

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2013/0007

BETWEEN:

[1] RUTH DUBOIS
[2] ELVIS NAITRAM
[3] JOHN ALEXANDER

Appellants/Cross Respondents

and

FRANCIS MAURICE

Respondent/Cross Appellant

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

Appearances:

Mrs. Esther Greene-Ernest for the Appellants/Cross Respondents

Mrs. Wauneen Louis-Harris for the Respondent/Cross Appellant

2018: May 18.

Civil appeal — Personal injury — Assessment of damages — Special damages – Whether judge erred in the exercise of his discretion on the assessment of damages — Whether judge wrongly concluded that the claim for architectural drawings and construction should be limited to \$216,000.00 as opposed to \$288,000.00 — Whether judge misdirected himself by relying substantially on the evidence of the loss adjuster notwithstanding his statement to the contrary — Whether judge erred in not awarding the appellant all the expenditure incurred for his accommodation and treatment incurred in Martinique — Whether judge erred in not awarding expenditure for medical expenses incurred in Saint Lucia — Interest – Whether judge erred in awarding interest on special damages from the day the claim was filed — Prescribed costs – Whether judge erred in not awarding the respondents costs on the basis of prescribed costs — Whether judge erred in failing to award or calculate

prescribed costs on the summation of the amount awarded together with the interest awarded

REASONS FOR DECISION

Introduction

- [1] **BAPTISTE JA:** Francis Maurice filed a claim for damages for personal injuries sustained in a vehicular accident. Judgment in default of defence was entered in his favour and damages were subsequently assessed by a judge. The cross-respondents filed, but later discontinued, a notice of appeal in respect of the assessment of damages awarded against them. Mr. Maurice filed a counter-notice of appeal challenging the assessment of damages on several grounds, as well as the costs and interest awarded. The appeal proceeded on Mr. Maurice's counter-notice.
- [2] This appeal essentially represents a challenge to the judge's exercise of discretion with respect to the assessment of damages, and the issues of costs and interest. On 18th May 2018, this Court, having heard Mr. Maurice's counter appeal, allowed it in part and made no order as to costs. We now provide the written reasons for our decision.

Discussion

Exercise of Discretion in Assessment of Damages

- [3] An appellate court is chary about interfering with the exercise of a discretion which has been entrusted to a trial judge. Before examining the grounds of appeal, it is prudent to refer to the principles pertaining to appellate interference with an award of damages. A challenge to an award of damages commending itself to the assessment judge is a challenge to the judge's exercise of discretion; that being the case, it necessarily engages the well-established principles governing appellate interference with the exercise of a judicial discretion. Before an appellate court can interfere with an award of damages, it will be required to be satisfied that the trial

judge erred in principle or made an award so inordinately low or so unwarrantably high that it cannot be permitted to stand.¹

[4] In **Flint v Lovell**,² Greer LJ stated thus:

“In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage[s] to which the plaintiff is entitled.”

[5] An appeal court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at first instance. It must be satisfied either that the judge in assessing the damages acted upon a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage to which the plaintiff is entitled.³

[6] As Singh JA explained in **Martin Alphonso et al v Deodat Ramnath**:⁴

(a) The burden on an 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. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, an appellate court should not, unless under very exceptional circumstances, disturb his award.

¹ Per Lord Kerr in *Calix v Attorney General of Trinidad and Tobago* [2013] UKPC 15, at paragraph 28.

² [1935] 1 KB 354 at 360.

³ *Nance v British Columbia Electric Railway Company Ltd* [1951] AC 601, at 613.

⁴ [1996] 56 WIR 183.

- (b) The mere fact that the judge's award is for a smaller or larger sum than what the appeal court would have given is not of itself a sufficient reason for disturbing the award. The appellate court is empowered to interfere with the award, if of the opinion, having regard to all the circumstances of the case, that there is no 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.
- (c) The Court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages, which made his award a wholly erroneous estimate of the damage suffered.
- (d) The award of damages is a matter for the exercise of the trial judge's discretion and unless it has been demonstrated that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly or blatantly wrong, the appellate court will not interfere.

Grounds of Appeal

- [7] With these principles in mind, I now consider the grounds of appeal. Ground 1 alleged that the learned judge misdirected himself on income from farming, thus wrongly awarded \$180,000.00 instead of \$270,000.00. This ground was quite properly not pursued.
- [8] In Ground 2, it is claimed that the judge wrongly concluded that the claim for architectural drawings and construction should be limited to \$216,000.00 as opposed to \$288,000.00. I note that the sum of \$216,000.00 was specifically

pleaded in the statement of claim as representing loss of earning as a building contractor.

[9] In paragraph 11 of his affidavit of 20th January 2009, Mr. Maurice stated that he lost approximately \$288,000.00 in profits from his building construction business and architectural services, which is approximately \$8,000.00 per month, for a three-year period. In dealing with that issue, the learned judge noted that in support of his claim for damages for loss of earnings for construction, Mr. Maurice produced a number of letters and contracts for services rendered. The judge observed that these were not challenged other than in a general way, because there is no evidence of a submission to Inland Revenue in relation to monthly or annual earnings from construction. The judge stated that the sum claimed being \$216,000.00 would therefore be awarded under this head.

[10] The basic principle is that special damages have to be pleaded, 5articularized and proved. It has always been necessary to plead and prove special damage with proper particularity. As Lord Donovan said at page 579 in **Perestrello E Companhia Limitada v United Paint Co. Ltd**,⁵ a claimant who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.

[11] The learned judge having considered the matter, and the evidence produced by Mr. Maurice, and having stated that there was no challenge except in a general way, quite properly awarded Mr. Maurice the sum he pleaded in his statement of claim. In the face of an unamended pleading of \$216,000.00 as loss of profits from the building construction and architectural services, it was quite appropriate for the judge to have awarded the sum specifically pled. In the circumstances,

⁵ [1969] 1 WLR 570.

Mr. Maurice's attempt to expand the loss in his evidence on assessment was of no avail. In my view, the learned judge did not err in making the award. This ground of appeal therefore failed.

[12] Grounds 3 and 4 will be considered together. The third ground alleges that the learned judge misdirected himself by relying substantially on the evidence of Claudius Francis notwithstanding his statement to the contrary. The fourth ground states that the judge erred in not awarding the appellant all the expenditure incurred for his accommodation and treatment incurred in Martinique.

[13] At paragraph 21 of his judgment, the judge stated that: '[h]owever, it is true that Mr. Francis did rely on hearsay. The court cannot rely on hearsay evidence.' The learned judge then stated: "[t]he question that arises is what conclusion should I come to on the issue on the sums incurred in Martinique.'

[14] At paragraph 9 of his judgment, the learned judge stated that '[i]n addition to the questions raised in the evidence of Mr. Claudius Francis under cross-examination, a number of issues arose which raised doubts about Mr. Maurice's evidence'. The learned judge stated at paragraph 10:

"Mr. Maurice conceded that he did not produce a report on his medical treatment in Martinique. He said that he never spent four months in Martinique which contradicts bills attached to his affidavit of January 20, 2009 in the name of Murial Samson."

At paragraph 11, the learned judge stated:

"Mr. Maurice also conceded that he did not mention seeking medical treatment in Martinique in his statement of claim. Mr. Maurice claimed that he paid a lady in Martinique named Murial Samson for assisting him. He produces receipts but no statement from Murial Samson. He insisted that transportation costs were \$185,000.00."

While at paragraph 12, the judge noted that Mr. Maurice said he attended Dr. Jeffers at Tapion Hospital for a second opinion, but he produced no medical report from Dr. Jeffers. The learned judge observed at paragraph 14, that Mr. Maurice also conceded that his statement of claim did not say anything about the nursing care which he now claims.

[15] At paragraph 15 to 17, the judge referred to the affidavit of Mr. Claudius Francis, a loss adjuster, filed on 17th March 2009, and his evidence with respect to costs of rental accommodation and transportation in Martinique, challenging that of Mr. Maurice. While recognising that Mr. Claudius Francis relied on hearsay evidence, the judge emphasised that the court cannot rely on hearsay evidence. Importantly, the learned judge stated that Mr. Maurice had not succeeded in persuading him that the costs allegedly incurred in Martinique was in fact incurred or that it was necessary to spend the amount of time alleged residing in Martinique for the purpose of therapy. Further, the receipts did not set him at ease in relation to these doubts. As an example, the judge pointed out that Mr. Maurice presented receipts from Muriel Sampson in Martinique for rental of a furnished apartment there, along with meals and other services for a period of four months in each instance. But under cross-examination, Mr. Maurice admitted that he never spent four months in Martinique.

[16] Mrs. Louis-Harris asserted that it was erroneous for the judge to have found that Mr. Maurice had spent a period of four months in each instance. She stated that the receipts presented to the court referred to intervals of two months in each instance. Counsel submitted that there was sufficient evidence to conclude that Mr. Maurice expended the amount he said in Martinique. Further, when one considers paragraphs 9 to 12 and 15 to 17 of the judgment, the learned judge relied on the evidence of Mr. Claudius Francis and the court spent a great deal of time on his affidavit.

- [17] While it is correct that the learned judge referred to the evidence of Mr. Claudius Francis, he clearly stated that the court could not rely on hearsay evidence. A perusal of the paragraphs Mrs. Louis-Harris referred to, does not bear out the assertion that the learned judge relied on the hearsay evidence. On the question as to what conclusion he should come to on the issue of the sums incurred in Martinique, the learned judge was satisfied that Mr. Maurice was not referred to any specific doctor in Martinique for medical treatment. There was no medical report from the doctor who Mr. Maurice mentioned. Further, while Mr. Maurice may have visited a doctor in Martinique he should not claim for that visit since it was not specifically referred to and the evidence surrounding that episode was riddled with unexplained discrepancies. In the circumstances, the learned judge did not award the sums claimed for the travel accommodation, therapy treatment and other care in Martinique.
- [18] The judge clearly articulated the reasons for arriving at his conclusion that Mr. Maurice was not entitled to all the expenditure he claimed was incurred for his accommodation and treatment in Martinique. The conclusion was not based on the evidence of Mr. Claudius Francis, which was not accepted, as it was hearsay. The judge evaluated the admissible evidence, made findings of fact which were undoubtedly open to him on the evidence, made findings with respect to the unreliability of the evidence, and was clearly influenced by the absence of reliable evidence. It was incumbent upon Mr. Maurice to properly prove and plead his case with reliable evidence. In the absence of a medical report detailing the treatment required, the period for which Mr. Maurice obtained such treatment and the loss flowing directly therefrom, it was clearly open to the learned judge to arrive at his conclusion. In the circumstances, grounds 3 and 4 presented no basis for appellate interference and accordingly could not be sustained.
- [19] Ground 5 asserts that the learned judge erred in not awarding expenditure for medical expenses incurred in Saint Lucia. The learned judge found that based on the receipts made available to the court, it does not appear that Mr. Maurice spent

more than \$5,000.00 on medical expenses in Saint Lucia. He therefore awarded \$5,000.00 under that head. The learned judge awarded Mr. Maurice the value of medical expenses in Saint Lucia based on the evidence presented. The judge cannot be faulted for so doing. This ground likewise failed.

[20] Ground 6 states that the learned judge erred in awarding interest on special damages from the day the claim was filed. The learned judge awarded interest on special damages at 6% per annum from the date of the claim until payment. Mrs. Louis-Harris submitted that the case of **Fenton Auguste v Francis Neptune**⁶ is the authority for the proposition that interest ought to be calculated upon special damages from the date of the accident to the date of payment. The accident occurred on 12th March 2002.

[21] Learned counsel for the respondents, Mrs. Greene-Ernest, argued that the court must take cognisance of the fact that Mr. Maurice claimed damages spanning three years from the date of the accident and to award him interest on loss of profits or income which he incurred in the period he delayed in filing his case, would produce an unjust result. Mrs. Greene-Ernest cited Article 1009A of the **Civil Code of Saint Lucia**⁷ which provides that:

“In any proceedings tried in any Court for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given, interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment”.

[22] The award of interest and the rate at which it is applied is a matter for the exercise of the judge's discretion. The question is: did the learned judge err in principle or erroneously exercise his discretion in awarding interest on special damages from the date of the filing of the writ until payment?

⁶ [1997] ECSCJ No. 27 (delivered 24th November 1997).

⁷ Cap 4.01 of the Revised Laws of Saint Lucia.

- [23] In principle, interest is awarded to compensate the claimant for being deprived of his damages for a period of time, not as compensation for the damage done to him or as a punishment for the defendant.⁸ In **Auguste v Neptune**, Singh JA stated that 'the general principle is interest ought only to be awarded to a plaintiff for being kept out of money which ought to have been paid to him'. In that regard His Lordship cited his judgment in **Alphonso v Ramnath**. With respect to special damages, Singh JA also stated that interest should be awarded for the period from the date of the accident to the date of trial. In **Alphonso v Ramnath**, this Court also awarded interest on special damages from the date of the accident. It is seen therefore that in both **Alphonso v Ramnath** and **Auguste v Neptune**, interest was awarded on special damages from the date of the accident.
- [24] In **Jefford and another v Gee**,⁹ at page 709, the court said that '[s]pecial damages mean the actual pecuniary loss suffered by the plaintiff, up to the date of trial, owing to the wrongful act of the defendant'. In principle the claimant should be awarded interest on the sum which represents that loss as from the date it was incurred. Interest should be awarded from the date of accident to the date of trial at half the rate allowed on the other damages.
- [25] The learned judge gave no reason as to why interest was awarded on special damages from the date of the filing of the claim as opposed to the date of the accident. It can be taken as settled, as the authorities show, that interest on special damages should be awarded from the date of the accident. In the circumstances, it is my respectful opinion that the learned judge erred in principle in awarding interest on special damages from the date of the filing of the claim. It is long established that where special damages are incurred, throughout the period up to trial, interest should be payable at a reduced rate from the date of the accident to the date of judgment. The date of the accident being 12th March 2002, interest on special

⁸ John Powell and Roger Stewart: Jackson and Powell on Professional Liability (8th Edition, Sweet & Maxwell U.K.) at paragraph 3-024.

⁹ [1970] 2 WLR 702.

damages should be awarded from that date. This ground of appeal was accordingly allowed.

[26] Grounds 7 and 8 concern the issue of costs. With respect to costs, the learned judge stated: 'I award costs to the Claimant in the sum of \$49,880.00'. Ground 7 alleges that the learned judge erred in not awarding the respondents costs on the basis of prescribed costs. Ground 8 asserts that the judge erred in failing to award or calculate prescribed costs on the summation of the amount awarded together with the interest awarded. Mrs. Louis-Harris submitted that the judge should look at the global aggregate of the award plus interest on the general and special damages awarded. Mrs. Greene-Ernest submitted that the sum of costs awarded by the court is in sync with the scale of prescribed costs.

[27] The learned judge awarded Mr. Maurice \$411,500.00 as special damages with interest thereon at 6% per annum from the date of the claim until payment – as stated earlier, the sum of \$87,300.00 for pain and suffering and loss of amenities, with interest at the rate of 6% from the date of the accident to the date of trial and post judgment interest at 6% from the date of trial to the date of payment.

Costs

[28] Costs are in the discretion of the trial judge and an appeal court will only interfere with the exercise of that discretion on the well-defined principles earlier articulated. Rule 65 of the **Civil Procedure Rules 2000** (the "CPR") deals with the quantification of costs. Appendix B deals with the scale of prescribed costs. Appendix C deals with the percentage to be allowed at various stages of the claim: up to default judgment and including assessment of damages, 60%. In this case the judge assessed damages after a default judgment. The costs award should reflect 60% of the total costs up to default judgment and including assessment of damages. In the circumstances, I agree with Mrs. Louis-Harris that costs should have been awarded on the global sum of general and special damages up to the date of judgment. Grounds 7 and 8 were accordingly allowed.

Conclusion

[29] For all the reasons given, the cross appeal was allowed in part. Both parties have achieved success on the cross appeal. In the circumstances there was no order as to costs on the cross appeal.

[30] It was accordingly ordered that:

- (1) Grounds 1 to 5 of the grounds of appeal of the cross appellant are dismissed.
- (2) Ground 6 is allowed to the extent that interest is awarded on the sum of \$411,500.00 for special damages from the date of the accident to the date of judgment at the rate of 3% per annum.
- (3) Grounds 7 and 8 consolidated are allowed and prescribed costs are awarded to the cross appellant calculated pursuant to rule 65.16 of the CPR on the global sum of \$675,033.35 for general damages, special damages and interest up to the date of judgment in the sum of \$42,601.42.
- (4) There will be interest on the total amount awarded inclusive of costs at the rate of 6% per annum from the date of judgment until payment.
- (5) There shall be no order as to costs.

I concur
Mario Michel
Justice of Appeal

I concur
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar