JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 94/97

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	ALCAN JAMAICA COMPANY	DEFENDANT/APPELLANT
A N D	LESLIE MIGHTY	PLAINTIFF/RESPONDENT

David Batts and Daniella Gentles, instructed by Livingston, Alexander & Levy, for the defendant/appellant

Carol Davis, instructed by O. G. Harding and Company, for the plaintiff/respondent

March 15, 16, 17 and December 20, 1999

RATTRAY, P:

Having read in draft the judgment of Bingham J, I fully agree with his reasoning and conclusion and have nothing further to add.

FORTE, J.A.:

I also agree.

BINGHAM, J.A.:

In this appeal the appellant company challenges the award of damages made by the learned trial judge arising out of an assessment of

damages awarded to the respondent in a written judgment delivered on 4th July, 1997.

The Facts

The claim arose out of an incident on 5th March, 1990, when the respondent, then employed to the appellant company and, while replacing a recently-repaired tyre on the appellant's truck, the tyre exploded causing injury and damage to the respondent. He suffered the following injuries:

> "**(a)** laceration to the root of penis and left upper thigh.
>
> **(b)** one centimetre jagged puncture wound to the anterior aspect of the middle third of the left leg.
>
> **(c)** deep oblique laceration of the left groin running from the dorsum of the base of the penis across the inguinal region transacting femoral nerves and artery.
>
> **(d)** amputation of terminal phalanx of right ring finger;
>
> **(e)** two centimetre longithdural laceration of the dorsum of the terminal phalanx of the right middle finger.
>
> **(f)** undisplaced midshaft fracture of the left tibia.
>
> **(g)** fracture of the terminal phalanxes of the ring and middle finger.
>
> **(h)** weakness, numbness and wasting of quadriceps in both legs.
>
> **(i)** loss of bulk and sensation in left leg.
>
> **(j)** area of induration on left side of penis.

(k) weak erections and left lateral deviation of penis;

l) 30% permanent loss of penile function."

Following on his injuries, the respondent was transported to the company's clinic at Ewarton where he was seen by the doctor in charge, Dr. Excell. He was subsequently transferred to the Medical Associates Hospital where he was admitted and attended to by Doctors Warren Blake, Granville Smith and Robert Wan. He became unconscious and an operation was performed on him. He was in great pain and was helpless. He remained in hospital for about 16 days.

On his discharge from hospital, the respondent was confined to his home recuperating from his injuries. He was able to move around on crutches. He made regular visits to the doctor and to a physiotherapist which treatment continued long after his discharge from hospital.

In June 1992 the respondent was still recuperating from the effects of his injuries and under the care and treatment of Dr. Blake, the orthopaedic surgeon to whom he had been referred by the appellant company's doctor, Dr. Excell. At this time he was informed by the company's personnel manager that his services with the company were terminated.

Efforts made by the respondent to find other employment did not meet with any success. In August 1993 the respondent started a business at Faiths Pen, St. Ann, selling jerk chicken and drinks. This venture has been his main source of income since the loss of his job with the appellant

company. He was still so engaged up to the time of the hearing of this matter below.

The learned judge assessed the damages to the plaintiff as follows:

> **1.** Special damages: **$253,144.60**
> with interest at 3% per annum from 5th March, 1990.
>
> **2.** General damages for pain and suffering and loss of amenities: **$1,750,000**
>
> with interest at 3% per annum from the service of the Writ.

A claim made for loss of future earnings (or loss of earning capacity) was disallowed.

The Award for Special Damages

Grounds 1 and 2 sought to challenge the award for special damages. Ground 1, in so far as it was relevant, reads as follows:

> "**1.** The learned trial judge erred in law when he made an award of... $253,144.60 for special damages in that such award is excessive in all the circumstances and ought to be reduced."

Ground 2 reads:

> "**2.** The learned trial judge erred in law in awarding the Plaintiff/Respondent the sum of $247,729.60 for loss or earnings for the period March 1990 to 14th October, 1996 as on the evidence the injuries sustained by the Plaintiff/Respondent did not cause his loss of earnings from April 1992 to the 14th October, 1996."

The award of special damages was computed under the following head:

a. An award for loss of earnings calculated over a period from 5th March, 1990, the date of the accident to October 1996. This sum was arrived at by the learned judge on the basis that had the respondent been at work and earning an income he would have earned the sum of seven hundred and four thousand eight hundred and twenty-five dollars sixty cents ($704,825.60).

From this sum, a statutory deduction of 30% for taxes and statutory dues as well as deductions for disability benefits received were made. These deductions covering a period up to June 1992 amounted to $222,235.20 and $27,280.80 respectively. When deducted from the total of $704.825.60 it resulted in a balance of $491,309.60. There was a further necessary deduction of $243,580, being income accruing to the respondent from the profits of his business of selling jerk chicken and drinks. This resulted in a final sum awarded to the respondent under this head of $247,729.60.

When to this amount is added the cost of the medical reports for which the agreed amount was $3,750 and the cost of damaged clothing for which an amount of $1,665 was agreed, this resulted in a final award for special damages of $253,144.60.

Learned Counsel for the appellant argued that the award for loss of earnings made by the learned judge was wrong. He submitted that it ought to have been calculated from the date of the accident for a period up to April 1992. Any further loss occasioned by the respondent since that date was not caused by the injuries he received, as Dr. Excell, the company's doctor, had requested the appellant to return to work, which request he ignored. He

could be regarded as having voluntarily abandoned his job as from April, 1992.

Learned counsel for the respondent submitted that the award for loss of earnings up to the date of trial was too low. She contended that the learned judge did not take into consideration the fact that the respondent, had he remained in the employment of the appellant company, would have been promoted from a tradesman to a tyre man, a category which would have resulted in him receiving a higher level of remuneration.

Insofar as the learned judge based his computation under this head of the claim up to the date of trial he was in error. It is common ground that the respondent received and accepted an amount of $5,699.38 as vacation and end of service pay without raising any objection. This amounted to a waiver of whatever rights he had under his contract with the appellant. For loss of earnings up to the trial to be sustainable would be based upon his establishing that he was wrongfully dismissed. His entitlement under this head would be limited to the period when his services were lawfully terminated. I am of the view, however, that he would nevertheless be entitled to some remuneration from May 1992 when his services were dispensed with, up to August 1993 when he started his business selling jerk chicken and drinks. This he has done up to the present, earning an income far in excess of that earned as a tradesman. I am fortified in this approach by the fact that the respondent's conduct in remaining off work was as a result of the advice of Dr. Warren Blake, the orthopaedic surgeon to whom

he had been referred by the company's doctor, Dr. Excell, following his injuries and in whose care he was at the time his services were terminated by the company.

When the formula utilised by learned counsel for the appellant is applied the result would be as follows:

1. March 1990 - September 1990 (28 weeks at 40 hours per week at $13.71 per hour) **$15,355.20**

2. October 1990 - December 1991 (64 weeks at 40 hours per week at $15.20 per hour) **$38,912.00**

3. January 1992 - July 1993 (82 weeks at 40 hours per week at $41.24 per hour) **$135,267.20**

Sub-total **$189,534.40**

less taxes and statutory deductions of 30% **$56,860.32**

less disability benefits received from the respondent for the period December 16, 1990 to May 8, 1992, 176 weeks at $378.90 per week - $27,280.80 **$84,141.15**

Total due **$105,393.35.**

When to this sum is added, the amount claimed for the cost of the medical reports and the damaged clothing being $5,415, the sum which ought to have been awarded for special damages is reduced to $110,808.35.

Learned Counsel for the respondent contended that the respondent was entitled to an award of damages for loss of future earnings. This, she submitted, was based on the proposition that the proper measure of

damages in this area would be that sum the respondent would have earned from the company compared with the sum he now earns. She then sought to fix a multiplier of 10 which, by her calculation, would have resulted in an award under this head of $898,000.

As the learned judge, in my opinion, correctly found, there is no basis for such an award. The evidence of the respondent was that his earnings from the business which he started in August 1993 selling jerk chicken and drinks far exceed the salary he earned while employed to the appellant company. This claim for loss of future earnings would only be sustainable if as a result of the injuries suffered by the respondent there was some diminution in his income or earning capacity - in short, his actual loss as a result of the injuries sustained. No such loss being established on the evidence this claim was rightly rejected.

General Damages

Learned Counsel for the appellant then sought to advance a series of awards based on an itemised assessment of each separate injury suffered by the respondent in seeking to arrive at a sum of seven hundred thousand dollars ($700,000) which he submitted ought to be regarded as a reasonable amount to be awarded under this head for pain and suffering and loss of amenities. In so doing, he was ignoring the directive of this court laid down in ***United Dairy Farmers v. Goulbourne et al*** [1984] 21 J.L.R. 10. There the court laid down the principle that such awards were to be arrived at by the learned trial judge adopting a global approach based on the total injuries

suffered by the plaintiff rather than on an item to item basis in arriving at the sum to be awarded under this head of damages.

In the above cited case, this court, in disapproving of such an approach, said:

> "Another common problem was that of *itemization of the heads of damage* that go to make up the final award of general damages. It is clear that ultimately it is the general award, the sum total, that must be looked at to see whether there has been present any of those factors referred to in Lord Wright's speech in ***Davies v. Powell Duffryn Associated Collieries Ltd.,*** [1942] A.C. 601 at pages 616-617, viz. something that shows the trial judge acted on wrong principles of law, misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. Itemization of the factors taken into consideration in making the award has the virtue that it will tend to show whether there has been duplication or overlap of damages swelling the final award further than is just. But it is the final figure, the total that counts." [Emphasis supplied]

In arriving at the sum of $700,000 which he considered as being a reasonable amount to be awarded under this head, Mr. Batts relied on the assessment made by Dr. Blake and the opinion expressed by Dr. Wan in contending that the award made by the learned judge was out of line with current awards made in respect of similar injuries in this jurisdiction.

Dr. Blake saw the respondent on July 6, 1993, when he went to him for a final medical assessment. On that occasion, although the respondent was experiencing some improvement in the use of the lower limbs, there was still some slight disability caused by the hypersensitive tip of his right ring finger, a factor which, in the doctor's opinion, meant that the respondent's

total permanent disability remained unchanged. He assessed this as being equated to a 2% impairment of the whole person.

Dr. Wan, for his part, expressed the opinion that resulting from the injury to his private parts the resopondent had suffered a 30% permanent loss of the erectile function of his penis. In this regard, counsel failed to take into consideration the further assessment arrived at by Dr. Blake with respect to the injuries that he treated the respondent for.

Learned counsel relied cn the following:

1. ***Gravesandy v. Moore*** [1986] 23 J.L.R. 17 at 18 (E-I).

2. ***Pogas Distributors Ltd. v. McKitty*** S.C.C.A. 13/94 and 16/94 (consolidated) delivered on 24th July, 1995, at pages 21-24.

3. ***Moeliker v. A. Reyrolle and Co. Ltd.*** [1977] 1 All E.R. 9.

4. ***Kemp and Kemp - The Quantum of Damages (Part 1. Personal Injuries and Fatal Accidents Claims)*** Revised Edition.

5. ***British India Steam Navigation Co. Ltd. v. France (William) Fenwick and Co. Ltd.*** Lloyd's Law Reports 419.

One has to take into consideration the fact that the injuries suffered by the respondent arose out of an incident on 5th March, 1990, which injuries were still affecting him in March 1992, when the respondent visited Dr. Blake. At that time Dr. Blake remarked as follows:

> "Mr. Mighty returned to see me 29th January 1992. At that time he still complains of numbness to the medical aspect of the left leg in the L4 and

> L5 dermatomal zones. He also stated that the power of the muscle in his lower limbs was recovering gradually. I therefore ordered the nerve conduction studies. He returned to see me on 23rd March, 1992, when the result of these were available. The nerve conduction test showed what is known as an axosal neunopathy of the left femoral nerve. It also showed that there was some degree of muscle reinnervation by the femoral nerve. This merely states that the peripheral endings of the nerve were damaged and was recovering. He also complains then that the numbness in his limbs persisted. Power of the limbs was also noted to be improving. He continued to receive physiotherapy and his power continued to improve. His main difficulty remains on ascending and descending a slope.
>
> He was also medically recommended to return to light duties on 6th July, 1992."

The respondent was subjected to a long period of recovery. In March 1992 he had still not reached the stage of full recovery and was not passed fit to return to work. Any award under this head ought to take into account the length of time spent by respondent in convalescing from these injuries.

In considering the proper approach to be followed by an appellate court, where the award of the trial judge is challenged under this head of damages as being excessive, I find the dictum of Greer, L.J., in ***Flint v. Lovell*** [1934] All E.R. (Rep.) 200 at 202(I) which was followed in ***Davies v. Powell Duffryn Associated Collieries*** [1942] A.C. 601; [1942] 1 All E.R. Rep. 657, most helpful. He said:

> "To justify reversing the assessment of damages by a judge who has tried the case without a jury a Court of Appeal must be convinced either that the judge has acted on a wrong principle of law or that the amount awarded was so extremely high or so

> very small as to make the assessment an entirely erroneous estimate of the damages to which the plaintiff is entitled."

It was, therefore, for the appellant to show that the award for general damages was out of line with current awards made in this jurisdiction.

An examination of the cases relied on by learned counsel for the appellant indicates that these awards sought for the most part to deal with awards in relation to separate injuries rather than assessments arrived at on a global scale. Not much help can be derived from the judgment of the learned judge below as to the basis for his award under this head. Having summarised the awards cited to him by counsel, he was content to state that:

> "I have considered the cases cited and the injuries received by the Plaintiff. The injury to his penis was particularly significant. He can no longer take part in cricket and football; two games he played before injury. Consequently, award for pain and suffering and loss of amenities is $1,750,000." [Emphasis supplied]

In spite of the opinion of the expert Dr. Wan that the injury to the respondent's penis will not affect his partaking in sexual activity, the respondent's evidence disclosed that it has resulted in the break-up of his relationship with his live-in companion. This condition he will have to contend with for the rest of his adult life. It is also a matter in respect of which male persons in this society, given our cultural background, place a significant premium. When this is considered, along with other injuries suffered, looked at in the round, and examined in the light of the long period that the respondent was subject to in convalescing from his injuries, I would not be

minded to interfere with the award made. One cannot say that the learned judge who saw and heard the respondent, observed his demeanour was an entirely erroneous estimate of the damages to which the plaintiff is entitled.

Apart from the extent to which the award for special damages is reduced, in the light of the above reasons therefore, I would dismiss the appeal and affirm the judgment of the learned judge. I would also order costs to the respondent, such costs to be agreed or taxed.