CHHITIBHAI PATEL v BORDER MOTOR CO. LTD RANCHHODBHAI CHHITIBHAI PATEL and J PROVEN (Male) and RANCHHODBHIAI CHHITIBHAI PATEL and BORDER MOTOR COMPANY LTD (1970) ZR 20 (CA)

COURT OF APPEAL 5

DOYLE CJ, PICKETT J AND HUGHES J

13th MAY 1970 10

Flynote

Damages - Personal injuries - Assessment of damages.

Workmen's Compensation - Proviso to s. 9 (a) of the Workmen's Compensation Ordinance - Meaning of "have regard to" the amount which is likely to become payable to the Commissioner - Whether the whole 15 amount of compensation payable is deductible from the amount assessed in negligence.

Statutes - Interpretation - Meaning of words "have regard to" in the Workmen's Compensation Ordinance, proviso to s. 9 (a).

Headnote

The appellant who was a shop assistant, was injured in a collision 20 between the vehicle in which he was travelling and a vehicle driven by the first respondent as the servant of the second respondent. The owner of the vehicle in which the appellant was travelling was the appellant's employer, and it was agreed between the employer and the Workmen's Compensation Commissioner that the accident had occurred in circumstances 25 in which the Workmen's Compensation Commissioner was liable to pay compensation. In the action in negligence for personal injuries the trial court assessed a certain sum as payable to the appellant and deducted from that the total amount held payable by the respondents to the Compensation Commissioner under s. 9 of the Workmen's Compensation 30 Ordinance. The appellant appealed on the grounds that the trial court in assessing damages for personal injuries had not taken into consideration the permanent disability and had not gone into the detail on the amounts making up the award, and further that it was wrong in law to deduct from the aggregate of the assessed damages under the various heads the sum 35 recoverable by the Compensation Commissioner from the respondents.

Held:

(i) The assessment of damages for personal injuries is not an exact exercise. There is in such an assessment an element of swings and roundabouts. Ordinarily a judge should go into detail on the 40 amounts making up an award. He is not bound to do so, but it is helpful to an appellate court if he does.

(ii) When one comes to have regard to the sum which is likely to become payable to the Commissioner, one must start off first with the knowledge that by s. 59 (4) the legislature has intended

that the workman shall receive a minimum sum for his disability. One must then bear in mind that this may be an over compensation, as against a third party and one must try to make some adjustment. If the over compensation for disability is very large, that is a matter to be taken into account when awarding 5 the damages at common law. This may result in the award by a judge of less sum for pain and suffering than he would have otherwise made.

Case cited:

(1) Watson v Powles, [1967] 3 All ER 721. 10

Legislation referred to:

Workmen's Compensation Ordinance, Cap. 188, ss. 9, 59 (3), (4).

Judgment

Doyle CJ: delivered the judgment of the court.

The appellant, who was a shop assistant, was injured in a collision between a vehicle in which he was travelling and a vehicle driven by the 15 first respondent as the servant of the second respondent. The owner of the vehicle in which the appellant was travelling was the apellant's employer, and it was agreed between the appellant and the Workmen's Compensation Commissioner that the accident had occurred in circumstances in which the Workmen's Compensation Commissioner was liable 20 to pay compensation. In consequence the Commissioner admitted a present and future liability in a sum which has been capitalised as £2,501.10.11. Of that sum an amount of £155.9.9 was attributable to hospital expenses and a sum of £4.14.8 was attributable to travelling expenses. The sum therefore attributable to the appellant's disability was 25 £2,341.6.9.

Section 9 (1) of the Workmen's Compensation Ordinance reads as follows:

"9. (1) Where an accident in respect of which compensation is payable was caused in circumstances creating a legal liability in 30 some person other than the employer (in this section referred to as the third party) to pay damages to the workman in respect thereof

(a) the workman may both claim compensation under this Ordinance and take proceedings against the third party in 35 a court to recover damages: Provided that where any such proceedings are instituted the court shall, in awarding damages, have regard to the amount which, by virtue of the provisions of paragraph (b) of this subsection, is likely to become payable to the 40 Commissioner or the employer individually liable, as the case may be, by the third party, and

(b) the Commissioner or the employer individually liable by whom compensation is payable shall have a right of

action against the third party for the recovery of the compensation he is obliged to pay under this Ordinance as the result of the accident, and may exercise such right either by joining in a suit instituted by the workman against the 5 third party or by instituting separate suit: Provided that the amount recoverable under this paragraph shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the workman but for the provisions of this Ordinance." 10

Briefly the subsection provides

(a) that the workman has a concurrent remedy against a negligent third party;

(b) that the Commissioner has the right, subject to certain limitations, to recover from such third party, the compensation which 15 he has been obliged to pay to the workman;

(c) that in assessing the damage recoverable by the workman the court must "have regard" to the amount which the Commissioner is likely to recover from the third party.

The appellant sued the respondents in negligence. He was successful 20 on the issue of liability. The learned trial judge found that appellant had pain and mental distress and that he had a permanent shortening of the leg and would super from osteo - arthritis of the right leg. He assessed the value of these injuries at £1,000. He found that the appellant should have been able to resume full employment approximately twelve months 25 after the accident and he assessed the value of earnings lost during this period as £1,118. He also found that the appellant was entitled to a sum of £44.3.0 for certain medical and other charges. These sums came to a total of £2,162.3.0.

Prior to the action the Workmen's Compensation Commissioner had 30 negotiated with the second respondent as to the liability arising under para. (b) of s. 9 and they had agreed on a settlement for sum of £1, 751.1. 6. The learned trial judge found that the amount to which he had to have regard under the proviso to para. (a) of s. 9 was the amount of £1,751.1 6 which the Commissioner had agreed to accept. This finding is not in 35 dispute. He deducted this amount from the sum of £2,162.3.0 and gave judgment for the plaintiff for the balance of K 411.1.6 or K 822.15.

The appellant appealed on the following grounds:

A. The assessment by the learned trial judge of the sum of K 2,000 under the head of general damages is low having regard to 40 the nature and extent of the permanent disability and the anticipated development of osteo - arthritis. Alternatively the learned trial judge misdirected himself on the facts when assessing damages under this head.

B. The trial judge erred in holding that the appellant might 45 reasonably have been able to resume work twelve months after the accident notwithstanding the findings of the learned trial

judge that appellant was not a malingerer and of not very great intelligence and having regard to the medical evidence.

C. The learned trial judge in purporting to apply the provisions of s. 9 of the Workmen's Compensation Ordinance, Cap. 188, misdirected himself on the law in the following respects: 5

1. (a) Deducting arithmetically from the aggregate of the assessed damages under the various heads the sum recoverable by the Workmen's Compensation Commissioner from the respondents when the said trial judge was required merely to gave regard thereto in assessing damages due to the appellant 10 from the respondents.

(b) Alternatively by deducting the sum recoverable by the Workmen's Compensation Commissioner from the respondents as aforesaid from the whole of the aggregate sum of the assessed damages comprising both pecuniary and 15 non-pecuniary loss inasmuch as the trial judge was entitled in law to have regard to the sum recoverable by the Workmen's Compensation Commissioner in assessing damages under the various heads of pecuniary loss only as set out in ground C(2) hereunder. 20

2. (a) Failing to make a distinction and assessing separately damages due to appellant in respect of pecuniary and non pecuniary loss inasmuch as the said provisions of the Workmen's Compensation Ordinance are apt only in respect of pecuniary loss as aforesaid. 25

(b) By applying the proviso to s. 9 (1) (a) of the said Workmen's Compensation Ordinance in respect of both pecuniary and non-pecuniary loss.

As regards ground B. there was ample evidence upon which the learned trial judge could properly come to this finding, and I reject this 30 ground of appeal without ado.

Appellant's counsel first argued ground C and stated that if he were successful on this ground he was prepared to abandon ground A. Ground C appears to be set out as four separate, though related, grounds. Ground Cl (a) is clear enough, but, with respect to the learned counsel, indeed the 35 fault may lie with me - I have had difficulty in apprehending why ground Cl (b) is alternative and also in separating Cl (b), C2 (a) and C2 (b). It seems to me that ground Cl (b) is a submission that the words "have regard to" do not connote a mathematical deduction of the whole of the sum recoverable by the Commissioner, while the remainder of ground C is a submission that only such portions of the damages awarded which relate to pecuniary loss can be taken into account as the sum recoverable by the Commissioner.

The result of the appeal on this ground rests on the proper interpretation of the words "have regard to". The appellant has pointed out that 45 these words have been inserted into the Ordinance in contra - distinction

to the words contained in s. 8 of the Ordinance, which, when the employer is sued, require a complete deduction. He maintains that the legislature must have intended something different. On the other hand, the respondent submits that there is no real distinction between the two though he 5 distinguishes slightly by submitting that "have regard to" does not mean mathematical deduction, but means a deduction after minor rounding off. He points out that under the provisions of the Workmen's Compensation Ordinance it is possible for a workman to recover less in a common law suit for negligence than the compensation awarded under 10 the Ordinance, and that, if there is not an almost complete deduction, the result will be that the workman will get double damages. In reply to this the appellant's counsel reiterates the difference in the wording and points out that even in the South African legislation, upon which it is clear s. 9 is based, the workman is treated more favourably in an action 15 against a third party than in an action against his employer.

One must look at the object of the Workmen's Compensation Ordinance in order to resolve the points at issue. The definition of "disablement" in the Ordinance reads as follows:

"'disablement' in relation to a workman, means disablement which 20 results in the loss or diminution of wage - earning capacity or in the reduction of the chances of obtaining employment."

The definition of "partial disablement" reads as follows:

"'partial disablement', in relation to a workman, means the inability of such workman, as the result of an accident in respect of 25 which compensation is payable, to perform the whole of the work at which he was employed at the time of such accident or to obtain other suitable work at the same rate of earnings as he was receiving at the time of such accident."

It seems from these definitions that disablement is to be related to loss 30 of earnings or loss of earning capacity. However, the Ordinance provides in s. 59 for compensation for permanent disablement. Subsections (3) and (4) of that section read as follows:

"59. (3) Where a workman has sustained an injury specified in the First Schedule to this Ordinance, he shall be regarded for the 35 purpose of this Ordinance as being permanently disabled at least to the degree set out for such injury in the said Schedule.

(4) Where the injury (including any injury to genital parts) is not specified in the First Schedule to this Ordinance a percentage of disablement which is not inconsistent with the provisions of such 40 Schedule shall be regarded as the minimum degree of permanent disablement for the said injury."

These subsections make an exception from the intention of the Ordinance to compensate for actual loss of earnings or earning capacity. They provide that in respect of injuries there shall be a minimum 45 percentage of disablement as laid down in the schedule. This will apply irrespective of the factual disablement from earning power. Under the

Ordinance an employee who loses both legs is deemed to be totally disabled. It is however plain, for instance, that a navvy who loses both legs in an industrial accident and a clerical worker who suffers the same loss, do not necessarily suffer the same disablement. While it is likely to be true in fact that the navvy is totally disabled from his accustomed 5 work, it is unlikely that the clerical worker is so disabled. Yet both are deemed to be totally disabled. It is this provision which raises the anomaly under which a workman may recover more under the Ordinance than he truly lost, and conversely in a common law action for his true loss may recover less than the compensation to which he is entitled under the 10 Ordinance.

Certain cases have been cited by counsel for the respondent which, in relation to s. 8 (1) (a) of the South African Workmen's Compensation Act, which is virtually identical to our s. 9 (1) (a), find that the words "have regard to" mean that the whole amount must be deducted. There 15 is, however, a very clear distinction between the South African Act and our Ordinance. Under the South African Act there is no provision for deduction in an action against an employer. Indeed, by s. 7 of the South African Act an employer is protected completely from an action for negligence by his workmen. He is only required to pay compensation. 20 Under our Ordinance a workman is entitled to a concurrent remedy and can sue his employer for negligence as well as claiming compensation. In these circumstances the legislature has seen fit to provide under s. 8 of the Ordinance that the whole amount of any compensation which has been paid or is payable under the Ordinance shall be deducted from the 25 damages recovered.

This is a clear provision. If the legislature had also required that the whole of the compensation should be deducted in an action against a third party as provided in s. 9, it could have said so. It did not, and I have no doubt that the legislature intended to make a distinction between 30 what should be deducted in an action against an employer and in an action against a third party. It is indeed understandable that the legislature should do so. By s. 41 of the Act the employer is made liable for compensation even if the accident has been wholly due to negligence not amounting to serious and wilful misconduct, by his employer. This 35 encroachment on the employer's common law rights warrants special consideration when he is being sued concurrently under the common law.

The question is what is that distinction? The words "have regard to" are imprecise. I do not accept that, as is suggested by counsel for the respondent, they merely mean a rounding off of an almost complete 40 deduction. That would be a distinction without a real difference. On the other hand if, as is maintained by the appellant, the words "have regard to" mean that there should only be a deduction from the pecuniary amounts of the damages, that provision could have been put into precise words. Furthermore, the requirement of the Ordinance is to have regard to the 45 total sum likely to be recovered by the Commissioner and not only one part of it.

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DOYLE CJ

There is, of course, an anomaly in requiring a third party who has no special duty towards another person's employee to pay more than the amount which would be required from him at common law. There is also however, an anomaly in failing to compensate a person for pain and 5 suffering. For

example, two workmen suffer similar injuries, one in circumstances which cause little pain and suffering, and the other in circumstances which cause a great deal of pain and suffering. Where the statutory compensation exceeds the common law liability a full deduction could swallow up all the amount applicable to pain and suffering.

In Watson v Powles (1) Lord Denning, M.R, had this to say in relation to the compilation of damages:

"Counsel for the plaintiff made a general submission which is of some importance. He said that the judge ought to divide up the general damage into its separate heads. A judge ought to say how 15 much he awarded for the past pain and suffering up to the date of trial; then how much for the future pain and suffering and loss of amenities for the rest of his days; then how much he awarded for the future incidental losses when he is off work in the future; and then how much for the reduction in his earnings for the rest of 20 his life. Counsel says if that were done, it would be far more satisfactory to the parties and he suggested that a more just result would be achieved.

We have often had to consider such a suggestion. In the old days, when damages were assessed by juries, there could be no question 25 of sub-division. A jury gave one award of general damage. In modern times, when damages are assessed by judges sitting alone, this court has discouraged judges from going too much into detail. When I was a judge of first instance, this court told me that it was a mistake to sub-divide the amount. On the whole 30 I think that this is right. There is only one cause of action for personal injuries, not several causes of action for the several items. The award of damages is, therefore, an award of one figure only, a composite figure, made up of several parts. Some of the parts may be capable of being estimated in terms of money, sach us 35 loss of future earnings. Others cannot truly be estimated in money at all but must proceed on a conventional basis, such as compensation for pain and suffering and loss of amenities (see Ward v James (1)). At the end all the parts must be brought together to give a fair compensation for the injuries. If a man is awarded 40 a very large sum for loss of future earnings, it may help to compensate him for his future pain and suffering. If he has no loss of earnings, he may be more generously compensated for pain and suffering - and so forth. Just as a jury in the old days would award an overall figure, so may a judge today. The 45 invariable direction to juries in fatal accident cases was -

' that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury,

but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation.

See Rowley v London And North Western Railway CO. (2), per Brett, J. Likewise in personal injury cases a judge is to give what is, in all the circumstances, a fair compensation. Every judge, when 5 working out the sum, notes down the item and calculates so much for loss of future earnings, so much for pain and

suffering, and the like That gives him a starting point; but there are so many uncertainties and intangibles involved that in the end he has to gather all the items together and give a round sum. So I do not 10 agree with counsel for the plaintiff's contention. It is not the judge's duty to divide up the total award into separate items. He may do so if he thinks it proper and helpful, but it is not his duty to do so."

I cite these passages not to dissuade any judge from going into 15 detail on the amounts making up an award. Indeed, I consider that - and in this I must respectfully differ from that great lawyer Lord Denning if he is advocating the contrary - ordinarily a judge should do so. He is not bound to do so, but it is helpful to an appellate court if he does. It seems to me that the award of a mere round sum without detail may 20 appear to another court and to the litigants as the substitution of an enlightened guess for a sum arrived at after proper consideration of the various matter comprised in it. I cite the passage to emphasise that the assessment of damages for personal injuries is not an exact exercise. There is in such an assessment an element of swings and roundabouts. 25

I consider that when one comes to have regard to the sum which is likely to become payable to the Commissioner, one must start off first with the knowledge that by s. 59 (4) the legislature has intended that the workman shall receive a minimum sum for his disability. One must then bear in mind that this may be an over compensation as against a third 30 party and one must try to make some adjustment. If the over compensation for disability is very large, that is a matter to be taken into account when awarding the damages at common law. This may result in the award by a judge of a less sum for pain and suffering than he would otherwise have made. It is a matter of adjustment between two 35 conflicting principles.

How this approach affects this case I will deal with later. My view, however, means that the appellant has not fully succeeded on his third ground of appeal.

On the first ground of appeal, ground A, the learned judge has 40 specifically set out the factors which caused him to award a sum of £1,000 damages. This award is to my mind somewhat on the low side for the injuries suffered and referred to by the trial judge, but not necessarily in itself so low as to require alteration by a court of appeal. If the judge had merely been adjusting the damages on the principles I 45 have stated earlier in dealing with the third ground of appeal, I would have no quarrel with it. In fact he has plainly not been doing so as he has

subsequently made a total deduction of the workmen's compensation liability. In addition the learned judge has omitted for consideration under the head of damages any possible loss of chances of future promotion or advancement in the plaintiff 's occupation or indeed any other 5 occupation which he might reasonably have taken up. Although he may have fully recovered so as to be able to carry out the work of his actual employment, his disability might well be a factor against him for further promotion. Indeed in seeking a post his disability might discourage an employer from employing him where another applicant for the post has 10 no disability. Although the plaintiff might be fit to do the work, his injury

might result in a loss of the marketability of his talents. Had these factors been considered the learned judge might have awarded a greater sum in general damages.

The learned judge has now left Zambia and it is not possible to send 15 the case back to him for a further award. The court of appeal must do the best it can. Whether any extra award would have completely bridged the gap between the pecuniary loss and the amount received in compensation is a matter of conjecture. Possibly it would not, but it might well have not fallen far short of it. The amount for pain and suffering is 20 if anything on the low side. I think, therefore that, bearing in mind the principles I have enunciated in dealing with the second ground of appeal, justice in this case will be done if one holds that the amount actually awarded for pecuniary loss augmented by the additional award for loss of promotion possibilities and marketability substantially offsets the 25 amount recoverable by the Commissioner for Workmen's Compensation. This would leave the appellant as damages the full amount awarded for pain and suffering together with the amount of £44. 3. 0 for medical outgoings already referred to.

I should add that counsel for the respondent did argue that appellant 30 had received a sum of £654. 12. 3 as wages from his employers, Amin & Co. after the accident. It is true that appellant said this in his evidence but later he also said that he got no pay from Amin & Co. except his periodicals payments. The Workmen's Compensation Commissioner gave evidence that the periodical payments which he made amounted to £654. 12. 3 35 and was included in the capitalised amount. It is patent that the appellant was merely confused on the source of the sum. Furthermore, there was no cross - appeal on the amount of special damage.

I would allow the appeal and substitute judgment for the plaintiff in the sum of £1,044. 3. 0 i.e. K 2,088.30. 40

Appeal allowed

1970 ZR p28