[2012] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 139/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN ELECTORAL OFFICE OF JAMAICA APPELLANT

AND HAUGHTON DUHANEY RESPONDENT

Miss Lisa White and Miss Alicia McIntosh instructed by the Director of State Proceedings for the appellant

Miss Tania Mott instructed by Marion Rose Green & Co for the respondent

23 November 2010 and 22 June 2012

PANTON P

[1] I have read in draft the judgment of Harris JA and agree with her reasoning and conclusion. I have nothing further to add.

HARRIS JA

[2] This appeal challenges the quantum of damages awarded by Rattray J on a claim made by the respondent for damages for breaches of statutory duty and negligence. Rattray J ordered as follows:

"1. By and with consent of both parties judgment entered in favour of the claimant against the First named Defendant.

2. Damages assessed in favour of the Claimant in the amount of:
Eight Million Dollars ($8,000,000.00) for Pain and Suffering and Loss of Amenities plus interest at the rate of 6% per annum from July 30, 2001 to June 21, 2006 and thereafter interest at the rate of 3% per annum from June 22, 2006 to September 17, 2009.

Two Hundred and Twenty-nine Thousand Five Hundred Jamaican Dollars (J$229,500.00) and Eight Hundred Pounds Sterling (£800.00) for Special Damages plus interest at the rate of 6% per annum from November 2, 1997 to June 21, 2006 and thereafter interest at the rate of 3% per annum from June 22, 2006 to September 17, 2009;

One Hundred and Sixty-four Thousand Dollars ($164,000.00) for future medical expenses."

BACKGROUND

[3] On 2 November 1997, the respondent was a passenger in a motor vehicle which collided into a utility pole. At the time of the collision, the respondent was employed to the appellant and the motor vehicle was being driven by the appellant's agent. Arising from the collision, the respondent sustained extensive injuries mainly to the head, face and neck and was hospitalized for several days. On 24 July 2001, he commenced proceedings against the appellant and the driver outlining in his statement of claim the following particulars of injuries:

"PARTICULARS OF INJURIES

1. Loss of consciousness
2. Laceration vertical to forehead four to five (4-5) cm
3. Headaches
4. Periorbital haematoma bilaterally
5. Pain in lumbar sacral
6. Fracture (undisplaced) zygomatic complex (left side of face)
7. Temporomandibular pain in left face
8. Cerebral conscussion [sic]
9. Avulsion of L incisor
10. Mouth opening restricted to 50%
11. Trigeminal Neuralgia (Pain in the left temporal side of the head and face.
12. Tenderness at the left temporomandibular joint pain radiating across face, left to right and reverse.
13. Numbness in the right maxilla
14. Fracture [sic] facial and nasal bones
15. Massive pain in the left side of the face
16. Trigeminal Neuralgia (pain in the fifth cranial nerve due to damage [sic] nerve) which last [sic] for a day to days.
17. Damage to the left temporomandibular joint, which will restrict the opening of his mouth to 50%.
18. Inability to function in his present capacity as a driver.
19. Cut on his forehead and broken bones in his nose, face and lower jaw.
20. Upper and lower teeth were knocked out and the bone around the upper teeth was broken.
21. Deformed face despite operation on his nose
22. Confused on and off
23. Inability to chew properly
24. Inability to open his mouth widely and thus has to use hand to pry it open.
25. Crimpy sound in his left ear when chewing
26. Numbness in his right face and cheek
27. Itching of right eye and foggy vision when he looks to the left.
28. Swelling of his right cheek

29. Obvious asymmetry of his face with flattening of his glabella and nasofrontal bone areas.
30. 2.5cm scar vertical to the glabella
31. Nasal bones show mild shift to the left
32. Fracture site depressions at left and right infraorbital bones.
33. Paresthesia of the right cheek and upper lip over the distribution of the right infraorbital nerve.
34. Limitation of movement in his left tempromandibular [sic] joint with bone clicking and rubbing when opening mouth.
35. Fractured frontal-glabellar nasal bones
36. Fractured left Zygomatic (cheek) bones
37. Undisplaced fracture of right infraorbital area causing crush injury of right infraorbital nerve hence the numbness in his right face and upper lip
38. Traumatic avulsion of the lower and upper teeth
39. Fractured left subcondylar area of the lower jaw
40. Infraorbital nerve injury causing paresthesia after three years is now permanent, also the articular sounds in his left tempromandibular [sic] joint.
41. Permanent recurrence of sinusitis.
42. Head injury with concussions and a 2 inch laceration on the forehead associated with bruising around both eyelids on both sides.
43. Bruising around the nose and right side of his face
44. Bruising and swelling in the lumbar region of his back
45. Pain and swelling over the zygomatic region of his face
46. Facture of the frontal bone of the skull
47. Continual pain over the left temporal mandibular joint.
48. Persistent frontal headaches
49. Constant feeling of heaviness and discomfort in the face.
50. Tendency to be forgetful of recent matters to the extent that he would forget things that he had just read and often tended to forget engagements and appointments.

51. Pain in the region of the left tempromandibular [sic] joint when he attempted to fully open his mouth fully [sic].
52. Feeling of numbness over the right cheek
53. Pains over the back of the neck
54. Deficiency of approximately 10% in recent memory function both for verbal and visual memory.
55. Vertical curvilinear two-inch scar is present near the midline of his forehead.
56. Cutaneous sensation is impaired over the right cheek overlying the fracture of his zygomatic bone indicating a crushing injury to the branches of the infraorbital nerve on this side.
57. There is restriction of the range of motion of the cervical spine for lateral rotation in both directions by approximately 30%.
58. Impairment of recent memory function is compromised by 10%; which is 5% of the whole person.
59. Scar on his forehead, approximately 2 inches and is readily visible in daylight at ordinary conversational distance; it constitutes a cosmetic defect.
60. Traumatic neuritis which gives rise to facial discomfort. This impairment is 2% of the whole person.
61. Headaches are post concessional
62. Painful restriction of the range of motion of his neck indicates a Cervical Whiplash [sic], the brunt of the neck injury being borne by the muscular and ligamentous structures in the neck which have healed with some scarring. The disability is 3% of the whole person.
63. Permanent partial disability arising out of the neurological injuries is assessed at 9% of the whole man.
64. Temporarily totally disabled for a period of 9 months immediately following the accident."

His claim for special damages included a claim for paid assistance from November 1997 to December 1999 and from January 2000 to July 2001, loss of earnings and medical expenses.

[4] A defence was filed by the appellant in which it initially denied liability but at the commencement of the trial, it resiled from this position and a consent judgment was entered. The trial therefore proceeded only in relation to damages. In seeking to prove his claim, the respondent relied on the medical reports of Dr S Donaldson of the Faciomaxillary Department of the Kingston Public Hospital and of Dr Randolph Cheeks and Dr Hal Shaw. The respondent's injuries as outlined in the medical report of Dr Donaldson dated 20 May 1999 were as follows:

> "1. Laceration vertical to forehead four to five (4-5) cm
> 2. Periorbital haematoma bilaterally
> 3. Alert and conscious with headaches
> 4. Pain in lumbar sacral region of back
> 5. Pain in nose and left ear
> 6. Fractured nose – Frontal bones
> 7. Fractured (undisplaced) zygomatic complex (left side of face)
> 8. Temporomandibular pain in left face
> 9. Cerebral concussion
> 10. Avulsion of L incisor"

Surgery was performed on his naso-frontal bones. The extent to which he was able to open his mouth ranged from 80% in January of 1998 to 50% in February of 1999. He was diagnosed as having fractured facial and nasal bones, massive pain in the left side of his face and pain in the fifth cranial nerve due to damage to the nerve. It was opined that the respondent's ability to open his mouth would be restricted to 50% and that he

would continue to suffer the pain in his fifth cranial nerve, which came on without notice and lasted "a day to days".

[5] Dr Cheeks, a consultant neurosurgeon saw the respondent in December 2000. In his report dated 5 January 2001, he noted the following:

> "His higher mental functions are intact except for a deficiency of approximately 10% in recent memory function both for verbal and visual memory.
> A vertical curvilinear two inch scar is present near the midline of his forehead
> Cutaneous sensation is impaired over the right cheek overlying the fracture of his zygomatic bone indicating a crushing injury to the branches of the infraorbital nerve on this side
> The special senses are intact
> His ability to fully open his mouth is impaired by approximately 20%
> There is a restriction of the range of motion of the cervical spine for lateral rotation in both directions by approximately 30%
> The lumbar spine has a full painless range of motion
> His gait, posture and coordination are intact, and all four limbs are normal in all neurological respects
> Examination of the chest, heart, lungs and abdomen was unremarkable."

He also noted that the respondent was of healthy general appearance with physiological vital signs, was fully alert and that he spoke with rational coherent speech. He further stated that he did not detect any signs of any general medical disorder. He opined that the injury to the head was a concussion of moderate severity, that impairment of recent memory function, of which the respondent complained, was a recognized sequel and that his memory function was compromised by 10%. He further opined that injury to the right infraorbital nerve had healed with inflammation in the nerves (traumatic

neuritis) which resulted in the facial discomfort of which the respondent complained. This injury had resulted in 2% disability of the whole person.

[6] He was also of the view that the restricted range in motion in the respondent's neck resulted in a disability of 3% of the whole person and that the headaches of which the respondent complained were post-concussional in nature and were expected to subside in time. He assessed the permanent partial disability arising out of the respondent's neurological injuries as being 9% of the whole man. He also stated that the respondent should be regarded as being temporarily totally disabled for a period of nine months immediately following the accident.

[7] The report of Dr Hal Shaw, an ear nose and throat maxilla facial plastic surgeon, dated 9 February 2001, recorded the respondent's complaints as follows:

> "1) He was unconscious and woke up in KPH 4 days after the accident.
> 2) He had a cut on his forehead and broken bones in his nose, face and lower jaw.
> 3) His upper and lower teeth were knocked out and the bone around the upper teeth was broken.
> 4) His face is deformed despite an operation at KPH on his nose.
> 5) He is confused on and off.
> 6) He cannot chew properly.
> 7) He cannot open his mouth widely and thus has to use his hand to pry it open sometimes.
> 8) 'Crimpy' sound in his left ear when chewing.
> 9) Numbness in his right face and cheek.
> 10) Itching of right eye and foggy vision when he looks to the left.
> 11) Swelling of his right cheek on and off."

He indicated that his examination revealed the following:

> "There is an obvious asymmetry of his face with flattening of his glabella and nasofrontal bone areas. There is a 2.5cm scar vertical at the glabella. His nasal bones show mild shift to the left. There are possible old fracture site depressions at left and right infraorbital bones. There is paresthesia of the right cheek and upper lip over the distribution of the right infraorbital nerve. There is limitation of movement in his left TMJ with bone clicking and rubbing when opening mouth.
> Oral cavity and teeth- There were missing upper right central and left central and lateral incisors. Lower right 1st premolar and 1st molar, left 1st and 2nd premolars and molars. "

He opined that the respondent's complaints could be substantiated by the injuries he received and that the infraorbital nerve injury causing paresthesia and the sounds to be heard in the left ear while chewing were permanent. It was also his opinion that the occasional swelling of the respondent's right cheek showed recurrent sinusitis which could also be permanent.

[8] The appellant filed the following two grounds of appeal challenging Rattray J's decision:

> "iii. The Learned Judge erred in finding that there was a paid assistance [sic] for the period of four years is reasonable [sic], as the evidence provided did not support such an award.
>
> iv. The Learned Judge erred in making an excessive award in the circumstances."

Ground one

[9] In written submissions, it was submitted on behalf of the appellant that the learned judge had erred as a matter of fact in finding that the services of a paid

assistant were necessary for a four year period. There was no medical evidence to indicate that there was such a need. At best, the medical evidence was that the respondent had been incapacitated for nine months following the accident. It was further argued by Miss White that although it was open to the court to come to the conclusion that the respondent's partial disability extended beyond the period of permanent disability, there was no medical evidence to prove that his disability was such that a paid assistant was necessary, or even any evidence from the alleged caretaker that assistance was in fact provided. She submitted that the learned judge did not award damages for loss of earnings because he was of the view that the medical evidence did not support that claim and so, the same evidence should have guided the court in relation to the claim for paid assistance. It was also her contention that the respondent had departed from the rule as outlined in ***Murphy v Mills*** (1976) 14 JLR 119 that special damages ought to be strictly proved.

[10] Miss Mott submitted that there was evidence from the respondent by way of his witness statement that he had been in need of assistance. The judge, it was argued, had used his common sense on the medical evidence before him, and the respondent's testimony in examination in chief and cross-examination. The judge, she argued, would have had the benefit of the respondent's physical appearance in court and would have observed his demeanour and ability to stand or sit while being examined by the attorneys. There was also the evidence, she argued, contained in two medical reports, almost four years after the accident that the respondent was still in great pain and discomfort and experiencing much inconvenience. The judge, it was submitted, had

taken the evidence as a whole and had exercised his discretion, and found as a fact that after the initial nine months, the respondent would still be disabled due to the gravity and extensiveness of the injuries suffered. She also pointed out that the award had been made in relation to the period of three years and five months as claimed, and not four years. In relation to the issue of the failure of the respondent to adhere to the rule that special damages should be specifically pleaded, relying on ***Clifford Sewell v Kirk Mitchell*** Suit No CLB 241 of 2001, delivered 13 July 2001, Miss Mott contended that there was case law to suggest that the court must take the parties before them as it finds them. She cited the case of ***Bowen v Ho-Shue*** SCCA No 23/2002, delivered on 30 July 2004, and submitted that the learned judge, based on what was before him, could have drawn the inference that the respondent required the help for four years.

[11] The appellant's challenge is firstly in relation to a finding of fact, that is, that the paid assistance was necessary for the period awarded, which, by my calculation, was three years and seven months. This court may disturb a finding of fact only where it is demonstrated that the trial judge was plainly wrong or he so misdirected himself on the facts that it would be manifestly unjust to allow the judgment to stand (***Industrial Chemicals v Ellis*** (1986) 35 WIR 303; ***Ivanhoe Baker v Michael Simpson*** SCCA No 50/2000 delivered 20 December 2001).

[12] It is true that the medical report of Dr Cheeks indicated that the respondent would be totally disabled for nine months. It is also true that the respondent did not refer to any information in the report which stated expressly that assistance would have

been needed for four years after the accident. In dealing with this issue, the learned judge said at paras 24-25:

> "24 …As a Consultant Neurosurgeon, Dr. Cheeks' report has focused on his area of specialty. In giving his considered view of Mr. Duhaney's condition, he regarded him as temporarily totally disabled for a period of 9 months immediately following the accident. That does not mean, nor could it be taken to mean, that thereafter Mr. Duhaney was fully recovered. It is clear that after that initial period, in light of the severity of his injuries, the Claimant would still be disabled, if only partially, due to the gravity and extensiveness of the injuries suffered.
>
> 25. The medical reports of Dr. Shaw and Dr. Cheeks were both prepared in the early part of 2001…. Despite the passage of over three (3) years between the accident and the dates of those reports, Mr Duhaney's injuries were still a source of great pain, discomfort and inconvenience. It is therefore not unreasonable, in the circumstances of the present case, to understand the need for a paid assistant to aid the Claimant as he dealt, as best as was possible with these multiple injuries."

[13] In evaluating the amount claimed by the respondent for paid assistance, the learned judge took into account the evidence of the respondent and the medical evidence that was before him. In assessing the evidence of the respondent he said the respondent stated that he had to secure the service of a helper for four years due to the nature and extent of his injuries. He found that there was a discrepancy as to the period during which the helper was engaged, for the reason that the respondent's claim for reimbursement of the amount paid to the helper was not in conformity with his pleading. It was also his finding that the respondent's wife rendered assistance to him for two months prior to the hiring of the helper which he discounted. As a result, he

also found that the respondent's claim would qualify him for reimbursement from January 1998 to July 2001 and not 10 November 1997 to 3 July 2001 as pleaded.

[14] The learned judge reviewed the medical evidence adduced in the reports of Doctors Cheeks, Donaldson and Shaw. As can be observed, he noted that Dr Cheeks stated that the respondent's total disability would have lasted for nine months, and concluded that this would not necessarily mean that he had fully recovered. It was open to the trial judge to assess the nature of the injuries as described in the medical reports and, by inference, determine whether it was reasonable in those circumstances for the respondent to have obtained assistance. The learned judge would have had to consider the fact that although Dr Cheeks' medical report stated that the respondent's gait, posture and coordination were intact, the doctor observed that there was painful restriction of the range of motion of the neck. The doctor also did not present an opinion that was at variance with the respondent's complaint about headaches and pain and tenderness in the neck and facial region. In these circumstances, it cannot be said that the learned judge was plainly wrong in making his findings.

[15] The learned judge, having concluded that the expenditure incurred by the respondent was reasonable and necessary, made the award of $219,500.00. The issue which now arises is whether the learned judge was correct in making the award in light of the fact that, it being an item of special damages, there was an absence of "evidence other than that of the respondent that he had paid for his care". It is well accepted that special damages ought to be strictly proved and as a consequence, a claimant cannot expect "to write particulars, and, so to speak, throw them at the head of the Court.

They have to prove it" (per Lord Goddard in ***Bonham Carter v Hyde Park Hotel*** (1948) 64 TLR 178, referred to with approval in ***Murphy v Mills***). However, this is not an inflexible requirement; a court must take into account the peculiar circumstances of the case. In ***Bowen v Ho-Shue*** *Cooke* JA said:

> "This court has accepted the principle that there is an onus on a plaintiff to prove his loss strictly. See ***Lawford Murphy v Luther Mills*** [1976] 14 J.L.R. 119. However, what is sufficient to amount to strict proof will be determined within the context of the particular case. For example, a casual worker could not be expected to produce documentary evidence of his earnings."

[16] In ***Wayne Ann Holdings v Sandra Morgan*** [2011] JMCA Civ 44, delivered on 2 December 2011 this court allowed an award for paid assistance in the absence of receipts to substantiate the claim. In my view, it is not unreasonable to conclude that the arrangement in relation to the paid assistant may not have been of so formal a nature as to involve the giving of receipts. It would therefore have been for the judge, after observing the respondent being tested under cross-examination, to decide whether he accepted his evidence that he had paid for the help. In my view, once the learned judge was satisfied that the nature of the injuries was of such as to require the extra help and he believed the respondent that he had paid these sums, he was entitled to make the award. I can see no basis for disturbing the award under this head of damages. This ground therefore fails.

Ground two

[17] The complaint of Miss White in this ground is that the 63 particulars

of injuries listed contained some amount of repetition. She cited, as an example, the fact that although there was one laceration indicated on the report from the Kingston Public Hospital, where the respondent was first seen, there were various references to it in the particulars. The injuries sustained as recorded in the three reports were finite, but were multiplied in the claim, she argued. She further submitted that the respondent had failed to put any recent medical evidence before the court to enable the court to properly assess general damages, as the assessment was made in 2009, but the latest medical report had been done in 2001. The medical reports, it was submitted, when read chronologically, show that there was improvement over the three year period between the date of the accident and the preparation of the reports. It was also argued that the judge had failed to give due consideration to the cases cited by the appellant, which were ***Walter Amore v Ruel Sudu***, Khan's, Volume 5 at page 185, ***George Dawkins v the Jamaica Railway Corporation*** Khan's Volume 5 at page 104 and ***Charley Brown vs Cummings and Miller*** *Harrison's Assessment of Damages for Personal Injuries* at page 61. Referring to the authorities of ***Tanya Reid v Dacres & Dacres*** *CL 1998 R021,* delivered 17 August 2000, ***Ucal Simpson v Allied Protection***, claim no 0935/2007, delivered 13 July 2010 and ***Norris Francis v UC Russal Alumina Ja Ltd***, claim no 03957/2007, delivered 13 July 2010, Miss White submitted that the award of $8,000,000.00 for general damages was inordinately high and that a reasonable award in the circumstances would have been $4,000,000.00.

[18] Miss Mott sought to distinguish the cases relied on by the appellant arguing that the injuries suffered in those cases were less serious when compared to the

respondent's injuries. She further argued that ***Reid v Dacres & Dacres*** and ***Dawkins v Jamaica Railway Corp*** were unhelpful as the injuries were not comparable. Relying on the principle expounded in ***Flint v Lovell*** [1935] 1 KB 354, as to the basis upon which an appeal court may disturb an award, Miss Mott submitted that this court ought not to disturb the award as there is nothing in the reasoning of Rattray J to indicate that he had misdirected himself as to the law, or that the award was extremely high.

[19] As was rightly submitted by Miss Mott, this court will not interfere with an award in damages unless it is shown that the judge made a "wholly erroneous estimate of the damage" to which a claimant is entitled or that he "acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small" (***Flint v Lovell; Clarke v Olga James Reid*** SCCA No 119/2007, delivered 16 May 2008).

[20] The learned judge in dealing with this issue, outlined the injuries as disclosed by the medical reports and observed that the latest medical report had been some eight and a half years before trial. However, he noted that the respondent's evidence revealed that those injuries were still heavily impacting his body "as regards the continuing pain throughout his body, his inability to chew solid food without discomfort, being unable to exercise and take part in the game of cricket which he enjoyed prior to the accident". He then examined the cases of ***Isiah Muir v Metropolitan Parks and Markets Ltd and Dennis Whyte*** Khan's Vol 4 at page 185 and ***Vin Jackson v Gibbs*** *Harrison's Assessment of Damages for Personal Injuries* at page 55, on which the respondent relied. The updated awards in these cases were $6,792,091.80 and

$10,490,832.00 respectively. The learned judge accepted that there were similarities between the injuries sustained in ***Jackson v Gibbs*** and those suffered by the respondent, but was of the view that the authority was not wholly useful as it was not possible to ascertain from the report how much of the award may have been apportioned to the several categories of general damages. He then reviewed the cases referred to by the appellant but was of the view that the injuries sustained by the respondent were far more serious than those suffered by the claimants in ***Charley Brown*** and ***George Dawkins*** for which the updated awards were $520,000.00 and $1,516,014.00 respectively. In relation to ***Walter Amore***, he noted that the court in that case found that the most significant injury was a skull fracture and he expressed the view that the injuries suffered by the respondent were more extensive than those suffered in that case although the percentage disability was less. It is therefore not correct to say, as the appellant asserted, that the learned judge did not take into account the cases it had cited.

[21] In ***Jackson v Gibbs***, the injuries sustained were: concussion and swelling of the head; basal fracture involving the temporal bone; contusion of the 7th cranial nerve; and injury to the right facial nerve. Although these injuries and the resulting disability were of a similar nature to that of the respondent, the extent of the respondent's permanent disability is less in that the respondent is not suffering from paralysis of the 7th cranial nerve, a twisted face and speech impediment. In the light of these facts and the fact that there was no indication of what specific sum was awarded for pain and

suffering and loss of amenities, I agree with the learned judge that this case was of limited use and therefore the award to the respondent would have to be far less.

[22] In ***George Dawkins***, the plaintiff was unconscious and hospitalized for six weeks. His injuries were fracture of the upper jaw with cranio-maxillary disruption; fractures of the inferior orbital area on the left side of the face associated with severe nose bleed; fracture of the lower jaw (mandible); laceration and swelling of the tongue and lacerations above the elbow, below the left eye and of the upper lip. His residual disability included: residual facial asymmetry, that is, the eye levels were not the same; facial scarring below the left eye; impairment in the sense of smell; left lateral rectis palsy; dilopia in looking up or to the left; and difficulty in breathing through his left nostril. There is no indication in the report of the case of the personal disability rating of the plaintiff. Although the learned judge fully reviewed this case, it appears that he was of the view that the updated award in this case would not provide appropriate guidance.

[23] In ***Walter Amore,*** the plaintiff suffered fracture of the left frontal bone of the skull; fracture of the base of the skull, leaking of the cerebro-spinal fluid from the left nostril and injury to the left eye and shoulder. The fracture of the base of the skull exposed the brain matter to infection and involved vital nerves particularly those dealing with hearing, sense of balance as well as the nerves involving recent memory function. His loss of hearing was quantified as being 4%. He also had several dizzy spells and suffered from post-concussional disorder. His disability of the whole person was assessed at 17% and he was stated to be functioning at 40% in his psychological,

social and occupational area. The trial judge found that the fracture to the skull was the major injury. An award of $1,800,000.00 was made for pain and suffering and loss of amenities, which , when updated converts to $4,337,349.40.

[24] In the respondent's case, the fracture was to several bones in his face. This fact taken together with his loss of several teeth, suffering severe pain to his face and his neck and impairment of his eating function could reasonably lead to the conclusion that his injuries were more extensive than Amore's. Both Amore and the respondent suffered similar disabilities in relation to the concussion and impairment of psychological functions. However, Amore's resultant disability was far greater. In the case at bar it is to be noted that other than the respondent's evidence, there was no medical evidence as to the respondent's percentage disability some 11 years after the accident. This information would have been useful; particularly since it appears that there was some improvement in the respondent's condition over the period for which the reports were prepared.

[25] In ***Isiah Muir,*** the plaintiff had been unconscious, suffered a compound fracture of the skull, central concussion and laceration to the left forehead. He complained of headaches, loss of consciousness on five occasions with generalized stiffening of the body, a cramp-like feeling in the left leg, change of personality and undue irritability. Dr Cheeks' opinion was that he suffered concussion associated with compound linear fracture of the skull vault and was experiencing post-concussional syndrome associated with post-traumatic epilepsy. He was given anti-epileptic medication which he would need for life. The doctor opined that the headaches and

irritability were features of post-concussional syndrome and would be resolved in the coming months. In ***Isiah Muir***, the major injury appeared to be a compound fracture to the skull. Muir had similar post-accident complaints, although they were not as varied as those of the plaintiff in ***Walter Amore*** or the respondent. It may therefore be said that ***Muir*** too is a comparable case, and contrary to the appellant's contention, the cause or source of the injury is immaterial. The injuries and disability the respondent suffered could be viewed as being more extensive than those suffered by the plaintiff Muir, which would necessitate a higher award. It is true that the award of $8,000,000.00 made to the respondent far exceeds that which was made in ***Walter Amore***, which could be considered a comparable case. However, in ***Walter Amore***, clearly there was no evidence that Amore had attempted to mitigate his loss. This could account for the amount awarded to him.

[26] The object of an award is to compensate a claimant for the wrong he has suffered. The practice is for a trial judge to be guided by comparable cases. However, in making an award he should consider what is a fair compensation in the particular case**.** In ***Pickett v British Rail Engineering Limited*** [1980] AC 136, at page 168 Lord Scarman said:

> "There is no way of measuring in money pain, suffering, loss of amenities, loss of expectation of life. All that the court can do is to make an award of fair compensation. Inevitably this means a flexible judicial tariff, which judges will use as a starting-point in each individual case, but never in itself as decisive of any case. The judge, inheriting the function of the jury, must make an assessment which in the particular case he thinks fair: and, if his assessment be based on correct principle and a correct understanding of the facts, it is

> not to be challenged, unless it can be demonstrated to be wholly erroneous: ***Davies v Powell Duffryn Associated Collieries Ltd*** [1942] A.C. 601."

[27] It should be borne in mind that in deciding on a reasonable compensatory sum for pain and suffering, it is a matter for a trial judge to weigh up the circumstances of a particular case and adopt an approach which would justify the award made. The learned judge, at paragraphs 51 and 52 of his judgment said:

> "51. It is readily accepted that no two cases of persons sustaining personal injuries are exactly alike. And yet our system of justice requires that, as far as is possible, there be consistency in awards involving similar injuries. The award of a sum of money as compensation for severe and extensive injuries suffered in an accident, as in the present case, can never put a person back in the position he was in prior to the accident, nor provide adequate solace for his misfortunes. The unenviable task of the Court is to arrive at a fair money value as redress for a claimant's afflictions, in effect doing what has been described as 'measuring the immeasurable.'
>
> 52. After careful consideration of the authorities cited by Counsel and having reviewed the evidence in this matter, I believe the sum of **$8,000,000.00** to be an appropriate award for Pain and Suffering and Loss of Amenities."

There can be little doubt that the learned judge had given due consideration to the authorities cited against the background of the injuries and resultant disability of the respondent. The learned judge, in making the award of $8,000,000.00, was doing what he considered his best in what was an imprecise exercise. I would not say he was wrong.

[28] I would dismiss the appeal with costs to the respondent to be taxed if not agreed.

DUKHARNAN JA

[29] I too agree with the reasoning and conclusion of Harris JA and have nothing to add.

PANTON P

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.