JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 65/81

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AC.)

BETWEEN: UNITED DAIRY FARMERS LTD - DEFENDANTS/APPELLANTS
LASCELLES McCULLUM

A N D : LLOYD COULBOURNE - PLAINTIFF/RESPONDENT
by next friend GLORIA WILLIAMS

Messrs. R. Williams, Q.C., & Ian Robins for the appellants.

Messrs. H. Edwards, Q.C., & A.C. Mundell for the respondent.

October 5 & 6, 1983; January 27, 1984

KERR, J.A.:

I have had the benefit of reading the draft judgments of Carberry, J.A. and Campbell, J.A. (ag.) and am in agreement that the damages awarded are in the aggregate manifestly excessive and accordingly that the appeal be allowed and the judgment varied in accordance with the assessment of Campbell, J.A. (ag.).

CARBERRY, J.A.:

I agree with the judgment of Campbell, J.A. (ag.), but as judgments on the assessment of damages are from time to time canvassed in later cases - by the plaintiff seeking to show that if these damages were awarded for these injuries I should get as much or more, and by the defendants seeking to show that if those damages were awarded for those injuries the plaintiff should get less - it may perhaps be of some use if I add a few words,

particularly as Kerr, J.A. and myself both sat on the panel that heard the appeal in Smith & Stewart v. Foster (Supreme Court Civil Appeal 13/81), judgment in which was an oral judgment delivered by Rowe, J.A. on the 6th of May, 1983, immediately on the termination of the argument.

In both cases serious injuries had been received by very young persons involving not only broken femurs and shortening of the leg, but also brain injuries that would affect them long after the broken bones had mended. One common problem was how to assess prospective loss of earnings in the cases of persons who had never worked before the accident, because of their youth. There were available none of the traditional yardsticks, pre-accident earnings as against post-accident earnings, yet it was clear that there would be a loss of future earnings, a head of damage for which awards are properly made, and which is distinct (though it overlaps slightly) with another head, i.e. loss of earning capacity or handicap on the labour market.

Another common problem was that of itemization of the heads of damage that go to make up the final award of general damages. It is clear that ultimately it is the general award, the sum total, that must be looked at to see whether there has been present any of those factors referred to in Lord Wright's speech in Davies v. Powell Duffryn Associated Colleries Ltd. (1942) A.C. 601 at pages 616-617, viz. something that shows the trial judge acted on wrong principles of law, misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. Itemization of the factors taken into consideration in making the award has the virtue that it will often tend to show whether there has been duplication or overlap of damages swelling the final award further than is just. But it is the final figure, the total that counts. Itemization has of course another use, in that awards of interest may be based on them in certain cases.

Campbell, J.A. (ag.) has referred in his judgment to the damage or injury suffered by the plaintiff in Smith & Stewart v. Foster, and I do not repeat them, but am content to observe that they were far more serious than those suffered by the plaintiff in the instant case.

In Foster's case the judge itemized the damages going to make the total award of $85,000.00 general damages thus:

Pain and suffering and loss of amenities	$35,000.00
Intellectual impairment	30,000.00
Other factors: spasticity, fractures, scarring, etc	20,000.00
	$85,000.00

It will be noticed that the trial judge seemed to have awarded various sums for various items of injury. This seems to me to be undesirable. It certainly departs from the traditional heads of damage as set out for instance in Kemp & Kemp, 4th Edition (1975) Chap. 9: General principles and heads of damage. For the reasons given by Campbell, J.A. (ag.) I do not easily see how one can distinguish between the pain and suffering to be attributed to a broken leg and that to a head injury, both received by the same person and both contributing to his overall loss, whether it be loss of amenities or lost future earnings or pain and suffering. While it is true that at various times various organizations, for example the buccaneers, have attempted to set out fixed awards for various injuries, so much for a lost hand, so much for a lost foot, these approaches have long been abandoned in favour of attempts to make awards on an individual basis, while applying generally recognized heads of damage.

In Smith & Stewart v. Foster this Court observed that no sum had been awarded for either loss of future earnings, or handicap on the labour market. Counsel for the plaintiff did not attempt to support the itemization made by the trial judge, but

pointed out that the total could be justified if these factors were taken into consideration. Defence Counsel for his part pointed out that the itemization, particularly "other factors" supported an argument that there had been duplication, as items such as spasticity and scarring must have figured in pain and suffering. This item was vulnerable, and was reduced by $10,000.00, leaving an overall total all told of $75,000.00 which must be taken in view of the argument before us to have included compensation for handicap on the labour market and loss of future earnings. The plaintiff there would in all probability never be able to work at all, and in argument it was suggested that the Court should consider the legal minimum wage (then $30.00 per week) and a multiplier of not less than twenty years. This Court did not in its judgment adopt that calculation, but it was able on the facts and arguments to find that the overall total of $75,000.00 was a fair award for the injuries suffered.

In the instant case the learned trial judge itemized as follows:

Pain and suffering and loss of amenities	$30,000.00
Prospective loss of earnings and future medication	30,000.00
Loss of earning capacity	10,000.00
Fractured femur resulting in 1 inch shortening - 15% - 25% disability.	20,000.00
	$90,000.00

Once again the itemization used tended to ground the argument that there had been duplication, alternatively that the addition of compatible sums showed an award inconsistent with the general pattern of awards made for similar injuries, and of course the award made in Foster's case a few months before was relied on.

Clearly there was inconsistency so far as the total of the awards, the overall sum awarded as general damages in each case goes. Making allowance for the facts of each individual case, it is a function of this Court to attempt to secure a certain measure

of consistency between the awards made to several plaintiff for similar injuries. It should also be noted that both awards were made in 1981, and the inquiry before us is what would have been a fair award at the time that it was made.

As far as the individual items of the total award go, Foster's case is not of as much assistance as it might have been, for the reason that it did not consider the other problem, how to calculate prospective loss of earnings (as opposed to handicap on the labour market) where the plaintiff has never worked.

As to this, I make a few general observations. 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. 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. In making awards for prospective loss of earnings the Courts are not dealing with the immeasurable or subjective elements such as pain and suffering, but are attempting to make an award which can be justified as a pecuniary loss that is measurable to a degree. We were referred to passages in Kemp & Kemp, at Chapter 12: Loss of earnings and profits: The author there observes: (pp. 121-2):

> "There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it can not act on mere speculation."

Cited are Ashcroft v. Curtain (1971) 1 W.L.R. 1751; (1971) 3 All E.R. 1208, where due to a lack of any proper records of earnings it was found impossible to make an award for prospective loss of earnings to the plaintiff, an engineer and proprietor of a one man company. The Court did however find it possible to make an award for the related but separate head of lost earning capacity. See too the observations made in Kemp & Kemp at page 128.

We were also referred to Field v. British Europeon Airways, cited in Kemp & Kemp at page 88 note 4, and page 127, note 28, and briefly reported in the 1973 Current Law Year Book, under the head Damages, case 730.

This point was not actively canvassed in Foster's case, but it was canvassed in this one. Foster's case concerned a little girl who had never worked. In the instant case the plaintif had actually gone to work, though he pointed out that the job was secured for him through family influence rather than merit. The problem of attempting to show that but for the injury he would have secured other and better employment was rather different. In Foster's case the probability was that the little girl would never be able to work at all, and at east in the argument it was possible to argue on the basis of the legal minimum wage, and a multiplier, though as the Court expressed no final view on that argument the point remains open. Here the plaintiff had gone to work, and could work: but no evidence was offered, apart from speculation, to show that had the accident not occurred he could have secured better employment. Though perhaps not easy, some attempt might and should have been made. For example by calling school friends of similar age and ability and showing that his contemporaries had now gone far beyond his meagre earnings. It is an argument that may perhaps be tendentious: they too might have had family influence, but at least it is an argument and offers some evidence.

In this connection I might also mention Taylor v. Bristol Omnibus Co. Ltd. (1975) 1 W.L.R. 1054 (C.A.) not cited in the 1975 Edition of Kemp & Kemp as it came out after, and not cited to us by either Counsel. In that case a child of three and a half years had received serious brain injury, and would never be able to work. The trial judge made an award for future loss of earnings, nevertheless,

but basing it on what the child's father was earning, and saying in effect that from that background there was evidence that the child would likely have pursued the same sort of work with this type of earning. The Court of Appeal upheld the award on this head, and Counsel for both sides might perhaps read with interest the remarks made by Lord Denning, M.R. at page 1059: "Loss of future earnings", and those of Orr, L.J. at pages 1061-1062 on the same subject.

The problem of presenting evidence under this head is not insoluble, and those who appear for plaintiffs must attempt it, if they hope to secure damages under this head. As Campbell, J.A. (ag.) points out, no such attempt was made here, I agree with the conclusions to which he has come and I do not think there is anything I can usefully add.

For completeness I should however say that we were referred to a passage in Kemp & Kemp at page 135, where dealing with how prospective loss of earnings is assessed in practice, the author deals with the problem we have been discussing, i.e. "where the plaintiff is a child or youth and has not commenced on any career, and so there is no figure for net annual loss at the date of the trial".

The passage points out the difficulty we have been discussing, and suggests that in this class of case the damages are so much at large that appellate Courts are more reluctant to interfere than usual.

I do not read the passage as detracting from earlier remarks as to the need for evidence, and as pointed out in Taylor's case cited above, there are ways to deal with the problem, and plaintiffs desiring to secure awards under this head must seek them out.

CAMPBELL, J.A. (AG.):

The appeal in this case is against the quantum of general damages awarded by Wright J., on an assessment made by him the 7th day of October, 1981.

Judgment in default of appearance having been entered against the appellants on 3rd December, 1980, damages were subsequently assessed by the learned trial judge in the sum of $91,280.43 being $1,280.43 special and $90,000.00 general damages.

The general damages were particularised as hereunder:

1.	Pain and suffering and loss of amenities	$30,000.00
2.	Prospective loss of earning)	30,000.00
3.	Future medication)	
4.	Loss of Earning capacity	10,000.00
5.	Fractured Femur resulting in 1" shortening - 15% - 25% disability	20,000.00
	Total	$90,000.00

Against this award Mr. Williams submits that:

(a) The award of $30,000.00 for Pain and Suffering and loss of amenities coupled with the specific independent award of $20,000.00 for the disability arising from the fractured femur was manifestly excessive.

(b) The award for loss of future earnings and future medication was not only manifestly excessive but ought not in any case to have been awarded as there was a total absence of evidence to sustain the award.

(c) The award for loss of earning capacity was manifestly excessive, not substantiated by evidence and not properly founded in law.

(d) The global figure was manifestly excessive and not in accord with the level of awards in Jamaica.

Dealing with the awards of $30,000.00 for pain, suffering and loss of amenities and $20,000.00 for the fractured femur, Mr. Williams rightly submitted, and Mr. Mundell agreed with him, that a fractured femur was not per se a head of damage

nor for that matter was any other physical, mental or intellectual disability or impairment. Such disabilities or impairments were factors to be considered in considering a general award for pain and suffering, loss of amenities, handicap in the labour market and/or loss of earning capacity but as an independent head of damage they were unknown to the law. In the instant case, in the view of Mr. Williams, the erroneous award of a separate sum for the fractured femur and also the quantifying of this award in the excessive amount of $20,000.00 exacerbated the situation since the disability flowing from the fractured femur must undoubtedly have already been reflected in the substantial award of $30,000.00 for pain, suffering and loss of amenities.

Mr. Mundell for the respondent submitted that what the learned trial judge had done was to limit the award of $30,000.00 to the pain, suffering and loss of amenities resulting from the organic brain damage which on the evidence he accepted. Thus the further award of $20,000.00 for the fracture of the femur would be for the pain, suffering and loss of amenities resulting from the aforesaid fracture.

I cannot accept Mr. Mundell's submission that the learned trial judge did bifurcate his award for pain, suffering and loss of amenities. Pain and suffering undoubtedly resulted from the fracture of the femur as well as from the headaches and giddiness flowing from the organic brain damage. Loss of amenities likewise results as much from a limping gait, cramping of the foot, inability to walk for long distances, which together, put constraints on manly sports and pastimes as from the inability to maintain sustained concentration for long periods and the realization that there were never to be fulfilled hopes and expectations. Pain, suffering and loss of amenities connote a total experience and it would indeed be a novelty for a trial judge to differentiate, for purposes of compartmentalizing, the pain suffering and loss of amenities attributable to organic brain

damage, from pain suffering and loss of amenities attributable to the fracture of the femur. I am satisfied from a careful perusal of the judgment of the learned trial judge that he indulged in no such bifurcation and compartmentalization. Had he meant items 1 and 5 to be limited to each area of damage namely brain damage and the broken femur respectively, he would have said so.

The crux of Mr. Williams' submission is that considering the total figure of $50,000.00 for the pain, suffering and loss of amenities attributable to the organic brain damage and the fracture of the femur, it was in the light of the evidence, and the level of awards for such injuries in Jamaica manifestly excessive.

The judgment of the learned trial judge discloses the following specific findings of fact namely:

1. The respondent suffered great pain, nervousness, giddiness and periods of blackouts.

2. The leg injury had healed but it resulted in a 1" shortening of the leg.

3. The leg injury and attendant disability were not the respondent's greatest problem.

4. The respondent's greatest problem was the organic brain damage as found by Dr. Doorbar which on the respondent's evidence resulted in occasional giddiness and blackouts, fuzziness of vision, frontal headaches, dramatic decrease of concentration span to about fifteen minutes and on Dr. Doobar's evidence resulted in poor 'memory - recall' and irritability i.e. change in personality.

5. Though the respondent had suffered some impairment in intellectual capacity he was at the same time of only average intellectual endowment. His pre-accident school report disclosed no remarkable attainment, he thus could never, contrary to the evidence of Dr. Doorbar, have attained to the position of a chartered accountant.

6. The organic brain damage, such as there was, had affected only the faculty to acquire new knowledge or alternatively the faculty to acquire new knowledge at a satisfactory rate and this resulted in frustration and irritability.

From the above findings of fact, the disability which the learned trial judge found as providing the respondent with the greatest problem was that emanating from the organic brain damage. There is however no evidence which was accepted by the learned trial judge of the estimate of the respondent's intellectual impairment flowing therefrom. Though Dr. Doorbar testified that the respondent suffered serious impairment and that in certain areas his otherwise average intellectual ability was down by as much as 35% the learned trial judge did not apparently accept this testimony but rather preferred to rely on her conclusions contained in her report of July 17, 1981 in which she merely concluded that there was organic brain damage coupled with a post traumatic psychoneurosis in a man of basically average level intellectual endowment. She was, like Dr. V.O. Williams, of the view, which the learned trial judge accepted, that the respondent could be helped considerably by medication.

In the recent decision of this court in Smith and Stewart v. Foster and Earle, Supreme Court Civil Appeal No. 13/81 delivered on May 6, 1983, an award of $75,000.00 was considered fair and reasonable compensation in 1981 to a girl aged 8 years at the time of the accident for injuries and disabilities detailed as hereunder namely:

(1) Head injury resulting in brain damage.

(2) 30% impairment of intelligence.

(3) Fracture of the femur of the left leg resulting in 2" shortening thereof and assessed as a 15% orthopaedic disability.

(4) Spastic weakening of the left arm.

The evidence of the orthopaedic surgeon Mr. John McNeil Smith was that the injured plaintiff when seen and examined by him some six years after the accident, walked with a spastic gait stumbling like a tired soldier. The spasticity affected both the upper and lower limbs. It affected her walking making

her more prone to stumble when walking on uneven ground, stairs and steps. She showed a healed fracture of the left femur. Her orthopaedic permanent partial disability was 15%.

The neuro-surgeon Mr. John Hardy in his evidence disclosed that apart from the obvious disability revealed by a 2" shortening of the plaintiff's left leg, she showed spastic weakness of her left arm with some tremor. Her gait was bad. From her history and his findings she appeared to have sustained brain damage affecting the brain stem and her intelligence. The impairment of her intelligence in January 1977 was 40% which in January 1981 had slightly decreased to 30%. He was of the opinion that at a level of 40% impairment of intelligence, there would be difficulty in the patient ever being able to support herself. A 30% impairment in intelligence was still a significant impairment and would seriously limit what such a disabled person could do.

In the instant appeal the organic brain damage has considerably less disabling effect than in the cited case. There is admittedly a reduction in the faculty of "memory-recall" for recently acquired knowledge but this did not disable the respondent from entering a Business and Accounting Institute and successfully gaining a certificate in Payroll Accounting. The disability in not being able to acquire fresh knowledge at a satisfactory rate leading to frustration and irritability is amenable to medication even though this may necessitate a prolonged course of treatment.

In the light of the above I am of the view that the award of $50,000.00 for Pain, Suffering and Loss of amenities resulting from the fractured femur and the organic brain damage is manifestly excessive. An award in the amount of $35,000.00 would be fair and reasonable compensation under this head of damage.

Mr. Williams' next submission is that in regard to the award for prospective loss of earning and future medication there ought to have been no award at all since there was no evidence whatsoever from which the learned trial judge could essay an estimate.

The respondent on the evidence is gainfully employed as a clerk with the St. Catherine Parish Council. He said his ambition was to be a doctor, engineer or chartered accountant. Dr. Doorbar's evidence is that while he would be overambitious in aspiring to be a doctor or an engineer he could conceivably be a chartered accountant. The learned trial judge in the light of the respondent's pre-accident scholastic attainment rightly found that he did not manifest the ability to be a chartered accountant as opined by Dr. Doorbar though he would, "with his average intellectual endowment, egged on by ambition, have in all probability attained some level within his capacity." What this level would be, how it actually affected the respondent's level of earning subsequent to the accident are however unknown. He was never employed before the accident. He gained employment after the accident and is still employed. The prospect of reduction in his salary as a result of his injuries does not here arise. Further there is no evidence of what the respondent might have earned but for his injuries for comparison with his existing salary so providing the data for the award of damages for loss of prospective earnings. The award under this head cannot be sustained for want of evidence and must accordingly be set aside.

The award however included an amount for future medication. Both Dr. Doorbar and Dr.V.O. Williams concur in the view that continued medication is necessary. The respondent's mother Gloria Williams in her evidence stated that she spent $51.00 for medical expenses for the treatment of the respondent up to

February 8, 1979. Thereafter, she has to date spent $420.00 in fees to Dr. Doorbar and $125.00 between Dr. Ali and Dr. Williams. While the evidence discloses only minimal medication expenses to date other than Dr. Doorbar's fees for examining and assessing the respondent, there can be no doubt that some medication expenses on drugs will be incurred in the future. An amount of $5,000.00 would represent a fair and reasonable estimate for future medication. The award of $30,000.00 for prospective loss of earnings and future medication is set aside and there will be substituted an award of $5,000.00 for future medication.

Mr. Williams also attacks the award of $10,000.00 for loss of earning capacity on the similar ground that there was no evidence to support it. Loss of earning capacity is a known head of damage distinct from prospective loss of earning. Loss of earning capacity as a head of damage is peculiarly suited to circumstances where though there is no satisfactory evidence to sustain an award for future loss of earnings because for example the pre-accident and post-accident level of earning remains the same, yet there is evidence which satisfies the Court that in consequence of the injury and disability suffered by a plaintiff he is deprived of a special earning capacity which he would have had but for his injury and disability or he is in consequence of such injury and disability at a distinct disadvantage or otherwise handicapped in the labour market. The respondent in this case suffers a personality change. He cannot concentrate for periods beyond fifteen minutes. He does not acquire new knowledge at a satisfactory rate. Though there is no evidence of any special earning capacity lost in consequence of the injury and disability, the respondent would be at a distinct disadvantage in the labour market in any quest for a new job should his services with the St. Catherine Parish Council be terminated. The learned trial judge assessed compensation under this head in the amount of

$10,000.00. Though the award would appear to be on the high side due to the unlikelihood that the respondent will ever lose his job and so be thrown on the labour market, it is not so manifestly excessive to warrant any interference by this Court.

I would allow the appeal in part setting aside the award of $90,000.00 general damages. I would substitute therefor an award of $50,000.00 made up as follows namely: (a) pain, suffering, loss of amenities and loss of earning capacity flowing from the injuries and disabilities $45,000.00, (b) future medication $5,000.00. The special damages will remain at $1,280.43.