Nirumalan V Kanapathi Pillay v Teo Eng Chuan
[2003] SGHC 96

Case Number : Suit 1129/1994, RA 600081/2002

Decision Date : 21 April 2003

Tribunal/Court : High Court

Coram : Kan Ting Chiu J

Counsel Name(s) : Liew Teck Huat (Niru & Company) for the Plaintiff; Ms Chua Hwee Ping (Niru & Company) for the Plaintiff; B Rao (B Rao & KS Rajah) for the Defendant; Fazal Mohamed (B Rao & K S Rajah) for the Defendant

Parties : Nirumalan V Kanapathi Pillay — Teo Eng Chuan

Civil Procedure – Delay – Delay in prosecution of case – Consequences on pre-trial interest on damages – Civil Law Act (Cap 43, 1999 Rev Ed) s 12(1)

Damages – Quantum – Personal injuries cases – Loss of earning capacity – Pain and suffering – Application of precedents – Whiplash injury

1 The plaintiff Mr Nirumalan V Kanapathi Pillay is an advocate and solicitor and managing partner of the law firm Niru & Company he established.

2 On 19 July 1991, the plaintiff was injured when the taxi he was in was involved in a motor accident. He was thrown forward and injured his cervical spine. His condition, which did not appear serious initially, worsened with time. From 1995, he was examined by neurosurgeons and other medical specialists.

3 He instituted legal proceedings in 1994. In May 1995, he obtained an interlocutory judgment, with damages to be assessed. The assessment was conducted by an assistant registrar. It started on 1 October 2001 and concluded on 30 August 2002.

4 He was unhappy with the outcome and appealed. He felt that some of the awards made were too low and that some other awards should have been made which were not. I will deal with each of his complaints.

Pain and suffering

5 The plaintiff suffered a whiplash injury to the spine with posterior disc prolapse at the C5/C6 and C6/C7 levels. This was particularly unfortunate because the plaintiff has a congenitally narrow spinal canal. Dr Balaji Sadasivan, a consultant neurosurgeon who attended to him between 1995 and 1999 described the injury as moderate.[1]

6 The assistant registrar noted that "it is undisputed that the plaintiff has a disc prolapse due to the trauma and that this aggravate his canal stenosis. He also has nerve root denervation at C7 leading to radiculopathy. He has weakness in both hands, a stiff neck and frequent headaches."[2]

7 There was a divergence in the medical opinion whether myelopathy, which is the functional disturbance or pathological change in the spinal cord, has set in. Dr Balaji, Dr V K Pillay, Mr Alan Crockard and Mr D A Campbell, neurosurgeons engaged by the plaintiff found signs of early myelopathy in 1997. On the other hand another neurosurgeon the plaintiff consulted, Professor Andrew Kaye examined him in 1999 and found that the plaintiff may need to have an operation as "it would diminish the risk of the development of a myelopathy in the future, and it would also reduce the risk of a sudden paralysis associated with a minor jolt to the neck."[3]

8 Dr Robert Don, a surgical specialist in rehabilitation medicine went through the plaintiff's medical reports at the request of the defendant in 1998. Dr Don was of the opinion that there was no myelopathy because the condition is progressive, and if it had set in there would be more severe neurological impairment and functional disability than was found.[4] Dr Ho Kee Hang, a neurosurgeon engaged by the defendant to examine the plaintiff in April 1999 found no clinical or radiological evidence of myelopathy.[5]

9 In the light of the divergent findings and opinions, the assistant registrar ruled that

> Bearing in mind the irreconcilable medical evidence, I am unable to conclude that the plaintiff is suffering from myelopathy and accordingly I hold that the plaintiff has not discharged the burden of proof in this respect. However, what is plain from the evidence is that the plaintiff's condition will continue to degenerate if there is no surgical intervention. His congenitally narrow spinal canal also made him susceptible to complete paralysis if he should suffer another jolt. The medical experts, including Dr Ho, agreed that the plaintiff should undergo surgery to prevent further degeneration of the spinal condition. That being the case, I find that it would be reasonable for the plaintiff to undergo the recommended surgery to remedy the radiculopathy as well as to prevent the onset of myelopathy.[6]

10 The assistant registrar was right that the evidence was not consistent and that the plaintiff had not established myelopathy.

11 Counsel for the plaintiff submitted that the assistant registrar had not given proper consideration to the fact that the plaintiff has bowel dysfunction which could have been caused by myelopathy. The evidence counsel was referring to came from gastroenterologist Dr Melvyn Korman, whose opinion was that it is possible that the spinal injury could make a contribution to irritable bowel syndrome, but the doctor also stated that the syndrome could be caused by the stress and anxiety that the plaintiff had experienced[7] and his further opinion that the plaintiff "suffers irritable bowel syndrome made considerably worse by the ongoing stress since his car accident and neck spinal code injury."[8] In fact the plaintiff had experienced bowel dysfunction and had consulted Dr Korman even before the accident.

12 I do not think that counsel's criticism of the assistant registrar is justified. The evidence falls short of showing that the plaintiff's bowel condition was the result of myelopathy. The condition existed before the accident, and could have been aggravated by stress rather than myelopathy.

13 In arriving at the award, the assistant registrar referred to several precedents. The first is *Lim Ai Geok v Ang Gim Choon* [1999] Mallal's Digest para 1231 where $22,000 was awarded for the damage to intervertebral discs leading to severe disc degeneration in four lower discs (L2-3, L3-4, L4-5, L5-S1) with L3-4 and L4-5 discs slightly bulging, and narrowing spinal canal and disc herniation. There was the possibility of the degenerated discs prolapsing and causing severe pain and affecting nerves in the spinal canal.

14 The second is *Ong Swee Huat v Cheng Yun Hian* [1992] MMD 601 where the injured suffered a whiplash injury. He was left with tenderness of the lower cervical spine, reduction of movement of the cervical spine, osteophytic lipping of C5/6 and C6/7 and reduction of the C6 and C7 disc space. The award for the injury was $12,000.

15 In the appeal counsel for the plaintiff argued that the award of $20,000 is too low. He submitted that a proper award should be between $40,000 and $50,000 because the court should not

be shackled by precedents and is justified in awarding substantial damages for pain and suffering.[9]

16 He also referred to *Lim Ai Geok*. In addition to that, he referred to *Zakaria bin Putra Ali v Low Keng Huat Construction Company (S) Pte Ltd* [1994] Mallal's Digest 1212 (and on appeal in CA No 181 of 1993). In this case the plaintiff who suffered four fractures of the vertebra with unspecified neurological consequences, weakness in the right leg, restricted movement in the hip, incontinence and a degree of impotence was awarded $80,000.

17 Lastly he referred to *Ang Buk Chuk v Arunchalam Senkuttuvan* reported in Assessment of Damages: Personal Injuries and Fatal Accidents pages 264-5 where $12,000 was awarded for a sprain of the cervical spine leading to the loss of cervical lordosis, degeneration in the C5-6 cervical vertebrae and 3 cervical discs C4 to C5, and causing difficulty in looking down and in lifting heavy objects.

18 In deciding on the proper quantum of damages reference should be made to the precedents available. However applying the precedents to a specific case is not a straightforward exercise. Often there are only brief descriptions of the injuries and residual disabilities. Allowance has to be made for the age of the award and the injured person.

19 After going through the submissions I do not accept the $40,000-$50,000 range suggested by counsel, particularly when it was premised on the existence of myelopathy. On the other hand, $20,000 is low for the injuries described in para 6 and the possibility of paralysis if the plaintiff has a jolt. I increase this award to $30,000.

Cost of future surgery

20 The assistant registrar made an award for $20,000 for one operation. Counsel for the plaintiff submitted that she should have awarded cost for two operations.

21 The evidence on this was mixed. While the neurosurgeons agreed that surgery will be necessary, only Mr Campbell mentioned two operations. He stated in his report that there should be an operation from the anterior approach and "if, however, even after such surgery [the plaintiff] feels he is deteriorating then serious consideration would be given to a posterior decompression"[10], without stating the degree of the likelihood of a second operation.

22 Before the assistant registrar, Mr Campbell departed from his earlier opinion and said that although normal patients would need only one operation, the plaintiff would need two,[11] but he did not reconcile the two positions.

23 Dr Balaji, when referring to the surgery that he, Mr Crockard and Professor Kaye recommended said "(t)he surgery is called anterior cervical discectomy. It involves removing the disc and reversing the narrowing of spinal canal and openings for nerve roots. It is a major operation with a small risk of paralysis"[12] and that such an operation would costs between $20,000 and $30,000. Evidently, they contemplate one operation.

24 In the face of the evidence the assistant registrar was justified in making the award of $20,000.

Loss of future earning capacity

25 The award for loss of future earning capacity was $60,000. The plaintiff contends that it

should be at least $300,000.

26 There was clear evidence that the plaintiff has cut back on his court work since the accident, and that he cannot work the same hours that he did before.

27 Nevertheless, he is an important part of the firm. He manages it and supervises the other members, and maintains the firm's relationship with clients.

28 His income has not dropped after the accident. There was no suggestion that his position in the firm has come under threat or that it may be at risk in the foreseeable future. The fact that he has released some equity in the firm to other members is consistent with the growth of a practice. The plaintiff was about 50 years old at the time of the assessment, some lawyers of that age scale down their court work and take on partners if they had not done that earlier.

29 Having said that, there is no doubt that the plaintiff's injuries did affect his ability to work. When that continues and his input to the firm is reduced, it is likely that he may have to reduce his share of the firm's earnings, or retire earlier than he would have liked if he was not injured.

30 The assistant registrar took all that into account. The difficult part of the exercise is to quantify the loss. The $60,000 awarded is, according to the plaintiff, equivalent to two months of his average earnings.

31 For the purpose of determining the loss earning capacity, I proceed on the basis that he would work till he is 65 years old if he was not injured. How is compensation for the loss to be fixed? It is a difficult task as the plaintiff is the founding and dominant member of the firm, and is not likely to be forced out by his partners.

32 The precedents cited by both counsel are of limited assistance in this exercise as they related to younger employed persons whose jobs involve more physical exertion than is required of an advocate. Taking into account all the circumstances, I agree with the plaintiff that the award of $60,000 is low, and I increase it to $180,000.

Pre-trial loss of earning capacity

33 The assistant registrar did not make any award under this head because the plaintiff did not stop working and had not proved any loss of income.

34 Counsel for the plaintiff however asserted that in principle such an award must be made for the loss of capacity to earn, whether or not there was an actual loss of earnings. He referred to *The Law of Damages* by S.M. Waddams (3rd Edn) where the author stated at para 3.360

> A plaintiff's claim for loss of earnings before trial, being separately calculated, is sometimes regarded as fundamentally distinct from the calculation of lost future earning capacity. … There can be no justification for applying a different principle to losses occurring before trial. The only difference is that knowledge of events occurring before trial takes the place of prediction. Thus if the plaintiff is entitled to recover compensation for future loss earning capacity, the plaintiff should be entitled to the compensation on the same principle in respect of the period before the trial.

35 There can be no earnings without earning capacity. But that does not mean that whenever there is a loss of earning capacity, there is a loss of earnings. Events prior to the trial should be taken into account when examining a claim for pre-trial loss of earning capacity. If a student is

injured, and continued to be in full-time studies up to the trial, his earning capacity, even if impaired, was not used. He suffered no loss of earnings. Any damages for the loss of that capacity up to that time must be nominal. That would be different if he sought employment during that period and was unsuccessful because of his injuries, or has to settle for lower paying employment than he would have secured if he was not injured. Likewise, if a workman's earning capacity was affected while he was injured, but was kept on by his employers without reduction of income or loss of promotion to the time of trial, his loss is nominal.

36 In the case of the plaintiff, he did not stop work, and his pre-trial earnings were not affected. There is no basis for the plaintiff to assert that $150,000 be awarded for loss of pre-trial earning capacity.

Loss of post-operation earnings

37 The plaintiff is also aggrieved that the assistant registrar declined to make an award for this.

38 The evidence before her was that the plaintiff would not be able to work for about 25 days when he undergoes the operation, but there was no indication that he would suffer any loss of income as a result of that. There was no disclosure of the arrangements between the plaintiff and his partners regarding his earnings, particularly whether his drawings would be affected if he went on medical leave for a serious operation. It is as likely that his partners will hope for a successful operation and for his early return to the office, rather than reduce or stop his drawings while he was under the knife.

39 Again his counsel argued that an award must be made as a matter of principle. Having read the authorities cited, I found that they did not support his argument. They show that such damages can be awarded in appropriate circumstances, but they do not show that such awards are made as a matter of principle.

Loss of future earnings

40 The plaintiff's contention is based on the assumptions that (i) he has to undergo surgery by the age of 55 and (ii) that thereafter he will have another 15 years working life.[13] The multiplier for the loss is then set at three years.

41 On the basis of that the following computation was put forth

> First 2 years – loss of S$420,000 per year for first 2 years – S$840,000. This is for working life of between 55-65.
>
> Remaining one year – earning would have reduced as Plaintiff aged. This would be for working life of between 65-70. Appropriate multiplicand should be S$15,000 per month, i.e. S$180,000 per year.
>
> Total loss of future earnings – S$840,000 + S$180,000 = S$1,020,000[14]

42 Of the neurosurgeons who have seen the plaintiff, only Mr Campbell had given an opinion that he would not be able to continue at a desk job after the operation.[15] However, even he was not firm on this. When he was questioned by the assistant registrar he changed his position and said that the plaintiff would be able to work for three to four hours at a stretch when he would have to take a rest, and carry on again for a shorter period.[16] This evidence did not present the picture of a person who cannot work. It showed a person whose capacity to work is reduced. The assertion that

the plaintiff would lose three working years was not made out.

43 I agree with the assistant registrar that no award should be made under this head. However I took this into account in my award of $180,000 for loss of earning capacity.

Pre-trial interest on damages

44 The assistant registrar awarded interest on damages but limited to 31 December 1999.

45 Interest on damages is payable on the discretion of the court pursuant to s 12(1) of the Civil Law Act –

> 12.(1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

46 It is useful to consider the courts' views on the exercise of this discretion. In *Lim Cheng Wah v Ng Yaw Kim* [1984-1985] SLR 497 LP Thean J said at p 500

> In a claim for damages on tort, if the defendant admits liability at the appropriate stage and assessment of the quantum is delayed owing to no fault of the defendant, the court will no doubt take this into account in deciding whether or not to award interest.

and referred to Lord Denning's statement in *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Company Ltd* [1970] 1 QB 447 @ 468 that

> An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly.

47 In *Yip Kok Meng Calvin v Lek Yong Han* [1993] 2 SLR 134 Judith Prakash JC (as she then was) held at page 142

> It is usual for a successful plaintiff in a running down case to be awarded interest on the amount of his damages from the date of the writ up to the date of judgment. The award is made to compensate the plaintiff for having been kept out of his money. Defendants and, even more, their solicitors are aware of this situation. They know that unless they can show special circumstances, for example, unreasonable and unjustified delay on the part of the plaintiff in prosecuting the action, such interest will be awarded almost as a matter of course.

48 The basis for awarding interest is that the plaintiff has been kept out of his money. He may be kept out of it because he did not press hard for it, or because the defendant delayed payment, by disputing the liability to pay, or the sum payable.

49 If a plaintiff is slow to prosecute his case, his claim to pre-trial interest is diminished because the defendant had not kept him out of his money. He has kept himself out of his money, and there is no reason for the defendant to compensate him for that.

50 There was no dispute that this case had taken an exceptionally long time to complete. The cause of action occurred in July 1991. The writ was filed in July 1994 and served in February 1995.

Interlocutory judgment was entered in May 1995. The damages were assessed in October 2001 – six years after the judgment.

51 The plaintiff did not blame anyone for the delay. He explained

> Since Interlocutory Judgment was entered, the matter took a long time to come for assessment because seeking compensation is not the paramount objective. I wanted to know what was the cause of all my problems and the extent of it.[17]

and

> This is not a case where I was rushing to get to Court to look for compensation. My first task was to find out what is wrong with me.[18]

52 He was not saying that he had taken all the reasonable steps to ensure that his claim comes to an early conclusion. It took a long time to come for assessment because seeking compensation was not his paramount objective. No one can criticise him for that, but it must be taken into account in deciding whether full pre-trial interest should be awarded.

53 It cannot be said that the defendant was kept out of his money for the period up to the completion of the assessment of damages on 30 August 2002, if being kept out means that he wanted the money but was prevented from getting it.

54 The assistant registrar awarded that pre-trial interest up to 31 December 1999. All the specialists reports used in the assessment were obtained before the end of 1999, except for the report of Dr Korman which was dated 4 May 2001 and the report of Mr Campbell dated 16 July 2001, but it was not the plaintiff's case that they could not have been obtained earlier. In these circumstances, I agree that the plaintiff was not entitled to the full measure of pre-trial interest, and I affirm the cut-off date.

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[1] Notes of Evidence pages 14-15

[2] Grounds of Decision pages 4-5

[3] PB55

[4] PB39 para 3, Notes of Evidence pages 12, 29

[5] PB63

[6] Grounds of Decision pages 2-3

[7] PB60

[8] PB66

[9] Plaintiff's Skeletal Submissions paras 23-4

[10]PB80

[11]Notes of Evidence page 151

[12]Notes of Evidence page 10

[13]Plaintiff's Skeletal Submissions para 61

[14]Plaintiff's Skeletal Submissions paras 64 and 65

[15]PB80

[16]Notes of Evidence page 181

[17]Notes of Evidence page 112

[18] Notes of Evidence page 114

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