

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2009/010

BETWEEN:

PHILMORE SKEPPLE

Appellant

and

JOSEPH WEEKES

Respondent

Before:

The Hon. Mde. Janice George-Creque
The Hon. Mr. Michael Gordon, QC
The Hon. Davidson Baptiste

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Dane Hamilton, QC for the appellant
Mr. Peyton Knight for the respondent

2009: July 23;
2010: January 25.

Civil Appeal – quantum – special damages – loss of income – whether general damages should be varied for a proper assessment of pecuniary prospects and loss of amenities – prescribed costs –

The appellant appealed the sum of a global award made by the master. The genesis of this case is a vehicular accident whereby the appellant drove the motorcycle which collided with the respondent's pickup van. The appellant seeks an addition of \$15,000.00 to be added to special damages to reflect loss of income for a period of five months which counsel for the respondent had conceded to. Also, that there be a proper assessment on general damages for loss of amenities and loss of pecuniary prospects and that prescribed costs be awarded both in the High Court and the Court of Appeal.

Held: allowing the appeal in part and increasing the award by the sum of \$15,000.00 for loss of income for the period of five months and awarding prescribed costs to the appellant in the court below based on an award of \$170,744.49 reduced by 60% as awarded by the master and for this appeal two-thirds of prescribed costs on the sum of \$15,000.00 reduced by 60%.

1. That the award for loss of pecuniary prospects could not be granted as there was no evidence that as a result of the accident the appellant was incapable of doing the job he was doing before as a result of some physical or mental injury suffered from the accident.

Alphonso v Ramnath Civil Appeal No. 1 of 1996 BVI followed.

2. That the damage claimed for loss of earnings before trial is precise, capable of being worked out and was suffered before trial of this case, thus a classic claim for special damages. No such special damages were claimed pursuant to CPR Part 8.9.

JUDGMENT

- [1] **GORDON, J.A. [AG.]:** This is an appeal from a decision of the learned master delivered on 25th March 2009 in which the master awarded to the appellant the sum of \$100,000.00 as the global award for general damages for pain, suffering and loss of amenities, \$55,744.49 as special damages, interest on the total judgment sum of \$114,972.62 [sic] at the rate of 5% per annum from the date of assessment until payment, and 60% of prescribed costs based on the award granted.
- [2] The orders sought on appeal were that the sum of \$15,000.00 be added to the special damages representing loss of income for five months - this was agreed to by counsel for the respondent; that general damages be varied upwards to allow for a proper assessment for loss of amenities and loss of pecuniary prospects; that an award be made for the appellant's loss of income between February 2005 and December 2006; and finally that prescribed costs be awarded to the appellant both in the High Court and the Court of Appeal on such augmented sum.
- [3] This case arose out of an accident on the Dickenson Bay Road on 5th September 2004, when the motorcycle ridden by the appellant collided with a pickup van being driven by the respondent. The respondent accepted liability for the accident so that all that the learned master was dealing with was an assessment of damages.

[4] As pleaded, the injuries suffered by the appellant were as follows:

Particulars of Injuries

- (1) Laceration of about 2 cm long in the right supraorbital area with mild ipsilateral periorbital hematoma.
- (2) Fracture of the mandible with displacement and active bleeding.
- (3) Fracture of the hard palate with loss of the upper incisors and canine teeth with active bleeding.
- (4) Dislocation of the right sternoclavicular joint.
- (5) A bulging deformity in the dorsum of the base of the first metacarpal bones of the left hand with tenderness and limited range of movements.
- (6) Laceration of about 3 cm long in the thenar region of the left hand and tenderness and crepitations in the distal phalanx of the ipsilateral thumb.
- (7) Swelling and tenderness of the right shoulder, though with full range of movements.
- (8) Abrasions of about 4 x 1 cm on the anterior aspect of the left leg.

[5] The totality of evidence presented for the Master's consideration was evidence in support of the appellant's case. It was the appellant's evidence that after the accident he awoke at the Holberton Hospital and that he was advised that he had been unconscious for about 16 hours. In his own words, as opposed to the technical medical terms, he suffered serious internal injuries, a broken jaw bone, a broken left thumb, a broken clavicle, bruised kidney, bruises over various parts of his body and he lost three teeth. As the appellant put it in his affidavit, he awoke to a sea of pain sited at his chest, head and pelvic area. He spent three weeks at

the Holberton Hospital of which one week was spent in the intensive care unit. During his time at hospital, he underwent two operations. For some six weeks after the accident the appellant was able to ingest only liquids due to the fact that his jaw was wired and clamped shut. After his stay of three weeks at Holberton Hospital the appellant went home where he spent the next three weeks in bed "because of the injuries I sustained in the pelvic area" making any movement or weight placed on his legs generate "excruciating pain".

[6] It was the appellant's evidence that during the three week period at home his mother and girlfriend provided the necessary care and assistance with the performance of his daily essentials. He complained that he still suffers from headaches and back pain.

[7] In so far as his broken jaw bone was concerned the appellant sought and obtained orthodontical help whereby his remaining teeth were moved to accommodate a fixed prosthesis which was emplaced to replace the missing teeth until further treatment.

Grounds of Appeal

[8] The first ground of appeal was that the learned master failed to award the sum of \$15,000.00 loss of earnings as special damages. As noted above the respondent has conceded that this sum should have been awarded.

[9] The second ground of appeal is that the learned master failed to award fair and reasonable compensation to the appellant in that she failed to give adequate consideration to the appellant's loss of amenities and to the loss suffered to his pecuniary prospects.

[10] The learned master in her written decision referred to the well known case of **Cornilliac v St. Louis**¹ wherein Chief Justice Wooding set forth the five matters to be considered by a court in awarding general damages, namely, the nature and

¹ (1965) 7 WIR 491

extent of the injuries sustained; the nature and gravity of the resulting physical disability; pain and suffering endured by the claimant; loss of amenities, if any; and, the extent to which pecuniary prospects are affected.

[11] At paragraph 6 of her written decision the master wrote:

“The quantification of general damages does not require disclosure by the court of the breakdown of the global award but it is important and necessary that the above heads be consciously borne in mind when making an appropriate award”

[12] With great respect to the learned master, this court has expressed a different view which trial judges and masters would do well to follow. In **Auguste v Neptune**² 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.”

He quoted with approval the following from the judgment of Sachs LJ in **George and another v Pinnock and another**³

“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.”

[13] Notwithstanding the gentle criticism of the learned master for failing to itemize, to the extent that she could, the quantum under each head of damages, it must be pointed out that she did say, in my view with absolute correctness, the following:

“The compensation [general damages] must as far as possible put a claimant in the same position he or she would have been in had the

² Civil Appeal No. 6 of 1996 SLU

³ (1973) 1 WLR 118

accident not occurred. The court must give regard to recent comparable awards in its own and other jurisdictions with a similar social and economic climate to assist it in its determination of the quantum of damages”

- [14] Thus, in so far as applying her mind to the principles of general damages (save the itemization issue) I can find no fault in principle with the award by the trial master.
- [15] Having said the above, I am of the view that in so far as general damages are concerned, this judgment could be concluded here. However, learned Queen’s Counsel for the appellant in his written argument placed considerable emphasis on the ground that the master failed to take into account the loss of pecuniary prospects on the part of the appellant and I feel that this should be dealt with seriatim as it raises the issue of what is general damages and what is special damages.
- [16] In his statement of claim the appellant claimed for his medical expenses, which were allowed, the sum of \$15,000.00 for loss of earnings which has been dealt with above, the cost of the motorcycle which he acknowledged had been paid for by the insurance company and further claimed the sum of \$110.00 for loss of use of the motorcycle from 5th September 2004, the date of the accident, to 16th March 2005. In the global award of \$55,744.49 as special damages, there is no breakdown of how that figure has been arrived at suffice it to say that the appellant has only appealed against the failure to include the sum of \$15,000.00 in the award of special damages. I need not, therefore, concern myself any further with the calculation of the special damages and what components make it up.
- [17] As I understand the argument of learned Queen’s Counsel, prior to the accident the appellant was earning \$3,000.00 per month at his then employment, Cars.com; subsequent to the accident, once the appellant had recovered, he was able to gain permanent employment with LIAT, but at a lesser salary of \$1,923.00 per month, hence he should be compensated for loss of pecuniary prospects. As the case was pleaded and based on the evidence led the learned master had no

alternative than to ignore the difference between the \$3,000.00 and the \$1,923.00, which I understand learned Queen's Counsel to be urging should form the basis of an increased award. The appellant's position could only be supported if there was evidence that as a result of the accident the appellant was incapable of doing the job he was doing before as a result of some physical or mental injury suffered as a result of the accident. There is no such evidence. In any event, the damage claimed is precise, capable of being worked out and was suffered before the trial of this case, thus a classic claim for special damages. Part 8.9 of the **Civil Procedure Rules 2000** is pellucid. Part 8.9 deals with special requirements applying to personal injury claims. Sub-clause (5) of Part 8.9 reads: "The claimant must include in or attach to the claim form or statement of claim a schedule of any special damages claimed". No such schedule was included in the appellant's claim form or statement of claim.

[18] In being invited to substitute this court's discretion for that of the learned master one is reminded of the oft quoted words of Singh JA in **Alphonso v Ramnauth**⁴

"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 than 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".

⁴ Civil Appeal No. 1 of 1996 BVI

With the greatest of respect to learned Queen's Counsel, he has not met the burden spoken of by Singh JA.

[19] The final matter appealed against by the appellant is the costs order of the master. This ground of appeal is predicated on the award of the master being augmented by this Court. The award has in fact been increased by the sum of \$15,000.00 which sum was conceded by the respondent in the skeleton argument filed on his behalf. In the circumstances, I would award prescribed costs to the appellant in the court below based on an award of \$170,744.49 reduced by 60% as awarded by the master and for this appeal I would order two thirds of prescribed costs on the sum of \$15,000.00 reduced by 60%.

Michael Gordon
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]