The Court of Appeal for Bermuda

CIVIL APPEAL No 13 of 2012

Between:

VINCENT J. BEST

Appellant

-v-

WARREN JENSEN

-and-

THE MARKET PLACE LIMITED

Respondents

Before: **Zacca, P.**
Evans, J.A.
Ward, J.A.

Appearances: Marc Daniels, Charter Chambers for the Appellant
Jai Pachai, Wakefield Quin Limited for the Respondent

Date of Hearing: **8 November 2013**
Date of Judgment: **17 March 2014**

JUDGMENT

Ward, J.A.

1. On 20 July 2004 the Plaintiff/Appellant was lawfully riding his motor cycle on Somerset Road in a northerly direction when he was struck by a motor van which was coming out of the parking lot of the Market Place Supermarket in Somerset. The Appellant was knocked off his motorcycle, was thrown into the

air and fell to the ground landing on his right shoulder which was injured as a result of the impact.

2. He was taken to the King Edward VII Memorial Hospital (KEMH) by ambulance where he was treated for his injured right shoulder. His arm was placed in a sling and he was given medication to relieve the pain.

3. The driver of the motor van and his employer accepted responsibility for the accident and for the damage flowing therefrom.

4. The issues at trial were what damage flowed from the collision and the measure of damages.

5. While being treated in KEMH the Appellant was under the care of Dr. Oleksak, a Consultant Orthopaedic Surgeon. In his Report of 15 February 2005 he wrote:-

> "Clinically he had a dislocated acromioclavicular joint with minimal tenderness. An MRI scan was ordered to assess the rotator cuff. These were performed on 1 November 2004 at the King Edward Memorial Hospital. These confirmed the acromioclavicular joint separation with no evidence of coracoclavicular ligament injury. The rotator cuff appeared intact...
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> OPINION: It is my opinion that this gentleman sustained grade II subluxation of his right acromioclaviuclar joint as a direct result of his motorbike accident which occurred on 19 July 2004 (sic). This was treated initially in a conservative manner with physiotherapy and analgesia. He was unable to continue working regularly as paint was hampering his activities of lifting heavy weights. He is also an avid weight lifter and experienced pain during exercise. An MRI scan was subsequently ordered to assess the rotator cuff, which did not demonstrate a cuff tear. Due to the on-going nature of his pain he then underwent an excision of his distal clavicle under general anaesthesia. He made an

uneventful post-operative recovery and at last follow up visit shortly after surgery he was pain free.

PROGNOSIS: His prognosis following the injury and surgery is excellent. Acromioclavicular joint injuries are usually treated in a conservative manner and remain with a small lump together with some discomfort. In a small minority of cases pain becomes an issue due to osteolysis of the distal end of the clavicle. This is a well-known feature in heavy weight lifters. In his instance this was treated with excision of the distal end of the clavicle and an acromioplasty. Functional rehabilitation should be close to 95% at one year following surgery."

6. This operation for an injury which flowed directly from the collision was performed by Dr. Oleksak at the KEMH on 6 December 2004. It became necessary because of the continuing pain suffered by the Appellant. The standard treatment was given which was an excision of his distal clavicle under general anaesthesia. He made an uneventful post-operative recovery and shortly after the surgery he was pain free. The purpose of the operation was to stop the rubbing of the collar bone and the acromium/shoulder bone. As observed in the Report of Dr. Francioni dated 2 May 2011 in most cases that type of operation is successful but some patients continue to have pain. Unfortunately the Appellant happened to be one of the unlucky ones.

7. A medical opinion was that such injuries take three to six weeks before normal activities are resumed. The Appellant's normal activities as a Convention Staffer at the Fairmont Southampton Princess Hotel involved the lifting of heavy loads and since the accident he has not been able to resume his former occupation. In addition, his hobby of weight lifting placed him in a high risk category of not making the optimum recovery.

8. After the operation on 6 December 2004 and before four months had passed, he consulted Dr. Stephen Lemos of the Lahey Clinic on 28 March 2005 who made a diagnosis of a more serious injury than that shown in the MRI scan of

1 November 2004. Rather than a Grade II subluxation of the right acromioclavicular joint, Dr. S. Lemos assessed the injury as a Grade III to IV AC joint dislocation, and ligament reconstruction surgery was contemplated if physical therapy did not work.

9. On 30 March 2006 Dr. Wilk performed the ligament reconstruction surgery. The necessity for this has been questioned by the respondents and no witnesses appeared for the Plaintiff/Appellant to submit to questioning and to support the need for this operation.

10. The approach of Counsel for the Appellant has been to rely on the academic qualifications and reputations of the medical doctors of the Lahey Clinic and seemed almost to suggest that it would be presumptuous to ask them any questions. Dr. Mark J. Lemos had some impressive qualifications. He was an Orthopaedic Surgeon at the Lahey Clinic Medical Center of Peabody, Massachusetts, U.S.A. He is the Director of Sports Medicine at Lahey and an Associate Professor of Orthopaedic Surgery at the Boston University School of Medicine. He has authored and co-authored several publications on orthopaedic problems and he has provided services to orthopaedic patients in Bermuda. But he did not attend to give evidence after having been warned to attend.

11. The Learned Chief Justice was not prepared to rely on the affidavit evidence of those highly qualified persons who treated the Appellant at the Lahey Clinic, but instead accepted the viva voce testimony of a trained and experienced medical witness, Dr. Francioni. In our view he was right to do so.

12. The issue of credibility has been addressed in many of the Judgments of the Court of Appeal for Bermuda. By way of example, in Trustees of the Seventh Day Adventist Church v Wilson, Civil Appeal No. 5 of 1985, the Court held that the credibility of a witness is essentially a matter for the trial judge.

The theme was repeated in Rego v Rego Civil Appeal No. 6 of 1989 where it was held that the assessment of credibility is a matter for the trial judge to whom it is open, having seen and heard the witnesses, to prefer the evidence of one over the other.

And in Adams v James Civil Appeal No. 11 of 1995 it was held that a function of the trial judge is to assess the credibility of witnesses.

13. It is not surprising therefore, that the learned Chief Justice should prefer the evidence of an impressive witness whom he had seen, to the affidavit evidence of witnesses whom he had not seen.

14. Counsel for the Respondents reminded us that we should be very cautious in differing from the trial judge on findings of fact and cited Biogen Inc. v Medeva plc. 38 BMLR 149 at 165 in which Lord Hoffman opined:

> "The question of whether an invention was obvious has been called ' a kind of jury question'...and should be treated with appropriate respect by an appellate court. It is true that in Benmax v Austin Motor Company Ltd. [1955] 1All E.R. 326 this House decided that, while the judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses were virtually unassailable...an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness. In drawing this distinction however, Viscount Simonds went on to observe that it was 'subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge.' The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence...Where the application of a legal standard such as negligence or obviousness involves no question of principle but is

simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

15. The case for the Appellant is that he had no shoulder problems before the accident, therefore all subsequent shoulder problems are attributable to the accident. His counsel argued that but for the accident and the wrongful act by the Respondents, the injury would not have occurred.

16. We find a flaw in that type of reasoning for there may be new or contributing factors which have caused the injury. It is an oversimplification.

17. In his Judgment of 28 August 2012 the learned Chief Justice found that the injuries suffered by the Appellant as a result of the road traffic accident of 20 July 2004 were not caused by the Respondents alone, but rather as a result of an intervening operation or series of operations to the extent of 50%. He held that the second set of injuries and any persistence of symptoms were not a natural consequence of the original accident when the Appellant fell on his right shoulder. The Appellant has appealed against those findings.

18. Both counsel cited Hogan v Bentinck West Hartley Collieries (Owners) Ltd. [1949] 1 ALL ER 588 in which the injury following an accident was aggravated by an ill-judged surgical operation and it was held by a majority in the House of Lords that Hogan's incapacity must be attributed solely to the operation and not to the accident.

19. In Baker v Willoughby [1970] AC (H.L. (E)) 483 the question was whether or to what extent the damages which would otherwise have been awarded in respect of a car accident must be reduced by reason of the occurrence of the second injury from a gun-shot wound which led to the amputation of the injured leg. The later injuries were held to be a concurrent cause of the disabilities caused by the first injury.

At page 492 Lord Reid stated:

> "The respondent founded on another Workmen's Compensation case in this House--Hogan v Bentinck...There the man had an accident but his condition was aggravated by an ill-judged surgical operation and it was held by a majority in this House that his incapacity must be attributed solely to the operation and not to the accident...Lord Simonds' one of the majority, quoted with approval [1949] 1 All ER 588, 592 from the judgment of DuParcq L.J. in Rothwell v Caverswall Stone Co. Ltd [1944] 2 All ER 350, 365:
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> 'If, however, the existing incapacity ought fairly to be attributed to a new cause which has intervened and ought no longer to be attributed to the original injury, it may properly be held to result from the new cause and not from the original injury, even though, but for the original injury, there would have been no incapacity.
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> The first wrongdoer must pay for all damage caused by him but no more. The second is not liable for any damage caused by the first wrongdoer but must pay for any additional damage caused by him. Performance Cars Ltd. v Abraham [1962] 1 QB 33.'"

20. In support of the principle of apportionment where each tortfeasor would pay for the damage he inflicted, Counsel for the Respondents cited Rahman –v- Arearose Ltd. [2001] Q.B. 351 CA in which the employee's right eye was injured at work and then, because of negligent treatment by the hospital, sight in the eye was lost. In considering the question what was the loss for which the employer was solely responsible it was held that the most serious damage – psychological – had to be apportioned because the two causes reacted with each other, that it would plainly be unjust to proceed on the footing that a defendant was responsible for the whole of the claimant's damage when he demonstrably was not, that the defendants' respective torts were the causes of distinct aspects of the claimant's overall psychiatric condition and neither had caused the whole of it."

21. The surgery by Dr. Wilks for the reconstruction of the ligament of the right shoulder did not eliminate the pain suffered by the Appellant and moreover,

the site of the surgery became infected, so that on 15 May 2006 the attended Dr. Shaw in Bermuda who removed pus from the infected area. The problem continued and in November 2006 Dr. Mark Lemos of Lahey Clinic treated him for the infection and on 14 March 2007 operated on his shoulder in an attempt to rid the site of the infection.

22. The Respondents do not accept liability for the consequences of the 2nd and 3rd operations performed at the Lahey Clinic viz. the reconstructive ligament surgery and the operation in an attempt to rid the site of infection or infected material.

23. The onus of proof was on the Appellant to prove that the damage he suffered was caused or materially contributed to by the Respondents. But he did not lead any viva voce evidence to establish the causal link nor the necessity for the 2nd and 3rd operations at the Lahey Clinic, although time was specially set aside for this purpose.

24. The Chief Justice therefore rightly concluded that the Plaintiff/Appellant did not prove on a balance of probabilities that his total injury was caused or materially contributed to by the Respondents and held that the Respondents should only pay for the loss caused by Jensen's tortious act, which loss was estimated at 50% of the proven damages.

25. In his Amended Notice of Appeal of 27 September 2012 the Appellant appealed against the apportionment of liability to the extent of 50%, the finding that there was a 50% prospect at the time of the accident that the Appellant's condition would worsen to the extent it ultimately did, which apportionment affected the final calculation of five heads of claim for damages.

26. The Appellant also appealed against the dismissal of various heads of claim viz;- loss of employee's contribution to Social Insurance' loss of employer's contribution to Union Pension Plan; DIY/ Home maintenance; Accommodation; Home Services Care.

27. These Heads of Claim were not established. We would also observe as stated in Dews –v- National Coal Board [1988] AC 1 that a contribution to a retirement pension fund was not intended to provide any immediate benefit and damages for personal injury are compensatory.

28. We were invited to change the basis for the assessment of damages, counsel for the Appellant finding our approach too restrictive. We declined the invitation. There should be clarity in the rules which apply which may be discerned from existing legal precedents and the JSB Guidelines. Such clarity promotes settlements.

29. Counsel for the Appellant submitted that allowing for a 10% deduction in place of the 50% deduction based on the degree of apportionment ordered by the Chief Justice, the Appellant should have been awarded $431,430.48 with costs. He was awarded $209,022.59. There has been a payment into Court of $220,000.00.

30. An application at the hearing of the appeal to re-amend the Amended Notice of Appeal and to add Argus Insurance Co. Ltd. as a party for directing, approving and funding the Appellant was refused, it having formed no part of the pleadings and a point which was never taken before the Chief Justice and to which he could not have directed his mind.

31. The appeal is dismissed with costs.

Ward, JA

Zacca, P

Evans, JA