Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 96/89

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	NATHAN CLARKE	DEFENDANT/APPELLANT
AND	GERNEL HANCEL	PLAINTIFF/RESPONDENT

Patrick Foster for Appellant

B.E. Frankson for Respondent

12th October & 18th December, 1992

GORDON, J.A.

In this appeal the appellant challenged the award for general damages made by Pitter J., on the 14th of November, 1989 as being "inordinately high and excessive so as to justify a disturbance by the Court of Appeal." This, the appellant submitted, "the court has jurisdiction to do by virtue of the principle stated in **Flint v. Lovell** [1935] 1 K.B. 354 at 360 and S.C.C.A. 45/85 **Jamaica Public Service Co Ltd v. Winston Barr."** (unreported). The learned trial judge's determination of the issue of liability against the appellant was not challenged.

The plaintiff's injuries are stated in the particulars of claim thus:

(1) Head Injury with loss of Consciousness.
(2) 2 cm Laceration to Dorsum Right Forearm.
(3) 3 cm Laceration to Posterior Aspect of Right Elbow.
(4) Fracture of Right Femur.
(5) 10% Permanent Disability of Left Lower Limb.

Two medical reports were tendered, by consent, by the plaintiff to support the claims he made. Injuries 1-4 supra were lifted from the report of Dr. Ellen Buchignani, consultant/surgeon at Spanish Town Hospital, dated 15th May, 1986. Injury #5 is taken from the report of Dr. Paul Wright, Orthopaedic Registrar at the University Hospital.

The plaintiff's evidence re the injuries reads in part:

> "I was hit out - not in my senses. ... I remained in hospital for nine (9) months and one week ... I felt pains in right leg and right hand and head. Even now I feeling pains in right leg. ... I not walking in the same way before accident. I now walk and drop."

In cross-examination he asserted that he was hospitalized to October 1986, then he admitted he had overstated his stay in hospital. He agreed that Dr. Wright's report was correct he had been hospitalized for one month only.

On the evidence adduced, the trial judge awarded $28,100 in special damagesand $100,000 in General Damages with interest at 3%. We were not assisted by a written judgment or notes of an oral judgment, if any, given by the learned trial judge. The notes of evidence show that on behalf of the defendant it was submitted that the award should be in the range of $45,000 - $50,000. These submissions were supported by reference to cases in "Recent Personal Injury Awards made in the Supreme Court of Jamaica" (Khan's Report). The court's attention was also directed to the medical reports.

On behalf of the plaintiff, Mr. Franksen does not appear on record to have cited any case in support of his submission for an award of $100,000 - $120,000 for pain and suffering. He mentioned the 10% permanent disability given in the medical report admitted in evidence.

In the absence of any assistance from a judgment as a guide to the method by which damages were assessed we are obliged to examine the evidence to determine whether the award made was just.

The submissions made by counsel in the court below and before us were predicated on the basis that the respondent has suffered a 10% permanent partial disability as claimed in item 5 of the particulars of injuries (supra). The respondent's evidence that he now walks and drops is supportive of his claim for this disability.

It is necessary now to consider the medical report of Dr. Paul Wright before proceeding to an examination of the assessment made by the learned trial judge. I will give this report in full:

" 26th May, 1986

TO WHOM IT MAY CONCERN

MEDICAL REPORT ON GERNEL HANSEL - AGED 25 YEARS

This patient was seen in the Out-Patient clinic of the Orthopaedic Service of the University Hospital of the West Indies, on the 6th February, 1986. At that time he complained, that on the 30th January, 1986 he was involved in a motor vehicle accident. He did not lose consciousness, but suffered injury to his right elbow and right lower limb. He was taken to the Spanish Town Hospital where he was seen, and admitted, and his right lower limb placed on skin traction. He was then transferred to this Hospital on the 6th February.

Examination revealed a man in distress. He had:

(a) Infected lacerations x 2 to his right elbow, with a full range of movement of this joint.

(b) Swollen, deformed and tender right thigh.

X-rays revealed a comminuted fracture of the mid-shaft of the right femur.

His wounds were cleaned and dressed and he was admitted to our Orthopaedic ward, where he was placed on 19 lbs. of traction.

"On the 20th February, 1986, he was taken to the Main Operating theatre where under a general anaesthetic, he had open reduction, and internal fixation of the fracture shaft of the right femur. His post-operative course was uneventful and on the 26th February, 1986, he was discharged from hospital, on crutches - non-weight bearing. We then followed him at regular intervals in our out-patient clinic.

On the 24th March, 1986, he was reviewed in our clinic. His wounds were healed, clean and dry, and he had a full range of movement of the right knee and hip. He was advised to partial weight bear on the limb, with crutches.

On the 28th April he remained pain free and full weight bearing was advised.

On the 19th May, 1986 he had reached his maximum medical recovery. He was pain free, and had full range of movement of the knee. His fracture was healed and solid.

He was then discharged from the clinic.

Mr. Hancel was totally disabled from the 30th January, 1986 until the 26th February, 1986. He then had a 30% disability in the use of his left lower limb, until the 28th April, 1986, when this was reduced to 10%.

He is now fully recovered."

The plaintiff said Dr. Wright was the Doctor who treated him and Dr. Wright's report is detailed. It gives a full account of the treatment administered and the status of the injury over the period 6th February, 1986 to 26th May, 1986. The report states that the patient's "post operative course was uneventful." The patient was seen and examined on 26th February, 24th March, 28th April and 19th May 1986. The report is dated 26th May, 1986. The report shows that on 24th March "he had a full range of movement of the right knee and hip," "on 28th April he remained pain free and full weight bearing was advised." On 19th May 1986, he had reached his maximum medical recovery. He was pain free and had full range of movement of the knee. His fracture was healed and solid.

In the penultimate paragraph the doctor gave his estimate of the disability the plaintiff suffered:

(1) He was totally disabled from 30th January 1986 until 26th February, 1986,

(2) He had a 30% disability in the use of his left lower limb until the 28th April, 1986,

(3) When this was reduced to 10% and

(4) On the date of the report which followed an examination on the 19th May, 1986 the last sentence and paragraph of the report states 'He is now fully recovered'.

There is no certification of a permanent limp (walk and drop) or permanent disability or intermittent pains. There is certification of full recovery from trauma which had an uneventful post operative history.

Mr. Frankson's final submission to the trial judge suggested "General Damages, Loss of Amenities 10% partial disability $45,000 Pain and Suffering $100,000 - $120,000." There is no evidence to support an award for loss of amenities. The damages to be assessed are therefore primarily for pain and suffering occasioned by a fracture of the right femur from which the plaintiff had made full recovery.

Mr. Foster submitted that the amount awarded as general damages was inordinately high and excessive so as to justify a disturbance by this court. This principle stated in **Flint v. Lovell** (C.A.) 1935 1 K.B. 354 at page 360 was adopted and applied in **Jamaica Public Service Co Ltd v. Winston Barr** S.C.C.A. 45/85. In **Beverley Dryden v. Winston Layne** S.C.C.A. 44/87 dated 12th June, 1989 (unreported). The injuries the infant plaintiff suffered were:

PERSONAL INJURIES

"Badly crushed right lower limb with compound fracture of the right tibia and fibula. Shock and substantial loss of blood.

RESIDUAL DISABILITY

1. Scar over anterior aspect of right leg.
2. Knock knee deformity of the leg (fracture had not been reduced).
3. Scarring at fracture site (10"X 2") with 2 incision scars above and below this scar.
4. Scar (9" X 2") to the posterior and lateral side of leg.
5. Growth disturbance with overgrowth of right leg which was bigger and ¼" longer than left leg.
   Corrective surgery could be undertaken but it was uncertain as to whether the disability would be removed.
6. Permanent Partial Disability 15% of right lower limb."

The trial judge awarded general damages of $70,000 under three heads viz pain and suffering $20,000 disability $25,000 scarring and loss of amenities $25,000. This court held that the learned trial judge assessed damages on the wrong principle which accounted for some overlap. The court went on to say per Campbell, J.A. "even if the learned trial judge assessed on a wrong principle, it is the global figure which is important and unless this figure is shown to be excessive the court ought not to disturb it." The award was upheld.

This court in **Layne's** case (supra) examined **Noel Gravesandy v. Neville Moore** C.A. 44/85 and 48/85 delivered 14th February, 1986 where an award of $90,000 was reduced to $50,000 and **Kenneth Kelly v. Michael Bennett** C.A. 45/87 (unreported) where an award of $26,000 was increased to $75,000.

In **Gravesandy's** case the injuries were less severe than those in **Layne's** case: The plaintiff suffered (1) a compound fracture of the tibia and fibula and (2) deformity consisting of shortening of the injured leg. No percentage of permanent partial disability was given as the doctor stated that a bone operation might have to be performed. In **Kelly's** case the injuries and the disabilities resulting therefrom comprised (1) compound fracture of

the right foot and ankle bone, (2) laceration of the inner aspect of the right thigh leaving an ugly and unsightly scar. (3) Permanent partial disability of the right lower limb was assessed at 5% - 10%. These injuries were similar to those sustained by the plaintiff in **Layne's** case in so far as it involved scarring and injury to one lower limb. Delivering the judgment of the court in **Layne's** case (Campbell, Downer, Gordon, JJ.A.) Campbell, J.A. said:

> "... a physical injury without consequences would attract only a nominal award. It is the consequence of the disability which really measures the loss for which the disabled is to be compensated."

He continued:

> "There is authoritative support for this opinion in **H. West & Son Ltd. v. Shephard** [1964] A.C. 326 where Lord Reid at p. 340 - 341 had this to say:
> 'The man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it, for that and for the mental strain and anxiety which results. There are two views about the true basis for this kind of compensation. One is that the man is simply being compensated for the loss of his leg or the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition - for the multitude of deprivations and even petty annoyances which he must tolerate. Unless I am **prevented** by authority, I would think that the ordinary man is, at least after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life." [Emphasis added]

At page 3 of his judgment in **Layne's** case Campbell, J.A. said:

> "both Mr. Morrison and Mr. Dale accept as established principles that personal injury awards should be reasonable and assessed with moderation and that so far as is possible comparable injuries should be compensated by comparable awards."

These principles were reiterated in the judgment of this court in S.C.C.A. 57/88 **Devon McFarlane vs. Frederick Barnett et al** delivered 28th October, 1991 (unreported) Rowe, P. Forte, Gordon JJ.A.) thus:

> "Many cases were cited as the submissions of counsel urged that there should be consistency in awards for comparable damage. This has always been the approach adopted by the Courts."

The plaintiff in this case had (1) multiple lacerations on the left upper face and right leg. (2) A **comminuted** fracture of the proximal **third** of the left femur and of right tibia. He was hospitalized from 24th April, 1987 **until** 7th September, 1987 (4½) months and his residual disability consisted of (a) multiple scars, (b) slight bowing at the fracture site of the femur, (c) the left lower limb was ½" shorter than the right and (d) he walked with a slight limp. The scars on the leg had a tendency to keloid. There were also multiple superficial scars to the face. The Court reviewed awards made in a number of cases and concluded that the award of $35,000 was too low and an award of $97,000 would be excessive. The award of $35,000 was increased to $60,000.

The question of a misinterpretation of the medical evidence was not argued in this appeal and it may be considered that as this is so it should not be the basis for a determination affecting the damages assessed. Accepting that as correct the court observes that in **Dryden v. Layne** the plaintiff suffered residual scarring, deformity and an overgrowth of the right leg. The permanent partial disability was assessed at 15% and the award of $70,000 was approved.

In **Gravesandy vs. Moore** there was deformity consisting of a shortening of the injured leg. There was no stated percentage of permanent partial disability and the award was reduced from $90,000 to $50,000.

In **Kelly v. Bennett** there was an ugly and unsightly scar on the inner aspect of the right thigh coupled with an assessed 5 - 10% permanent partial disability of the right lower limb. The award of $26,000 was increased by the court to $75,000.

In **Devon McFarlane vs. Frederick Barnett** there was scarring and deformity. The injured limb was ½" shorter than the other and the plaintiff walked with a limp. The award was increased from $35,000 to $60,000.

In all these cases there was deformity and permanent partial disability of 5 - 15% and the range of awards was $50,000 to $75,000. Even accepting the plaintiff's evidence that he walked with a limp as true, his injury being to one leg only the award of $100,000 is out of line with the awards made in the cases reviewed. This court considers that an award of $60,000 to the plaintiff in this case is appropriate.

The appeal is therefore allowed the amount of $100,000 set aside and an award of $60,000 substituted. In all other respects the judgment of the learned trial judge remains unchanged.