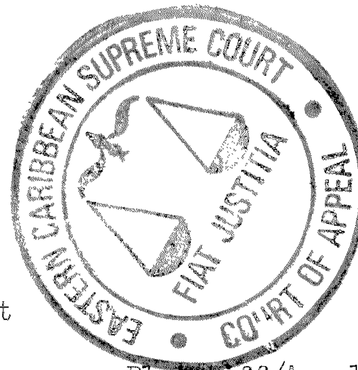
IN THE COURT OF APPEAL

VIRGIN ISLANDS



Civil Appeal No.2 of 1970

Between: LUDELL LEONARD an infant by JOSHUA LEONARD his father and next friend — Plaintiff/Appellant

and

WINFIELD FORBES and DENNIS FORBES — Defendants/Respondents

Before: The Honourable the Chief Justice
The Honourable Mr. Justice Gordon
The Honourable Mr. Justice P. Cecil Lewis

C.E. Hewlett for the Appellant
McW. Todman for the Respondents

1971, March 8, 26

JUDGMENT

LEWIS, C.J.

In this case the appellant complains of the inadequacy of the amount of damages awarded to him for injuries and loss suffered by him as a result of the negligent driving of the first respondent, an employee of the second respondent. In the accident which occurred on the 31st October, 1966, the appellant's skull and ribs were fractured and his brain and nerve tracts were permanently damages so that he is now a spastic. He also suffered damage to his teeth. He has been a patient in hospital ever since. He was deeply unconscious for about five months. Thereafter he showed continuous improvement and was eventually sent to a rehabilitation centre in Jamaica where he received extensive physiotherapy and speech therapy. His speech is still difficult and at times incomprehensible. Since his return from Jamaica in April 1969 there has been no further improvement in

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his condition.

The judge's award of $3,118.32 for special damages took account only of expenses incurred by the appellant in obtaining medical treatment in Tortola and Jamaica. He assessed the general damages at $5,000.

With respect to the assessment of special damages the appellant complains that no award was made in respect of loss of earnings for the period of 4 years between the date of the accident and the date of the trial. With respect to general damages he alleges that the amount awarded is grossly inadequate.

I shall deal first with the special damages. The rule is that a plaintiff is entitled to recover such earnings as he can prove he has lost by being prevented from following his ordinary vocation owing to his injuries. In this case the appellant was a casual employee who had recently left school. He worked "now and then", to use his own words, with one Smith as a loader on a truck, earning $4.00 per day. On the day of the accident he was working as a labourer on the respondents' vehicle doing an odd job for which he would have been paid $2.00. No evidence was given as to his average weekly or fortnightly earnings upon the basis of which the trial judge could make a fair and reasonable assessment of the amount of his loss during the four years between the accident and the trial. Doubtless the appellant, had he not suffered these injuries, would have earned wages which he has lost, but he has not discharged the onus which lay upon him of proving the amount of the loss which he had in fact sustained. In my view this Court cannot interfere with the learned judge's assessment of the special damages and this ground of appeal fails.

With respect to general damages, learned counsel for the appellant contended (1) that the trial judge erred in principle in not taking into account the loss of prospective earnings and (2) that in any event the sum awarded was wholly inadequate. On the

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first ground he referred to the case of Cornilliac v. St. Louis (1965) 7 W.I.R.491, a decision of the Court of Appeal of Trinidad and Tobago in which Wooding, C.J. stated the various factors which a judge should bear in mind when assessing general damages resulting from personal injuries. Although the trial judge did not specifically mention the various heads as set out in Wodding C.J.'s judgment, his evaluation of the evidence indicates that he took account of them. He particularly states that the appellant was a casual employee with a low income, that there is no chance of his leading a normal life, and that he would need constant care as he could not look after himself. The conclusion to be drawn from these findings must be that for the rest of his life he would be unable to work and that his loss of future earnings must be assessed on the basis of a low income.

I do not think that it has been established that the learned judge overlooked any relevant factor and thus erred in principle, but I agree that his assessment of the general damages is inordinately low and entirely erroneous.

The learned judge found that "although the plaintiff according to the medical evidence did not suffer pain yet he was very seriously injured and has suffered a loss of all the amenities of life." I have already referred to the appellant's spastic condition. No regeneration of the nerves is expected. The appellant is aware that his prospects for the future are hopeless, for he said in his evidence: "I am in the hospital for I was licked out of this world. I thought I was dead." According to the medical evidence he is mentally alert and willing but cannot do what he wants to do because of the brain damage. His frustration must be well nigh intolerable. He has no sense of balance when standing. He was trained by his father, a sea captain, to sail a boat, but will never be able to enjoy the pleasures of sailing. He used to play cricket and drive a car,

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but now he cannot even walk without assistance.

The medical evidence establishes that the appellant's expectation of life has not been shortened. At the age of 19 he must therefore look forward to a broken barren life beset with frustrations. His utter dependence upon the care of others must add to his distress and anxiety.

A plaintiff in the positionof the appellant is entitled to reasonable compensation not only for the severe physical injuries he has sustained but also in respect of "the grave and sombre deprivations" which he will suffer throughout his life. Recent decisions in the United Kingdom and the Caribbean confirm the view that where, as the trial judge found, the plaintiff has suffered a loss of all the amenities of life, substantial compensation should be awarded, and the more so where the plaintiff has a long expectation of life and is able to appreciate his condition. See Wise v Kaye (1962) 1 Q.B.638; H.West and Son Ltd. v Shephard (1964) A.C.326; and Aziz Ahamad v Reghubar (1967) 12 W.I.R.352.

In this case an award must also be made to meet the special need to provide continuous care for the appellant over a long period.

Finally, the appellant, though a casual worker, has been forever deprived of the opportunity to earn his wages, however small, and to improve his earning capacity in employment on land or at sea. Sparse though the evidence is, the Court must endeavour to assess the value of the earnings he will lose.

Taking all relevant factors into account, and having regard to awards which have been made in cases bearing some similarity to this in the United Kingdom and the Caribbean, I consider that an appropriate figure for general damages is $37,000.

I would therefore allow the appeal, and order that judgment be entered for the appellant for $40,118.32 with costs.

(Allen Lewis)
Chief Justice

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CECIL LEWIS, J.A.

This is an appeal against an order of a judge of the High Court dated October 16th, 1970, awarding the appellant the sum of $5,000 general damages and $3,118.32 special damages and costs in an action brought by the appellant to recover compensation for personal injuries and loss caused by the negligent driving of the first-named respondent who, it is stated, was the servant of the second-named respondent. In his statement of claim the appellant alleged that he was travelling as a passenger in a vehicle on the 31st day of October, 1966, when it got out of control, ran off the road, and overturned causing him to sustain certain injuries.

In the defence, a short document of three paragraphs, it was admitted that the first-named respondent was the driver of the vehicle at the material time and the second-named respondent was its owner. In paragraph 3 it was asserted as follows:

> "Save as hereinbefore expressly admitted the defendants(respondents) deny each and every allegation in the statement of claim in like manner as if the same were herein set forth and traversed seriatim."

Despite this denial of liability, when the action came on for hearing it was agreed between the parties that the only issue for the determination of the Court was the quantum of damages. The trial judge awarded the sums which I have mentioned, but the appellant being dissatisfied with these amounts appealed therefrom on the sole ground that "the general damages awarded are grossly inadequate."

At the hearing of the appeal counsel for the appellant sought leave to strike out the word "general" in his ground of appeal so as to enable him to challenge the adequacy of both the general and special damages, but he gave no notice to counsel for the respondents of his intention to make this application. However the respondents' counsel did not object to the application and the Court gave leave for the amendment to be made.

The evidence called in support of the appellant's case was largely unchallenged. His father stated that at the date of the trial he was about 19 years old, and the trial judge found that he was about 15 when he received his injuries. The........

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appellant who gave evidence on his own behalf stated that he worked now and then with Alpheus and Leo Smith and that on such occasions he received a wage of $4.00 per day. He had been employed on the day of the accident by the second-named respondent to assist him in putting a calf on the truck. This respondent said that he knew that the appellant used to be employed by one Antonio Smith as a loader on his truck, but sometimes Antonio did not "have any work to do".

The trial judge found that the appellant was a casual employee with a low income and this finding has not been challenged by the appellant.

The appellant's injuries were of a most serious nature. According to the evidence of Dr. Robert Thomas he was admitted to the Roadtown Hospital at about 10 p.m. on 31st October, 1966, in an unconscious condition. An X-ray examination revealed a fracture of the skull and ribs. His breathing was difficult and artificial respiration was administered for several hours, after which time he started breathing spontaneously. He remained deeply unconscious for five months and it was not thought that he would ever regain consciousness. Hé however regained consciousness and during the next year his condition continued to improve. He was kept at the Roadtown Hospital for about 2 years, and in an attempt to improve his condition still further he was transferred to the Rehabilitation Centre in Jamaica on November 4th, 1968, where he remained receiving extensive physiotherapy and speech therapy till April 22nd, 1969.

The appellant also received certain injuries to his eyes and glasses had to be prescribed for him; some of his teeth had been damaged in the accident and dentures had to be supplied. He was re-admitted to the Roadtown Hospital on 22nd April, 1969, and was still there at the date of the trial on 20th July, 1970. At that time, in the doctor's opinion, he had made no more progress than when he had returned from Jamaica.

As a result of the fracture of the skull his brain and nerve tracts were damaged to such an extent that he has become a spastic and no rehabilitation of the nerves can be expected. He is mentally alert and willing, but cannot do what he wants because of the brain damage. In the doctor's opinion he did not suffer any pain, but there is no chance whatever of his

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leading a normal life. His life expectancy is the same as it was before the accident. He feeds and washes himself but this is really difficult as he has no sense of balance when standing. He will always have to be looked after.

In regard to the claim for special damages counsel for the appellant submitted that the trial judge failed to take into account the pecuniary loss suffered by the appellant between the date of his injuries (31.10.66) and the date of judgment (16.10.70) - a period of almost 4 years - and contended that an award for loss of wages during this period should have been made. The short answer to this is that there is no evidence as to the average rate of the appellant's earnings over a particular period which might have been used as a basis for assessing loss of wages. I am therefore of the opinion that a claim for loss of wages under the head of special damages cannot be sustained.

On the question of general damages, counsel referred to the case of Cornilliac v. St. Louis 7 W.I.R.491, and quoted from the judgment of Wooding C.J. the several considerations which ought properly to be borne in mind by a judge in assessing general damages in a case of this type. These, as stated at pages 492 and 493, were -

"(i) the nature and extent of the injuries sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured;

(iv) the loss of amenities suffered; and

(v) the effect on pecuniary prospects."

Counsel conceded that the judge considered the first four of these, but he contended that as regards the fifth he did not take into account the appellant's loss of prospective earnings as a result of his injuries.

He next referred to the case of Mohamid v. Theodore 3 W.I.R.324, the facts of which he said bore some similarity to those in the instant case. This was a case in which a boy of 9 years of age sustained injuries on April 12th, 1950, resulting in severe contusion of the brain with damage to the speech centre; a broken clavicle, damage to his knees and unconsciousness for 4 days. A medical examination disclosed that at the date of the trial he was suffering from "post traumatic dementia upon injury resulting in imbecility and epilepsy". The trial judge found that "the plaintiff is and

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always will be for the rest of his natural life a living piece of human wreckage, and no better than a mere vegetable." He awarded $20,000 as general damages. In arriving at this figure Hyatali J. applied a dictum of Hallinan C.J. in Ramsawak v. Carnavon 2 W.I.R.426 at 428 "that damages in Trinidad are not given on as high a scale as in England." Counsel further stated that in Aziz Ahamad Ltd. v. Raghubar 12 W.I.R.352 this dictum was criticised and not followed, and he pointed out that Wooding C.J.(at page 356) remarked that Hyatali J. had taken the dictum "as good ground for depressing the damages which he might otherwise have awarded in Mohamid v. Theodore"(Supra). I therefore understand counsel for the appellant to be saying that, although the injuries in Mohamid's case were somewhat similar to those in the instant case, nevertheless, bearing in mind the fact that Mohamid's case was decided in 1961 and that a wrong principle might have been applied in arriving at the quantum of damages in that case, the sum of $20,000 awarded by Hyatali J. ought not necessarily to be considered as an adequate award in the circumstances of that case and this Court should regard it with reserve.

Counsel for the appellant further pointed out that where a plaintiff can appreciate the loss which he has suffered he is entitled to greater damages than if he cannot. He contended that in this case the appellant could appreciate his loss of amenities for in his evidence he said:

> "I come here today to explain how I get mash up......
> I am in hospital for I was lick out of this world and
> thought I was dead.......I used to go to the field and
> play bat and ball and so sometimes. I used to drive
> and I cannot walk so good now."

Counsel, quite correctly, pointed out that although the trial judge had mentioned in his judgment that the appellant "has suffered a loss of nearly all the amenities of life", he nowhere specifically referred to those passages in the appellant's evidence quoted immediately above, and submitted that the effect of this omission might well mean that the trial judge did not give due and sufficient weight to this particular consideration in assessing general damages. He drew the Court's attention to the words of Lord Morris in H.West & Son Ltd. v. Shephard (1963) 2 All E.R.625 at p.634 where he referred to the manner in which the trial judge, Paull J., dealt with this aspect of the matter in that case.

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He said:

> "In his judgment in the present case Paull J. pointed out that there was the factor, absent in Wise v. Kaye, that the respondent might well appreciate, at least to some extent, the condition in which she was and for that reason was probably in a worse condition than was the plaintiff in Wise v. Kaye. After stating that had the respondent in the present case had a longer expectation of life he would have awarded higher damages, Paull J. said:
>
> > "However I have got to take into account that she may well die within five years. Clearly she has lost all the amenities of life, clearly she has got to be looked after and she may well recognise the condition in which she is, and in her mind may be the most appalling thoughts as to the condition in which she is. I do not know. I think that in a case of this sort the proper sum to award for general damages is £17,500." "

After remarking that the learned judge "was clearly approaching some matters on an objective basis and others on a subjective basis", Lord Morris stated that he could "see no fault in the approach of the learned judge."

In his judgment in the instant case the trial judge found that although the appellant could feed and wash himself he would always have to be looked after; that although he did not suffer pain yet he is very seriously injured and had lost nearly all the amenities of life. Although the appellant was a casual worker and suffered no loss of wages, and no evidence was given as to his earnings at the time of the accident or even as to his average earnings as a casual labourer, thereby precluding any computation for loss of wages as special damages, he is nevertheless entitled to compensation for his loss of the opportunity to earn wages as a casual labourer and this loss is a direct result of his injuries. Evidence was given that at the date of the trial the appellant was some 19 years of age. There is no evidence that he was other than a normal healthy boy, and since the medical evidence is that his expectation of life has not been impaired it may be that he has before him a fairly long period of life - probably some 40 years - in which he will have to be wholly dependent on others and will be unable to work. During this time also he will have to be looked after and someone will have to be paid for doing this.

Counsel for the respondents quite frankly conceded

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that the award of $5,000 as general damages was "somewhat on the low side."

Taking into account the factors which I have mentioned, I am of the opinion that in arriving at this sum the trial judge "made a wholly erroneous estimate of the damage suffered", (to use the words of Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd. (1942) 1 All E.R. 657 at 664), and I would accordingly allow the appeal, vary the award of general damages by increasing it to $37,000 and enter judgment for the appellant for $40,118.32 and costs.

(P. Cecil Lewis)
Justice of Appeal

GORDON J.A.

I agree.

(K. L. Gordon)
Justice of Appeal

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