[2012] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 98/2008

APPLICATION NO 179/2012

BETWEEN	**LEIGHTON GORDON**	**APPLICANT/2ND RESPONDENT**
AND	**PATRICK THOMPSON**	**1ST APPELLANT/ RESPONDENT**
AND	**EVERTON EUCAL SMITH**	**2ND APPELLANT/ RESPONDENT**
AND	**DEAN THOMPSON**	**1ST RESPONDENT**
AND	**KIMAR BROOKS**	**3RD RESPONDENT**
AND	**SHELLION STEWART**	**4TH RESPONDENT**

21 September 2012

(Considered on paper pursuant to rule 2.10 of the Court of Appeal Rules 2002)

IN CHAMBERS

BROOKS JA

[1] On 17 July 2003, a fire tender truck collided with an International motor truck along the Exton main road in the parish of Saint Elizabeth. The driver of the fire truck was Mr Dean Thompson. His passengers were Messrs Leighton Gordon, Kimar Brooks

and Shellion Stewart. Mr Dean Thompson and his passengers were injured. They will, together, be referred to hereafter as, "the respondents". All filed claims against the owner of the International truck, Mr Patrick Thompson and the driver thereof, Mr Everton Smith. Together, they will be referred to, hereafter, as "the appellants".

[2] On 18 August 2008, N.E. McIntosh J (as she then was) gave judgment for the respondents. In particular, she found that the present applicant, Mr Leighton Gordon, "suffered more than the other [respondents] leaving him with a 25% whole person disability, in terms of his orthopaedic injuries". She awarded him damages in the following terms:

"Special Damages:	$ 708,680.00
General Damages:	$6,000,000.00
(for pain and suffering and loss of amenities)	
Handicap on the Labour Market	$5,973,834.00"

[3] The appellants have appealed the judgement both in respect of liability and damages. Although complaining generally that the damages awarded to the respondents are excessive, the appellants complain, particularly, that the learned judge erred in making an award for handicap on the labour market in favour of Mr Gordon. The error, they state, is due to the fact that she had already made an award for loss of future earning. In addition, the appellants complain that the award for handicap on the labour market, made to Mr Gordon, is excessive.

[4] Mr Gordon has now applied for permission to adduce fresh evidence at the hearing of the appeal. The fresh evidence is in respect of the award for handicap on

the labour market. No objection has been filed on behalf of any other party. The question, as to whether to allow that evidence to be adduced, falls to be considered by a single judge, pursuant to rule 2.10 of the Court of Appeal Rules 2002.

The relevant law

[5] The starting point, for analysing the question, is section 28 of the Judicature (Appellate Jurisdiction) Act. It authorizes this court, in determining an appeal, to order the production of documents and the examination of witnesses, which production or examination is necessary for the determination of the appeal. The next relevant provision is rule 2.15(2)(h) of the Court of Appeal Rules 2002. That rule permits this court to "make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal". These provisions would seem to allow fresh evidence to be adduced.

[6] The fresh evidence, as adduced, may either be conclusive of the appeal or may cause the court to order a retrial of the matter. The bases on which the reception of fresh evidence should be considered, were set out in **Ladd v Marshall** [1954] 3 All ER 745. Lord Denning, at page 748 A-B of the report, outlined them as follows:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: **first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive**: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible." (Emphasis supplied)

[7] This court, in **George Beckford v Gloria Cumper** (1987) 24 JLR 470, approved the principles laid down in **Ladd v Marshall.** In his judgment, in **Beckford's** case, with which the rest of the court agreed, Carberry JA, comprehensively examined and applied the principles expounded in **Ladd v Marshall.**

[8] Similar, though not identical criteria, to those laid down in **Ladd v Marshall** were set out in **R v Parks** [1961] 3 All ER 633. These criteria were approved by this court in **Shawn Allen v R** SCCA No 7/2001 (delivered 22 March 2002). Panton JA (as he then was), at page 2 of the judgment, cited the following quotation from **R v Parks**:

> "First, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly, and this goes without saying, it must be evidence relevant to the issues**. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. " (Emphasis supplied)

[9] The principles set out in **Ladd v Marshall** have been considered as still being relevant since the promulgation of the Civil Procedure Rules 2002 (CPR). In **Hertfordshire Investments Ltd. v Bubb** [2000] 1 WLR 2318, the English Court of Appeal emphasised that strong grounds were required to allow fresh evidence in the face of a final judgment.

[10] The principles set out in **R v Parks** were also considered as still being relevant, despite the passage of the years. Their Lordships so held, in **Kenneth Clarke v R** [2004] UKPC 5. **Clarke's** case was an appeal to the Privy Council from a decision of this court. It was, however, a criminal law case. After noting the difference in this context, between civil and criminal cases, in terms of the standard of proof, their Lordships addressed the matter of fresh documentary evidence. At paragraph [56] of the judgment, the Board quoted from **R v Sales** [2000] 2 Cr App R 431 to address the approach that an appellate court should take in respect of attempts to adduce fresh documentary evidence:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court. It was a course which we followed in this appeal, in relation to the evidence of the appellant himself and the three witnesses called in support of his appeal to whom we have referred." (Page 438 B-C)

[11] The criteria set out in **Ladd v Marshall**, **R v Parks** and **R v Sales** all apply in this court. Based on those criteria, the questions which arise to be asked in analysing whether to admit fresh evidence are:

1. Was the evidence discoverable, with reasonable diligence, at the time of the trial?
2. Is the evidence relevant?

3. Does the documentary evidence fall under any of the following categories of credibility:
    a. Is it plainly capable of belief?
    b. Is it plainly incapable of belief?
    c. Is it possibly capable of belief?
4. Would the evidence have made a difference to the outcome?

It is now necessary to analyse the present application against the background of those criteria.

The analysis

[12] Mr Gordon seeks to adduce two documents into evidence. The first is a letter dated 11 July 2012 from his employer, the Jamaica Fire Brigade. It speaks to his being "retired from the Brigade on Medical Grounds with effect from 01 May, 2012". The second, is a medical report dated 11 November 2011. It addresses Mr Gordon's condition and makes recommendations as to his conditions of work.

[13] There is no difficulty in finding that the documents satisfy the first requirement, in that they, based on their dates, did not exist at the time of the trial. The next question, that of relevance, is perhaps the most problematic of the three criteria. It appears that Mr Gordon wishes to put these documents into evidence to show that subsequent events have proved the learned trial judge correct in making an award for handicap on the labour market. Miss Catherine Minto, one of his attorneys-at-law, deposed, in support of the application, that the evidence is relevant. She stated at paragraph [4] of her affidavit filed on 17 August 2012:

> "That this retirement letter is critical to the issues on Appeal as an award for Handicap on the Labour [Market] was made by Her Ladyship Mrs. Justice Norma McIntosh based on submissions made that the Second Respondent was at risk of losing his employment given the severity of his physical injuries and resulting in permanent partial disability. The risk has now manifested or solidified."

At paragraph [5], she said:

> "That the Appellant is challenging the said award made to the Second Respondent as well as the award for pain and suffering and loss of amenities and therefore the evidence now being sought to be adduced is critical to a determination of the Appeal and the award made by Her Ladyship in relation to this Respondent."

[14] Mr Gordon has not filed a counter-notice of appeal. There will, therefore, be no attempt to have the level of damages increased as a result of the development. What, it seems, Mr Gordon wishes to do, is to show that the award by McIntosh J has been vindicated or justified by events occurring afterward.

[15] Since they address the issue of the loss of his employment, that is relevant to the question of handicap on the labour market (see **Moeliker v Reyrolle & Co Ltd** [1977] 1 WLR 132; **Edwards and Another v Pommells and Another** SCCA No 38/1990 (delivered 22 March 1991); **Walker v Pink** SCCA No 158/2001 (delivered 12 June 2003)). The cases just cited, speak to the risk that a person, who is injured but returns to his job, may lose that job in the future.

[16] I would hold that the documents are relevant and, therefore, satisfy the second requirement laid down by the authorities. It is, perhaps, necessary to state that the documents do not address the issue of causation. No connection between the motor

vehicle collision and the loss of employment need be shown. As has been stated above, the issue to which these documents are connected is the risk of Mr Gordon gaining other employment, that is, the effect on his earning capacity.

[17] The third test is whether the documents are credible. That, as the authorities make it clear, does not mean that they are irrefutable. I would hold that the question, "are they plainly capable of belief?", should be answered in the affirmative. That being so, the third test would have been satisfied.

[18] As the application has been made for the purpose of affirming the findings and decisions at first instance, the fourth test is not relevant. Indeed, if Mr Gordon had already been dismissed the assessment ought to have proceeded differently (see **Moeliker v Reyrolle**).

[19] On the basis of the foregoing, I would grant the application.

Order

[20] (1) The second respondent is hereby granted permission to adduce as fresh evidence on appeal:

a) Letter dated 11 July 2012 from the Jamaica Fire Brigade addressed to Mr Leighton Gordon, and

b) Letter dated 11 November 2011 from Dr Raefer D. Wilson addressed to Mr Homer Morris.

(2) The costs of the application to be costs in the appeal.