ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.16 OF 2004

BETWEEN:

WADADLI CATS LIMITED

Appellant

and

FRANCES CHAPMAN

Respondent

Appearances:

Mr. John Fuller for the Appellant
Mr. Clare Roberts for the Respondent

CIVIL APPEAL NO.19 OF 2004

BETWEEN:

[1] KEITHLEY GEORGE
[2] FRANCIS TRADING AGENCY LIMITED

Appellants

and

GERALD KHOURY

Respondents

Appearances:

Ms. Catherine Williams-Kentish for the Appellant
Ms. Sharon Cort for the Respondent

Before:

The Hon. Mr. Adrian Saunders — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Madam Suzie d'Auvergne — Justice of Appeal [Ag.]

2004: December 2;
2005: April 25.

CORRECTED JUDGMENT

[1] GORDON, J.A.: These two appeals came before us at the same sitting in Antigua and both deal exclusively with the issue of the quantum of damages. In neither case did the issue of liability arise before us. Given the parity of principle to be applied in each case and the width of divergence in the application of judicial discretion by the two different trial judges it was decided to write a conjoined judgment.

[2] In Appeal No16 of 2004 (hereafter referred to as the "Wadadli appeal") The Respondent suffered injuries to her person whilst on a boat trip organized and conducted by the Appellant. In her Statement of Claim the Respondent, who was the Plaintiff, particularized her injuries as follows:

- Shock
- Severe bruising to the head
- Severe pain in the neck and arm
- Bruising of the inner ear and post concussion syndrome
- Paraesthesia – pins and needles in her right arm
- Numbness over the right thumb and forefinger
- Cervical spondylosis and a mild degree of carpal tunnel syndrome

[5] The Respondent in the Wadadli appeal did not claim for any special damages and none were awarded. The learned trial Judge awarded the following sums as general damages: $500,000.00 for pain, suffering and loss of amenities; $40,000.00 for the depression and other psychological problems she has suffered in the aftermath of the accident; $30,000.00 for loss of a congenial form of employment, making a total award of $570,000.00 for general damages.

[6] In Appeal No 19 of 2004 (hereinafter referred to as the "Khoury appeal") the Respondent/Plaintiff suffered injuries as a result of being hit by a van whilst he

was stationary on his moped. The Statement of Claim particularized his injuries as follows:

- shock and severe pain
- multiple bruises and swelling of left ankle and leg
- severely comminuted and crushed intra-articular fracture of the lower ends of the tibia and fibula
- bruising and operation scars to left ankle.

[5] In the Khouri appeal special damages were pleaded and awarded in the sum of $157,508.15. The sum of $120,000.00 was awarded for pain, suffering and loss of amenities, $208,000.00 for loss of future earnings and $258,000.00 for the costs of future medical care

[6] In Alphonso v Ramnath[1] this Court laid down the principles which should guide an appellate court in the interfering of a discretionary award by a trial judge. I believe that the statement by Justice of Appeal Singh is worth repetition:

> "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 damage 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".

[1] Civil Appeal No 1 of 1996, BVI

[7] In CCAA Limited v Julius Jeffrey[2] this Court said the following in relation to the criteria that a trial judge should apply in the exercise of his discretion on the question of general damages for personal injuries:

> "…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 not a precise science, leaving much room for the exercise of the trial Judge's discretion.
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> 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[3] (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)
>
> 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."

[8] One further point of general application on which this Court has opined and held is that where an award is made for pain suffering and loss of amenities the trial court should always try to separate and itemise the amounts awarded under the various heads. In Auguste v Neptune[4] Singh JA said the following:

[2] Civil Appeal No. 10 of 2003 SVG
[3] [1998] 3 All ER 481
[4] Civil Appeal No. 6 of 1996 SLU

> "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."

He quoted with approval the following from the judgment of Sachs LJ in George and another v Pinnock and another[5]

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

[9] In the two appeals being considered neither of the two trial judges sought to itemise the awards under the various sub-heads of pain, suffering and loss of amenities, though, in my view there was sufficient evidence before them to do so.

The Wadadli appeal

[10] As stated above the learned trial judge awarded $500,000.00 for pain suffering and loss of amenities. In Auguste v Neptune (see supra) 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. It is to be remembered that the trial judge in that case found that the victim would endure suffering and loss of amenities (paraplegia) for the rest of his life.

[5] (1973) 1 WLR 118

[11] In CCAA Limited v Jeffrey (see supra) the victim 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 which the trial judge found caused and continued to cause him excruciating pain. The trial judge awarded $250,000.00 for pain, suffering and loss of amenities. This Court varied the award to $40,000.00 for pain and suffering and $40,000 for loss of amenities. It is to be noted that the Court expressed the view that had there not been a concession on the part of counsel for the Appellant the sum awarded for loss of amenities would have been lower.

[12] The learned trial Judge in Wadadli found that the most significant personal injuries suffered by the Respondent were pain and loss of balance. He went on "Her pain is permanent and chronic. She will be vulnerable to further trauma through falls and exposure to injury from sharp instruments as a result of the lack of sensation in her fingers. On that somewhat sketchy basis, the trial Judge awarded, as I have said, $500,000.00. In the words of Singh JA "[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] the damages are out of all proportion to the circumstances of the case."

[13] I believe that it would be proper to quote from one of the medical reports submitted to the Court on behalf of the Respondent. This was from Mr. Kim W. Ah-See, a consultant in the department of Otolaryngology/Head & Neck Surgery which report is dated 20th May 2003, some five and a half months before the trial of this matter:

> "Over the last two years, Mrs. Chapman has shown definite signs of improvement. This I believe is largely due to her programme of vestibular rehabilitation under the supervision of Simon Shemilt our senior Audiological Scientist in Aberdeen…
>
> "I found Mrs. Chapman much more positive in her outlook at her last ENT visit one week ago and I feel this is because she herself has noticed improvements in recent months… and I believe with her currently more positive outlook, she will do very well. As mentioned, however, once there has been damage to the peripheral vestibular system, this is essentially

irreversible and she copes from a balance point of view by relying on compensatory function of her remaining vestibular function."

[14] It is not to gainsaid that the Respondent has had her professional life substantially upset, and to a lesser extent her social life. Nevertheless, in all of the circumstances, I hold that an award of $40,000.00 for pain and suffering and $80,000.00 for loss of amenities would, in all of the circumstances be both fair and in line with other awards within the jurisdiction.

[15] The learned trial Judge, in addition to his award for pain, suffering and loss of amenities, also awarded the Respondent the sum of $40,000.00 for "depression and other psychological symptoms she has suffered in the aftermath of the accident". He further awarded the sum of $30,000.00 for loss of congenial employment. With respect to the latter head of damages, I am of the view that this head falls within the head of loss of amenities. There appear to be two schools of thought. On the one hand there is the school which relies on the first instance case of Hale v London Underground[6] the ratio of which, we were advised recognizes loss of congenial employment as a separate head of damages. I have not been able to see this case for myself. The second school recognizes loss of congenial employment as a factor to be taken into account when a court considers damages for loss of amenity – Davies v Mersey Regional Ambulance Service NHS Trust[7]. In many respects, it makes no difference. However, for the avoidance of doubt, the sum of $20,000.00 has been included within the sum of $80,000.00 awarded for loss of amenities as damage for loss of congenial employment.

[16] With regard to the award in relation to depression and other psychological symptoms suffered by the Respondent subsequent to the accident I have taken these matters into account in relation to my award for pain and suffering.

[6] [1993] PIQR Q30
[7] 11th March 1998 (unreported) CA

Conclusion

[17] The award to the Respondent therefore is $120,000.00 for General Damages together with interest at the rate of 6% per annum, from the date of the filing of the Claim to the date of judgment (from March 8, 1999 to April 1, 2004) as awarded by the learned trial Judge and not appealed from. Costs in the Court below in accordance with CPR Part 65 .5 based on the award herein are awarded to the respondent and two thirds of that amount are awarded to the Appellant in this appeal.

The Keithley George appeal

[18] There were various challenges by the Appellant to the various heads of damage. The first such challenge was to the award of $208,000.00 which the learned trial Judge characterized as "Loss of future earnings". In making this award, the learned trial Judge seriously misled herself in two significant respects. Firstly, I will deal with the issue of the Pleadings. This case commenced under the regime of Rules of the Supreme Court 1970 and continued under the Civil Procedure Rules 2000 (CPR.) Under both regimes the duty of the Plaintiff/Claimant is to plead such facts as he will rely on for the purpose of pursuing his claim. Under either regime there was, in my view, a duty on the part of the Respondent to claim losses for loss of future earnings and to assert the basis on which such a claim was being made. This was not done. The issue on the pleadings was not advanced before the Court below and only in passing before us. It is, however, not necessary to make a decision on that point.

[19] The learned trial Judge determined that the Respondent would have to employ a fork-lift driver to drive a fork-lift vehicle which was integral to the running of his business – a function that the Respondent used to do. At paragraph 11 of her judgment, headed "Loss of future earnings" she says the following:

> "On the basis that it is reasonable that he could have been expected to drive his fork-lift until the age of 65 that is for 14 years he should be compensated for that projected expense. However, he is getting his

> money in advance and therefore the usual adjustments have to be made for such payments and I think that an adjustment to ten years is fair. The wages currently paid are $400.00 per week and therefore the award is $208,000.00"

Clearly, such an award could not be for loss of future earnings. Indeed, in the Schedule of claimed damages submitted by the Respondent in the Court below the Respondent claimed the expense of hiring a fork-lift driver for only for two periods of 18 weeks presumably to coincide with the periods of recovery after the two surgical operations recommended by the expert evidence. The evidence is that such a driver would be paid $400.00 per week. This award is therefore re-characterised as damages for future expenses and is made in the sum of $400.00 x 36 or $14,400.00

[20] The next ground of appeal that I will deal with is the challenge to the award of $65,000.00, plus US$2,000.00 for the necessary hardware, for the two surgical procedures that the Respondent is recommended to have. The evidence of the Respondent's expert, Mr. Kunwar Singh, Orthopaedic Surgeon is definitive in stating that the cost of such procedures would be $55,000.00 plus US$2,000.00 (EC$5,400.00) for 'external fixation'. However, the Appellant complains that there is evidence that the same procedures would cost $22,000.00 in Barbados and that the Respondent is under a duty to mitigate his loss. Whilst I fully agree that there is a duty on a Claimant to mitigate his loss, I do not accept that this obliges a Claimant to go shopping for the cheapest medical attention. The Respondent is, in my view, entitled to receive the medical attention that he seeks in the place of his accident and where he is resident. In any event, if there is evidence of the cost of the procedures in Barbados, such evidence does not form part of the Record of Appeal. I would vary this award to $55,000.00 plus $5,400.00.

[21] Complaint is also made by the Appellant of the award of $42,000.00 for future nursing care for seven weeks being the time of anticipated recovery from the two surgical procedures. This sum, the learned trial Judge calculated as being based on a rate of $200.00 for an eight hour day. I am of the view that the learned trial

Judge confused the mathematics in this calculation. In the Schedule of Damages submitted by the Respondent in the Court below the Respondent claimed the sum of $6,106.50 for future local nursing care. I find this to be a reasonable sum and I vary the award of the learned trial Judge under this head to $6,106.50.

[22] The next complaint raised by the Appellant is that the learned trial Judge's award of $145,600.00 for future physiotherapy. That sum was based on the need for the Respondent to have therapy twice a week at $100.00 per session giving an annual cost of $10,400.00. The learned trial Judge applied a multiplier of 14 to the figure of $10,400.00. Learned Counsel for the Appellant argued that the learned trial Judge was wrong in two respects. Firstly, that she assumed that the therapy would be necessary for the rest of the Respondent's life. As I understand the evidence of Mr.Singh, the orthopaedic surgeon, physiotherapy does not help with the pain, but rather with maintaining mobility. But, he stated, once the two surgical procedures are undertaken, the Respondent will have much greater mobility. Mr. Singh offered no time frame for the procedures stating only that the symptoms will indicate in the future when they need to be done. The second error, according to Counsel for the Appellant was that such a multiplier (of 14) was too high in the context of Alphonso v Ramnath (supra) where the victim was 42 years old and a multiplier of 12 was used. With great respect to Counsel for the Appellant, that latter case is not relevant in the present circumstances. In the context of the uncertainty of the timing of the two surgical interventions, I would agree that the multiplier is too high and would reduce it to 5 years. I would therefore vary the award for future physiotherapy to $52,000.00.

[23] The final complaint of the Appellant is in respect of an aspect of special damages and deals with the award of the sums of $38,964.80 for the cost of an air ambulance to take the Respondent to the United States of America very shortly after the accident, the sum of $41,398.59 for hospital fees in the United States and the sum of $4,189.65 for a first class air ticket to return to Antigua from the United States. In the opinion of Counsel for the Appellant, the Respondent did not fulfill

his duty to mitigate his losses and should have gone to Barbados for the required surgery. The learned trial Judge found that the Respondent traveled to the United States of America for the dual reason that treatment of the kind required was not available in Antigua and that the referral to the St. Lukes Hospital in New York was at the recommendation of Dr. Joseph John under whose temporary care the Respondent was. The medical evidence was that the injury was of such severity that the Respondent was in danger of losing his foot. In those circumstances I find it eminently reasonable that the Respondent took the advice of his doctor. The suggestion that he should, in his state, have gone shopping around the Caribbean for less expensive treatment I find offensive to good sense. I also find that the circumstances of the Respondent chartering an air ambulance, in the absence of being able to fly on a stretcher on a commercial airline, to be entirely reasonable. So that there be no misunderstanding, a victim is entitled to seek the best medical help that is available to him. If a defendant alleges a breach of the duty to mitigate, then the burden is upon him to show that comparable care was reasonably available at a lesser cost. It is within judicial knowledge that in the various jurisdictions served by this Court some medical procedures are unavailable. In the circumstances I would confirm the award of the learned trial Judge for Special Damages in the sum of $157,508.15.

[24] There was no appeal against the award of $120,000.00 for pain, suffering and loss of amenities nor against the awards of interest on the various heads of damage and so I do not address these awards.

Conclusion

[25] The awards to the Respondent, therefore are as follows:

(1) General damages for pain suffering and loss of amenities of $120,000.00 with interest at the rate of 5% from the date of filing of the writ, 27th July 1999 to the date of judgment, 23rd April 2004

(2) Special damages of $157,508.15 with interest at the rate of 14% per annum from 27th July 1999 to 23rd April 2004

(3) Future expense of hiring a fork-lift driver $14,400.00

(4) Cost of future medical care $118,506.50

(5) Prescribed costs in the Court below based on the above awards in accordance with CPR Part 65.5. I would make no order as to costs in this appeal as both parties have been partially successful.

Michael Gordon, QC
Justice of Appeal

I concur.

Adrian Saunders
Chief Justice [Ag.]

I concur.

Suzie d'Auvergne
Justice of Appeal [Ag.]