In The Supreme Court of Bermuda

CIVIL JURISDICTION
2005: No. 217

BETWEEN:

RAYNOL SHANE TODD

Plaintiff

-v-

DR ANNAMALIE PANAGAL CHELVAM

Defendant

EX TEMPORE JUDGMENT (ASSESSMENT OF DAMAGES)

(in Court)

Medical negligence-delayed diagnosis-assessment of damages for pain and suffering-costs-Calderbank offer

Date of Judgment: January 31, 2017

Mr. Bruce Swan, Apex Law Limited, for the Plaintiff
Mr David Kessaram and Ms Akilah Beckles, Cox Hallett Wilkinson Limited, for the Defendant

Introductory: the liability established at the trial on liability

1. The Plaintiff in this case seeks an assessment of damages pursuant to the Judgment delivered in this matter on 2nd December 2016[1]. In that Judgment the crucial finding that I made appears at paragraph 15:

> "*15. … The operative delay of which the Plaintiff can complain is no more than 10 days. If one assumes that the time lag between deciding on overseas treatment and the surgery taking place (6 weeks) were pushed back by 10 days, the surgery would have taken place on November 4, 2003 rather than on November 14, 2003 when it actually occurred*…."

2. The operative finding was that the Defendant was liable for failing to diagnose the spinal condition which the Plaintiff was suffering from for that period of time in paragraph 29 of the judgment I said this:

> "*29. The Defendant breached his duty of care to the Plaintiff by failing to diagnose what his expert Mr Dyson described as a diagnosis which was 'only obvious in hindsight'. This occurred in relation initial presenting symptoms so unusual that Dr Chelvam would likely encounter them only 'once in a career'. This delayed the successful operation which the Plaintiff eventually had in London by no more than 10 days. The Plaintiff primarily complained of damage in the form of a substantially reduced recovery outcome. No such damage was proved. However, it was self-evident that the Plaintiff sustained additional pain and suffering through the duration of the additional time spent awaiting surgery.*"

The approach to assessing damages for pain and suffering

3. The damages to be assessed therefore relate, somewhat atypically perhaps, purely to pain and suffering. Mr Kessaram for the Defendant referred the Court to '*Kempe and Kempe the Quantum of Damages and Personal Injury and Fatal Accident Claims*', Volume 1[2]. And paragraph 3-001 sets out an explanation of how one should approach this issue. The short version of what is said is that a Plaintiff is entitled to be compensated for the actual pain of which he is aware and also for any fear or anxiety that he has experienced in relation to the injury from which he is suffering.

[1] [2016] SC (Bda) 107 Civ (2 December 2016).
[2] Looseleaf Edition (Sweet and Maxwell: London, 2016).

The respective arguments

4. The Plaintiff sought the stunning figure of $300,000.00 in compensation for pain and suffering without support from any authority. Mr Kessaram rightly countered that our system of assessment of damages is very precedent-heavy and depends on an analysis of the level of awards that have been made in other cases. He put before the Court a variety of cases which he submitted entitled the Plaintiff to no more than $1,000.00. Mr Swan in response sought to argue that the cases relied upon by the Defendant were all distinguishable and were all on the low side.

5. It is helpful to refer briefly to the cases that were put before the Court. The case of *Hotson-v-East Berkshire Area Health Authority* [1987] 1 A.C. 750 was a case where treatment was delayed for a period of 5 days during which the Plaintiff suffered excruciating pain and the award in 1987 was $150. Mr Kessaram relied primarily on this case because if one followed the traditional approach of adding 7 percent for each year since the date of the case and doubling the sterling award[3], one ended up with an award of $1,000.00 for the present case.

6. It is helpful to get some idea of the sort of injury involved in that case to illustrate what type of pain and suffering the award in *Hotson* related to. On page 753 of the report the statement of claim is referred to, and it indicates that the Plaintiff while at school fell 12ft from a tree and suffered considerable pain and was unable to take his weight on his left leg (on 26th April 1977). He was operated on the 2nd May 1977. The case primarily related to matters other than pain and suffering. That type of injury it seems to me Mr Swan was correct to suggest was on the low side bearing in mind that the Plaintiff in the present case was a mature man who was suffering a gradual loss of mobility and the ability to walk and was when he arrived in the United Kingdom for treatment, which he received on or about 14th November 2003, described as being "*paraplegic*".

7. The next case that Mr Kessaram referred to was *Marcus-v-Medway Primary Care Trust et al* [2011] EWCA Civ 750 where an award of pain and suffering was made for a period of 28 days. Mr Kessaram points out that the pain was described as being of a "*very severe nature*" which was not alleviated by medication and an award of only two thousand pounds was made in that case. That award Mr Kessaram conceded today would be in the region of $5,000.00 Bermuda dollars.

8. The Defendant's counsel also referred to *Williams-v-Bermuda Hospitals Board* [2014] Bda LR 52, which is a decision of Justice Hellman. However he pointed out

[3] *Williams-v-Bermuda Hospitals Board* [2014] Bda LR 52 (Hellman J, at paragraph 12), the so-called rule in *Wittich-v-Twaddle*, Supreme Court Civil Jurisdiction 1979: No.117 (unreported).

rightly that the award in that case, although an issue of delayed surgery was involved, related also to permanent complicating factors which occurred due to the delay. And so the assessment of the award of $60,000 for general damages by Justice Hellman cannot be equated to an award for pain and suffering alone. However in the course of his judgment[4], Justice Hellman referred to cases which were cited by counsel for the defendant in that case which included the following two awards.

9. In *L-v-Nottingham City Hospitals Trust* (2001), a 65 year old went to the hospital and was admitted to the Intensive Care Unit ("ICU"). He developed complications from which he died ten years later. In that case £3,000 was awarded for pain and suffering, an award which would today amount to BD$8,790. The next case he referred to was *KH-v-University Hospital of North Staffordshire NHS Trust* (2011). There, the Plaintiff was admitted to hospital suffering from head injuries in a road traffic accident. He spent 15 days in the ICU (5 of which he was not conscious for). And so for 10 days of being in ICU suffering from a cardiac arrest the award was £5,000 for pain and suffering, which would in Bermuda terms amount to $10,000.

10. Mr. Swan did his best to try and 'ramp-up' the value of his client's claim by reference to the evidence that is before the Court. That evidence most reliably come in the form of Hospital notes which indicated that the Plaintiff while in hospital between for present purposes the 4th of November and the 7th of November (a) did in fact require medication for pain, and (b) was in fact suffering discomfort while attempting to walk. The difficulty with the evidence is, as Mr. Kessaram rightly pointed out, that there is 'radio silence' for the period between 7th November when the Plaintiff was discharged and his arrival in the United Kingdom to have surgery on or about 14th November. Although the Court is left to some extent to speculate, Mr Swan fairly referred the Court to the letter report of Mr Afshar of 149 Harley Street, who on the 1st of December 2003 wrote this:

> "*On his arrival in the UK in mid-November 2003 Mr. Raynol was found to be paraplegic with just a flicker of movement in the toes and grade 1-2 power for ankle movements only. He was unable to lift either leg off the bed and showed marked spasticity right more than left with up-going plantars.*"

Assessment of appropriate award

11. Bearing in mind that the Plaintiff was diagnosed with (spinal) cord compression and was told that he had to have surgery, it is clear that he would have had some anxiety about his prognosis during the time while he was waiting for his surgery. That anxiety would have been accentuated if his condition was deteriorating during that period, as it seems it was. It would be wrong to overstate the degree of that anxiety having regard to the fact that the evidence overall in this case suggests that when the Plaintiff

[4] At paragraph 15.

had significant concerns he sought medical assistance; notably checking himself into Hospital in late October. And there is no evidence that after he was discharged from Hospital on or about the 7th November that he sought medical advice because of anxiety about his worsening condition.

12. And so, looking at the matter in the round, this case is one which as Mr Kessaram submitted does warrant considerable sympathy for the Plaintiff's position, but falls well below the worst case of pain and suffering. Doing my best, and making a very rough and ready assessment of the appropriate award in this case having regard to the authorities place before me and the available evidence, I find that the Plaintiff should be awarded the sum of $5,000.00 for pain and suffering[5].

13. I will hear counsel as to costs.

[Having heard counsel]

Costs

14. In this matter the Defendant on 14th August 2013 sent a 'Without Prejudice Save as to Costs' letter, otherwise known as a '*Calderbank*' letter, disclosing the Defendant's Expert Report-which admitted liability for a delayed diagnosis-and offering the Plaintiff $20,000 in terms of general damages, $5671.76 in interest and payment of "*reasonable legal costs*". That offer was rejected. There was on 3rd March 2014 a payment into Court of $26,000 and that amount was not accepted.

15. In the event, following a trial on liability and an assessment of damages today, the Plaintiff has been awarded the sum of $5000. In these circumstances the only appropriate order as to costs, following established principles, is as follows. The Plaintiff is awarded his costs, having succeeded on liability, up to 14th August, 2013, to be taxed if not agreed. Thereafter, the Defendant is awarded his costs, to be taxed if not agreed.

Dated this 31st day of January, 2017_____
IAN RC KAWALEY CJ

[5] The Plaintiff is of course entitled to interest, the usual award being at the rate of 3.5 % from the date of the Writ (or service of the Writ) until trial and at the statutory rate of 7% from the date of judgment. The parties have liberty to apply if required as this issue was not addressed.