[2023] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00100

BETWEEN	**JAMAICA URBAN TRANSIT CO LTD**	**APPELLANT**
AND	**JOY MURRAY**	**RESPONDENT**

Miss Jamila Maitland for the appellant

Mrs Andrea Walters-Isaacs for the respondent

25 and 27 April 2023

Damages – Whole Person Disability – Handicap on the Labour Market- Future Medical Care- Whether Damages Awarded were Excessive

ORAL JUDGMENT

F WILLIAMS JA

[1] In this matter, the appellant appeals against an award of damages to the respondent, arising from injuries sustained by her on 31 December 2002. After a trial on 16 September 2021, on 4 November 2021, Hutchinson J ('the learned judge') entered judgment for the respondent against the appellant and made the following orders as to damages and costs:

> "As such, my award to the Claimant is as follows:
>
> - pain, suffering and loss of amenities - $6,000,000.00 (with interest at 3% per annum from the date of service of the claim to November 4th, 2021;
>
> - handicap on the labour market - $2,000,000.00 (with no interest);

- Future medical care - JMD $140,000 and USD $43,500;
- Special damages - $140,000 (as agreed) with interest from the 31st December 2002 to November 4th, 2021;
- Costs."

[2] The respondent's injuries were sustained in the course of her employment as a conductress on a motor bus owned and operated by the appellant. In summary, she was injured when the bus driver negotiated a corner at great speed, and the bus fell into a large pothole, which caused her to be thrown violently forward and then back in her seat.

[3] In her particulars of claim, at para. 5, the respondent set out her particulars of injuries as including the following:

> "i) Sacroiliac pain
>
> ii) Pain in back with radiation of pain down to lower limbs
>
> iii) Stiffness in the back from the cervical to lumbar region
>
> iv) Disc bulge L5/S1
>
> v) Disc material protruding into exiting nerve root
>
> vi) Spinal injuries"

[4] By this appeal, the appellant does not challenge the finding of liability arrived at by the learned judge; she only challenges some aspects of the award for damages. There are, in fact, three grounds of appeal contained in her notice and grounds of appeal, filed on 18 November 2021, as follows:

> "a. The award for General Damages (pain and suffering and loss of amenities) is excessive and that it amounts to an erroneous estimate of the sum to which the Claimant is entitled.
>
> b. The award for "handicap on the labour market" is wrong in law in that there is no medical evidence to suggest that the Claimant would be handicapped on the labour market. In fact the contrary is set out in the evidence as the Claimant did not make any attempt to find work from 2008, the date on which she was made redundant (see

> paragraph 4 of judgment) or in the alternative there was no assessment on the part of the learned judge as to how she arrived at the award.
>
> c. The award for future medical care was wrong in law in that the estimate for care was provided by a medical doctor who gave evidence touching an area outside his care [sic] of competence and further that he did not revise his position after the Claimant have had [sic] surgery."

Ground a. The award for General Damages (pain and suffering and loss of amenities) is excessive and that it amounts to an erroneous estimate of the sum to which the Claimant is entitled.

Summary of submissions

For the appellant

[5] On behalf of the appellant, Miss Maitland acknowledged that this court should only intervene with the judgment of the court below if it is satisfied that the learned judge acted on some wrong principle of law or that the award was an entirely erroneous estimate of the damages to which a claimant was entitled (citing Wolfe JA in **Williams v Cope** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 60/1991, judgment delivered 5 October 1992).

[6] She further submitted that the award was excessive and that the learned judge erred in relying on the case of **Michael Baugh v Juliet Ostemeyer and others** [2014] JMSC Civ 4. She would have been better advised, it was further submitted, to rely on the case of **Richard Henry v Marjoblac Limited** [2017] JMSC Civ 42, in which the injuries were similar and the updated award at the time of the judgment was $1,315,146.24.

For the respondent

[7] On the other hand, Mrs Walters-Isaacs submitted that the award for pain and suffering and loss of amenities was "extremely conservative" and could have been the subject of a cross-appeal. She pointed out that, to this day, the respondent continues to suffer from life-altering, debilitating and excruciating pain. She sought to highlight the fact that Dr Neville Ballin, the pain specialist, had assessed the respondent's whole-person

disability to be 17%; and that Dr Grantel Dundas and Dr Warren Blake had each assessed the whole-person disability to be 7%. She referred to the cases of **Evangelia Deyannis v Half Moon Bay Ltd** (unreported), Supreme Court, Jamaica, Claim No HCV 2007 001001, judgment delivered on 12 June 2009; and **The Attorney General v Phillip Granston**, (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 125/2009, judgment delivered on 20 January 2011. Those cases featured awards of $10,238,970.58 and $13,860,031.04, respectively, for similar injuries, although there was no quantification of the whole-person disability, she submitted. These figures are updated for inflation up to the time of the trial.

[8] Her ultimate contention on this ground was that the award ought not to be disturbed.

Discussion

[9] In **Flint v Lovell** [1934] All ER Rep 200 at pages 202-203, Greer LJ gave the following guidance, which directs how we must approach this appeal:

> "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 the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on 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 damages to which the plaintiff is entitled."

[10] In paras. [32] to [40] of her written judgment, the learned judge listed and considered all the cases on which the appellant and respondent relied. Thereafter, she conducted an analysis of the similarities and differences between the injuries of the respondent with those of the other appellants in the cases that were referred to. Some of those referred to by counsel for the respondent included: (i) **Stephanie Burnett v Metropolitan Management Transport Holdings & Jamaica Urban Transit Co.**

Ltd, Khan's volume 6, page 195. That case featured a whole-person disability ('WPD') of 13% with an award at the time of judgment of some $8,725,848.56. (ii) **Icilda Osbourne vs George Barned & Metropolitan Management Transport Holdings et al** (unreported), Supreme Court, Jamaica, Claim No 2005 HCV 0294, judgment delivered 17 February 2006, which dealt with a WPD of 10% and an award of $7,672,176.30. (iii) **Marie Jackson vs Glenroy Charlton and George Harriot** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 0294, Khan's volume 5, page 167, dealing with a WPD of 8% and an award of $9,114,545.45. (iv) **Evangelia Deyannis v Half Moon Bay Limited** (previously referred to).

[11] Among the authorities cited by counsel for the appellant were: (i) **Michael Baugh v Juliet Ostemeyer and others** [2014] JMSC Civ 4, with a 4% WPD and an award of $1,646,305.41; (ii) **Richard Henry v Marjoblac Limited** [2017] JMSC Civ 42, with a 7% WPD and an award of $$7,734,159.78; and (iii) **Ann Lutas v Lilieth Hanson and another** [2012] JMSC CIV. 102, with a 6% WPD and damages of $1,269,515.66.

[12] In her written judgment, at paras. [41] to [48], the learned judge considered the medical reports that were in evidence and arrived at an award of $6,000,000.00 , finding that the case of **Michael Baugh** most closely mirrored those of the respondent. She indicated in her judgment, however, that the updated award in that case appeared to be on the conservative side. At para. [3] of the judgment in the **Michael Baugh** case, his injuries are listed as follows: a) cervical strain; b) permanent lumbar spondylosis; c) mildly desiccated and a mild posterior disc bulge at disc L2-3; d) posterior annular tear at disc L3-4; e) At L4-5 disc narrowed and desiccated and a diffuse posterior disc protrusion with associated mild facet hypertrophy; f) at L5-51 a central posterior disc protrusion; g) permanent partial disability of the whole person of 4%. These are not dissimilar to the respondent's injuries in this appeal.

[13] It will be seen from this review that the awards in the cases cited spanned a very wide range. The sum eventually awarded appears to have fallen somewhere around the middle of the range. It is to be remembered that the cases that a court considers when

assessing general damages are limited in their use to being just general guides. This is so as no two cases are ever exactly the same, with injuries and resulting disabilities in one always being different in some way from another – even those in which the injuries are generally similar. An award, therefore, represents a judge's estimate or assessment of an amount that would be fair compensation to a claimant, given his or her particular (and sometimes peculiar) circumstances. We are unable to discern any error in the learned judge's approach to the quantification and award of damages under this head; and so the appellant has not made out this ground.

Ground b. The award for "handicap on the labour market" is wrong law in that there is no medical evidence to suggest that the Claimant would be handicapped on the labour market. In fact the contrary is set out in the evidence as the Claimant did not make any attempt to find work from 2008, the date on which she was made redundant (see paragraph 4 of judgment) or in the alternative there was no assessment on the part of the learned judge as to how she arrived at the award.

Summary of submissions

For the appellant

[14] In challenging the award on this ground, Miss Maitland submitted that the respondent had led no evidence of the risk of losing her job and, in fact, remained at work for five years after the accident. She also testified, it was submitted, that the respondent did not seek employment since the date of her being made redundant. Referring to **Moeliker v Reyrolle & Co Ltd** [1977] 1 All ER 9, she submitted that the respondent had not assisted the court with evidence to assess the risk involved in re-joining the workforce; and that, given that the requirement for the award is in two parts, the threshold had not been met to justify an award under this head of damages. The courts frown upon lump-sum awards under this head, Miss Maitland further submitted, citing **Dawnette Walker v Hensley Pink** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 158/2001, judgment delivered 12 June 2003.

For the respondent

[15] On behalf of the respondent, Mrs Walters-Isaacs submitted that there was both *viva voce* and medical evidence to support the award for handicap on the labour market. She argued that the respondent continues to suffer from pain caused by the injuries she sustained in the accident. She stressed as well that the reason why the respondent testified that she had not made an effort to find work since she was made redundant was the severe pain that she continues to suffer. Mrs Walters-Isaacs also pointed to the evidence that, as a result of her injuries, the respondent was given different duties when she returned to the job and worked fewer days and on an on-and-off basis. It was the pain suffered by the respondent that had led to her becoming incapable of competing effectively on the job market, it was argued.

Discussion

[16] At para. [50] of her written judgment, the learned judge dealt with the matter thus:

> "[50] At the time that the Claim was filed and the matter subsequently tried, the Claimant was no longer employed. The medical evidence provided amply demonstrated that for the rest of her life, she would suffer a severe handicap in the labour market. Her viva voce evidence outlined that it was her ongoing pain which deterred her from seeking other employment and she was reduced to relying on the charity of others. In these circumstances, I am persuaded that an award under this head is not only justified but can properly be made as part of general damages. Although the authorities on the point indicate that the multiplier/multiplicand method is appropriate in this regard, I have elected to make a lump sum award of $2 million."

[17] The court agrees with the submissions made by Mrs Walters-Isaacs on this ground. This paragraph is in keeping with the evidence and shows that the learned judge took into account all the relevant considerations. The evidential support from the respondent can be seen, *inter alia*, at paras. 28, 29, 31 and 33 of the respondent's witness statement as follows:

> "28. While I was on sick leave in October 2005, JUTC wrote to Dr. Dundas requesting a medical report on my medical condition for them to determine whether or not I would be able to resume duties as a conductress.
>
> 29. I continued working on and off at JUTC during this period. I received a letter dated November 23, 2007 from JUTC inviting me to a meeting to discuss <u>my illness and possible separation from my job</u>. My Union, U.A.W.U. was also invited to attend the meeting, representative, Mr. Grant attended.
>
> 31. Sometimes in 2008 I was made redundant from my job as a conductress at JUTC. I received redundancy payment. I have not worked since that time. <u>To date I still suffer from constant and excruciating pain. The pain to my back sometimes radiates down to my leg, and I have a numbing sensation. Some days I am unable to move</u>. My medical condition has also affected me mentally and emotionally as I sometimes suffer from bouts of depression.
>
> 33. I am in dire need of financial support as my medical condition has rendered me unemployable. I am now 59 years old. At the time when I was laid off from my job as a Conductress at JUTC and was eventually made redundant in 2008 I was earning the sum of $28,000.00 per month. I received a little over $400,000.00 for my redundancy payment. If I were still working at JUTC as a Conductress I would be earning in the region of $100,000.00 monthly. My situation is extremely frustrating and embarrassing as since being made redundant I have had to rely on the generosity of family members and strangers." (Emphasis added)

[18] In **Cook v Consolidated Fisheries Ltd** [1977] ICR 635 at 640, Browne LJ made it clear that an award for handicap on the labour market was not confined to cases in which the claimant was still on the job at the time of the award; but could also be made where the claimant was unemployed at the time of trial. He opined as follows:

> "In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial…In Moeliker's case at p. 261 of the report in [1976] ICR, I said: 'This head of damage…arises where a plaintiff is at the time of the trial in employment'. On second thoughts, I realize that is wrong…and, when I came to correct the proof in the report, in the All England Reports, I altered the word 'only' to 'generally' and that appears at [1977] 1 All ER 9,15."

[19] It is important to note, as well that, if the multiplier-multiplicand approach had been used, the evidence suggests that the award could have been much more than the $2,000,000.00 awarded under this head. With the respondent's unchallenged testimony that she would have been earning around $100,000.00 per month at trial, had she still been employed; and with her having been 59 in 2021 (see para. 33 of her witness statement); if she were to retire at age 65 (the usual retirement age), the applicable multiplier would be 6. The yearly multiplicand would be $1,200,000.00 ($100,000.00 x 12), making a total potential award of $7,200,000.00. So, although the multiplier-multiplicand approach might have been the preferred or more-appropriate method, the award made by the learned judge cannot fairly be said to have worked an injustice to the appellant. We cannot say that she erred. The lump sum award that was made by the court below, therefore, cannot fairly be faulted.

Ground c. The award for future medical care was wrong in law in that the estimate for care was provided by a medical doctor who gave evidence touching an area outside his care [sic] of competence and further that he did not revise his position after the Claimant have had [sic] surgery.

[20] There are two elements to this ground: (i) that Dr Ballin testified with respect to an area that is outside his area of competence; and (ii) that his evidence was not revised after the appellant had had surgery.

[21] In his medical report, dated 20 September 2008, Dr Ballin's qualifications are stated thus:

> "I am acting as an expert witness. I am a Consultant in Anaesthetic Critical Care and Pain Management and my qualifications are M.B., Ch. B. F.F.A. I am fully registered with the Medical Council of Jamaica, the General Medical Council U.K.; I am a member of the Anaesthetist Association of Jamaica, the Medical Association of Jamaica, the Association of Anaesthetists of Great Britain & Ireland and the American Academy of Pain Medicine."

[22] It was Dr Ballin who, in that said report, made the recommendation (which the learned judge acted on and awarded) for the respondent to use a spinal cord stimulator

which then cost US$22,000.00. The battery and other associated expenses are also referred to and recommended in that report.

[23] Significantly, just before those recommendations are made, the following is stated in relation to the respondent's prognosis and further treatment on page two of the report:

> "Miss Murray suffered low back pain following an accident in 2002 [T]he condition resulted [in] her undergoing lumbar spine surgery in March 2004. She continues to have severe pain which affects her activities of daily living and her ability to work at her job."

[24] Also stated on page two of the report is the following:

> "She had some relief immediately following the surgery but the pain gradually returned."

[25] From all the foregoing, it is clear that Dr Ballin was an expert appointed by the court with specific expertise in the area of pain management. It does not appear (as Mrs Walters-Isaacs pointed out) that any challenge was ever raised about his competence or area of specialization until after the case was determined against the appellant. We can see no merit in the appellant's contention that Dr Ballin testified about an area in respect of which he was not competent. That aspect of the ground must, therefore, be resolved in the respondent's favour. In fact, so too must the other part of the ground. The reason for this is that, as the quotations from the report show, the latter part of the ground (based on a presumption that his report preceded the surgery) is based on a misunderstanding, as the surgery was performed before Dr Ballin wrote the report. In the result, the appellant has not made good on any of its grounds. Its appeal must, therefore, be dismissed.

Order

[26] These are the orders of the court:

1. The appeal is dismissed.
2. Costs both here and below are awarded to the respondent, to be agreed or taxed.