SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 10 OF 2003

BETWEEN:

CCAA LIMITED

Appellant

and

JULIUS JEFFREY

Respondent

Before:

The Hon. Sir Dennis Byron	Chief Justice
The Hon. Mr. Adrian Saunders	Justice of Appeal
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Samuel Commissiong for the Appellant
Mr. Richard Williams for the Respondent

2003: November 24;
2004: March 2.

JUDGMENT

[1] GORDON, J.A. [AG.]: In February 1999 the Respondent was employed as a carpenter by the Appellant at the Appellant's work site on Canouan in the Grenadines. On the 22nd February a large crane belonging to the Appellant fell on the Respondent's hand causing severe injury. The issue of liability was not contested and so the only issue for the learned trial Judge in the Court below was the assessment of damages.

[2] The Respondent sustained a traumatic amputation of his left thumb, compound fractures of the 4th and 5th metacarpal bones with lacerated flexor tendons on the

4th and 5th fingers. The Respondent claimed special damages and general damages.

[3] The learned trial Judge awarded damages as follows:

-	Special damages	$203,927.09
-	Loss of future earnings	159,927.30
-	Loss of earnings	28,431.52
-	Cost of care by mother	5,400.00
-	Pain suffering and loss of amenities	250,000.00

in addition the trial Court awarded interest on pain, suffering and loss of amenities at the rate of 5% (per annum) from the date of service of the Writ to the date of judgment, viz: $46,875.00

and awarded interest at the rate of 2.5% (per annum) on the special damages from the date of the accident to the date of judgment, viz: $20,392.72

[4] The Appellant has appealed against the award of $250,000 for pain, suffering and loss of amenities as being out of all proportion to like awards in the OECS; against the award of $159,927.30 for loss of future earnings on the grounds that the trial Judge did not take into account the effect of increased productivity resulting from a successful operation on the Respondent's hand thereby affecting the quantum of lost future income and generally that the award was out of proportion. The Respondent filed a Counter Notice of Appeal appealing against: the award for loss of earnings; failure of the learned trial Judge to discount the sum of $20,000.00 previously paid by the Appellant to the Respondent; the finding by the learned trial Judge that the Respondent was under a duty to mitigate whereas the same had not been pleaded by the Appellant, and hence was not an issue in the case; the award for loss deriving from the need to provide domestic care; and, that the award of costs were not in line with prescribed costs as required by Part 64 and 65 of the Eastern Caribbean Supreme Court Rules 2000.

[5] The first Ground of Appeal on behalf of the Appellant is that the award for pain, suffering and loss of amenities is excessive and out of all proportion to like awards in the Organization of Eastern Caribbean States. In addition to the Appellant's complaint that the award was too high, there was the further complaint that pain suffering and loss of amenities were all lumped together and in no way itemized. In Auguste v Neptune[1] Singh JA said the following:

> "It is my considered opinion, that the practice of non itemization should only be used where it is impracticable to itemise the awards under different heads. This can happen where there was a vagueness of the evidence and lack of specific diagnosis of the injury…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 different heads."

Singh JA quoted with approval the following from the judgment of Sachs LJ in George and another v Pinnock and another[2]

> "On the other hand, it is also in part due to the general adoption of that considerable body of judicial opinion which held to the effect that the 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."

I completely agree. A Court of Appeal which is asked to interfere with the exercise of the discretion of a trial Judge in his award of general damages requires as much help as possible determine whether that discretion has been properly exercised.

[6] In Auguste v Neptune the victim suffered a dislocation of the 11th and 12 thoracic vertebrae which resulted in complete spinal cord transection and paraplegia. In its judgment delivered in November 1997, the Court of Appeal awarded the sum of $75,000.00 as a reasonable award for pain and suffering which involved the consideration of the nature and extent of the injuries sustained, the victim's personal awareness of pain and his capacity for suffering. The sum of $125,000.00 was considered reasonable for loss of amenities. As remarked

[1] Civil Appeal No. 6 of 1996, St. Lucia
[2] (1973) 1 WLR 934

above, the learned trial Judge in this case awarded the sum of $250,000.00 for pain suffering and loss of amenities.

[7] This Court has ruled on the circumstances in which an appeal Court will interfere with a discretionary order of a Judge. In Alphonse v D. Ramnauth[3] the following passage appears:

> "In appeals, comparable in nature to the present one, it must be recognized 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 quantum of damages from the evidence they give…The mere fact that the Judge's award is for a larger or smaller sum that we would have given is not 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 of 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…The award of damages is a matter for 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".

[8] Whilst I agree with the opinions expressed above, it is, in my view, a function of the law, as far as possible, to be predictable, given the infinite variety of the affairs of human kind. In the context of damages for personal injuries, there are certain principles which apply and then there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based; that is to say, the trial Judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would clearly be very helpful, but even awards of wholly dissimilar injuries are helpful in relating the claimant's injuries on a comparative scale. This is

[3] Civil Appeal No 1 of 1996, BVI

not a precise science, leaving much room for the exercise of the trial Judge's discretion.

[9] I am aware of the school of thought advanced before us that a trial Judge may take into account damages awarded in comparable cases, but is in no way bound to. I believe that that school of thought has served its time and has been replaced by the more modern school as expressed in Wells v Wells[4] (a House of Lords decision) wherein Lord Hope of Craighead observed that:

> "The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the Court's best estimate of the plaintiff's general damages" (emphasis added)

[10] Thus, to summarise, I accept that the trial Judge must exercise his discretion based on the evidence before him, but that discretion must be curtailed by attempting to achieve consistency in awards within the jurisdiction of this Court.

[11] In this case, to reiterate, the Claimant suffered severe injury to his left hand which the trial Judge accepted caused him excruciating pain. Based, however, on the report of Dr. Eduardo Gonzalez-Hernandez, a specialist in the treatment and rehabilitation of hands etc. whose report was introduced into evidence by the Respondent, the Respondent stands a very good chance of having a toe to hand transfer which in the opinion of the doctor would be the best option for reconstruction. He opines that "this is a very reliable procedure providing a strong thumb which is sensate and has good cosmesis and good function". In his judgment, the learned trial Judge quoted the opinion of Dr. Gonzalez-Hernandez, and, I assume, accepted the prognosis.

[4] [1998] 3 All ER 481

[12] There appears to be some ambiguity in the judgment delivered by the learned trial Judge in his award of damages. At paragraph [10] of his judgment he states:

> "The court's consideration on special damages will be limited to actual loss sustained at the date of trial, specifically pleaded and proved. Pain and suffering, loss of amenities, future expenses and loss of future earnings will be considered under the head of general damages." However, at paragraph [13] of his judgment he states "In his amended statement of claim the claimant set out particulars of his claim for special damages, including past and future medical expenses, to a total of $203,927.09. In the absence of pleading by the defendant to these claims, the claimant is entitled to judgment in respect of those heads of damages".

The amount awarded by the trial Judge for special damages is precisely the sum claimed for future medical expenses - the estimated cost of the surgery and treatment as recommended by Dr. Gonzalez-Hernandez to replace the thumb with a toe.

[13] By both the Notice of Appeal and the Counter Notice of Appeal the Appellant and the respondent have appealed against damages at large and so I have no hesitation in transferring the sum of $203,927.09 from special damages to be a part of general damages. This will be apparent in the award below.

[14] The Appellant complains that the sum of $250,000.00 awarded for pain, suffering and loss of amenities is excessive. Because the trial Judge did not separate the pain and suffering from the loss of amenity, it is not possible to determine what proportion of the sum was ascribed to either factor. However, the sum of $250,000.00 has to be put in the context of other awards in this jurisdiction, and in this connection reference is made to Auguste v Neptune and Alphonso et al v. Ramnath cited above. In the Ramnath case the injuries to the claimant left him with pains to his head, back, abdomen and both legs. He suffered a broken rib and fracture of the left ulna. As a result of post traumatic sequel the following conditions were identified:

[a] Hemi paresis of the left hand side of victim's body;

[b] Grand mal seizures;

[c] urinary incontinence

[d] anosmia and diminished sense of taste;

[e] loss of one leg. Damages awarded for pain suffering and loss of amenities in that 1997 judgment was US$45,000.00 or EC$121,500.00.

[15] In the instant case the learned trial Judge awarded $250,000.00 for pain, suffering and loss of amenities. Paraphrasing Singh J.A. in Ramnath, I am clearly of the opinion that, having regard to all of the circumstances of the case, I cannot find any reasonable proportion between the amount awarded and the loss sustained and I find the damages under this head out of all proportion to the circumstances of this case. It is interesting and instructive that the Respondent in his submissions before the learned trial Judge sought general damages of only $160,000.00 of which the sum of $50,000.00 was for pain and suffering, and $110,000.00 for loss of amenities. Learned Counsel for the Appellant suggested the sum of $40,000.00 for pain and suffering and a further sum of $40,000.00 for loss of amenities. In his response to the Appellant's Skeleton Argument, the Respondent argues that the sum of $250,000.00 is not excessive or erroneous in the particular circumstances of this case. On the basis of the Appellants 'concession' I would substitute the sum of $40,000.00 for pain and suffering and the sum of $40,000.00 for loss of amenities. In view of the prognosis of Dr. Hernandez and in view of the award of the sum necessary for future medical expenses, I would have been inclined to award substantially less for loss of amenities.

[16] The second ground of appeal is that the learned trial Judge erred in awarding the sum of $159,927.30 for loss of future earnings and authorizing the cost of the operation at the Miami Hospital without taking into account any increased productivity that may result from a successful operation on the hand thereby affecting the quantum of lost future income.

[17] The learned trial Judge referred to the evidence of the Respondent that once the pain had stopped, he would be able to do limited work and he estimated that he

would be able to earn no more than $200.00 per fortnight as opposed to $543.76 per fortnight prior to the accident. Thus the multiplicand must be the difference of those two numbers, or $343.76 rather than the multiplicand used by the trial Judge which was $543.76. I would not interfere with the multiplier used by the learned trial Judge. Thus the gross figure for loss of future earnings will be $343.76 x 26 x 15 = $134,066.40.

[18] In his Counter Notice of Appeal the Respondent claims that the learned trial Judge misled himself when he found that the Respondent earned $543.76 per fortnight. In an exhibit to the Affidavit of the Respondent filed in the Court below, the Respondent showed gross earnings of $17,422.20 over a period of 14 fortnights. Of that sum $9,822.09 was over time. Thus the straight time earnings of the Respondent was $543. per fortnight. Clearly, therefore the learned trial Judge predicated his award in this regard on the straight time earnings of the Respondent. In arriving at this multiplicand the learned trial Judge clearly had in mind the advice of Singh JA in Alphonso v. Ramnath wherein he states:

> "For the purposes of the multiplicand, the basis should be the least amount the respondent would have been earning if he had continued working without injuring".

There is therefore an evidentiary basis for the learned trial Judge's finding and I would not substitute my discretion for his.

[19] The learned trial Judge discounted the gross figure by 25%. In the Respondent's case he claimed for future medical expenses. As indicated above, the prognosis for a significant recovery of the use of his thumb by the Respondent is good. In the circumstances I would discount future loss of earnings by 50% rather than the 25% used by the trial Judge. In doing so I am mindful of the fact that the trial Judge, in the exercise of his discretion did not seem to take into account the likely recovery of the Respondent. Thus I would substitute an award of $67,033.00 for loss of future earnings.

[20] The Appellant did not appeal against the award of $5,400.00 for cost of care by the Respondent's mother, but in his Counter Notice, the Respondent complains that the learned trial Judge erred in both limiting the period to 36 months and the amount to $150.00 per month rather than the $300.00 claimed. The evidence relating to this head of damage is to be found at paragraph 30 of the Respondent's Affidavit and a passing reference in the notes of evidence. I can find no argument by the Appellant with the estimate of the Respondent that $300.00 per month would be a fair sum to pay for the services provided by his mother. Further, by the time of judgment, some 50 months had passed since the accident and now a further 11 months have passed. I would award the Respondent the sum of $18,300.00 for cost of care by his mother

[21] Though neither side has raised the point, I believe that in the interests of fairness and completeness there is one further matter that needs to be addressed in connection with Special Damages. It is conceded by the Respondent that the Appellant paid or caused to be paid to him the sum of US$26,228.01 for expenses incurred. He accounts for the expenditure of that sum. But in addition, as I understand the Respondent, he is claiming a further sum of EC$4,165.65 for past medical expenses. This has not been challenged by the Appellant and I would award him this sum.

[22] The Respondent in his Counter Notice complained that the learned trial Judge erred in the award of costs of $35,000.00 and failed to apply prescribed costs as required by part 64 and 65 of CPR 2000. I will address this issue in my conclusions

Conclusion

[23] I would allow this appeal and make the following awards:

[1] Special damages: $ 4,165.65

[2] General damages:

[a]	Loss of future earnings:	$ 67,033.00
[b]	Loss of earnings	$ 28,431.52
[c]	Future medical expenses:	$203,927.09
[d]	Cost of care	$ 18,300.00
[e]	Pain suffering and loss of amenities	$ 80,000.00
	Sub-Total:	$401,857.26
	Less $20,000.00 advanced by Appellant to Respondent	
	Total damages	$381,857.26

[24] The issue of interest was not argued before us and so I propose to adopt the rates and periods adopted by the learned trial Judge as follows:

> Interest on pain, suffering and loss of amenities: 5% from date of service of writ to the date of this judgment, 4 years and 8 months: $18,640.00
>
> Interest on special damages: 2.5% from the date of the accident to the date of this judgment, 5 years : $ 520.70

Costs

[25] Costs as remarked above the Respondent appealed against the award of $35,000.00 costs as not being in keeping with “Prescribed Costs” as set forth in CPR 2000 Part 65. I find his complaint to be justified. I would vary the order for costs in the Court below and award the Respondent the sum of $59,685.00.

In this Court, I find that there has been a mutuality of success and so I would make no order as to costs in this appeal.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Sir Dennis Byron
Chief Justice

I concur.

Adrian Saunders
Justice of Appeal