IN THE COURT OF APPEAL

GRENADA:

CIVIL APPEAL NO. 4 of 1975

BETWEEN: 1. JAMES FRANCIS

2. BLANCO & JANSSEN CONSTRUCTION COMPANY LIMITED

- DEFENDANTS/APPELLANTS

and

JOSLYN CYRUS - PLAINTIFF/RESPONDENT

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: C. Bristol for appellants,
E. De Freitas with him.
M.R. Bishop for respondent instructed by Ovid C. Gill

1976, January 28, February 6

PETERKIN, J.A.:

The appeal before the Court is against the assessment of general damages made by the trial judge in this matter which he fixed at $7,550.00.

The grounds of appeal are, (i) that the damages awarded are excessive an d (ii) that the trial judge applied wrong principles in arriving at the assessment.

The medical evidence concerning the Plaintiff/Respondent's injury is as follows:-

A medical report given by the surgeon specialist, Mr. Holgate, showed that Joslyn Cyrus was admitted to the General Hospital on 9th September, 1971, and that he was suffering from a fracture of his left humerus. At the date of this report, namely, 22nd November, 1971, the surgeon noted that

the Plaintiff/Respondent's condition was satisfactory, a nd that there would be no permanent disability. A second report from Mr. Noel, R.S.O., noted that the fracture was reduced after manipulation, and that the patient was discharged on 13th September, 1971, after spending 4 days at hospital. He stated that the patient had had peridic checks as to the progress of the healing of the fracture which should take about 10 to 12 weeks. He further stated that he would be incapacitated for at least another 8 weeks. There is a third report. It comes from Mr. Friday, Consultant Surgeon, and is dated 18th September, 1972, approximately one year after the accident. He stated that he had first seen this patient in December 1971, and that he had been treating him periodically since then. He noted that the fracture had healed, but that the patient still got pain in the left shoulder after exertion. He went on to say that he expected that the patient would make a full recovery, though he could not say how long it would take,

Mr. Friday also testified at the trial on 28th April, 1975, approximately 3½ years after the injury was sustained. He said this:-

"Looking at the plaintiff's arm now, in Court, and examining it I find that he does have some reduction of disability with regard to some active movements at the shoulder joint. The left arm is slightly weaker than the right. If he is right handed his left arm would normally be weaker. The disability seems to be a question of movement at the shoulder

joint.....

joint principally. When an arm is in plaster for a long time, after removal the shoulder if kept immobile tends to become what is known as a frozen shoulder. This stiffness should diminish with physiotheraphy. With proper physiotheraphy I would say it would disappear within three to six months. He would, I think, be able then to pursue his normal life."

His evidence has been accepted by the Judge.

The Plaintiff/Respondent also testified concerning his injury.

In quantifying the general damages, the trial judge has evaluated the evidence under separate heads before arriving at an omnibus award.

Heads (a) and (c) present no difficulty. They deal with the nature and extent of the injury sustained, and its effect on pecuniary prospects.

Under head (b), the nature and gravity of the resulting physical disability, the trial judge has commented, inter alia, as follows:-

"I have experienced some little difficulty in appreciating why the shoulder should remain immobile after the removal of the plaster cast.Clearly a plaintiff cannot himself keep his shoulder immobile in order to prolong the recovery of his arm, and then ask a negligent defendant to compensate him for that. The plaintiff must act reasonably and in the absence of good and adequate reason for not mobilising his shoulder after the cast has been

/removed.....

removed, I am unable to see how he can claim for the time he could and should have been moving it, so as to aid or, at least, not delay, the recovery. I have however assumed that the state of frozen shoulder probably commenced at the time the plaster cast was removed, and that there would be some effort not to immobilise it thereafter or some effort to move the joint in the process of getting back to normal."

Under Head (d), loss of amenities, the judge stated that the Plaintiff/Respondent had exaggerated his position, and that there was no doubt in his mind about it.

Under Head (e), Pain and suffering, he said, inter alia; "Once again the Plaintiff sought to enhance his position by alleging, in my view, and to some extent, in the view of the experts, greater pain than in fact he endured."

Counsel for Appellants has accepted the principle that the onus rests on him to show that the assessment is inordinately high, and he has based his submissions and arguments on the medical testimony and on the findings of the trial judge to which reference has been made.

On the first ground of appeal, he has submitted that the injury should be regarded as being a minor injury, i.e., an uncomplicated fracture with no resulting permanent disability. He then referred the Court to a number of cases decided within this area, as well as to some recent awards made in the United Kingdom, among which were the cases of Sminlovitch v. Watling, and.....

and Chalcraft v. Aviation Engineering Traders Ltd. In the former case, in which was involved a fractured right humerous, the general damages were fixed at £800. While in the latter case the plaintiff had sustained a fractured elbow, and the general damages were agreed at £750.

Counsel then submitted that, having regard to the medical testimony and to the findings made by the trial judge, the damages in the instant case were inordinately high.

Counsel for the Plaintiff/Respondent submitted that the Court should consider and take into account the following:-

1. That in considering the range of awards in comparable cases in the same jurisdiction, or in neighbouring localities where similar conditions exist, it was not yet possible to speak of a discernable trend in such matters.
2. That the Appellants must show that the value of money has not changed so drastically to warrant an increased award.
3. That the Appellants must show that the differences in the facts in the cases relied upon are sufficiently taken into account.
4. That the Appellants must show that there are good reasons why the impugned award should not be regarded as being capable of justifying a new trend.

Counsel argued here that any variation must be substantial,

/but.....

but conceded that a variation of one-third could be regarded as being substantial.

5. That there was no onus on the courts to equate awards made by them with awards in the U.K. as the prices of goods and services are much more expensive here than in the U.K.

In reply to Counsel for the Appellants he submitted that loss of amenities does not have to be permanent as contended for by him. This was later conceded.

Counsel finally submitted that there was evidence before the Judge on which he could have made such an award, that the onus cast on the Appellants had not been discharged, and that the award should be sustained.

While I agree that the U.K. awards are not binding, I cannot agree that they should be disregarded by Courts in this area. In my opinion they form a useful guideline in the assessment of damages in comparable cases and should be taken into account. Indeed, this was precisely the request made of the trial judge by Counsel for the Plaintiff/Respondent at the trial stage of this matter.

In a case within this Jurisdiction, namely, the case of Donna Bailey v. Cyril Moukram et al, Civil Appeal No.7 of 1972 (Grenada), cited by Counsel for the Plaintiff/Respondent, the Plaintiff, then a school girl aged 16, suffered an injury to her right foot which necessitated excision of the tendons of three toes and an operation for plastic surgery. She lost the ability to lift these

/toes.....

toes as a result to the excision of the tendons, and there was permanent disability in that she would have a permanent swelling of the injured foot with scarring. The trial Judge assessed the general damages at $1200. This was increased on appeal to $5,760. In my view the injury here was far more serious than that suffered by the Plaintiff/Respondent in the instant case which was an uncomplicated fracture with no permanent disability.

I am of the opinion that taking into account the medical testimony , the findings of the trial judge, and the awards in the cases cited to the Court during the course of the arguments, the assessment of general damages in the instant case by the trial Judge was inordinately high and should be reduced by approximately 20%.

The second ground of appeal no longer arises for consideration.

Accordingly, I would allow the appeal and substitute for the sum of $7,550.00 the sum of $6000.00 as general damages.

(N.A. PETERKIN)
JUSTICE OF APPEAL

I agree.

(MAURICE DAVIS)
CHIEF JUSTICE

I also agree.

(E.L.ST.BERNARD)
JUSTICE OF APPEAL