	98
meals and incidentals	100
loss of wages	300
Mr Crompton's fees	3,000
For attendances at Adelaide on three other occasions in relation to consultations for contact lenses and examinations and general expenses	500
(His fares and accommodation were paid for)	
For pethidine eyedrops and other drugs prescribed by Dr Rasa	300
For Mr Mahmood's report	200
	$6,063

It is not clear on the evidence whether some of those expenses, particularly those of the medical experts, should properly be categorised as damages or costs. However, the plaintiff has sworn that he has paid those amounts. In so far as they are estimates only, they do not appear to be unreasonable and there is no reason why they should not be allowed in his favour as part of his damages.

An assessment of a fair amount for pain, suffering

and loss of amenities is difficult. There can be no doubt that during the period his eye was being operated upon by the defendant he suffered excruciating pain and that it took sometime for that to diminish on each occasion. He has suffered the disability of loss of sight whilst the blindness gradually improved over a period of five months. His evidence as to his past general disabilities with the eye which are continuing and which might be expected to continue is set out above. A figure of $15,000 for past pain, suffering and loss of amenity of life will be allowed, and $5,000 for the future.

He will have a continuing need for eyedrops ($99.60 per annum); loss of wages upon his periodic attendance upon the eye specialist each six months ($400 per annum) and will incur the specialist's fees ($105 per annum). That amounts in all to approximately $11.60 per week. The lump sum value of a payment of a $1 per week for a 40 year old man ceasing at death on the 3% tables totals $1,078, giving a result of $12,504.80. However, an allowance should be made in favour of the defendant to take into account that there will be no loss of wages to the plaintiff after his anticipated retiring age of 60, and that sum will therefore be reduced to $11,000.

Mr Crompton expressed the opinion that it was quite possible that the sight of the plaintiff's left eye will continue to change, if that occurred it would tend to

cause him to lose binocular vision, and because of his occupation it is unlikely he would be able to wear ordinary spectacles or corneal lenses. There is a risk, therefore, that his ability to perform his usual employment may be lost at some indeterminate time in the future.

There is nothing in the evidence to demonstrate the probability of the plaintiff requiring to undergo further surgery to correct any future interference with his vision brought about as a result of the defendant's negligence. Reference has already been made to Mr Crompton's opinion regarding the difficulties which will arise if the plaintiff's sight in his left eye continues to change. Current opinion is that the sight in that eye had returned to its pre-operative level by the time he resumed work. Mr Mahmood does not touch upon the future in his reports, except to say that the long term prognosis for the plaintiff is uncertain and will depend on the total capacity of his cornea to remodel and the resultant residual astigmatism. There is, however, a risk of loss due to unemployment in the future, the time and circumstances in which it may occur and the amount of that loss is impossible to predict. As was pointed out by Dean, Gaudron and McHugh JJ. in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at p643: "Questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing

damages, it can only do so in terms of the degree of probability of those events occurring". They go on to show how the probability may be very high or very low. In this case the only evidence upon which the Court can rely is the assessment of Mr Crompton that it was "quite possible" that the plaintiff's sight in the left eye will continue to change in such a way as may eventually lead to his not being able to continue his current employment. An award of $20,000 will be allowed under this heading.

The plaintiff claims interest. As to the award for past pain and suffering and loss of amenities of $15,000, the appropriate allowance is at the rate of 4% for a period of approximately 3 years, amounting to $1,800.

As to special damages, the bulk of them seem to have been incurred commencing in early 1991 and interest on them will be allowed at the rate of 12% for a period of 2 years amounting to approximately $1,440.

On past loss of earnings in the sum of $21,651.91, interest will be allowed at 12% for the period since the plaintiff returned to work, approximately 2¾ years, approximately $7,160.

Judgment for the plaintiff against the defendant in the sum of $89,114.91 including interest.