SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 6 OF 1996

BETWEEN:

FENTON AUGUSTE **APPELLANT**

and

FRANCIS NEPTUNE **RESPONDENT**

Before: The Honourable Mr Satrohan Singh Justice of Appeal
The Honourable Mr Albert Redhead Justice of Appeal
The Honourable Mr. Odel Adams Justice of Appeal [Ag]

Appearances: Mr Hilford Deterville, Mr Sylvester Anthony with him for the appellant
Mr. Dexter Theodore for the respondent

[Oct 28, 29; Nov. 24, 1997]

JUDGMENT

SATROHAN SINGH J.A.

On July 31, 1996, Matthew J in this negligence suit, awarded the appellant the sum of $133,000 as general damages and $35,161.28 as special damages for injuries sustained by him in a motor accident involving the respondent. The appellant is dissatisfied with this award and has appealed to this Court. This appeal therefore concerns the question of quantum of damages only.

The evidence disclosed, that as a result of the accident, the appellant, who was then 21 years old, was converted from a healthy whole person into a paraplegic. The doctor testified that the appellant suffered a dislocation of the 11th and 12th thoracic vertebrae which resulted in complete spinal cord transection and paraplegia. The doctor also testified that the appellant would be confined to a wheel chair for the rest of his life, and will suffer from urinary

incontinence which will require use of a permanent condom urinal. He will have to endure constipation and foecal incontinence and will suffer from bed sores and lower back pain. The doctor considered these ailments permanent. This evidence also showed that the appellant will never walk again, he will have no control of his bowel and urine movements, and that he was more or less now a helpless person. He will not be able to look after himself after he has urinated or passed stool. He would need to wear pampers for his incontinence and these conditions will prevail until the end of his life.

The challenge in this appeal related to the awards made with respect to almost all the heads of damages. The appeal therefore is really a challenge to the exercise of the judge's judicial discretion when he made those awards.

The principles of law relevant to the powers of a Court of Appeal in attempting to disturb a discretionary order of a judge have now been well-established and have been dealt with by this Court on numerous occasions the latest of which was in the case of **Alphonse v. Deodat Ramnauth Civil Appeal No. 1 of 1996 BVI:** In that case this Court crystallised the law as follows at p. 11 of the said judgment:

> "In appeals, comparable in nature to the present one, it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the Judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award. But, we are powered to interfere with the award

> if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This Court will also interfere if the Judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge's discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere. [See the judgment of this Court in **Bernard Nicholas v. Kertist Augustus Civil Appeal No. 3 of 1994 Dominica dated April 15, 1996.]"**

Applying this dictum to this appeal, I propose now to examine the respective heads of damages. In carrying out this exercise, I say immediately that I would find myself quite justified in disturbing any of the awards made by the judge if any needed such disturbance because, from the judge's own judgment, it appears that he failed to take into consideration matters which were very relevant in the making of the awards under the respective heads. I refer to this observation by the judge:-

> "An abundance of cases was cited and I do not propose to examine them all or even to refer to all of them. I am also not going to undertake any economic or statistical analysis of the cases, with or without price index, in order for me to determine the quantum of damages which I regard as appropriate for the Plaintiff."

I intend first to deal with the applicable multiplier.

THE MULTIPLIER:

In determining the multiplier, the learned judge treated this 21 year old appellant as having a working life of up to 61 years and chose a multiplier of 15. In arriving at this figure, the judge seemed to have relied on the case of **Moriarty v. Mc Carthy (1978) 2 All E.R. 213,** where a paraplegic of 24 years old, was given a multiplier of 15 and **Hunte v. Severs (1994) 2 WLR** where the House of Lords upheld the Court of Appeal increasing to 15 a multiplier of 14 on a life expectancy of 25 years which was given by the trial judge. However, in the case of **Graham v.**

Dodds (1983) 1 WLR 313, the House of Lords assumed that a multiplier of 18 in the case of a breadwinner between 20 and 30 could not be considered excessive. In our jurisdiction a man of 45 years with a working life expectancy of 65 years was given a multiplier of 12 by this Court **[Alphonse v Ramnauth] (supra).** In that case, there is also disclosed a multiplier of 10 with respect to a 57 year old doctor where the evidence disclosed a working life of up to 70 years **(Franklyn Lloyd v. Nathaniel Phillip, Civil Suit No: 79 of 1991 St. Kitts**).

Matthew J, in determining the appropriate multiplier, apart from making reference to the first three cases mentioned above, did not state what principles he applied in arriving at the multiplier of 15. We will presume that he adopted the correct principles. Those principles were laid down by us in **Alphonse v Ramnauth** at p. 13 as follows:

> "In determining the multiplier a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident {**See Franklyn Lloyd v Phillip Supra}**.

Applying these principles, and based on the above references, I am of the considered opinion that **Matthew J** erred in his judgment when he fixed the appellant's working life as ending at 61 and the multiplier at 15. In my judgment, considering all the circumstances and applying the law as abovestated, I would give the appellant a working life of up to 65 years and fix the multiplier at 18.

THE MULTIPLICAND

On the question of the appropriate multiplicand, the learned judge found that the appellant's real wages were $200: per fortnight or $400: per month. He then said "that the plaintiff had not got a secure job, and employment may have been seasonal or dependent upon harvesting. The fortunes of banana farmers vary and so must the

workers". The learned judge then arrived at a multiplicand of $2,500: per year.

I have perused the record of appeal in this matter and I can find no evidence to support the facts in the above quotation of the judge. I therefore find great difficulty in reconciling how, with an earning of $400: p.m. the annual earning could be $2500: I would have thought, applying simple mathematics, that the correct figure would be $4,800: per year. I would therefore fix the multiplicand at $4,800. In arriving at this multiplicand, I am conscious of the principle enunciated in **Cook**
Cookson v. Knowles (1979) AC 556 and restated by us in **Alphonse v Ramnauth,** that for the purpose of arriving at the multiplicand, the basis should be the least amount the respondent would have been earning if he had continued working without being injured. Having adjusted the multiplier and the multiplicand, I now proceed to deal with the damages proper. I dealt first with general damages.

GENERAL DAMAGES

1. PAIN SUFFERING AND LOSS OF AMENITIES

Matthew J, in considering the nature and extent of the injuries sustained by the appellant, the nature and gravity of his resulting physical disability, his pain, his suffering and the loss of his amenities, found that the appellant will remain with all his suffering as found by the doctor for the rest of his life. The learned judge also found no evidence of loss of expectancy of life and found a probability of 40 years

more working life. On those findings, he awarded the appellant $55,000: damages covering those heads of damages. In arriving at this sum, the learned judge referred to certain unreported cases as precedents which dealt with paraplegia.

These cases show that in St Lucia in 1974 a 40 year old paraplegic was awarded $25,000: In 1990, a 60 year old St. Lucian knee amputee confined to a wheel chair was awarded $37,500: In 1990 a paraplegic in St. Vincent was awarded $65,000 and in 1991 in Trinidad a stable paraplegic with wheel chair mobility only was awarded $260,000. Mr. Deterville for the appellant contended that based on the above awards, when consideration is had to the more serious factors disclosed in this matter and also to the aspect of inflation, that a sum in the range of $150,000to $250,000: is a more realistic award. He suggested that the time has come for this Court to take a quantum leap in the award of damages.

I do not propose to accede to Mr. Deterville's request for a quantum leap. However, I am of the view that the learned judge, when he made the award of $55,000; must have misapprehended the true nature of the incapacity in this matter. I find it inconceivable that, given the more exacerbating factors existing in this case and the level of the gravity of the appellant's injuries, that the award under the four heads above should have been a mere $55,000. I consider this an inordinately low award and an award which exceeded the generous ambit within which reasonable agreement is possible and which is therefore clearly and blatantly wrong. Given the circumstances of this matter and my finding above increasing the working life of the appellant to 65 years, and, taking into account inflation over the years, I consider a sum of $200,000: covering those four heads of damages, to be a more appropriate award.

In computing this sum, I considered $75,000: a reasonable award for pain and

suffering. This involved consideration of the nature and extent of the injuries sustained, the appellant's personal awareness of pain and his capacity for suffering. For loss of amenities I considered the sum of $125,000: reasonable. This involved consideration of the nature and gravity of the resulting physical disability, the fact of the deprivation which is a substantial loss, whether or not the appellant is aware of it. [See **Lim v. Camden Inslington Area Health Authority) (1979) 2 A.E.R. 910]**.

Criticism was made by Mr. Deterville of the judge not itemising the award of $55,000 under the different heads. The learned judge in declining to do so seemed to have been following what **Berridge JA** said in **Alfred v Thomas (1983) 32 WIR 183 at p 187:**

> "I pause here to state, however, that there is no obligation on the part of a judge to mention arithmetical calculations on the several amounts under the separate heads of damages in his judgment, provided that he takes into account all the relevant factors, keeps in mind the various heads which damages should be awarded and applies the correct principles."

And to what he himself said in 1987 in **Jules v Long (unreported)** where he quoted the aforementioned passage of **Berridge JA** and then uttered these words:

> "that is enough for me. The different heads of damages are not to be treated as a housewife shopping in the supermarket for different commodities"

It is my considered opinion, that the practice of non itemisation should only be used where it is impracticable to itemise the awards under the different heads. This can happen where there was vagueness of the evidence and lack of specific diagnosis of the injury as was experienced by **Byron J** (as he then was) in **Henry v. Charles in St. Lucia (unreported).** But where the evidence is such that it is practicable to itemise, such practice should be followed. This is the modern approach, and it is necessary especially when dealing with the issue of interest that is to be awarded under the different heads. In **George and another v. Pinnock and another (1973) 1 WLR 934 Sachs LJ** gave this advice:

> "It is thus as well to say that, whatever may have been the

> differing judicial views up to a few years ago and, indeed up to 1970, as to whether a judge should simply award a global sum, or whether he should state in his judgment what are the main components of that figure, the modern practice, since **Jefford v Gee** (also decided in March 1970), is to adopt the second course. It is true that that adoption has to a considerable extent come into being because of the differing rates of interest applicable to differing heads of damage under the **Jefford v Gee** decision. On the other hand, it is also in part due to the general adoption of that considerable body of judicial opinion which held the effect that plaintiff and defendant alike are entitled to know what is the sum assessed for each relevant head of damage and thus to be able on appeal to challenge any error in the assessments. In my judgment, this court should be slow to emasculate that right of litigants.";

My suggestion is, that under the four heads referred to above, there should be separate itemisation for pain and suffering, and loss of amenities.

2. LOSS OF FUTURE EARNINGS

The learned judge on the issue of future earnings used a multiplicand of $2,500: with a multiplier of 15. I have already found both of these approximates to be erroneous. Utilising my approximates of a multiplier of 18 with a multiplicand of $4800: the award under the head of loss of future earnings is increased from $37,500 to $86,400:

3. COST OF NURSING CARE

On the issue of future nursing care, the evidence of Dr St Rose who tended to the appellant, was that the appellant would need regular nursing care for the rest of his life. He would need someone to look after his personal hygiene on a daily basis and that there had to be proper nutrition. There would be need for regular antibiotics for anticipated urinary infection. There was anticipation of occurrence of severe bed sores which would need hospitalisation and he would need medication for back ache. The doctor also said that the appellant needed to be seen by a nurse or doctor once every 2 or 3 months. A retired nurse Andrina Landers, testified on affidavit that the appellant needed private nursing care every day for 3 hours at $20: per hour or $60 per

day. The learned judge, under this head of damage, awarded the appellant $100: per month. This was to be paid to the mother of the appellant, who was not a nurse, to take care of the appellant. In doing so the judge rejected the evidence of nurse Landers as being self-serving.

I consider this award without legal or factual foundation. The evidence disclosed that the mother of the appellant was not a nurse, she was a part time fruit vendor and she had a sick husband to care for. This evidence therefore shows that she would have neither the time nor the expertise to give to the appellant the care that was medically recommended. The evidence of nurse Landers was unchallenged and uncontroverted, she was not employed by the appellant as his nurse. I can discern no basis for the judge's conclusion that her evidence was self-serving.

Given these circumstances I consider the award of $100: per month erroneous. Based on the evidence of nurse Landers and Dr. St. Rose, the proper award should have been $60 per day or $21,600 per year. However, some adjustment should be made for the contingency that his condition may improve. To allow for this, I would use a multiplier of 10 suggested by Mr. Deterville. Mr. Theodore suggested a multiplier of 11. That would approximate the cost of future actual nursing care at $216,000.

4. DOCTOR'S VISITS

The learned judge awarded $300: per year for the occasional doctor's visit. Applying a multiplier of 18 makes that award $5,400.

5. PAMPERS

For pampers for the appellant, the judge plucked out of a hat $1200: per year. How he reached that figure is mind-boggling. Addressing the issue from evidence given by the respondent himself, the cheapest cost was $6: per day or $2,190: per year. With a multiplier of 18, the award should have been $39,420:

From these different sums, the total cost of nursing care is increased to t $260,820. This would total the general damages to be awarded in this matter at

$547,220: However, this being a lump sum payment being obtained upfront, and, taking into account the vagaries vicissitudes and the imponderables of life, I would scale it down to a rounded figure of $500,000:

SPECIAL DAMAGES

1. **Loss of Earnings**:

The learned judge found that the special damage of loss of earnings should be calculated on the basis of 36 months employment lost from the date of the accident to the date of trial at the rate of $400: per month. We agree with this and confirm the award under this head of $14,400.

2. **Pampers:**

For pampers bought up to the date of trial, the judge awarded the sum of $1200: per year for 3 years equalling $3600: Mr. Deterville suggested $2,190 per year with a total of $6,570: based on the cost awarded above as general damages. I will not interfere with the judge's award, special damages needing proof of actual loss and not of estimated loss.

3. Cost of care provided by the appellant's mother:

For care provided to the appellant by his mother, the judge awarded $100: per month or $3600 for 3 years. As I understand the law, the measure of damages to be awarded under this head, is the reasonable value of the services rendered to the appellant gratuitously by his relative or friend, in the provision of nursing care or domestic assistance of the kind necessary by the injuries the plaintiff has sustained [See **Hunte v. Severs (1994) 2 WLR 602**. Given the circumstances of this case, I consider this sum inordinately low. A more practical award would have been $500: per month for 3 years which is less than $20: per day. I therefore substitute for this award the sum of $18,000.

4. TRANSPORTATION COSTS

The judge awarded 1,000: This was not challenged and is therefore confirmed.

5. WHEEL CHAIR

Terencia Gaillard, the Director of the St. Lucia Red Cross Society said on affidavit evidence that she was familiar with the prices of wheel chairs and that a motorised wheel chair suitable for the plaintiff would cost $4,000: US or $10,800: She never testified, as the judge found that "a wheel chair suitable for the plaintiff would cost $595: U.S. or $1600 E.C." This was therefore an erroneous finding of fact of the judge. Because of this and because this evidence was unchallenged and uncontroverted I would substitute for the cost of the wheel chair $10,800: instead of $1600: In this Hi Tech age of Dot Coms and cellular phones, I do not know that an unmotorised wheel chair would be proper apparatus for this paraplegic as the judge obviously thought when he awarded $1600:, especially when one considers the hilly terrain of the residential areas of St. Lucia.

6. THE WALKWAY

Because of the appellant being converted by the accident into a paraplegic and therefore now relegated for the rest of his life to a wheel chair, the issue of the cost of a driveway for the wheel chair arose for consideration by **Matthew J**. The learned judge had before him the unchallenged and uncontroverted affidavit evidence of one Thomas Walcott, a qualified professional engineer and valuer with a detailed itemised list of all that was needed to construct such a driveway. This witness swore as follows:

> "I state that on the basis of the said measurements, observations and analysis of the data obtained, I arrived at the structure of a service walkway which is suitable to a person in the plaintiff's condition and the cheapest possible means of building a pathway for a person on a wheel chair to gain access to the main road from his home. I state that the said service walkway cost $49,045.82.

This was the only evidence led as to the cost of the walkway. I now reproduce the learned judge's finding on the issue:-

> "The second deponent was Thomas Walcott, a qualified civil and structural engineer, who estimated that to alter the access to the Plaintiff's home to facilitate a wheel chair would cost $49,045.82 in addition to $3,234.56 for the cost of his services. I do not recall any of the witnesses

> describing the house in which the Plaintiff lives. I rather suspect it to be a chattel house since it was stated that there is no internal bathroom. When one considers the vulnerability of such houses in a hurricane area I wonder whether it would not be possible for the house to be blown away leaving intact the extravagant service walkway which may almost be the value of the house. I reject that claim for in my view the average mason could build an adequate walkway for not more than $10,000."

I really cannot understand what happened here to the learned judge. He simply ignored the evidence of the professional engineer. It would seem to me, that in a moment of judicial aberration, he abdicated his role of judge, assumed that of witness, testified, then reverted to his role as judge and accepted his own evidence. I can find no other reason. This phenomenon manifested itself not only on this aspect of the case, but also when he dealt with the multiplicand and with general damages under the heading of pampers and future nursing care.

On the evidence as it stood, the cost of the service walkway should have been accepted at $49,052:82. And I so order. There was also the cost of the engineer's bill of $3,234.56 which is also allowed. I would therefore order a total of $52,280.38 for the walkway.

7. MEDICINES

The order of the judge of $901.28 for the cost of medicines has not been challenged and is affirmed.

From these wards the total special damages would be $91,081.66.

INTEREST

In awarding damages in this matter, **Matthew J** was silent on the question of interest on general damages. He awarded 4 per cent interest on the special damages from March 29, 1994, presumably the date of the service of the writ, to date of judgment. Mr. Deterville asks this Court for interest on general damages as well.

As was said by us in **Alphonse v. Ramnauth (supra),** the general principle is that interest ought only to be awarded to a plaintiff for being kept out of money which ought to have been paid to him. With regard to general damages, no interest should be

awarded before judgment on loss of future earnings. On damages for loss of amenity and pain and suffering, interest should be awarded from the date of the service of the writ to the date of trial at the rate payable on money in Court placed on short term investment. Regarding special damages interest should be awarded for the period from the date of the accident to the date of trial at half the above rate. [See **Jefford v. Gee (1970) 1 All E.R. 1202].**

There was no evidence led as to the rate of interest on a short term investment. In deciding the issue of interest before judgment therefore, I propose to use the "legal rate" (as it is called in the St. Lucia Code) of 6% per annum as the yardstick as the awardable rate and follow the aforementioned guidelines. These will now be reflected in my conclusion of this matter.

CONCLUSION

For all the reasons given, I would order that this appeal be allowed with costs to the appellant to be taxed if not agreed. The damages awarded by the learned judge are varied as follows:

GENERAL DAMAGES

Pain, suffering and loss of amenities	$200,000	Interest at the rate of 6% p.a. from date of service of the writ March 29, 1994 to the date of trial Nov. 24, 1995
Loss of future earnings	86,400:	No interest
Nursing care	216,000:	No interest
Doctor's visits	5,400:	No interest
Pampers	39,420:	No interest

Total general damages rounded off at $500,000:

Special Damages	91,081:66	Interest at the rate of 3% pa from the date of the accident 18th June 1993 to date of trial Nov. 24, 1995

Total Damages $591,081.66

There will be interest on this global sum from the date of **Matthew J's** judgment 31st July, 1996 until payment at the rate of 6% p.a. I make no deductions for Income Tax or NIS contributions as we were not fed with that evidence. It will be a matter for the respective commissioners whenever payment is made to secure their pound of flesh.

Mr. Deterville, at the end of his arguments, with much enthusiasm, asked this Court to suggest in this judgment bands of damages for different injuries sustained by accident victims based on previous awards with the consideration of inflation. I do not propose to do so. I would have thought that as President of the St. Lucia Bar Association, his enthusiasm for this exercise would have been better directed to the members of his association or may be to those of the O.E.C.S. Bar Association.

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SATROHAN SINGH
Justice of Appeal

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ALBERT REDHEAD
Justice of Appeal

....
ODEL ADAMS
Justice of Appeal [Ag.]