[2012] JMCA Civ 50

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 24/2010

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN **COURTS JAMAICA LIMITED** **APPELLANT**

AND **KENROY BIGGS** **RESPONDENT**

Lowell Morgan and Mrs Kerry-Ann Sewell instructed by Nunes, Scholefield, DeLeon & Co for the appellant

Miss Christine Mae Hudson instructed by K Churchill Neita & Co for the respondent

30 January, 1 February and 8 November 2012

HARRIS JA

[1] I am in agreement with the reasons and conclusions of my sister McIntosh JA and have nothing further to add.

McINTOSH JA

Introduction

[2] The point in this appeal is a simple one. It concerns a complaint by the appellant that the sum of $18,000,000.00 awarded to the respondent for pain and suffering and loss of amenities in an assessment of damages in the Supreme Court by Sykes J, was inordinately high and inconsistent with awards made in comparable cases. Accordingly, the appellant seeks a variation of that award to a sum of no more than $10,000,000.00.

[3] It is, it seems to me, to be beyond question that the injuries inflicted on the respondent on the night of 23 March 2003, when he was then a mere lad of 19 years, were severe. Further, the evidence disclosed that his resultant pain and suffering had continued up to the date of the hearing which was in December 2009 and that, in many respects, there was no end in sight. Undoubtedly the appellant had done "the right thing" in accepting liability for the respondent's injuries which resulted from the actions of its employee who so negligently drove its vehicle at 11:00 o'clock that night that it hit the respondent as he walked along the Cane River Road, in the parish of Saint Andrew, pinning him to a wall from his stomach down to his feet. It was a night that surely must indelibly be imprinted in his mind.

The respondent's injuries

[4] The learned judge's summary of the nature and extent of the respondent's injuries, is given first from the respondent's perspective after the

incident, when he was taken to the Bull Bay Police Station, then to the Kingston Public Hospital and before the input of the medical experts. It is to be found at paragraphs 4 and 5 of his judgment and is set out below:

> "4. Mr Biggs complained of feeling pain in his hip and 'belly bottom' from the time of the accident. He noted that the flesh on his left foot was torn away. The left foot was crushed from the knee down to the ankle. He also had bruises to his side and right arm.
>
> 5. While at the police station he found out that he was not able to urinate and this added to his pain and discomfort. This was the beginning of his urological problem that has continued to this day."

[5] The doctor who saw and examined the respondent at the Kingston Public Hospital noted his findings in his medical report, dated 4 November 2003, as follows:

> "1. abrasions to right side of chest and upper abdomen
>
> 2. abrasions to medial aspect right arm
>
> 3. mangled left lower limb with wound extending from mid thigh across the posterior aspect of the knee, down to the leg. No sensation below the knee; pulses diminished.
>
> 4. fracture right and left superior and inferior rami of the pelvis;
>
> 5. open fracture of the left femur (Grade IIIc) with injury to the pelvis;
>
> 6. transection of the urethra with inability to pass urine."

[6] In the course of his treatment both locally and in the United States of America (the USA) the respondent underwent several surgical procedures. Most of the local procedures seemed to have been in an effort to save his left leg but all efforts proved unsuccessful and, after six months, it had to be amputated. He had problems with the healing of the amputation site and had severe urination problems which required him to use a urine bag and that in itself caused severe problems. It was the urological problems which took him in search of additional medical assistance in the USA. There was a recurrent urethral narrowing which necessitated repeated urethral dilations. These dilations were extremely painful for the respondent and there was a real possibility that reconstructive surgery would be necessary which, according to the medical expert, would be a major undertaking. The prognosis was that he would need urethral instrumentation for the rest of his life.

[7] Three years after the incident he was examined by an orthopaedic surgeon who found the respondent to have:

> a. a left above knee amputation with a bony spur which had developed to the rear and side of the end bone where the amputation had occurred. There was also significant osteoporosis of the left femur consistent with an above knee amputation;

b. anterior cruciate ligament instability of the right knee and a diminution of the joint space in the right knee with a cartilage gap of 5mm on the lateral aspect and 3mm on the medial aspect;

c. chronic urinary tract infection with urethral stenosis (narrowing of the urethra);

d. mid-tarsal arthrosis; and

e. fractured pelvis which he described as a butterfly pelvic fracture with mild misalignment of the united bones.

After he evaluated the degree of impairment suffered by the respondent to all the affected areas of his body the orthopaedic surgeon assessed his combined impairment at 55% of the whole person (see report dated 8 May 2006).

The grounds of appeal

[8] In the assessment court the learned judge was clearly motivated by the medical evidence of the severity of the respondent's injuries and the evidence from the respondent himself to make the award that he did but, ought he to have first taken guidance from previously decided cases with awards for comparable injuries and was the award he made for pain and suffering and loss of amenities out of line with those awards? This is the substance of the appellant's complaint which was formulated as follows:

"(i) The Learned Judge erred as a matter of law in failing to take into account or properly consider

comparable authorities in making the award for Pain and Suffering and Loss of Amenities.

(ii) The award for Pain and Suffering is inordinately high and inconsistent with awards made in comparable authorities."

Submissions

[9] The appellant, through its counsel, contended that the learned judge had correctly identified a sum of $8,000,000.00 as the usual award for injuries of the type sustained by the respondent, based on previously decided cases, but nevertheless awarded a sum far in excess of that figure. This award was not in keeping with the principle that awards for personal injury should be reasonable and moderate and comparable with similar awards, counsel submitted. He referred to cases he had commended to the learned judge for his guidance including **Owen Francis v Corporal Baker** delivered on 16 November 1992 and reported in Khan's Recent Personal Injury Awards (Khan's) Volume 4 at page 129, which the judge said had been most helpful to him in his assessment but, counsel submitted, it did not appear that there was a proper evaluation of the injuries sustained by Mr Francis. When compared with the respondent's injuries, counsel contended, the injuries sustained in **Owen Francis** were much more severe and debilitating, resulting, for instance, in permanent sexual dysfunction while the respondent's corresponding dysfunction was not complete and was mitigated with the use of medication. Additionally, counsel submitted, Mr Francis was rendered a paraplegic as a result of his injuries while the respondent had an

above knee amputation which was addressed by the provision of a top-of-the-line prosthesis at the expense of the appellant. These were factors which improved the functionality of the respondent, counsel argued and should have resulted in a lowering of the learned judge's award for pain and suffering and loss of amenities.

[10] It was counsel's further contention that the learned judge neither gave any concrete explanation for his departure from the $8,000,000.00 mark nor cited any authorities, but it would seem that the additional $10,000,000.00 was designed to compensate the respondent for psychological distress, a feature with which the learned judge appeared to have been most concerned. However, there was a similar psychological element in Mr Francis' case, yet his award was $8,000,000.00 and the respondent's was $18,000,000.00. He submitted that substantial awards have not been the norm in cases where the court is concerned with psychological impairment and he referred to several cases in support of this submission including **Vanura Lee v Petroleum Co of Ja Ltd and Anor** 2003 HCV 1517 delivered in the Supreme Court on 16 December 2004, where an award of $300,000.00 was made for what the medical expert described as post-traumatic stress disorder and major stress disorder arising from burns sustained by an aspiring cosmetologist, to her face, neck and upper and lower limbs; **Marva Protz – Marcocchio v Ernest Smith**, reported in Khan's, Volume 5 at page 284 where the claimant received an award of $100,000.00 for post-traumatic stress disorder as she suffered severe phobia

anxiety after being bitten by dogs; and **Suzzette Hinds and Anor v South East Regional Health Authority** 2008 HCV 05757 delivered in the Supreme Court on 15 December 2010 where the court awarded the sum of $850,000.00 for post-traumatic stress disorder as a result of surgical trauma.

[11] The jurisdiction of this court to disturb any award found to be excessive is well established, counsel submitted and, in this regard, reliance was placed on **Trinidad Transport Enterprises Ltd and Another v De Souza** (1973) 25 WIR 511; **Davies and Anor v Powell Duffryn Associated Collieries Ltd** [1942] 1 All ER 657 and **Flint v Lovell** [1934] All ER Rep 200. It was based upon the foregoing arguments that the appellant urged the court to reduce the award to no more than $10,000,000.00 with an award of costs to the appellant.

[12] The respondent's counsel had a different perspective on the case of **Owen Francis**. It was her contention that of the two, the respondent's injuries were the more severe. While Mr Francis was reportedly totally disabled from 16 June to 30 September 1985, the respondent was hospitalized for six months during which time he underwent seven surgical procedures. Further, counsel submitted, the respondent's evidence contained in his witness statement gave a vivid picture of his pain and suffering as a result of his severe urological problems and it was clear from the learned judge's analysis of the medical evidence that his main focus was not on the respondent's psychological impairment but that he addressed every aspect of the respondent's condition. It was also clear that the learned judge considered the cases referred to him but

found none of them to fully cover the respondent's particular circumstances in terms of the nature and extent of his injuries, the pain he endured and will continue to endure, the protracted period of rehabilitation, his consequential losses and the general impact of the injuries on him.

[13] It was the respondent's submission that in determining the appropriate award in any case, the court should consider not only the seriousness of the injuries but should also have regard to the changing attitudes of the court over time. Counsel pointed out that **Owen Francis** was decided 19 years ago, and, she argued, its usefulness as a guide is questionable when one looks at the general trend of awards made in recent times. Counsel referred, for instance, to the award of $3,000,000.00 for pain and suffering and loss of amenities in **Trevor Clarke v National Water Commission and Ors** CL 1993 C 371 delivered on 25 October 2001 and reported in Khan's Volume 5 at page 21 where the claimant suffered an above knee amputation, was unable to wear an artificial leg and was assessed with a whole person impairment of 36%. The respondent's injuries in the instant case had involved not only amputation but permanent urological dysfunction resulting in painful lifelong dilations and these, counsel submitted, were features which would attract substantial awards. It was certainly not without significance, counsel submitted, that even the appellant appeared to be of the view that a higher award was warranted as it proposed an increase of $2,000,000.00 on the "usual" $8,000,000.00. Further, counsel submitted, **Owen Francis** no longer represents the current approach in the

Supreme Court to parapiegia (see **Lloyd Clarke v Corp E F Quest and Others** delivered on 12 December 2008 and reported in Khan's Volume 6 at page 170 where the award was $26,000,000.00 for pain and suffering and loss of amenities from injuries resulting in complete paralysis from navel down with total dependence on someone to help with personal hygiene). Counsel asked the court to view **Owen Francis** in light of the passage of time and to find that the current trend is for higher awards.

[14] She cited two other cases as indicative of the modern trend namely, **Mark Smith v Roy Green & Dennis McLaughlin** delivered on 21 November 1995 (where an award of $3,000,000.00 was made for pain and suffering and loss of amenities, as reported in Khan's Volume 4 at page 118) and **Phillip Granston v Attorney General of Jamaica** 2003 HCV 1680 judgment delivered on 10 August 2009. It was counsel's contention that only **Mark Smith** had injuries with a reasonable measure of similarity to the respondent's, but there was no evidence of any permanent sexual and/or urological dysfunction in that case. Counsel argued that using **Mark Smith** as a base guide and making the necessary adjustments, it could not be said that the learned judge's award was excessive or out of line with recent awards in the Supreme Court. Counsel further submitted that the respondent's pain and suffering and loss of amenities surpassed Phillip Granston's since Granston had suffered no loss of limb, no permanent urological or sexual dysfunction but suffered pain which was capable of relief by the use of a pain pump. The pain element was a dominant feature in

the instant case, counsel submitted and referred to the opinion of one medical expert that the respondent had a poor tolerance for pain. Counsel contended that in upholding the award of $8,000,000.00 under this head of damages, the Court of Appeal, in **The Attorney General v Phillip Granston** [2011] JMCA Civ 1, had endorsed the pain element as a significant feature in assessing damages and it was her submission that in all the circumstances of the respondent's case the award to him should be higher than Granston's award.

[15] Counsel disagreed with the appellant's submission that the courts have demonstrated a tendency towards low awards for psychological impairment and cited the case of **Joan Morgan and Cecil Lawerence v Ministry of Health and Others** delivered on 19 December 2007 and reported in Khan's Volume 6 at page 220 where the court made an award of $3,500,000.00 for psychiatric injury (severe post-traumatic stress disorder) with no accompanying physical injury. At the end of the day, counsel submitted, the learned judge properly exercised his discretion and applying all the recognized principles affecting the assessment process, made an award that was reasonable, balanced and reflective of the severity of the respondent's pain and suffering and his award should not be disturbed.

[16] At the conclusion of the respondent's arguments counsel for the appellant saw the need to respond to only three of the cases relied on by the respondent, namely, **Phillip Granston v Attorney General**; **Mark Smith** and **Joan**

Morgan indicating that no reliance ought to be placed on them for the following reasons:

i) Phillip Granston's pain was daily and so severe that he had to be on morphine in contrast to the respondent who, on the evidence, experienced pain only when he had to dilate and there was no evidence that he had to have pain killers prescribed for him. The high award in **Phillip Granston** was reflective of the pain he had to suffer for the rest of his life.

ii) Mark Smith suffered severe injuries to his buttocks and genitalia and was left severely handicapped. The award in this case was an anomaly given the decisions in that period (see **Owen Francis** decided some two or three years earlier). It was counsel's view that had the assessment been appealed the award would have been overturned.

iii) **Joan Morgan** was a special case and should be viewed in that context. It was not similar to cases where there were physical injuries and should be viewed in the context in which it was decided.

The appellant therefore remained resolute in its challenge to the learned judge's award.

Analysis

[17] In my opinion, the nature of the appellant's complaints in its two grounds of appeal makes it necessary to deal with them together and, in so doing, to look in some depth at the written judgment delivered by the learned judge as it contains a clear demonstration of the care and thoroughness with which he approached the task of evaluating the material before him. He examined the nature and gravity of the respondent's physical injuries and followed the entire course of his treatment through the several medical reports. He not only identified the relevant legal principles but applied them to the circumstances of the case. In his analysis of the evidence, the learned judge highlighted the evidence of the pain and suffering endured and to be endured by the respondent, for instance, the life long painful dilation of his penis and the pain and suffering to come when the site of the stump of the amputated leg was revised to accommodate the prosthesis. The judge also highlighted the respondent's lost amenities, namely, playing football and basketball hitherto enjoyed by him, riding his bicycle, going to parties and his good health in relation to which the judge wrote "[a]s it has been said, loss of good health is loss of something of great value" (and here it bears repeating that this respondent was, at the time of the accident, a healthy 19 year old). There was also a psychiatric component as at some point the respondent suffered from depression and anxiety though his psychiatric evaluation placed him at 65% of his full overall psychological functioning.

[18] At paragraph 78 under the main heading General Damages and the subheading "Pain, suffering and loss of amenities", the learned judge had this to say:

> "It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see **H.W. West & Sons v Shephard** [1964] A.C. 326). The objective component deals with the actual injury and the subjective part takes account [the effect] of the injury on the claimant. Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in **Lim Poh Choo v Camden and Islington Health Authority** [1980] A.C. 174 189G, reaffirming what was said in **H. West & Son Ltd v Shephard** [1964] A.C. 326). Lord Scarman made the very important point often overlooked, that pain and suffering depends on the claimant's awareness of and capacity for suffering. Thus it is entirely possible for there to be a low award in a personal injury case for fairly serious injuries if the evidence shows that the claimant is unable to appreciate the suffering or has no capacity for awareness of the pain. On the other hand, the lack of awareness of pain and the lack of capacity for suffering does not necessarily mean that the award for personal injury will be low. It can be quite high if the injuries in and of themselves are so serious that the claimant has, on an objective view, suffered a significant loss. This was indeed the case in **Lim Poh Choo** were [sic] the claimant was unable to appreciate her suffering and pain but suffered a substantial loss."

[19] The learned judge went on to say at paragraph 79 that "the combined effect of these principles is that where the claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from his injuries

then the award is going to be a high one". The medical opinion was that this respondent had a low pain tolerance and this is clearly to be seen from his witness statement where, for instance, at paragraph 54 he said:

> "I still self dilate myself using the long tubes made of plastic to push up my penis to keep the passage open for the urine to pass. This is very distressing and very, very painful. Sometimes I am afraid to do it and sometimes it is just so painful and I don't do it as regular as I should but I try to do it at least once per day. It is a type of pain I can't get used to, no matter how many times I dilate. I am suppose to do it at least 2 times per day."

[20] Contrary to the appellant's complaints the learned judge in his judgment at paragraphs 80 to 84 amply demonstrated that he took account of the authorities commended to him by both sides. He rejected the submission by the respondent's counsel that he should disregard a number of Supreme Court decisions where counsel contended that the awards were inordinately low, stating that:

> "I am afraid that I cannot do as suggested by counsel. That is a function for the Court of Appeal and while they are not binding authority nonetheless they represent what the Supreme Court thinks is an appropriate award in the circumstances of those cases."

He further stated that counsel would have had to "make a powerful argument that these cases were decided in error" namely by, "(a) an incorrect assessment of the facts; (b) misstatement of legal principle; or (c) error in applying law to fact". Clearly the learned judge fully appreciated the principles by which he

should be guided in an assessment of damages. In his opinion the respondent's counsel had not made out any of the required arguments and he was therefore obliged to take into account the cases relied on by the appellant.

[21] The learned judge indicated that he would not refer to all of the appellant's cases but singled out the case which he regarded as most helpful, namely, the **Owen Francis** case. He again resisted the urgings of the respondent's counsel to ignore this case as he said, this was "quite a bold assertion given that this decision is from the Court of Appeal and not the Supreme Court". He went on to point out, however, that the first instance award in that case was $400,000.00 for pain, suffering and loss of amenities and this was increased to $500,000.00 by the Court of Appeal. The latter sum had a current market value of $8,020,833.00 but the injuries in that case which left the claimant a paraplegic with a 35% whole person disability did not indicate any urological damage.

[22] He considered other cases with lower limb injuries and amputation including **Trevor Clarke** (referred to earlier) and **Lealan Shaw v Coolit Limited and Glenford Coleman**, Suit No CL 1991 S 109 delivered on 26 July 1995 and reported in Khan's Volume 4 at page 41. He pointed out that in the former there was no indication in the report of any urological damage and in the latter, no indication of any sexual dysfunction. Then at paragraph 84 the learned judge had this to say:

> "It would seem to me that injuries which result in an above knee amputation attract high awards. It appears that the range is at least $4m. Where there is urological damage the award goes up to around $6m. If there is impairment of sexual function then the award goes up to $7m. Whether it goes far above $7m seems to be influenced by the extent of the dysfunction. If there is a complete loss of sexual function then the award goes to around $8m."

This is the paragraph upon which the appellant places great reliance contending that after acknowledging that the range which would apply to this respondent was around $8,000,000.00 the learned judge went too wide of the mark. However, as submitted by the respondent's counsel, even the appellant seemed to accept that the $8,000,000.00 figure was not quite adequate as it proposed an award of $10,000.000.00.

[23] But how did the learned judge justify the award he made? In paragraphs 85 through 91 the learned judge indicated the factors which in his opinion took this case well out of the range indicated in paragraph 84. He accepted that the respondent is not a paraplegic and has suffered no loss of internal organs, clearly having the cases he reviewed in his contemplation. He also accepted that the impairment of the respondent's sexual function is not total and that medication provides some assistance in that regard. He further accepted that the damage to his urological system, as serious as that is, has not resulted in a total loss of urinary function but noted that the urethral constriction with the consequential need for the painful process of dilation is lifelong. He considered that the respondent not only suffered great pain on the night of the injury but also during

the treatment regime involving serious psychological impact from the use of the urine bag, at times exposed for all to see and the shame and embarrassment which resulted, making him depressed and anxious. There was also the shame and embarrassment from his sexual dysfunction and the emotional trauma from the failed efforts to save his leg.

[24] In paragraph 90 the learned judge exposed his thinking in his efforts to arrive at an appropriate award befitting the level of pain and suffering which the evidence disclosed that the respondent endured and will continue to endure for the rest of his life. The learned judge very candidly stated his position as follows:

> "According to the medical evidence, Mr Biggs has a 55% whole person disability. Let me admit that when Miss Hudson proposed the figure of $18m - $20m, as appropriate, I had grave doubts about this. However, having reviewed the cases cited by both sides, it is clear to me that the figure of $10m put forward by Mr Morgan would not be an adequate amount for the degree of physical and psychological damage that Mr Biggs has suffered. It does not take account of the severe impact that this injury has had on a previously healthy 19 year old male who played sports. To go from an independent working adult to a dependent person, at least for the first few months after the accident must have been crushing to the spirit and the psyche. It could not have been easy for an able bodied young man to find himself bed ridden and constantly engulfed in the smell of urine. Even to relieve himself in other ways posed a serious problem."

He referred to the respondent's fears of his sexual dysfunction being noised abroad in his community and added that this factor undoubtedly has dampened

his enthusiasm for life. Based on the reaction evoked by the sight of his urine bag, it seems to me that the learned judge was justified in taking into account the fears experienced by the respondent of being exposed to further humiliation if his sexual dysfunction was generally known in his community.

[25] It was all of the above considerations that led the learned judge to conclude that the sum of $18,000,000.00 was appropriate compensation for pain, suffering and loss of amenities which, according to the judge, cover physical as well as psychological suffering.

Conclusion

[26] In **Davies and Another v Powell Duffryn Associated Collieries Ltd**, Lord Wright at page 664 H gave the following helpful guidance where the appellate court is asked to make any adjustment to a trial judge's assessment of damages:

> "It is difficult to lay down any precise rule which will cover all cases but a good general guide is given by Greer, L.J., in **Flint v Lovell** [[1934] All E.R. Rep 200] at page 360. In effect the court before it interferes with an award of damages, should be satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

[27] No case was cited before the learned judge or before this court which covered all of the injuries suffered by the respondent and none of them involved the percentage whole person disability similar to that assessed in the respondent's case. The learned judge was left to measure the immeasurable and, in so doing, did he make an incorrect assessment of the facts? In my view, that question must clearly be answered in the negative. Has he misstated any legal principle? Again, the answer must be in the negative as the learned judge very carefully explored the applicable legal principles and demonstrated their application to the facts of the instant case.

[28] Neither did he make any "erroneous assessment of the damage suffered" (see **Davies v Powell and Another v Powell Duffryn Assocated Collieries Ltd**). Contrary to the appellant's submissions, there is no benefit to accrue to the appellant because the respondent's sexual dysfunction may be partially relieved. The evidence disclosed that even in that regard the respondent was subjected to additional discomfort and Viagra does not seem to be a workable option. Nor can there be any benefit to the appellant because he has been provided with a prosthetic leg. Much pain and suffering was occasioned by all that had to be done to accommodate the leg and there was the emotional trauma occasioned by the loss of the leg.

[29] I find merit in the submissions of the respondent's counsel concerning a trend towards higher awards and agree that consideration ought to be given to changes in direction of the courts in making awards some 19 years after the

Owen Francis award. The cases cited lend support to that view. In increasing the sum awarded for pain and suffering and loss of amenities in **Owen Francis** it could reasonably be argued that even in the Court of Appeal it was felt at the time that the sum was on the low side. This, in my view, was no pioneering judge seeking to tread uncharted territory as others before him had moved out of the **Owen Francis** mould so that there was precedent for higher awards. It is to be noted that the learned judge did say at paragraph 90 that when counsel for the claimant (that is, the respondent before this court) had proposed the figure of "$18m - $20m as appropriate I had grave doubts about this. However, having reviewed the cases cited by both sides it is clear to me that the figure of $10,000,000.00 would not be an adequate amount for the degree of physical and psychological damage that [the claimant] has suffered". Clearly, he arrived at the award he ultimately made, as befitting the respondent's circumstances. In my opinion, the attack on the figure in this award is therefore unsustainable and grounds one and two fail. Accordingly, I would dismiss the appeal with costs to the respondent.

BROOKS JA

[30] I too have read in draft the judgment of McIntosh JA and agree with her reasons and conclusions.

HARRIS JA

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.