



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**2012: No. 98**

**BETWEEN:-**

**KAMAL WILLIAMS**

**Plaintiff**

**-v-**

**THE BERMUDA HOSPITALS BOARD**

**Defendant**

## **EX TEMPORE RULING**

**(In Chambers)**

Date of hearing: 14<sup>th</sup> May 2014

Mr Jai Pachai, Wakefield Quin, for the Plaintiff

Mr Allan Doughty, ISIS Law Limited, for the Defendant

### **Introduction**

1. This is a hearing pursuant to the judgment of the Court of Appeal reported at [2014] Bda LR 22. Its purpose is to assess damages for the Defendant's negligent failure within a reasonable time to diagnose and treat the Plaintiff appropriately, by removing his appendix, for appendicitis.

## Facts

2. The material facts are summarised in the judgment of the Court of Appeal:

18. The surgery began at 10:15 p.m. almost 12 hours after the Appellant first arrived at the hospital and approximately 11 hours after his admission. He was found to have a perforated appendix. ...

19. During the surgery the patient suffered from impaired heart function, otherwise described as a cardiac event, his heart and lungs were malfunctioning and he was admitted to the Intensive Care Unit at 15 minutes after midnight with acute respiratory syndrome and he was placed on a ventilator where he remained for the next seven days.

20. On 7 June 2011 he was transferred to a general ward where he was cared for until his discharge from the KEMH on 13 June 2011.

21. On 1 August 2011 he was diagnosed by his private physician as having developed adhesions as a complication to the perforation.

3. Although the above summary is concise, I also have in mind the more detailed summary of the evidence relating to the operation that was prepared by Mr Pachai, counsel for the Plaintiff, for the Court of Appeal hearing. The Court of Appeal accepted the accuracy of the Plaintiff's summary, and so do I. The Plaintiff's summary also provided greater detail about Mr Williams' visit to his private physician:

Subsequently, Mr Williams attended his family physician, Dr. Margot Harvey on 1 August 2011 complaining of "on and off excessive flautus, gaseous pain and cramp on right" and was diagnosed as having "developed adhesions as a complication of the perforation. This could continue to be a chronic problem with changes in his bowels and abdomen pain".

4. The Plaintiff, who was aged 39 years at the date of the incident, gave evidence to update me on the position. He said that he had experienced excessive flatulence every day since the incident. Sometimes he experienced gaseous pain: sometimes not. There were digestive issues, and he sometimes experienced bowel pain when he went to the bathroom. He also experienced occasional cramping. When he saw Dr Harvey, she told

him that there would be cramping issues: he accepted this and didn't return. He was not taking any medication for his condition. He confirmed when cross-examined that he had not sought any further medical attention.

### **Special damages**

5. Special damages are awarded as follows:
  - (1) *\$40,688.95* for medical expenses, with interest at the rate of 3.5% from the date of the most recent expense, namely 5<sup>th</sup> August 2011. The figure and the date from which interest runs are by agreement.
  - (2) *\$6,582.66* for loss of earnings, with interest at the rate of 3.5% from the date of the incident, 30<sup>th</sup> May 2011. The figure is by agreement.
6. The total sum awarded for special damages is therefore *\$47,271.61* plus interest.
7. The medical expenses are claimed on behalf of the Plaintiff's insurer, which has already made payment to him in that sum. I am unclear as to the position between the Plaintiff and his insurer with respect to loss of earnings, but whatever the position it does not impact upon the figure which I award.

### **General damages**

8. General damages are more contentious. The Plaintiff has undergone one of the most unpleasant experiences that a human can undergo. That experience was life-threatening. The harm that he suffered was therefore serious. The award of general damages should reflect this.
9. Following his operation, the Plaintiff developed symptoms which, while relatively minor, continue to impact on his quality of life. It is speculative to say that they would probably have developed as a result of the operation anyway, even had it been carried out promptly. I am therefore satisfied that a material cause of these symptoms was the Defendant's negligence.

10. The Judicial College Guidelines from England and Wales provide no closely relevant guidance. However I have been referred to several unreported cases from that jurisdiction with broadly comparable facts.
11. Mr Pachai relies on Petch v Trafford Health Authority. This is an unreported judgement of Rix J (as he then was) given in the High Court on 1<sup>st</sup> March 1996. The facts are reported in the Personal Injuries Quantum Database for the case:

The plaintiff [who was aged 31 years at the date of the accident] developed a small left-sided inguinal hernia and was referred for hospital treatment. During a laparoscopic repair operation a 3 cm tear was caused to the dome of the plaintiff's bladder. An attempt to staple a prolene mesh to the posterior abdominal wall failed and several metal staples entered the bladder. The defect in the bladder was undetected for two days, by which time the plaintiff had developed severe peritonitis and toxæmic shock. The bladder defect was repaired when the plaintiff underwent a laparotomy but, following the procedure, he was found to be suffering from septic shock, adult respiratory distress syndrome, disseminated intravascular coagulation, acute renal failure and cardiovascular collapse. The plaintiff remained in intensive care on cardiovascular support and kidney dialysis for three weeks and remained catheterised for approximately three months. The toxæmia resulted in the plaintiff suffering a metabolic encephalopathy, causing slight neurological damage that resulted in difficulty with attention, concentration and memory. He was more irritable after the incident and suffered moderate traumatic stress disorder, in relation to which the prognosis was good. The bladder symptoms had improved by the date of the trial, although the plaintiff would continue to suffer slight urgency and frequency of micturition. The hernia was never adequately repaired and the plaintiff continued to suffer a left-sided inguinal hernia together with an incisional hernia on the line of an ugly laparotomy scar. The plaintiff was in need of a further repair operation.

12. The plaintiff in that case was awarded general damages of GBP 20,000. At today's value, and updated in accordance with Heil v Rankin [2001] QB 272, EWCA, that figure would be GBP 34,250. In Bermuda, under the rule in Wittich v Twaddle, SC, Civil Jurisdiction 1979 No 117, the dollar value

of an English award is calculated by doubling the GBP figure. Thus today the value of the award in Petch in Bermuda would be \$68,500.

13. This approach is reflected in the observation of Ward J (as he then was) in this Court in Gilbert v Clarke [1990] 39 at page 5:

A judge must always relate an award to the society in which the award is made and must consider its real value in monetary terms.

14. In Petch the plaintiff experienced ongoing symptoms which, while of moderate severity, were significantly more serious than the ongoing symptoms experienced by the Plaintiff in the instant case. This suggests that were I to take Petch as a comparator, the award which I make should be reduced to reflect these differences.
15. Mr Doughty, who appears for the Defendant, referred me to two cases summarised on Lawtel. Mr Doughty has condensed the summaries, and I gratefully set out his condensed versions.

In the case of L v Nottingham City Hospitals Trust (2001) the Plaintiff [who was aged 65 years at the date of the injury] attended the Defendant Hospital after experiencing a few days of abdominal discomfort. The following day it was observed that he had a fever and was tachycardic. A laparotomy was then performed and generalized peritonitis was found. The Plaintiff was subsequently admitted to the Intensive Care Unit at which time sepsis was diagnosed. The Plaintiff thereafter developed ARDS and a small bowel peritoneal haemorrhage and died 10 days later. The Plaintiff's estate settled the claim for GBP 4,393 [of which GBP 3,000 was for pain, suffering and loss of amenity. The Hospital did not admit liability. The current value of the Plaintiff's claim for pain, suffering etc, taking into account the RPI, would be GBP 4,395, which equates to \$8,790.]

In the case of KH v University Hospital of North Staffordshire NHS Trust (2011) the Plaintiff [who was aged 26 years at the date of the injury] was admitted to hospital after suffering head injuries in a road traffic accident. While in hospital the Plaintiff pulled out his nasogastric tube. While waiting for that tube to be replaced the Plaintiff was not administered intravenous fluids. As a result of this the Plaintiff's Glasgow Coma Scale fell, he became tachycardic and his temperature

became elevated. Shortly thereafter the Plaintiff entered cardiac arrest. Upon being resuscitated, the Plaintiff was transferred to the ICU where he was sedated and intubated for five days. After 15 days in the ICU the Plaintiff was discharged. [The Hospital admitted liability.] As the settlement needed to be approved by a Judge, the Court indicated that an offer of Settlement of GBP 5,000 [for pain, suffering etc] would be acceptable. It was on that basis that the settlement was reached and ultimately approved by the Court. [The current value of the settlement, taking into account the RPI, would be GBP 5,340, which equates to \$10,680.]

16. In neither case did the plaintiff suffer ongoing symptoms: in KH because he recovered fully and in L because he died. Moreover, KH involved a settlement which was approved by a County Court judge and L, in which the defendant did not admit liability, involved a settlement which was not submitted to the Court for approval. These cases therefore carry less weight than Petch, in which damages for pain, suffering etc were assessed by a High Court judge.
17. I have considered the particular facts of this case and the authorities to which I have been referred. Of these, I have found Petch to be the most helpful. I award general damages in the sum of \$58,000. This is in addition to the \$2,000 in general damages which I have awarded previously. Interest runs on the general damages at a rate of 3.5% from the date of issue of the writ, namely 15<sup>th</sup> March 2012.
18. I shall hear the parties as to costs.

Dated this 14<sup>th</sup> day of May, 2014

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Hellman J