JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44/85

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

BETWEEN	NOEL GRAVESANDY	DEFENDANT/APPELLANT
AND	NEVILLE MOORE	PLAINTIFF/RESPONDENT

Orrin K. Tonsingh for appellant

Ainsworth Campbell for respondent

January 30, 31 & February 14, 1986

CAREY, J.A.:

This appeal is taken against that part of an order of Wright, J., in the Supreme Court dated July 24, 1985 whereby he awarded the plaintiff, the present respondent, under the head of general damages, an amount of $15,000.00 reflecting loss of earning capacity and $90,000.00 for pain and suffering and loss of amenities. As to the former sum, it was argued that there was no evidence to support such an award, and as to the latter amount, the award was inordinately high, having regard to the injuries received by the plaintiff.

On the last day of the hearing when we set aside the award for loss of earning capacity, and reduced the award for pain and suffering and loss of amenities, we promised to put our reasons in writing and hand them down at a later date. We now do so.

The plaintiff is a manufacturer of slippers and employs three persons in that business. On 8th March, 1984 while riding his motor cycle on the Waltham Park Road, St. Andrew, he collided with the respondent's car and received serious injury to his leg. The medical evidence adduced disclosed that he had suffered a "crush injury" to his left leg, i.e., involving bones, tendon and muscles. There was a compound fracture of the tibia and fibula. Although it was suggested that an osteotomy (an operation to realign bone) might have to be performed, an evaluation never took place because the plaintiff had not seen the doctor up to the time of hearing. There was no evidence as to the percentage of his disability and the doctor testified that there was the likelihood that the leg could even improve between the date of hearing and September 1985, the next date of appointment. Finally there was expected to be some shortening of that leg which was the deformity pleaded.

Loss of earning capacity

In the Court below, learned counsel for the plaintiff suggested $15,000.00 which, in the result, was awarded as the figure which should commend itself to the judge. Mr. Tonsingh maintained then, as he did before this Court, that there was no medical evidence to support any award on this aspect of the case. He relied on Moeliker v. A. Reyrolle & Co. Ltd. [1977] 1 All E.R. 9.

Before we consider the relevance of this case, it is as well to appreciate the distinction between an award for "loss of earning capacity" and for "loss of prospective earnings". In Fairley v. John Thompson (Design and Contracting Division) Ltd. [1973] 2 W.L.R. 40, Lord Denning at page 42 emphasized this point in these words:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages".

In the case of loss of future earnings, the Court is therefore concerned with quantifying an item of special damage, which, provided the evidence is adduced, is comparatively easy to assess. Loss of earning capacity is an item of general damages coterminous with pain and suffering. What the Court is being asked to assess is the plaintiff's reduced eligibility for employment or his risk of future financial loss.

Before dealing with the principles involved, it should be pointed out that whatever be the item or head of damage sought to be claimed, there must be evidence and Carberry, J.A., in United Dairy Farmers Ltd. & Anor. v. Goulbourne (by next friend Williams) [unreported] SCCA 65/81 dated 27th January, 1984 made this perfectly clear, when he observed at page 5:

> "Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however tenuous it may be".

We can now refer to Moeliker v. A. Reyrolle & Co. Ltd. (supra) which considered the principles to be applied in an award of damages for loss of earning capacity. We quote from the headnote which accurately, in our view, reflects the general principles applicable to assessing damages for loss of earning capacity. As stated by Browne, L.J., who delivered the main judgment of the Court of Appeal, Civil Division:

> "In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate".

The claim for loss of earning capacity is more likely than not to arise in cases where the plaintiff is in employment at the time of trial or assessment, for as Browne, L.J., points out, if the plaintiff is earning as much as or more than he was earning before he suffered injury, he can have no claim for loss of future earning but he may have a claim for loss of earning capacity if he should ever lose his present job. Although the case under reference was concerned with a plaintiff in employment, in our opinion, the principles therein stated, apply equally to a plaintiff who is self-employed as was the respondent in the present case. Plainly, if the possibility or risk exists that the plaintiff will be unable to perform and so have to close his business, he is in precisely the same situation as an employee who loses his present job. In considering this head, Browne, L.J., suggested that there are two stages, viz:

> "(i) Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life?
>
> (ii) If there is (but not otherwise), the Court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job".

So far as the medical evidence went, it was proved that the plaintiff as at July 1985, the date of assessment, had a deformed left leg caused by a compound fracture of the tibia and fibula. He experiences some pain which is apparently the natural effect of such a fracture. There would be some pain and swelling when he stands. Shortening had not been established although the plaintiff would have such a sensation. The evidence thus adduced in favour of the plaintiff's claim was therefore, as Mr. Tonsingh pointed out in the course of his submission, quite uncertain and unsatisfactory. It provided no basis for finding that there was a real or substantial risk that the plaintiff would be disabled from continuing in his present occupation and be thrown out in a handicapped condition in the labour market at some time before the estimated end of his working life.

The chance or risk must depend, in the first place, on the degree, nature or severity of the injury and the prognosis for full recovery. Where, as in the present case, the extent or the percentage disability was not known, it is impossible to begin to attempt a quantifying of risk. Further, there was evidence that although the leg could never be as before, it was probable that it would improve

by the time his next visit to the doctor was scheduled. Then there are other factors about which evidence would need to be adduced, for example, the length of the rest of his working life, the nature of his skills, the economic realities in his trade and location. This would be necessary to put a court in a position to assess the chances of obtaining other employment or continuing in some other business.

We think we have said sufficient to indicate the complete absence of any evidence which would allow the learned judge to assess damages under this head.

Pain and Suffering and loss of earnings

The learned judge awarded an amount of $90,000.00 under this head. There appears in the judge's notes of evidence the following:

> "Court observes: left leg gruesome in appearance and requires much courage to live with".

The note occurs after both counsel had completed their submissions and before he announced the awards, which inclines us to think his viewing of the deformed leg greatly influenced him in his award. It is necessary to note that the plaintiff never claimed for any cosmetic disability. In the course of his evidence, he contented himself with saying - "Foot very ugly", and at this point the judge took the opportunity of viewing the leg noting - Court views leg (deformed, black, enlarged, mis-shaped and ugly). In our opinion, in the absence of any pleading relating to cosmetic disability or any application to amend to allow its inclusion, the learned judge was not entitled to use his view to supply inadmissible evidence. And of no less importance, despite the learned judge's opinion that the

"gruesome appearance required much courage to live with", the plaintiff gave no evidence that he was so affected.

We were helpfully reminded by Mr. Tonsingh of some observations of Phillimore, L.J., in Dimmock v. Miles [1969] (unreported) Kemp & Kemp 4th Ed. Vol. 2, page 3651 where in dealing with facial disfigurement he said this -

> "... the real difficulty here is that she was not asked about her own feeling with regard to the scar and that is a much more serious matter in this sort of case. After all, some may treat a scar on the forehead as comparatively trivial, but to another it would be a source of serious worry".

These observations are, in our view, as apt with respect to any other form of disfigurement. We cannot accept that the judge was in these circumstances entitled to use his personal reaction as a basis for assessing this head of damage. In that, with all respect to the learned judge's experience, he fell into error.

We were referred to a number of cases in Mrs. Khan's valuable compilation of assessment of damages cases in order to see the range of awards being made by the judges in the Supreme Court in respect of similar injuries.

First Green v. Brown C.L. 1975 G035

award made 16. 2. 81

Compound fracture of right tibula and fibula. There was a ¼" shortening of right lower leg. Permanent partial disability of right lower limb assessed at 15%.
Pain and suffering and loss of amenities
Set at $14,500.00

Grant v. Montague Ch. 1975 G025

Award 5. 10. 76

There the plaintiff, storeman aged 45 years had

i. Compound fracture of left femur

ii. Compound fracture of right tibia
There was deformity at site of tibial fracture and plaintiff suffered from a weak knee, limped and could not lift heavy weights.
Awarded $18,000.00

Markland v. Deslandes

Award 29. 1. 79

Plaintiff a janitor aged 26 had compound fracture of the right tibia and fibula, fracture of shaft of right femur. He was unable to squat, to get his heel to the ground when walking without shoes. Limitation of right knee. Grossly deformed limb. Permanent partial disability assessed at 25% of the right lower limb.
Awarded $25,000.00.

In United Dairy Farmers Ltd. & Anor. v. Goulbourne (supra) the injured plaintiff had a fractured femur which although healed had resulted in a "shortening of the leg". The trial judge had awarded $50,000.00 for pain and suffering but this Court reduced that amount to $35,000.00. We would call attention to the recent decision of this Court in Central Soya of Jamaica Ltd. v. Freeman (unreported) SCCA 18/84 dated 8th March, 1985. Rowe, P., indicated the basis for measuring the inflation rate of awards since 1980. He said -

> "It was so submitted and it does seem to me that 1980 awards can be used as a starting point for computing awards at the present day. In the course of argument it was brought to the Court's attention that for sometime after 1980 inflation figures in Jamaica were less than 10% per annum. Using 1980 therefore as a base year for stability, to find what sum, due to inflation, would have the similar purchasing power in Jamaica in 1984, would have been a relatively simple matter if an experienced economist had been called to testify. That was not done. It was suggested that in the absence of any evidence the Court could take

> "judicial notice of the depreciation of the Jamaican dollar between 1978 and 1984 and use that rate of depreciation as the basis for arriving at the inflation rate. In the instant case I am prepared to adopt that course and to conclude that there had been a depreciation somewhere between 75% and 100% in that period. Therefore an award in 1984 could not be said to be excessive and wholly out of line if it reflected a 100% increase over an award made in 1978 or 1980 for a similar injury".

If one applies the approach suggested to the cases on assessment referred to above, we would have the following result:

> In Green v. Brown the award of $14,500.00 in 1981 would be equivalent to $29,000.00.
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> Grant v. Montague $18,000.00 in 1976, applying a multiplier of 3 would result in a figure of $54,000.00.
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> Markland v. Deslandes the award of $25,000.00 would be equivalent to $50,000.00.
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> The figure in the last case cited namely, United Dairy Farmers Ltd. & Anor. v. Goulbourne, the figure of $35,000.00 in 1984 would equal $50,000.00 at today's value of the dollar.

The range is therefore between $29,000.00 to $54,000.00.

We came to the conclusion that having regard to the injuries received and the uncertain prognosis, the award of $90,000.00 was inordinately high. It is true as Carberry, J.A., pointed out in United Dairy Farmers Ltd. & Anor. v. Goulbourne (by next friend Williams) [supra]:

> "In making awards the Courts do their best to measure the incomprehensible or the immeasurable, - (e.g. pain and suffering, or loss of amenities) - but there is a stage at which this ends and sheer speculation begins".

But, difficult though the exercise is, the court must make an award. In all the circumstances, we fixed $50,000.00 as reasonable compensation for the plaintiff's pain and suffering and loss of amenities.