JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 15/91

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG)

BETWEEN JAMAICA TELEPHONE COMPANY LIMITED DEFENDANT/APPELLANT

A N D DELMAR DIXON PLAINTIFF/RESPONDENT
(BY HIS NEXT FRIEND OLIVE MAXWELL)

John Givans for Appellant

Ainsworth Campbell for Respondent

July 7, 1993 and June 7, 1994

RATTRAY P.:

On the 5th of June 1987 the plaintiff a schoolboy of 9 years old was hit down by a motor van owned by the defendant/appellant and driven by his servant and/or agent. He suffered certain injuries for which he had to be medically treated and which left him with physical disability. In an action filed in the Supreme Court brought on his behalf by his next friend Olive Maxwell the injuries and their effect were described as follows by Dr. Imran Ali, a Medical Doctor and Orthopaedic Surgeon who examined him on the 3rd of July 1990.

> "He gave history of being involved in motor vehicle accident.
>
> On 5/6/87 at which time he suffered fractures to both his thighs for which he treated at the University Hospital.

"On examination, the fracture of both femur~~a~~ were well healed without any obvious deformity at fracture site.

However he had a genuvalvus knock knee at about 20 degrees of right knee and when measured left lower limb was ½' shorter than right.

He walked with obvious limp and complained of pains in both knees. I assessed him as having a permanent partial disability of between 15 - 20% of right lower limb.

It may be possible that he has pain in both knees - pain is subjective, knock knee may put strain on right knee.

He has some mal-alignment of right knee and this may lead to early wear and tear and arthritis. This condition genu valvus can be corrected by surgery. It is a bone operation which I will consider major. He would have to undergo anaesthetic. Would regard it as advisable. He is young and with growth any mal-alignment may increase.

Would be painful operation. He would have to be in cast again. Immobilization after such operation would be between 6 - 12 weeks. Should be completely healed at end of 6 weeks.

His permanent partial disability should increase after such operation. It would be difficult to say whether it would be completely gone. There is a theory that whenever there is a fracture there is some permanent disability. They are not good weather men. Would require at least a week in hospital. Minimum charge for overall cast - $15,000 - $20,000 varies from hospital to hospital. He would be in cast during 6 wks - 8 wks. In bed for about a month - restricted activity. Would need to be followed up by the surgery nursing care minimal. Xrayed monitored.

All things being equal, will need about six visits. Would be advisable for him to be brought to where ever he is being seen. (ear). Would regard two injuries to have been serious for this young chap. Injuries as is now would handicap him in running and jumping".

On cross-examination Dr. Ali maintained that young Dixon would have a residual disability. He was shown a Medical Certificate by a Dr. K. Vaughan who had seen the patient at the time of the accident at the University Hospital of the West Indies. The Certificate stated inter alia:

> "Examination revealed a young boy, alert, conscious with abrasions to the left cheek and left shoulder. Both thighs were swollen; the left more so than the right.
>
> Radiographs done revealed a displaced spinal fracture of the middle third of the shaft of the left femur along with an undisplaced fracture of the shaft of the right femur.
>
> He was admitted to the ward and skin tractions applied to both legs. This was maintained for three weeks following which a hip spica was applied to the right leg.
>
> Master Dixon was discharged from hospital on the 6th June 1987, with follow up clinic appointments.
>
> He was seen on the 27th July 1987, at which time the cast was removed. Walking, however was delayed for a further three weeks.
>
> Subsequent visits saw an uneventful recovery and Master Dixon was discharged from the clinic fully ambulant with equal leg lengths.
>
> As a result of his injuries, he should have no permanent disability".

With respect to the facts in the Certificate Dr. Ali stated:

> "... Increase in length of right leg is due to valgus he developed. Valgus would not necessarily be visible when Dr. Vaughan examined him. Valgus has potential growth disorder.
>
> The disability for which I have assessed him is due to valgus and apparent increase in length".

In a judgment delivered by Courtenay Orr J. on the 11th of March 1991 the plaintiff was awarded damages, inter alia, as follows:

General damages - pain and suffering and loss of amenities - $360,000.00.

Handicap on the Labour Market - $20,000.00.

It is these two items of damages which are being challenged by the defendant/appellant on appeal to this Court. We are being urged to say:

(1) That the sum for general damages is manifestly excessive having regard to the injuries alleged and proved.

(2) That the award of $20,000.00 for loss of earning capacity was unwarranted having regard to the evidence or alternatively was manifestly excessive.

We will deal with the award for loss of earning capacity otherwise referred to as "handicap on the labour market".

In the instant appeal a principle of law arises only in this small area - and it concerns the sum of $20,000.00 awarded under this heading. The relevant facts with respect to this item is that the plaintiff/respondent was at the time of the accident which caused him damage a schoolboy aged 9 years and therefore (a) had not gone on to the labour market at all or in any specified area, and (b) did not provide any evidence as to the nature of his prospective employment on that market whenever in the future he was old enough and ready to enter upon the market. The question therefore which necessarily arises is this: On what basis could there be any calculation and assessment which could result in an award under this heading ?

Obviously there are some species of injury which could result in diminished earnings in the future in whatever area of employment the injured person would be engaged, for eg. injury resulting in some mental deficiency. It is not such an injury with which we are now dealing. We need therefore to look at the respondent's injuries to determine the possibility of his injuries

reducing the earning capacity on the labour market which he would have had if he had not received those injuries.

The evidence of Dr. Imran Ali resulting from an examination of the respondent some three years after the accident, relevant to disability which he would have in the future disclosed:

(1) A genuvalvus knock knee at about 20° of right knee and when measured left lower limb was half inch shorter than right.

(2) Permanent partial disability between 15 - 20% of right lower limb.

(3) Some mal-alignment of the right knee which may lead to early wear and tear and arthritis.

He further stated that:

> "Injuries as is now would handicap him in running and jumping".

His evidence also was that the condition genuvalvus can be corrected by surgery.

Is the sum of $20,000.00 awarded for handicap on the labour market sustainable? Whilst this particular item of damages is always speculative "there must also be some basic fact or facts upon which a Court can make a forecast. When an infant is involved the amount of speculation is high as there are many imponderables. It is otherwise in the case of an adult who has been or is in the labour market". [See Gordon J.A. in George Edwards and Moses Morris vs. Dovan Pommells and Fitzritson Gordon, S.C.C.A. 38/90].

Whilst there is the basic fact of injury as disclosed which will affect the respondent in his working years the effect of the injuries as it relates to his future area of employment (which is unknown) and his capacity to earn is an imponderable both in terms of the nature of the employment itself and also in relation to an assessment under this heading in calculable terms. If the proposition is that any residual injury, in this case a permanent partial disability of between 15 - 20% of the right lower limb can result or probably will result in a loss of earning capacity then a nominal sum of $20,000.00 taken out of the air may be permitted as part of an award. However this proposition would falter when the nature of the employment is unknown since it may apply in one type of employment but not in another. It falters but does it fall flat on its face?

If the infant on arriving at an age when he probably would be in employment is likely to find such employment in an area that calls for some agility and standing for long periods of time it must be accepted that he would be suffering some handicap on the labour market. If his occupation is purely cerebral it would not. It is necessary however to bear in mind the fact that it is common practice in Jamaica for schoolboys to engage in holiday work in business places, like dry goods stores, supermarkets, warehouses, etc. which work requires the movement of articles from place to place, long hours of standing and a certain amount of agility. Such employment is in a segment of the labour market as known to our experience in Jamaica. Although the element of speculation exists and the imponderables are many we identify a basis on which a sum can properly be awarded and the sum of $20,000.00 is not so excessive as to be considered outside the limits of a conventional sum awarded when the relevant factors defy precise calculation. It follows therefore that the award of $20,000.00 under this head should not be disturbed.

In any event it is well established that it is the global figure of the award which in the final analysis must be examined by the Court of Appeal and if the segmented portion of the award which is under challenge can be accommodated within the global figure the Court of Appeal will not disturb the award.

This brings us therefore to a consideration of the award of $360,000.00 under the heading of "Pain and Suffering and Loss of Amenities".

We commence with the presumption that the decision on quantum made by the Trial Judge is a correct one "in every respect unless it is demonstrably wrong". For the Appellate Court to vary the assessment of the Trial Judge it must be satisfied that the judge has made a "wholly erroneous estimate of the damage". This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases in the past with the necessary adjustments, having regard to inflation and any special features of the injury on the other assessable factors of the particular case, is directed at achieving this uniformity. The availability of our own compilations of award as a result of Mrs. Khan's admirable dedication provides the appropriate perimeters within which real comparisons may be made.

Counsel for the appellant has referred us to several Jamaican cases upon which he has based his submissions that the Trial Judge has made a wholly erroneous estimate of the damages related to his award under the heading of "Pain and Suffering and Loss of Amenities". We mean no disservice to his industry when we say that he has overlooked one important factor and that is the age of the plaintiff/respondent. At the time of the accident he was a boy of 9 years of age and by trial date he was 12 years old. The cases cited related to plaintiffs between the ages of 24 and 37 years of age. The pain and suffering and loss of amenities in the case of this appellant are therefore likely to exist for a much

longer time than those persons of the ages of the awardees whose cases were cited. Specifically the handicap in respect of running and jumping, the pain in the knees, the probability of adverse weather effect on the injured areas, the obvious limp, the probability of wear and tear, mal-alignment of the growth due to his youth, and arthritis, the necessity for another operation described as "painful" are all established factors in this case which in many respects do not relate to the cases cited before us in this Court. It will be necessary therefore to make some adjustments when a comparison is made between this case and the cases which have been cited.

The principles governing an Appellate Court in its review of damages awarded by a lower Court are well established. They were stated clearly by Greer L.J. in Flint v. Lovell [1935] 1 K.B. 354 at p. 360 as follows:

> "I think it right to say that this Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled".

No principle of law arises in a consideration of whether the award of $360,000.00 for pain and suffering and loss of amenities can be justified. It is only a question of whether the award is in our judgment an entirely erroneous estimate of the damage under this head. It is always difficult to find comparable cases especially in the same jurisdiction which can point the way

as to what is an appropriate award in this specific case being considered on appeal. The judgment in favour of the respondent was delivered in March 1991, at which time the assessment of damages was made.

In Clifton Edwards v. Calfin Browning, Suit No. C.L. 1986/E 053 (See Khan Vol. III p. 238) the plaintiff age 37 years at the time of the motor vehicle accident suffered:

(1) 4 cm. laceration over the distal third of his right leg.

(2) Compound communited fracture of right tibia and fibula.

(3) Disfigurement and deformity of the right lower limb.

(4) Permanent partial disability of 30% of the right lower limb which could be reduced to 15% - 20% if an operation is successfully undertaken.

The right leg healed with angulation which resulted in the permanent partial disability as described. Malcolm J. awarded $150,000.00 for pain and suffering and loss of amenities in December 1990 which we consider on the low side. We would, making the required adjustment for inflation, arrive at an award in March 1991 of a figure of $180,000.00.

In our view the injuries suffered by the respondent were more serious in that the respondent was left with his left lower limb half an inch shorter than the right, walked with an obvious limp, had mal-alignment of the right knee which may lead to early wear and tear and arthritis and is now handicapped in terms of running and jumping. These additional factors plus the fact of his age 9 years old at the time of the accident and the need for another surgical operation point in the direction of a much higher award in his case.

In Suit No. C.L. 1986/S 1083, Calvin Stewart v. Roul Isaacs (See Khan Vol. III p. 57) the plaintiff age 24 a security guard received injuries in a motor vehicle accident which left him with the following disabilities:

(a) walks with a limp;

(b) approximately 20% permanent partial disability of left leg;

(c) suffers pain when mouth open widely.

His loss of amenities were:

(a) unable to run or stand for long;

(b) difficulty in climbing;

(c) cannot play cricket or dance.

Parkin J. (Ag.) awarded him $100,000.00 for pain and suffering and loss of amenities again considered low by us, in an assessment made in June 1987. Applying appropriate inflation rates this would amount to $190,000.00 in March 1991.

In determining a proper award for a young boy in the Jamaican jurisdiction in considering the effect of an injury which as in this case causes an obvious disfigurement which is permanent and affects the injured person in terms of mobility, a Court in our view may properly take into account two additional factors:

1. the importance of athletic prowess in our culture not only in respect of games but of recreation involving the movement of body and form for eg. the dance. The recognised phenomenon of involvement in dance hall and carnival as avenues of enjoyment and expression are well established.

2. the inhibiting effects of an obvious deformity particularly among young people in terms of social relationships.

These elements may not assume such magnitudes in countries which have been subjected to wars with their aftermath of obvious scarring on numbers within the population, a feature to which its populace has become conditioned and accustomed.

It seems to us that taking all these factors into account and the earlier cases which appear to us on the lower side since the base cases from which they were calculated were in any event low, the award of $360,000.00 for pain and suffering and loss of amenities is not "an entirely erroneous estimate of the damage to which the plaintiff is entitled". We therefore uphold the award of $20,000.00 for handicap on the labour market as well as the award under the heading of pain and suffering and loss of amenities of $360,000.00. The appeal is therefore dismissed with costs to the respondent.

**DOWNER J.A.:**

I agree.

**PATTERSON J.A. (AG.):**

I agree.