[2019] JMCA Civ 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 122/2009

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**CONSTABLE GARFIELD IRVING**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL**	**2ND APPELLANT**
AND	**PEARLINE WALKER**	**RESPONDENT**

Miss Tamara Dickens and Mrs Taniesha Rowe Coke instructed by the Director of State Proceedings for the appellants

Mr Demetrie Adams instructed by Chancellor & Co for the respondent

26, 29 November and 6 December 2019

F WILLIAMS JA

Background

[1] The one issue that arose on this appeal concerned an award of the sum of $1,294,800.00 for loss of future earnings made by a judge of the Supreme Court ("the learned judge") on an assessment of damages in the court below.

[2] That one issue was to be seen in the two grounds, but primarily in the first ground, of the amended notice and grounds of appeal filed on 12 January 2017, viz:

> "1. The Learned Judge erred in finding that the Respondent was entitled to and had proved her loss of future earnings."

The second ground was:

> "2. In the alternative, the learned Judge erred in making an excessive award in the circumstances."

[3] On 26 November 2019 we heard submissions in this matter; and on 29 November 2019, with a promise of brief written reasons to follow, we made the following orders,:

> "i. The appeal is allowed.
>
> ii. The award for loss of future earnings is set aside.
>
> iii. Costs of the assessment of damages to the respondent, to be agreed or taxed.
>
> iv. Half costs of the appeal to the appellants, to be agreed or taxed."

[4] This judgment is a fulfilment of that promise.

The litigation below

[5] In the court below, the respondent had sued the appellants arising from an incident on 5 April 2003, when the respondent, a pedestrian, was struck by a vehicle near the intersection of Port Royal and Church Streets, in the parish of Kingston. The vehicle was being driven by the 1st appellant and owned by the Commissioner of Police. The 2nd appellant was joined to the action pursuant to the provisions of the Crown Proceedings Act.

[6] The appellants admitted liability to the respondent. The assessment of damages was held on 15 June 2009; and the award being challenged was made on 28 July 2009.

Summary of submissions

For the appellants

[7] On behalf of the appellants, it was submitted by Mrs Rowe Coke that the learned judge erred in making an award for loss of future earnings. One main basis for this, it was submitted, is that the medical evidence did not indicate that the respondent was rendered unemployable as a result of the accident. Neither did it state that she would not be able to work for the rest of her life. In fact, it was submitted, the medical evidence showed the contrary – in particular, the medical report of Dr Melton Douglas of November 2006. The respondent, it was argued, therefore failed to discharge her evidential burden, as the medical evidence did not support her claim for the award. In addition, she failed to present to the court clear evidence of her earnings at the material time. The appeal should therefore be allowed.

[8] In support of the arguments advanced, the appellants relied on the case of **United Dairy Farmers Ltd and another v Lloyd Goulbourne** (1984) 21 JLR 10 in which Carberry JA opined at page 13 as follows:

> "In making awards for prospective loss of earnings the Courts are not dealing with the immeasurable…, but are attempting to make an award which can be justified as a pecuniary loss that is measurable to a degree."

[9] Also relied on was the case of **Gayle v The Jamaica Public Service Co Ltd and Anor** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 111/1998,

judgment delivered on 31 July 2001. This case was relied on for the proposition that, in order to become entitled to an award for loss of future earnings, a plaintiff must prove that, as a result of the injury suffered, one's physical condition has resulted in that plaintiff being unable to perform any gainful employment.

[10] The case of **Alcan Jamaica Company Ltd v Leslie Mighty** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 94/1997, judgment delivered 20 December 1999, was also cited and reliance placed on the dictum of Bingham JA at page 8 as follows:

> "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."

[11] In respect of ground two, it was contended that, even if (which was denied) the learned judge had been correct in making an award for future loss of earnings, the award was excessive. That point was argued because, whereas there was a finding by the learned judge that the respondent would not have been able to continue doing janitorial work, there was no express finding in respect of the respondent's ability to do domestic work. Yet, in addition to an award in respect of the earnings from the janitorial work, there was also an award in relation to the domestic work.

For the respondent

[12] The respondent also placed reliance on the case of **United Dairy Farmers Ltd v Goulbourne**, using the same quotation, but seeking to place a somewhat different interpretation on it.

[13] Also cited was the case of **Racquel Bailey v Peter Shaw** [2014] JMCA Civ 2 in which Brooks JA, at paragraph [16], made the following observation:

> "The court will however, bear in mind the principle enunciated by Greer LJ in **Flint v Lovell** [1935] 1 KB 354, that the award by the judge in the court below should not be disturbed unless, the court is satisfied that the judge either acted upon some wrong principle of law or that the award was unreasonably high or unreasonably low."

[14] It was contended that, in this appeal, the court below neither acted upon some wrong principle of law; nor could it fairly be said that the award is unreasonably high or low.

[15] The substance of the other contentions of the respondent might be seen in paragraphs 7, 8, 10, 11 and 18, which read as follows:

> "7. Whilst it is conceded that the report did not state that Ms. Walker was unable to work, it is submitted that a reasonable inference could be drawn that Ms. Walker would be unable to perform the day's work and the janitorial services for which she was engaged.
>
> 8. The learned judge was confronted by the fact that the Respondent wasn't a person of means and so there was a deficit of independent medical evidence presented in relation to her treatment between 1 August 2003 and 19 November 2006. The learned Judge did however have receipts from the

> South East Regional Health Authority for the period 2003 to 2007.
>
> …
>
> 10. Again, it is conceded that Dr. Douglas did not state that the Respondent could not work. He did however state that 'She has varicose veins of both lower extremities with signs of poor circulation of the venous drainage from the leg… She can develop chronic ulceration requiring continuous precautionary and preventative treatment.' This medical report did not state that the Claimant could function normally as the doctor made it clear that there were residual effects from the injury which could worsen.
>
> 11. Again there was no independent medical evidence of the Respondent's condition as at the date of trial.
>
> ….
>
> 18. It is clear from the Judgment that the learned judge regarded Ms. Walker as a credible witness. The learned trial judge had the benefit of viewing Ms. Walker as she gave evidence. He also had the benefit of the medical reports provided. Based on this evidence the learned judge stated that 'what the evidence shows and, which I accept, is that the Claimant was unable to resume her janitorial work due to pain which she was experiencing'."

[16] Counsel for the respondent, Mr Adams, also referred to the case of **Kamran Abbas v Sheron Carter** [2016] JMCA Civ 4, and in particular the dictum of P Williams JA (Ag) (as she then was) who observed, at paragraph [28] of the judgment that:

> "[28] Relying on the authority **of Desmond Walters v Carline Mitchell** (1992) 29 JLR 173, the learned trial judge found that the court could use its own experience in these matters to arrive at what is proved in evidence."

[17] It was submitted that that was the approach taken by the learned judge in this case. In all the circumstances, the award ought not to be disturbed and the appeal, consequently, ought to be dismissed with costs to the respondent, it was submitted.

The findings of the learned judge

[18] On page 11 of the record of appeal is recorded the following in the written judgment of the learned judge:

> "With respect to the complaint by the defendants as to loss of future earnings, claim by the Claimant that, there is no indication that the Claimant's employer discontinued paying the Claimant or, that her employment was terminated is, I think, untenable. What the evidence shows and, which I accept, is that the Claimant was unable to resume her janitorial work due to pain which she was experiencing. It is clear from the authority of **Icilda Osbourne v George Barnes et al, Claim No. 2005 HCB 00294** that the Claimant is entitled to claim for loss of earnings.
>
> In fact, compensation for loss of future earnings is awarded, for real assessable loss occasioned by her impairment. The question ought to be what is the multiplier. I think that it should be six (6) as the Claimant's evidence is that at age 49 she now works for two days per week: See Khan's compendium, supra, Volume 6.
>
> In respect of the Claimant's janitorial work the figure for loss of future earnings is $4,300 x 26 x 6 which yields $670,800.00, while for her domestic work, her unequivocal evidence is that she earned $2000.00 per week from Ms. Pitter. Therefore the figure comes out at $2000.00 x 6 x 52 = $624,000.00. Thus the grand total is $1, 294,800.00."

Discussion and analysis

The law

[19] It is well established that a court of appeal will only disturb an award of a lower court in certain limited circumstances. Panton JA (as he then was) in **The Attorney General v Derrick Pinnock** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006, at paragraph 6 put the matter thus:

> "....the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or their perceived pattern. The important point to be noted is that an award will not be disturbed by this Court unless it is either inordinately high or inordinately low, or there is a breach of some other principle of law." (Emphasis added)

[20] Guidance as to the basic requirements for proving an entitlement to damages is succinctly set out in a number of authorities and by a number of authors, among them: (i) **Halsbury's Laws of England**, 4th Edition, volume 12, paragraph 1199; and (ii) **McGregor on Damages**, 15th edition, paragraph 1453. In **Halsbury's**, the position is stated thus:

> "1199. Proof of damage. A plaintiff who alleges that he has suffered damage has the burden of proving not only that he has suffered the damage, but also its extent or amount..."

[21] Similarly, in **McGregor on Damages** (op cit), this is what is stated about the requirements for proving loss of future earnings:

> "The courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the plaintiff has been prevented by the injury from earning in the future." (Emphasis added)

[22] In **Fairley v John Thompson (Design and Contracting Division) Ltd** [1973] 2 Lloyd's Law Rep 40, Lord Denning MR, at page 42, made the following statement:

> "Compensation for loss of future earnings is awarded for real assessable loss proved by evidence..." (Emphasis added)

[23] How, therefore, does a claimant discharge the burden of proving that damages for loss of future earnings should be awarded? The answer is: "by evidence". And in a case

concerning personal injury, where medical evidence is called to establish the nature, extent and effects, if any, of the injury, then that evidence (and not just the claimant's evidence as to fact or otherwise) must be important in establishing a claimant's entitlement to that particular head of damages and the amount. It is therefore necessary to consider the more important aspects of the medical evidence that was before the court below.

The medical evidence

[24] The medical evidence came in two reports: (i) the report of Dr Rory Dixon, at the time an acting consultant in the orthopaedic department at the Kingston Public Hospital, dated 31 July 2003; and (ii) the report of Dr Melton Douglas, a consultant orthopaedic surgeon, dated 28 November 2006.

Dr Dixon's report

[25] Dr Dixon's report spoke, *inter alia*, to the respondent's admission on 5 April 2003 and to her being assessed as having:

> "…a basal skull fracture, fractures of the pelvis, left subconjunctival haemorrhage, and blunt chest trauma."

[26] Her recovery and progress after surgery were noted as follows:

> "She recovered gradually and was discharged home on bed rest on April 23, 2003. She was given analgesics and was advised to continue taking warfarin. She has made three clinic visits to date.
>
> She has been maintained non-weight bearing on crutches. She had some swelling of the right thigh post surgery which was gradually resolving. When seen on July 7, 2003 she had painless movement of the right hip and had significant

> swelling of the right thigh and leg, which [were] non-tender. She was assessed as having dependent edema and compression stockings were recommended. She is scheduled to return in August.
>
> Pearline Walker sustained multiple injuries for which she has been incapacitated since April 2003. She is still undergoing rehabilitation and her final outcome cannot be determined as yet."

Dr Douglas' report

[27] Dr Douglas examined the respondent on 20 November 2006. At the time of the examination, he had been provided with Dr Dixon's report and he also relied on the respondent's oral report. The parts of this medical report that were of most relevance to this appeal were those relating to the respondent's complaint to the doctor at the time; her physical examination and her prognosis. Those parts are set out in full as follows:

> "**PRESENT COMPLAINT**
>
> Ms Walker was examined in the Office on November 20, 2006. She complained of occasional pain in the right waist, and heaviness in the legs. The pain in the waist area was worse after washing clothes. She also said she would experience pain in the back if she lifts heavy objects and so avoids doing this. She does a days work twice weekly and on these days have exacerbation of her pain.
>
> She also complained of a soft swelling of the right mid-thigh. It was painless. There were also the development of varicose veins in both legs that developed since the accident and surgery.
>
> **PHYSICAL EXAMINATION**
>
> She had relevant examination findings confined to the musculoskeletal system. She walked with a normal gait. Her limb lengths were equal. There was a long surgical scar over the right waist extending to the front across to the left side.

It measured 27 cm. The right hip had normal ranges of movement. There was tenderness of the pubic symphysis. The flexion of the hip joint was slightly weak and assessed as grade 4/5 power.

There was a soft mass over the right mid-thigh measuring 12 cm in diameter. There were varicose veins in the legs. On the left inner aspect of the ankle, there was an area of darkened skin with increased pigmentation. There was no ulceration but the skin was markedly thickened.

Plain radiographs of the pelvis [were] done on November 20, 2006 confirmed the fracture of the acetabulum was fully healed without any residual arthritis of the hip joint. The metal implants of plate and screws were evident in the pelvis. The pubic symphysis was 2.5 cm apart.

….

PROGNOSIS

Ms. Walker has reached maximum medical improvement. The injuries she sustained were major and could have resulted in her demise. She has recovered from her injuries remarkably well, all things considered. She, however, has residual effects from her injury. She has varicose veins of both lower extremities with signs of poor circulation of the venous drainage from the leg. It is possible that a thrombosis of the iliac veins of the pelvis were responsible for the subsequent varicose veins. She can develop chronic ulceration requiring continuous precautionary and preventative treatment.

Her hip shows no signs of arthritis and will unlikely progress in that direction.

The removal of the metal implant is not encouraged. The risks are high, and the gains minimal. Though unlikely that the implant would be removed, if she becomes increasingly symptomatic this can be done. For the record the cost at present to remove the implant would be as follows:

Professional fees (Surgeon, assistant surgeon, anaesthetist)	$170 000
Hospital fee	$ 70 000

> She would be off work for a total of 2 months.
>
> She has an impairment rating of 12% of the whole person on the basis of the varicose veins it has resulted in. The reference text of the American Medical Association 'Guides to the Evaluation of Permanent Impairment' 5th Edition was used in the assessment."

[28] There were a number of observations to be made about the medical reports and their contents as follows: (i) Dr Dixon's report came within three to four months of the respondent's sustaining her injuries and, both by that fact and the concluding remarks of that report, no meaningful prognosis could then have been given. (ii) Dr Douglas, who gave his report as an expert witness, did not indicate a finding of an inability of the appellant to work. (iii) The assessment of a disability of 12% of the whole person related to the presence of varicose veins. (iv) Although the varicose veins were possibly caused by the injuries, they are not said to have incapacitated the respondent or prevented her from working. (v) The possibility of the respondent's developing arthritis is excluded. (In coming to this conclusion we declined to accept the invitation of counsel for the respondent to view the wording of Dr Douglas' report in another way.)

[29] This summary demonstrated that the medical evidence is lacking in establishing an inability on the part of the respondent to work or any likelihood that she would lose future wages as a result of the injuries that she sustained. The deficiency in the medical evidence was self-evident: so much so that it has been expressly recognized by the respondent's counsel in the written submissions previously quoted at paragraph [13] of this judgment; and that is summarized in tabular form below:

Concession	Paragraph number
"…the report did not state that Ms. Walker was unable to work…"	[7]
"…there was a deficit of independent medical evidence presented in relation to her treatment between 1 August 2003 and 19 November 2006..."	[8]
"…it is conceded that Dr. Douglas did not state that the Respondent could not work…"	[10]
"…there was no independent medical evidence of the Respondent's condition as at the date of trial…"	[11]

[30] In the face of the deficit of evidence that was needed to have established the respondent's inability to work as a basis for an award of damages for loss of future earnings, it was evident that the learned judge fell into error in attempting to rely on

aspects of the respondent's evidence and use that to form the basis for an award for loss of future earnings. Although the learned judge spoke, in making the award, about the need for there to be "…real assessable loss occasioned by her impairment", he failed to ensure that there was sufficient objective evidence of that loss. He appeared to have too-readily accepted the respondent's complaints of pain, without checking to see whether that pain (which admittedly would have had a subjective element) had any support in the objective findings of any of the doctors, but in particular, Dr Douglas. What the case below lacked was a final forensic medical report prepared for the purpose of a trial or assessment of damages, that gave an up-to-date assessment of and prognosis for the respondent and that specifically addressed the question of the effect of the injuries on the respondent's employment. Without evidence of that nature, the case was, as it has, bound to founder.

[31] In the result, I formed the view that ground one had merit and that, there being no counter-notice of appeal requesting that the award be affirmed on any other basis, the appeal should be allowed and the award for loss of future earnings set aside. There was therefore no need to consider ground two.

[32] On the question of costs, it appeared that the paucity of medical evidence arose as a result of the respondent's lack of funds. Although costs usually follow the event, I feared that an award against her for the full costs of the appeal might be unduly onerous. In light of that, I proposed that, as she substantially succeeded on the assessment of damages below, she should have those costs; and that the appellants should have half the costs of this appeal.

P WILLIAMS JA

[33] I have read in draft the reasons for judgment of my brother F Williams JA and agree with his reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA (AG)

[34] I too have read the draft reasons for judgment of F Williams JA. I agree with his reasoning and conclusion.