

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 25 of 1972

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BEFORE: The Hon. Mr. Justice Luckhoo, Ag.P. (Presiding)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Robinson, Ag. J.A.

MARJORIE PRIESTLEY - PLAINTIFF/APPELLANT

v.

VINCENT FORBES - DEFENDANT/RESPONDENT

Mrs. U. Khan for the appellant.

R.D. Alberga, Q.C. for the respondent.

May 21, 22; June 18, 1974

LUCKHOO, Ag. P.:

On December 17, 1968, Vincent Forbes, the defendant, drove his motor vehicle along Molyne's Road in the parish of St. Andrew so negligently that it collided with a motor vehicle in which the plaintiff, Mrs. Marjorie Priestley was a passenger. Mrs. Priestley was thrown forward and sustained cuts to the face and chest and a fracture of the left side of the larynx. She was taken to the University Hospital of the West Indies. The cuts to the face and chest were sutured and surgical treatment of the injury to the larynx put in hand. This latter injury has resulted in partial permanent disability of a nature which was described by Mr. George Milner, Senior Specialist Ear, Nose and Throat, at the Kingston Public Hospital, when he testified at the hearing before the trial judge Mr. Justice Marsh sitting without a jury of the claim subsequently brought by the plaintiff against the defendant for damages for personal injuries suffered and losses and expenses incurred as a result of the accident. The defendant accepted responsibility for the collision and thus the only matter

before the trial judge was the assessment of damages. The plaintiff now appeals against the award of damages made by the learned trial judge on the ground that it is far too low.

In order to ascertain whether there is substance in the plaintiff's appeal it is first necessary to examine the nature and extent of the injury to the plaintiff's larynx. On admission to hospital the plaintiff had to have tubes inserted for feeding, for the supply of saline and for breathing. She suffered considerable pain as a result of the injury to the larynx. She remained in hospital for 6 weeks. At first she could only take liquids. Later she could eat crushed foods. On leaving hospital she had to retain the tube in the throat for the purpose of breathing. The tube consisted of an inner portion and an outer portion which on occasions became stuck together and necessitated the speedy aid of the plaintiff's husband in freeing the two portions.

The plaintiff was for some eight months after the accident unable to communicate orally because of the injury to the larynx. She could but partially clear the throat of mucus and then only by the use of her tongue. There was a partial loss of her airway which rendered her incapable of physical effort for any appreciable length of time and she was for the most part confined to bed. She was now rendered more susceptible to contraction of colds and as a result had to be hospitalised on several occasions. In June 1969 she was admitted to the Kingston Public Hospital when Mr. Milner found the larynx completely blocked by scar tissue. He performed an operation on the larynx. His evidence given on April 26, 1972 in relation to this operation and to the plaintiff's resultant disabilities from the injury to the larynx is recorded by the learned trial judge as follows -

"The biggest cartilage in larynx was fractured on the left side. Above vocal cords the larynx was completely obliterated by scar tissue. Very difficult operation removing all the scar tissue. This would leave a raw area so we had to line the bare area with skin from her thigh then insert a mould - to keep the skin graft from contracting - for six weeks. During this time she still had to wear the tube in her neck. Mould is solid. After six weeks we removed the mould and also the tube so that she could use natural airway.- She had about 50 - 60% of normal airway - compromising between a large airway and no voice or small airway and some voice. Result - a voice a little better than a whisper. Disability after the operation. Severe disability. Could get around to do normal housework. Breathless from climbing stairs and e.g. running after bus. Also any infection in throat would further narrow the airway. We had to admit her to hospital for this reason on two occasions. After operation there was nothing more I could do for her. Disability is severe and permanent.

Last saw her last Saturday. Examined her. Found that her airway is even narrower than after the operation. Skin grafts may still contract for up to three or four years. She now has 35 - 40% of normal airway. No way could it improve of it itself. Now she would not be able to do work physical activity. Even with 50 - 60% she could not do what a normal person could without discomfort. She would have to fear any infection which might narrow the airway, e.g. tonsillitis. Swelling would affect her breathing. I agree that she can't do much washing or dancing or playing table tennis or gardening. I think she could do some housework. I agree that she can't run behind her children. I also imagine that her sexual relations would be affected. Agree that crossing of roads would make her excited.

I could put tube back in her neck. Any other operation would be extremely difficult nor would it guarantee any better result. If she is willing to live with permanent disability we could go along with it. If not we would have to do tracheotomy. It is possible that we may one day have to do the tracheotomy in any event. Skin graft

could continue to shrink. It is hard to say which is in her better interest. Better for her to use her natural airway than to use a tube. If she has a tube her sense of smell will be affected but her voice will be the same, no better. She can't do any job requiring physical work. She has to be very careful of the narrowing of her airway. Her life in future has to be a very inactive kind of life."

When cross-examined on these matters Mr. Milner testified as follows -

"She can have a certain degree of conversation. She is comfortable in a sedentary position. If a person's windpipe is completely severed it is no worse than her condition. Such a person would not necessarily have this same trouble, though they might. Partial paralysis below the waist. The plight of such a person is very much worse. Not so with a haemoplegic. So much can be done for him now. Difficult for me to assess. I am an E.N.T. man but paraplegic has many problems. Would equal the situation of haemoplegic. A tube would make her breathing better than it is now and allow her more exertion and allow her to perform normal exercises, dancing etc. Swimming would require special precaution. Tube has to be cared for regularly and has to be cared for by a nurse or doctor. Also has its own disadvantages. She could move in office but might get breathless doing it. She can laugh but not make much of a sound."

The plaintiff returned to work in the Jamaica Special Constabulary Force some 16 months after the occurrence of the accident. As a result of the degree of loss of her normal airway she no longer can perform any duty that involves even moderate physical exertion. She is unable to speak on the telephone. She has since her return to work been employed as a filing clerk. While her salary has increased, no doubt due to the normal increases in pay occasioned by the rise in the cost of living. She has earned no promotion and is unlikely

to do so having regard to the physical disabilities resulting from the accident. She has borne two children since the occurrence of the accident. At the time of the trial of the action she was 27 years of age. She has had to engage the services of a maid to look after the three children and also to do the housework she would have been able to do herself but for the physical disabilities resulting from the accident.

In the light of the evidence the learned trial judge awarded the plaintiff the sum of \$3,800 as special damages and \$24,000 as general damages. He itemised his award in the following way -

General damages

(1)	Pain and suffering	\$3,000
(2)	Loss of voice	\$8,000
(3)	Airway and breathing	\$4,000
(4)	Loss of amenities and scarring	\$4,000
(5)	Additional help	\$1,000
(6)	Loss of labour prospects	\$4,000
	Special damages reduced to	\$3,800

At the request of Mrs. Khan for the plaintiff the learned trial judge awarded interest on the amount of special damages at the rate of 3% per annum from the date the plaintiff cause of action arose to the date of the trial and on the total of the sums awarded for pain and suffering and for loss of amenities and scarring at the rate of 6% per annum from the date service of the writ of summons to the date of trial.

For the plaintiff it has been urged on appeal that the award of the learned trial judge both in respect of special and general damages is so inordinately low as to be a wholly erroneous estimate of the damage sustained whereby this Court should interfere and increase the award in both those regards. Mrs. Khan has submitted that, having regard to the evidence adduced, this contention is amply justified when regard is had to the amounts stated by the trial judge under each heading in his itemised award.

In particular Mrs. Khan referred to item (2) Loss of voice in respect of which the trial judge's figure is \$8,000 and compared this with the award of £5,000 in 1965 in the unreported case of Fisher v. Fisher mentioned in Kemp & Kemp: The Quantum of Damages (3rd Edition) Vol. 1 at p. 373. In that case an eighteen year old girl had her windpipe severed. After skilful surgery she spoke with a whisper. There is no mention in the short note of the case that there was any reduction of the normal airway. Mrs. Khan urged that at 1972 money values such an award would be equivalent to about J \$15,000. Mrs. Khan also referred to the trial judge's figure of \$4,000 in respect of item (3) Airway and breathing, and submitted that such an award was clearly too low for a disability to the human system which would endure for the remainder of the plaintiff's life and could conceivably become worse bearing in mind Mr. Milner's testimony that shrinkage of the graft might continue for some three to four years and that over one year of that period had yet to run when the trial was concluded. In respect of the amount of \$1,000 for additional help Mrs. Khan pointed out that the plaintiff would, quite apart from help with her children which would be required even if the accident did not befall her, need additional help because of her inability to perform those of the household tasks which she would otherwise have been able to perform had she not been disabled and that the need thereby for additional help would endure for the remainder of her life. The amount of \$1,000 was, Mrs. Khan urged, a quite unreasonable estimate of the amount to be awarded under this head. So too she urged was the trial judge's award of \$4,000 for the plaintiff's loss of labour prospects if she should be thrown upon the labour market.

Mr. Alberga, in observing that the injury sustained by the plaintiff was of an unusual kind and that as a result there was little guidance to be obtained from the reported cases as to the quantum of damages which might be awarded in a case of this nature submitted that in the circumstances it was proper for the Court to

have regard to awards in those cases where the plight of the injured plaintiffs were about the same as that of the plaintiff in the instant case even though the former had suffered injuries of a different nature. However valid such an approach might be in appropriate cases we do not think that such an approach might properly be applied in the circumstances of the instant case.

The nature of Mrs. Priestley's disabilities, as Mrs. Khan observed, relates not merely to the loss of one or more of the senses or the loss of a limb or part of the body but relates to the permanent loss in a very substantial degree of the plaintiff's ability to regulate the mechanism which sustains life itself as well as its consequent frustrations, limitations and not the least its attendant risks of danger to the plaintiff's life.

A case referred to by both Mrs. Khan and Mr. Alberga - Sanguinetti-Steele v. Irons et al (1965) W.I.R. 112 - related to an injury to the hyoid bone with haemorrhage into the right vocal cord, with a slight bowing of the vocal cords resulting in permanent substantial partial loss of voice and certain other injuries of a rather less serious nature. In the course of his judgment in that case Moody, J., in the Supreme Court of Jamaica said that the pain from the injury to the hyoid bone did not appear to be too severe or protracted being in the character of acute discomfort which would recur on extensive use of the voice. He considered that the suffering - the distress - the embarrassment and loss of amenities were considerable and that there was no prospect of improvement in the use or function of the voice. He awarded £3,500 under that head. This would be approximately J \$14,000 in the light of money values in 1972. In that case there was a permanent ^{partial} loss of voice but not as severe as a reduction to a little better than a whisper. Further there was no loss to any degree of the normal airway.

Reference was also made to the reports appearing in the Eleventh Cumulative Supplement to the Third Edition of Kemp & Kemp: The Quantum of Damages (Volume 1) of the cases of Donaldson v. British Railways Board (1972) C.A. No. 236 and Goodman v. Badcock (1971) C.A. No. 115 on appeal in both instances from Melford Stevenson, J. to the Court of Appeal in England. In the former, the plaintiff (age not stated) sustained severe multiple injuries in a railway accident. One of these injuries was a serious chest injury which resulted in intense breathing difficulties over the first 16 days in hospital followed by a tracheostomy. This operation left the plaintiff with a stricture of the trachea which for some 7 months after the accident had to be regularly dilated under general anaesthetic. About a year later the plaintiff underwent an operation to insert a Dacron graft, a sort of tube, into the throat, and a second operation to deal with the internal haemorrhage that resulted. He made a remarkable recovery but suffered a number of after-effects. The prognosis was hopeful in many respects but the plaintiff would always be anxious about his future condition, would always require a Dacron graft and has lost much in the way of general amenities of life. In addition he had suffered a slight personality change. Melford Stevenson, J. awarded £10,000 general damages for pain, suffering and loss of amenities. On appeal the Court of Appeal upheld the award of £10,000 general damages.

In Goodman v. Badcock the plaintiff, a married woman, then aged 52, suffered severed chest injuries, concussion and fractures of the pelvis in a road accident. She was in hospital some 10 weeks during which time she suffered intense pain. Her breathing capacity was at the time of trial of the action only just over 50% of normal and she was left short of breath after the least activity. Should she in the future ever contract any bronchial ailment, the consequences might be serious. The overall

effect of her injuries was to change her from a gay and active person to a tired and anxious-looking frail person. All her symptoms were likely to deteriorate with advancing years. The trial judge's award of £8,000 general damages was upheld on appeal.

Both of these cases were in some respects, though certainly not in all, somewhat similar to the instant case. In considering the awards of general damages upheld on appeal it must be borne in mind that in the Badcock case the plaintiff was then aged 52 while in the Donaldson case it would appear that the plaintiff did not suffer any substantial loss of voice.

Bearing in mind the opinion of the Judicial Committee of the Privy Council in Singh (an infant) v. Toong Fong Omnibus Co. Ltd. (1964) 3 All E.R. 925 as to the approach to be taken by the Court in assessing damages and by an appellate tribunal in relation to the trial judge's assessment of damages in personal injury cases we now turn to consider the award made by Marsh, J.

The award in the instant case relating to pain and suffering, loss of amenities of life and inconvenience and discomfort which really should be one comprehensive figure totals \$19,000 which on the evidence and after consideration of the cases to which reference was made before us is far too low. We think that \$29,000 would be a reasonable amount in that regard. In respect of the need for additional help the figure of \$1,000 is far too small having regard to the probable length of time the plaintiff would continue to require such additional help. We think \$2,000 would be nearer the mark. We see no reason to interfere with the amounts awarded in respect of loss of labour prospects and in respect of special damage.

The order of the trial judge in respect of interest on special damages awarded will stand but in respect of interest on general damages it will be varied by the substitution therein of the amount of \$11,000 for the amount of \$7,000.

Were we to itemise the award in the manner adopted by the learned trial judge the result would be thus -

(1)	Pain and suffering	\$ 3,000
(2)	Loss of voice	\$ 8,000
(3)	Airway and breathing	\$10,000
(4)	Loss of amenities and scarring	\$ 8,000
(5)	Additional help	\$ 2,000
(6)	Loss of labour prospects	\$ 4,000
	General damages total	\$35,000
	Special damages	\$3,800

In the result the appeal will be allowed with costs to the appellant to be agreed or taxed. The order of the learned trial judge is varied as indicated above.