

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 65/87

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	MICHAEL DIXON	PLAINTIFF/APPELLANT
AND	J.O.S. LIMITED	
AND	LENFORD HENRY	
AND	DONALD CHANTILOUPE	DEFENDANTS/RESPONDENTS

Ainsworth Campbell for appellant

Norman Wright for respondents

24th & 25th July and 2nd October, 1989

MORGAN, J.A.:

This is an appeal from an award of general damages in an assessment of damages. At the conclusion of the hearing we allowed the appeal, increased the award of general damages by \$30,000.00 thereby varying that portion of the total award to \$80,000.00 and ordered that the appellant should have his costs of the appeal.

We promised to put our reasons in writing which we now do.

The award was made by Patterson, J., in favour of the appellant Michael Dixon under the head of general damages for a sum of \$50,000.00 among other heads in respect of which there is no appeal.

The damages concern personal injuries which were sustained by the appellant as a result of the negligence of the second and third respondents arising out of an accident which occurred on the 11th December, 1984 at Harbour Street, Kingston. On that day a bus driven by the second respondent and owned by the third respondent, drove into a bus terminus, ran over the appellant's foot and broke it. He was taken to the Kingston Public Hospital where he was admitted, treated and discharged on the 29th of January, 1985.

The evidence of the injury and resultant treatment to the appellant for which the respondent admitted liability, though confined to a left foot, was exhaustive.

The appellant Michael Dixon who lived with his mother at Bull Bay, was at that time sixteen years old and for a period of one month after his discharge from the hospital, returned twice per week for treatment. Subsequently he attended the clinic at Harbour View but when maggots began to infest the wound in his foot, he returned to the Kingston Public Hospital for dressing, but unfortunately, up to the date of the hearing the wound had not yet healed. As he put it, "everytime it heal up, it break out back." There was no challenge by the defence to this account. The wound now requires plastic surgery.

Patterson, J., in awarding general damages, found -

"Treatment at clinic after leaving hospital not carried out as was necessary due to Plaintiff's neglect, resulting in ulceration and deformity which now require orthopedic correction and plastic surgery."

Accordingly he made no award.

The ground of appeal which reflected the thrust of the plaintiff's argument was -

- "1. That the Learned Trial Judge erred in his findings that the complications that developed following the Plaintiff/Appellant's injury were caused by the Plaintiff/Appellant's negligence i.e. there was no evidence upon which the findings could have been founded. The Medical evidence was contrary to this finding."

Dr. Grantley Dundas the Consultant Orthopaedic Surgeon at Kingston Public Hospital, who treated the appellant said that he had a severe laceration along the medial border (inside) of his left foot with swelling and deformity of the foot and fracture of the first metatarsus and navicular bones at the time of the injury. As a result he realigned the foot by internal fixation wire but because of the extent of the laceration (wound) the appellant remained in hospital until 29th January, 1985 for physiotherapy to assist in the healing of the wound, and to maintain mobility of the ankle. There was need, he said, for corrective surgery i.e., plastic surgery, at a cost of \$40,000.00 in order to do a skin graft to heal the skin (wound) and then orthopaedic surgery costing \$6 - \$10,000.00 to correct the alignment. The appellant would then have 35% to 40% disability of the limb. Still, as a whole man, after surgery, he would have 10% to 15% disability. As to the wound and its healing process, he said:

"It was a matter of time for wounds to heal - follow up therapy would assist healing process - without it, he would take a backward step. At discharge, he was at a safe stage not necessitating hospitalization, but follow up necessary - without follow up - possibility of ulcer. I found fibrosis and scarring. Fibrosis is the body's attempt to repair itself - fibrous tissue formed and scar is what is seen outward. The state of hygiene plays a part in the development of fibrosis - plastic surgery would be to exercise that scar and to replace its normal skin.

Under normal conditions and with follow-up treatment, plaintiff would have reached the zenith of recovery in about 6 months. If everything had gone well, neither plastic surgery nor orthopaedic surgery would be necessary at this stage. The present stage the plaintiff is in, is not totally a preventive stage. One frequently comes across complications which could result in the situation that plaintiff has now - anything can happen to set back a patient - lack of medicine."

Defence counsel then asked -

"Q. The condition that obtains today -
is it a natural result of the original
injuries sustained by plaintiff.

A. This type of result becomes a part of
our normal orthopaedic statistics despite
the best surgical and physiotherapeutic
applications in the world - and even with
the follow-up treatment, he could have
ended up this way."

Mr. Campbell for the appellant argued that the learned Judge ought to have accepted the need for corrective surgery and that he was wrong in law to find that there was contributory negligence by the plaintiff, as the plaintiff's conduct did not contribute to his condition, in that, he did not neglect his treatment. He argued that there was no evidence to establish that finding and asked that the plaintiff be awarded \$40,000.00 for plastic surgery as pleaded.

Mr. Wright for the respondent submitted that at the time of the appellant's discharge from the hospital, all that was needed to be done had been done and the only matter remaining was the wound to be healed, and had the appellant done what was necessary and ought to have been done, what eventually occurred to the wound would have been prevented. He submitted that the existence of fibrosis was caused by lack of hygiene necessitating plastic surgery and this was due to negligence on the part of the appellant. That what Dr. Dundas had said, in effect, was that "anything could happen" which was a general statement and meaningless.

The view I take in this case is not that put forward by Mr. Wright. Dr. Dundas said that the therapy following the hospitalization would assist in the healing process. This therapy the appellant said he followed, still eighteen months later it had not healed. Dr. Dundas found that fibrosis tissues had formed. This tissue is not formed by a lack of hygiene, but hygiene does play an important part in the development of fibrosis. It would not be correct, therefore, to hold or draw an inference without more that there was a total lack of hygiene on

the part of the appellant which restricted total healing. I am bolstered in this view by the doctor's further explanation that in of the best surgical applications and follow-up treatment of patients, the world statistics indicate that the resulting condition of such a wound could be the same as the appellant's.

Indeed, all did not go well for the appellant and so corrective surgery becomes the next step in the healing process. In my view, he ought not to be deprived of it and the learned judge fell into error in not making an award for corrective surgery, which was necessary for total healing.

It was submitted that there was no entitlement, as this head of damage ought to have been part of the special damages pleaded but was pleaded by amendment at the end of the case as general damages. It is fair to say that corrective surgery is a future expense and, though identifiable, could not be quantified with certainty.

Harvey McGregor in his book on the Law of Damages 13th Edition at page 1128 under the heading "Personal Injury to Plaintiff" sub-head "Medical & Related Expenses" has this to say -

"Both expenses already incurred at the time of trial, and prospective expenses, are recoverable, and while the rules of procedure require that the expenses already incurred and paid be pleaded as special damage and the prospective expenses as general damage, the division which depends purely on the accident at the time that the case comes up for hearing, implies no substantive differences."

I accept this as a correct statement of the law and in its application to this case, the corrective surgery has been properly pleaded and the appellant is entitled to damages.

The sum for treatment as quoted by the doctor is \$40,000.00. However, it is expected that the result of the surgery will enhance his prospects in the labour market and also it may be that he will no longer need special shoes. Patterson, J., has already made awards for these two items and, taking that into account, we consider that the assessment of general damages could adequately be increased by \$30,000.00.

The third ground of appeal was that the learned Judge's award under the head of general damage is so inordinately low as not to reflect awards made for similar injuries the plaintiff/appellant suffered.

Counsel sought to justify this ground by quoting three cases from "Khan's Report" Volume 2 by Ursula Khan. There is no justification for this request nor is there any basis put forward, as we see it, on which this Court could justifiably interfere with the award of the court below, taking into account the heads of damages for which he made the awards.

For these reasons we allowed the appeal in the terms earlier stated.

CAREY, J.A.:

I agree.

DOWNER, J.A.:

I agree.