FUN AND GAMES LTD. ET AL. v. SMITH, JORDAN THIRD PARTY;

SMITH v. JORDAN

[HIGH COURT - CIVIL SUITS NOS. 403 of 1992 and 896 of 1993

(King, J. (Actg.) October 26-28 and November 2, 1993; August 9 and 26, 1994]

(1994) 30 Barb. L.R. 357

Damages - Personal injury - Laceration of the right knee in the area of the patella tendon - Torn posterior cruciateligament and synovial hypertrophy - Postero-lateral rotary instability - Scarring - Quantum.

Facts: On March 7, 1988, there was a three-car collision on Rendezvous Hill, Christ Church. The second plaintiff, a highlyskilled 28 year old electronics technician, received injuries consisting of a laceration of the right knee in the aea of thepatella tendon, a torn posterior cruciate ligament and synovial hypertrophy, postero-lateral rotary instability and scarring forwhich he received extensive and expensive treatment abroad. Prognosis of worsening arthritis and inability to stoop, bendor lift heavy objects on a regular basis.

Held: The second plaintiff would be awarded damages as follows: special damages as agreed at U.S.$65,239 andBds$97,451.06 with interest at 4% from the date of the writ until judgment and 8% thereafter until paid; general damagesas agreed at Bds$73,000 with interest at 8% from the date of judgment until paid; U.S.$34,028 and Bds$7,960 for the costsof surgery visit, air fare, therapy together with biannual visits over a five year period and Bds$11,640 for loss of earningsduring the visits, these sums to be paid in a lump sum to bear interest at 8% from date of judgment until paid.

Cases referred to:

Chan Win Tong v. Le Ping Soar [1985] 1 A.C. 446.

Corbin v. Beckles, Barbados Court of Appeal No. 23 of 1988 (Judgment delivered February 1, 1991).

Moeliker v. A. Reyolle & Co. [1977] 1 W.L.R. 132.

Watson v. Mitcham Cardboards [1980] C.L.Y.B. 699.

Mr. H.deB. Forde, Q.C., and Miss M. Greene for the plaintiffs in No. 403 of 1992.

Mr. E.D. Mottley, Q.C., and Miss K. Parris for the defendant in No. 403 of 1992 and the plaintiff in No. 896 of 1993.

Mr. J. Connell and Mr. F. Stuart for the third party in No. 403 of 1992 and [357] the defendant in No. 896 of 1993.

KING, J. (Actg.): These two suits arise over a three car collision which occurred on Rendezvous Hill, Christ Church,about 4.55 p.m. on March 7, 1988: X. 1505 was owned by the first plaintiff and driven by the second plaintiff; X. 8271driven by the defendant in suit 403 of 1992 and owned by the plaintiff in suit 876 of 1993; and M.A. 259 owned and drivenby the third party in suit 403 of 1992 and the defendant in suit 876 of 1993.

Suit 893 of 1993 was filed after suit 403 of 1992 had been set down for hearing and, when it was ripe for hearing, an orderwas made on 1st September, 1993 consolidating the two suits.

The first plaintiff lost its vehicle, the second plaintiff received injuries for which he received extensive and expensivetreatment abroad; the defendant received injuries, the third party/defendant suffered damage to his motor car, and so did theplaintiff.

During the plaintiff's evidence in chief, and by consent, his counsel handed up a revised schedule of special damagesindicating that these figures had been agreed. The particulars of special damages of the first plaintiff amounted to$10,700.00.

The particulars of injuries of second plaintiff were as follows:

(i) Laceration of the right knee in the area of the patella tendon.

(ii) A torn posterior cruciate ligament and synovial hypertrophy.

(iii) Postero-lateral rotary instability.

(iv) Scarring.

The second plaintiff's special damages were substantial, ranging from loss of earnings for 116 2/3 weeks, medical fees,damaged clothing, physiotherapy, transportation and accommodation in the United States of America.

On March 18, 1992, the defendant issued a Third Party Notice to Mr. Edwin Jordan. In her defence the defendant admittedthe collision, but denied any negligence on her part, but alleging it was caused or contributed to by the negligence of thesecond plaintiff.... Alternatively, says the defendant the collision was caused solely or contributed to by the negligence ofthe Third Party. ...

The plaintiff described his injuries and the visits to doctors here and abroad. He gave no evidence how his earnings oremployment would be impaired. The evidence of his present difficulties and Dr. Bennett's evidence are such it could beinferred there would be some impairment and, if dismissed, it could be difficult finding further employment in his field orotherwise. He testified:

"... I have to lift in my job and try to avoid it. Every three months I have [358] to service the machines and thismeans I have to pick them down piece by piece and transport them to the workshop. ... Last month my back gaveout on me three times and I had to rest two weeks. I had to stop lifting. I am still employed by Fun and Games."

Dr. Errol L. Bennett, an Orthopaedic Surgeon of Baltimore, Maryland, United States of America, testified that the plaintiffhad a permanent impairment with a one-third loss of motion of the right knee with premature arthritis and wasting of histhigh muscles, and will certainly have ongoing problems with the knee for the foreseeable future. He opined that theplaintiff's work will be affected as it involves lifting and bending and he would be limited in doing these. Consequently, hewill have to modify his lifting activities and refrain from lifting heavy objects to prevent back pains; and he will needfurther medical and surgical interventions for an

indefinite time.

Dr. Bennett had recommended further surgery and, in answer to Mr. Mottley, said the object was to halt and prevent hisproblem getting worse. He described the chances of success as good, better than 60 - 40. As I understood the presentposition, the previous surgical interventions had not been entirely successful and therefore further surgical work ought to bedone. He did not think that the plaintiff's position was likely to change significantly, it would, but if he did nothing he waslikely to continue to deteriorate and would have greater impairment than he currently had.

No evidence was led from the employer of its attitude towards the plaintiff and what might be its future attitude if,perchance, his standard of work fell. ...

The Plaintiff

In dealing with loss of future earnings/earning capacity Mr. Mottley cited a case before the Local Court of Appeal No. 23 of1988 Corbin v. Beckles. He suggested that this sub-head of general damages need not be looked at as there was noevidence the plaintiff was likely to lose his job and would have problems finding another, and the job was not such aswould require one to conclude ne was handicapped in his work.

But, Mr. Forde took a contrary view. He contended that the evidence was clear that the plaintiff had the loss ofearnings/earning capacity ahead of him. He relied upon the plaintiff's evidence of the difficulties he presently experiences inlifting and bending and the support evidence by Dr. Bennett and particularly his forecast that the plaintiff's position couldbe worse if he did not accept further recommended surgery. Already, he had developed premature arthritis in the knee jointwhich would progress indefinitely. Dr. Bennett also testified -

"We felt the grafting had undergone some stretching and we recommended he should have a further evaluation ofthe knee joint which would necessitate another trip to the United States of America, surgery and [359]rehabilitation. I anticipate this would take approximately three months. He would not be able to work during thistime. It would necessitate his staying in the United States of America over that time as he would require specialisedrehab therapy not available here. ... It would be difficult to be exact but my opinion is he would be seen biannuallyand likely to need further surgical intervention and would need extensive physiotherapy for several years."

Dr. Bennett's latest report dated October 1993, recommended 4 months post operative care. Mr. Forde contended that theplaintiff would suffer loss of earnings over the period, and should be compensated for this as well as the biannual stay of 5days per stay. Apart from saying that his gross weekly salary was $950.00 per week and his net $684.69 a week, there is noevidence that the plaintiff would lose his pay over the periods in the United States of America. However, inasmuch as theparties have accepted and agreed on this head of loss in the special damages due the second plaintiff and there is nothing toshow that the employers would begin to pay in the future, I would therefore allow a four months estimated salary of $11640.00 ($684.69 x 17 weeks) together with costs of the biannual visits over a period of five years from today's date, theactual figures to be worked out by the parties; I cannot envisage the doctor meaning these visits are to last the remainder ofthe plaintiff's life.

As to the future loss of earning capacity, Mr. Forde identified the factors which the court should look at and said there wasno statement from the employer as this was not necessary; the court was to use a reasonable, commonsense approach andform its view of the evidence, for it was clear the plaintiff was handicapped and would be at a serious disadvantage in theBarbados labour market. He sought support from Watson v Mitcham Cardboards [1980] C.L.Y.B.] at page 699 where itwas held that the words of Brown, J. in Moeliker v. A. Reyolle & Co. [1977] 1 W.L.R. 132 at page 141 be "very widelyconstrued and applied by the court," and, in doing so, the plaintiffs' award of £200.00 for loss of earning capacity wasupheld although no evidence was tendered.

This head of damages was analysed in Moeliker v. Reyolle where Brown, L.J. said at page 140A:

"This head of damage generally only arises where a plaintiff is at the time of the trial in employment, but there is arisk he may lose this employment at some time in the future, and may then, as a result of his injury, be at adisadvantage in getting another job or an equally well paid job ... And at "F", if he is then earning as much as hewas earning before the accident and injury ..., or more, he has no claim for loss of future earnings. If he is earningless than he was before the accident ... he has a claim for loss of future earnings which is assessed on the ordinarymultiplier/multiplicand basis. But in either case he may also have a claim or an additional claim, for loss of earningcapacity if he should ever lose his present job." [360]

And, at page 141 c:

"In deciding this question all sorts of factors will have to be taken into account, varying almost infinitely with thefacts of particular cases. for example, the nature and prospects of the employer's business; the plaintiff's age andqualifications; his length of service; his remaining length of working life; the nature of his disabilities; and anyundertaking or statement of intention by his employers as to his future employment. If the Court

comes to theconclusion that there is no `substantial' or `real' risk of the plaintiff losing his present job during the rest of hisworking life, no damages will be recoverable under this head.

But if the Court decides that there is a risk which is `substantial' or `real', the Court somehow has to assess this riskand quantify it in damages. ...

The Court must start somewhere, and I think the starting point should be the amount which a plaintiff is earning atthe time of the trial and an estimate of the length of the rest of his working life. This stage of the assessment will nothave been reached unless the Court has already decided that there is a `substantial' or `real' risk that a plaintiff willlose his present job at some time before the end of his working life, but it will now be necessary to go on andconsider - (a) how great the risk is; and (b) when it may materialise - remembering he may lose a job and be thrownon the labour market more than once (for example, if he takes a job and then finds he cannot manage it because ofhis disabilities).

The next stage is to consider how far he would be handicapped by his disability if he is thrown on the labour market- that is, what would be his chances of getting a job, and an equally well paid job. Again, all sorts of variablefactors will, or may, be relevant in particular cases - for example, a plaintiff's age; his skills; the nature of hisdisability; whether he is only capable of one type of work, or whether he is or could become, capable of others,whether he is tied to working on one particular area, the general employment situation in his trade or his area, orboth. The Court will have to make the usual discounts for the immediate lump sum and for the general chances oflife.

... The consideration of this head of damages should be made in two stages (1) Is there a `substantial' of `real' riskthat a plaintiff will lose his present job at some time before the estimated end of his working life? (2) If there is (butnot otherwise), the Court must assess and quantify the present value of the risk of the financial damage which theplaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it maymaterialise, and the factors, both favourable and unfavourable, which in a [361] particular case will, or may affectthe plaintiff's chances of getting a job at all, or an equally well paid job."

Mr. Connell ... contended there was no evidence on which Moeliker's case could be applied, as no evidential foundationhad been laid, the employers having given no evidence and there was no indication the plaintiff would not be able to earn aliving in the future. The employer/employee relationship was good; but so were the relations between the parties inMeoliker's case and he succeeded in his claim.

The plaintiff was 28 years old at the collision. He gave his evidence clearly and without embellishment. He exhibited norancour against anyone over his plight but rather exhibited his future and that of his young family.

...I believe the evidence of the plaintiff that the defendant drove at speed, overtook a moving car at speed when overtakingthe and collided with his van. I find that defendant did not have a clear view of what traffic could approach her from the topof the hill. I can find no negligence by either the second plaintiff or third party, but rather, I find that the defendant by theacts of negligence alleged against her was wholly responsible for the collision. I cannot find that she was subjected to anydilemma or sudden terror which drove her to protect herself.

Judgment is therefore entered for the plaintiffs and the third party against the defendant in Suit No. 402 of 1992 and hercounterclaim is dismissed. The plaintiff's claim in Suit No. 896 of 1993 is dismissed and judgment is entered for thedefendant therein.

Loss of future earnings and loss of future earning capacity

As to the first, the plaintiff continues in employment and under Moeliker could not be entitled to a further award under thishead. An award has been made to fill the situation associated with his future surgery. It seems clear from the evidence thateven if he accepts the recommended surgery the plaintiff's health will continue to deteriorate, arthritis for example will getworse, and the service which he renders to his employers will consequently deteriorate. The evidence points to a real andnot a whimsical risk facing the plaintiff, the level of which I am required to determine.

In Corbin v. Beckles the plaintiff, a mason in his early twenties, was found unable to continue work as a mason, and wasawarded $3,000.00 for loss of future earning capacity. In determining that this award could not stand because there was noevidence as to a number of matters, the Court of Appeal cited Lord Frazer in Chan Win Tong v. Le Ping Soar [1985] 1A.C. 446 at 459:

"Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some futuretime during his working life lose his employment. If he is, and has been for many years, in secure employment witha public authority that risk may be negligible. In other cases the degree of risks may vary almost infinitely,depending on, inter alia, the claimant's age and the nature of his employment. Evidence will [362] also be generallyrequired to show how far the plaintiff's earning capacity would be adversely affected by his disability. This willdepend largely on the nature of his employment."

The award in Corbin v. Beckles was deleted as the requisite evidence was not led.

Although no evidence of the nature referred to was led, there is nevertheless enough on which I can consider an award forloss of future earning capacity. The plaintiff is 35 years old and as persons in private enterprise in Barbados usually retire at65 years, the plaintiff has 30 years working life ahead of him, but with worsening arthritis, his lifting, bending andstooping ability will further deteriorate. His employers have put up with his position for many years and the way they havetreated him suggests that he is a valuable employee who is not likely to lose

his job in the near future. I therefore assess the risk as not particularly high. Considering the other factors, the plaintiff is ahighly skilled electronics technician - a modern field with substantial prospects, which means he is not tied to hisemployers. I believe he will be able to secure employment in other areas of electronics which do not require bending,stooping or lifting heavy objects on a regular basis.

As Brown L.J. said in Moeliker's case at 143 B:

"... If the Court decides that the risk of the plaintiff losing his present job or of his being unable to get another job oran equally good job, or both,

are only slight, a low award is right."

In that case, and in two cited cases, awards alleged to be too low were upheld.

In this instant case, having taken all the factors into account, I find the plaintiff's risk is slight and would therefore award$10,000.00 under this head.

In summarising, I find the defendant was wholly responsible for the collision as set out earlier, and make the followingawards.

(a) Special damages as agreed in favour of both plaintiffs and the third party.

(b) General damages in favour of the second plaintiff to be agreed as undertaken.

(c) Loss of future earnings for the four month period of surgery and consequent therapy of $11,600.00, together withthe costs of the biannual visits of five years from the date of the figures to be arrived at by the parties. As a rider,this head will only be payable when the plaintiff undertakes his recommended surgery.

(d) $10, 000.00 for loss of future earning capacity. [363]

Award (a) is to bear interest at 4% from the date of the writ until today and 8% thereafter until paid; awards (b) and (d) areto bear interest at 8% from today until paid; award (c) is to bear interest on each item at 8% when it falls due until paid.

Both plaintiffs in Suit No. 403 of 1992 and the third party are to have their costs fit for two. The defendant's counterclaimin Suit No. 403 of 1992 and the plaintiff's Suit No. 896 of 1993 are both dismissed.

Counsel on all sides immediately indicated that the order under (c) was open ended and unclear and sought liberty to arguethe point. On 26th August, 1994 argument took place and the following figures were agreed, whether or not the plaintiffreceived the recommended surgery:

Surgery Visit .....U.S.$30, 778.00

Air Fare .....Bds.$ 1, 600.00

Biannual Visits (these over five years) Professional fees, hotel, taxi etc. ....U.S.$ 3,150.00

Air fares..... Bds$ 2, 010.00

Local therapy .....Bds$ 2, 430.00

Medication over 5 years .....Bds$ 1, 920.00

Loss of earnings during visits .....Bds$11,640.00

Totals: U.S.$34,028.00, Bds$7,960.00 plus $11,640.00 which sums are to be paid in a lump sum to bear interest at 8%from today until paid. [364]

General damages agreed earlier Bds$73, 000.00. Special damages as agreed earlier U.S.$65,239.00 and Bds$97,451.06with interest as indicated in judgment.