

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.17 OF 2004

BETWEEN:

GRENADA STEEL WORKS LIMITED

Appellant

and

HERMAN FORDE

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

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

Appearances:

Mr. Alban John for the Appellant
Mrs. Celia Edwards for the Respondent

2005: December 6;
2006: April 24.

JUDGMENT

- [1] **GORDON, J.A.:** This appeal concerns only the quantum of damages awarded by the trial judge after a trial. Briefly the facts are that the Respondent, a truck driver, went to the Appellant's premises to pick up a load of galvanized sheets manufactured by the Appellant. During the process of loading the galvanized sheets onto the Respondent's truck by an employee of the Appellant, an accident took place and the Respondent was injured.
- [2] The injuries suffered by the Respondent resulted in his having some 110 stitches in his leg, having been impaled on a piece of steel. The Respondent stated that this was extremely painful and that he was unable to drive his truck for six weeks.

[3] The learned trial Judge found that there had been contributory negligence of 30%, notwithstanding that contributory negligence had not been pleaded. However, as there is no counter notice of appeal, that part of the trial Judge's findings will remain undisturbed.

[4] The trial Judge awarded the sum of \$40,000.00 as general damages for pain and suffering and loss of amenities. He further awarded the sum of \$65,520.00 for loss of earning potential. The trial Judge's actual words in his judgment were:

"I find that as a truck driver the disability suffered must have shortened the claimant's working earning potential to some extent."¹

The trial judge went on to assess a multiplier of 3 based on the Respondent's "age and the kind of work he does"

[5] The Appellant, in a somewhat inelegantly phrased Notice of Appeal complains that the learned trial Judge "having accepted for guidance the authorities cited at paragraph 18 of the judgment awarded damages in a quantum far outweighing the sum awarded in the authorities relied on and the gravity of the injuries sustained, even allowing for inflation.". In addition the Appellant complains "that there being no pleading, or claim for, or medical evidence of disability, the award in the sum of \$65,520.00 due to disability was wrong in law." Finally, the Appellant offers that the costs awarded was exorbitant in the circumstances of the case.

The award of \$40,000.00

[6] The sole evidence by a medical practitioner consisted of a medical report dated some 20 days after the accident signed by what appears to be a Dr. Phillip on the letterhead of the General Hospital, St. Georges. It is worth quoting in full:

"To whom it may concern. Mr. Herman Forde was seen at the Accident and Emergency Department on the 31 . 5 . 2001. He was treated for a deep laceration to the right leg 17 cm in length. He also suffered a

¹ Paragraph 19 of judgment

laceration 10 cm by 4 cm with a circumscribed (sic) loss of tissue noted. There were also multiple abrasions to the right leg. Mr. Forde is still having daily dressing at the Emergency Department.”

In addition to that evidence there was the anecdotal evidence by the Respondent in his witness statement to the effect that “even now I still have some pain sometimes and I have to sometimes walk with a stick and have a 4” scar on the right side of my leg...I have not been the same man since”, and in his viva voce evidence under cross examination as follows: “Up to now I am weak and walk with a limp”.

[7] In *Martin Alphonso et al v Deodat Ramnauth*² from this court Singh JA said the following:

“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 exercise of 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] In *CCAA Limited v J. Jeffrey*³ the court said the following:

“[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

² Civil Appeals No. 1 of 1996 BVI

³ Civil Appeal No 10 of 2003 SVG

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.

[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."

[9] Learned Counsel for the Appellant referred to only one case decided within the jurisdiction of this Court, namely **Browne et al v Montserrat Electricity Services Ltd et al**⁵ and a number of cases from the jurisdiction of Trinidad and Tobago of which summaries taken from "The Lawyer" Vol. 7 No. 3 were provided for our guidance. Paraphrasing Singh JA, whilst the award of the learned trial Judge might be higher than I would have awarded, I do not find it so high as to say I cannot find any reasonable proportion between the amount awarded and the loss sustained, or that the damages are out of all proportion to the circumstances of the case. In the circumstances there is no basis for the substitution of my discretion for that of the trial Judge and I would dismiss the appeal against the award of \$40,000.00 general damages.

⁴ [1998] 3 All ER 481

⁵ [1997] ECLR 11

The award of \$65,520.00 for loss of earnings

- [10] Learned Counsel for the Appellant places his argument on this ground of appeal on two planks. Firstly, he argues that the trial Judge admitted in his judgment that there was no prognosis on the injuries and the likelihood of a full recovery and then went on to say "But I am prepared to accept that there is some residual pain and discomfort. Learned Counsel points out, with some accuracy that there was no finding by the trial Judge on the issue of disability. Rather there is this 'conclusion' which does not flow from any evidentiary sequence identified by the Judge: "I find that as a truck driver the disability must have shortened the claimant's working potential to some extent." The trial Judge then went on to assess a multiplier of 3 based on the Respondent's age and the kind of work he did. Based on uncontroverted evidence of the earnings of the Respondent the Judge came to the view that the Respondent earned \$21,840.00 per year and would have earned \$65,520 over the three year period awarded for loss of earnings.
- [11] The second plank of the Appellant's argument is that the Respondent (Claimant) did not allude in his pleading to any future loss of earnings. Whilst it is unquestionably true that technical rules of pleading have been considerably relaxed by the Civil Procedure Rules 2000 (CPR), nevertheless parties are constrained to plead their full case. Part 8.7 and 10.5 of Civil Procedure Rules 2000 (CPR) respectively speak to the necessity for the claimant and the defendant to set out all the facts on which the claimant or the defendant relies. The language of CPR differs considerably from the language of the Civil Procedure Rules of England and so the White Book is only of limited assistance
- [12] In the instant case the first three paragraphs of the Statement of Claim speak to the happening of the accident, the fourth paragraph alleges that the accident happened as a result of the negligence of the defendant, giving particulars of such

negligence and particulars of the claimant's injury. The fifth paragraph simply states "The Plaintiff thereby suffered loss and damage. There is then pleaded particulars of special damage and finally the prayer seeks special damages, general damages, further or other relief, interest and costs. The defence consists of the defendants version of the accident, a denial of negligence and a non-admission of any loss or damage suffered by the claimant. The claimant filed a Reply which dealt exclusively with the happening of the accident.

[13] In other words, at no point was the Appellant warned by the pleadings that the issue of loss of future earnings would be in issue. Further, according to the notes of the learned trial Judge neither counsel spoke to the issue of loss of future earnings in their final addresses. I can only conclude that this was a subject (loss of future earnings) which caught the attention of the trial Judge but not that of either counsel. Given the new paradigm of CPR I am of the view that the Appellant properly complains that he was ambushed by this award, in this case ambushed by the court.

[14] Learned Counsel for the Appellant relied on the authority of **Perestrello E Companhia Limitada v United paint Co. Ltd.** ⁶ in which Lord Donovan of the Court of Appeal said:

"...if a Plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into Court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case".

This is still good law. In the circumstances I would allow the appeal against the award of \$65,520.00 for loss of earnings due to disability.

⁶ [1969] 3 All ER 479

[15] In the circumstances I would confirm the award to the respondent of special damages in the sum of \$2,520.00. I would award the sum of \$40,000.00 general damages for pain suffering and loss of amenities making a total award of \$42,520.00. From this will be deducted the sum of \$12,756.00 for the Respondent's contributory negligence making a total award for special and general damages of \$29,764.00. Interest on the various sums is to be calculated in accordance with the award of interest by the learned trial Judge mutatis mutandis. Prescribed costs in the court below are awarded to the Respondent based on an award of \$29,764.00 and costs in this appeal are awarded to the appellant on the basis of one half of 2/3rds of the costs below reflecting only partial success of the appeal.

Michael Gordon, QC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal