ORMAN CORRIGAN (SUING BY HIS NEXT FRIEND) ALBERT JOHN CORRIGAN v TIGER LIMITED & ABDI JUMALE (1981) Z.R. 60 (S.C.)

SUPREME COURT
GARDNER, AG. D.C.J., BRUCE-LYLE AND CULLINAN, JJ. S.
12TH MARCH, 1980 AND 10th MARCH, 1981
(S.C.Z. JUDGMENT NO. 5 OF 1981)

Flynote

Damages - Interference with assessment - Principles to apply.
Damages - Assessment of - Unconsciousness - Whether it eliminates actual deprivations of the ordinary experiences and amenities of life.
Damages - Special damages - Whether calculated at the date of trial.
Damages -Future loss - Assessment by conventional method - Actuarial calculations - Different results - Whether recourse to traditional method justifiable.
Damages - Interest on - Rate of - Principles.

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Headnote

This was an appeal from an assessment of damages by the High Court. The assessment arose out of an action for damages for personal injuries suffered by the appellant in a road traffic accident, in which a vehicle driven by him collided with a parked vehicle, driven by the second respondent, which vehicle was the property of the latter's employer the first respondent. The first respondent's counter claim in respect of special damages was agreed at K1,082.57, that was K1,353.21 less 20 per cent. The assessments were concluded when damages were awarded to the appellant in the amount of K10,000 for pain and suffering, K25,000 for the loss of amenities and K75,000 for the loss of earnings, that was a total of K110,000. The appellant appealed against the assessment on the basis that the award in respect of each of the above three heads of damages was too low.

The learned counsel for the respondent submitted that the court should consider the awards made by the learned commissioner under the separate heads of pain and suffering and again loss of amenities as a composite figure in respect of both heads. On appeal:

Held:

(i) Before the appellate court can properly interfere with the quantum of damages, it must be satisfied either that the judge, in assessing the damages applied a wrong principle of law, or, if he did not err in law, then that the amount awarded was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. Nance v British Columbia Electric Railway (2) followed.

(ii) An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness does not, however eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be

30 the inevitable result of some physical injury.

(iii) Damages for items of special damage continuing at the date of trial are calculated down to that date and awarded as a separate sum which is referred to as "Special damages."

(iv) If it could be shown that assessment made by conventional methods produced wholly different results from those based on acturial calculations, it might be necessary to look at the traditional method.

(v) The rate of interest should be calculated according to the principles laid down in UBZ v Shanzi (8).

(vi) At the date of this judgment an appropriate rate of interest was considered to be 7 per cent.

Cases referred to:

(1) Henwood v Naoumoff (1966) Z.R. 78.

(2) Nance v British Columbia Electric Railway [1951] A.C. 601.

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(3) Kawimbe v Attorney-General [1974] Z.R. 244.

(4) Flint v Lovell, [1935] 1 K.B. 354.

(5) Rose v Ford [1937] A.C. 826.

(6) Roughead v Railway Executive (1949) 65 T.L.R. 435.

(7) West (H) and Son Ltd v Shephard [1964] A.C. 326.

(8) Betts v Mascot, Kemp & Kemp 1 - 602.

(9) Grace v Lamoureaux, Kemp & Kemp 1 - 603.

(10) Mallet v McMonagle [1970] A.C. 166.

(11) Administrator - General In Re Grove (deceased) v Albasini (1971) Z.R.10.

(12) Mitchell v Mulholland, [1972] 1 Q.B. 65.

(13) United Bus Company of Zambia Ltd. v Shanzi (1977) Z.R. 397.

For the appellant: J.H. Adams; J. H. Adams & Company.
For the respondent: C.A. Stacey; Lloyd, Jones and Collins.

Judgment

CULLINAN, J.S.:

This is an appeal from an assessment of damages by the High Court. The assessment arose out of an action for damages for personal injuries suffered by the appellant in a road traffic accident, in which a vehicle driven by him collided with a parked vehicle, driven by the second respondent, which vehicle was the property of the latter's employer, the first respondent. The accident occurred on 21st August, 1973. The appellant was then 24 years of age. The writ was filed on 20th January, 1975. The trial commenced on 5th August, 1976, and judgment, that is as to liability, was delivered on 10th November, 1976. Therein the proportion of the appellant's liability for the accident was fixed at 80 per cent and that of the second respondent being 20 per cent, the first respondent being vicariously liable therefore. The assessment of damages was adjourned to chambers. The assessment commenced on 18th May, 1978. The first respondent's counter claim in respect of special damages was agreed at K1,082.57, that is, K1,353.21 less 20 per cent. The assessment concluded on 6th November, 1978, when damages were awarded to the appellant in the amount of K10,000 for pain and suffering, K25,000 for the loss of amenities and K75,000 for the loss of

earnings, that is, a total of K110,000. The appellant appeals against the assessment on the basis that the award in respect of each of the above three heads of damages is too low.

The appellant suffered serious injuries in the traffic accident. The chief medical officer of Luanshya hospital reported that on admission to hospital his condition was as follows:

"1. Unconscious, and no response to painful stimuli except for some limb movement on pinching limbs.
2. Extensive bleeding was taking place from an 8 inch laceration of the left side of the scalp, beneath which was an extensive depressed fracture of the skull.
3. Multiple lacerations of lip and face - but small.

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4. Fracture of both forearm bones of right arm with severe displacement.
5. Small lacerations of both knees.
6. Right side of body moving less than left side."

The appellant underwent an operation to elevate the compound depressed fracture of the skull, to suture the scalp and facial injuries and for the reduction and Plaster-of-Paris immobilisation of the fractured forearm. The appellant remained unconscious for three weeks. Five days after admission a tracheotomy was performed to assist his respiratory function and after another three weeks the tracheotomy tube was removed. Some two months after the accident six of the appellant's teeth loosened in the accident had to be removed by a dental surgeon. He remained speechless up to six weeks after the accident and then only slowly recovered the power of speech. Thereafter the appellant underwent hospitalisation and treatment in a number of general medical and psychiatric institutions. After an initial vegetative stage there was some slight improvement. One year after the accident he wrote a letter to his father which apart from its obvious immaturity of handwriting was, I consider, aptly described by a surgeon as indicating "the letter writing capability of about a twelve year old child." Again, some six months later his behaviour was described by a professor of neuro-surgery as "that of a young child". Despite a slight improvement from the early stage, medical and psychiatric reports over a period of five years after the accident nonetheless indicate severe brain damage with marked personality change and pronounced recent memory loss resulting in disorientation as to time, place and person, and difficulty in maintaining conversation.

The learned counsel for the respondents Mr Stacey submits that the Court should consider the awards made by the learned Commissioner under the separate heads of pain and suffering and again loss of amenities as a composite figure in respect of both heads. While I fully endorse the learned Commissioner's procedure of making separate awards as being both convenient and equitable, nonetheless for the purpose of comparison with awards in other cases I propose to adopt Mr Stacey's suggestion, namely to consider the composite award of K35,000 for pain and suffering and loss of amenities.

The principles upon which an appellate court can interfere with an assessment of damages were stated by Blagden, C.J., in his judgment in the Court of Appeal case *Henwood v Naoumoff* (1) at p. 79:

> "On an appeal on the quantum of damages the principle on which an appeal court works have been stated in a number of authorities. Shortly, it amounts to this, that before the appeal court can properly interfere it must be satisfied either that the judge, in assessing the damages applied a wrong principle of law, or, if he did not err in law, then that the amount awarded was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage - see *Nance v British Columbia Electric Railway* (2)."

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Baron, D.C.J., in his judgment in this Court in the case of *Kawimbe v Attorney-General* (3) at p. 247 had occasion to explain the principles involved as follows:

> "An appellate court should not interfere with the finding of a trial court as to the amount of damages "merely because they think that if they had tried the case in the first instance they would have given a lesser sum" (per Greer, L.J., in *Flint v Lovell* (4), at page 360). Before this court will interfere it must be shown that the trial court has applied a wrong principle or has mis-apprehended the facts or that the award was so high or so low as to be utterly unreasonable or, in the words of Greer, L.J., in *Flint v Lovell* (4) "an entirely erroneous estimate of the damage to which the plaintiff is entitled"."

The learned Commissioner in this case took into account that the appellant had been unconscious for some three weeks after the accident and seemingly concluded that he could not have suffered during that period. He found some support for this approach in the cases of *Rose v Ford* (5) and *Roughhead v Railway Executive* (6). While there is some support in the former case, where the plaintiff died four days after an accident during the greater part of which she was in a coma, I can find no support in the latter case where the plaintiff died a day after the accident, during which time he was apparently conscious. There is positive support however to be found in the following passage from the speech of Lord Morris in the case of *West v Shephard* (7) at p. 349:

> "An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury."

The learned counsel for the appellant Mr Adams submits that in any event the nature of the injuries inflicted upon the appellant clearly indicated that pain and suffering after the initial period of unconsciousness was inevitable. There can be little doubt of this. The learned Commissioner obviously took this into account however when he observed that:

> ". . . one cannot say that (apart from the fact that the plaintiff was unconscious from the date of accident for a period of three weeks) the plaintiff has not suffered pain of mind and body since he regained consciousness."

The learned Commissioner went on to further observe:

> 45 "It appears that he may continue to suffer in mind if his memory improves, which is not unlikely. It is obvious that the plaintiff was aware of the accident immediately before he collided, as

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> such he would have undoubtedly suffered from a mental shock when he foresaw that he was about to crash into the tanker. Taking all these factors into account I hold that the plaintiff is entitled to a sum of K10,000.00 for pain and suffering as a result of the accident."

Quite clearly the learned Commissioner was of the opinion that the appellant had undergone pain and suffering after the initial period of unconsciousness. As to loss of amenities the learned Commissioner made the following observations:

> ". . . there is more than ample evidence that the plaintiff has had all the comforts, facilities and also enjoyment of life to the fullest at his age. He was holding a reasonably good job, he had very good prospects of progress, enjoyed good health, a happy home and was engaged to be married to a girl of his choice whom he does not appear to have forgotten though does not talk about. He was keenly interested in music, a good mixer, enjoyed the company of friends, in fact he seems to have enjoyed all that life could offer to most young men and suddenly finds himself wrenched off from all these enjoyments of life to carry on the rest of his life without the company of a wife and comfort of a home, perhaps in an institution, a situation no one will want to be. Needless to say that his chance of marriage and sexual life are absolutely nil. This undoubtedly is one of the most unfortunate cases as this uncertain life and these are some of the uncertainties of life with which one has to live and which has to be taken into account in the assessment of compensation."

In my view that summary of the appellant's position cannot be faulted. Mr Adams has referred us to cases of Betts v Mascot (8) and Grace v Lamoureaux (9), reported in Kemp and Kemp on the Quantum of Damages Vol. 2, 4th ed. at page 1602, where awards of 30,000 pounds and 27,500 pounds were respectively made for pain and suffering and loss of amenities. Mr Stacey submits however that the injuries in those cases were more severe than in the present case and that there are many authorities where the awards were a good deal less. I agree with this submission. An examination of the many awards reported in Section A, Part 3, Vol. 2 of Kemp & Kemp illustrates this point. For my part I am quite unable to say that the learned Commissioner's award of K35,000, made in 1978, is an entirely erroneous estimate of the damage to which the appellant is entitled under this head.

I come then to consider the award in respect of loss of earnings. No award in respect of loss of earnings up to the date of the trial in 1976 was made, as the appellant failed to plead such loss quantified as special damages. We are concerned therefore with prospective loss of earnings. The appellant at the time of the accident was an advertising executive with a monthly salary of K480 and a monthly car allowance of K40, that is, annual emoluments of K6,240. His prospects were excellent. There was the possibility of his becoming a director of the company which employed

him, but in any event his employers stated that

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he "would undoubtedly have been appointed General Manager, in addition to his responsibilities as an Advertising Executive. His salary would then have been in the range of K850" (per month), that is, K10,200 per annum. All of the doctors who examined the appellant over a period of five years were at one in opinion that he would have to lead a sheltered existence for the rest of his life and that he could not possibly return to his former occupation. There was the prognosis of the possibility in the future of simple work of a repetitive nature but this had not in fact proved possible. In dealing with the aspect of loss of earnings the learned Commissioner observed as follows:

> "Be that as it may, at the time of the accident the plaintiff was 27 years old and on the 11th of December, 1978, the plaintiff would be 30 years of age. Whatever might be said, had the plaintiff continued to be in his employment and when one considers his personality as deposed by his father in his evidence and also according to the document above referred to, the plaintiff would have had a very successful career where he would have in the near future not only commanded a very lucrative salary but would have also had other benefits and facilities that go with such positions. This of course is subject to the contingencies of lift and service. In normal circumstances, the plaintiff would have continued in service up to a normal period of 55 to 60 years of age and ended up in a very senior position which he might have held for a considerable period. On analysing the medical report and in spite of the best medical attention given to the plaintiff by his father, I have great doubts about the plaintiff being in employment by which he can make even a meagre income. I consider on the evidence that the plaintiff cannot be employed on any wage basis. Taking all factors referred into consideration and having considered the authorities relevant on this point, I would apply a multiplier of 12 years and I would assess the loss of earnings at K75,000.00."

There is a contradiction in the above passage in the matter of the appellant's age. He was in fact, as I have earlier said, 24 years of age at the date of the accident and was 27 years of age when the trial commenced on 5th August, 1976. Mr Stacey submits that the date of trial, for the purpose of pleading loss of earnings as special damages, should be regarded as the date of assessment, that is, over two years later in this case. I can find no support for this proposition. Indeed a passage concerning special damages quoted by the learned Commissioner from Halsbury's Laws of England, 3 Ed. Vol. II para 386 contains the following:

> "Damages for items of special damage continuing at the date of trial are calculated down to that date and awarded as a separate sum which is referred to as "special damages". In so far as it is proved, or may be inferred from what has been proved, that such special damage will continue thereafter a further sum, which is estimated to be the fair compensation for the prospective loss which will ensue therefrom, is included and merged in the lump sum of

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> damages awarded. That lump sum award, which may or may not be intended to include compensation for other items of general damages, is referred to as "the general damages".

Again, paragraph 1198 of Halsbury's Laws Vol. 12, 4 Ed. in dealing with the degree of particularity of pleading required, indicates that:

> ". . . in personal injury cases the plaintiff should give full details of his loss of earnings to date".

I do not see how a plaintiff can be expected to quantify his special damages up to any later than the date of trial, as that is the date on which it is expected that evidence will be led. Thereafter any award in respect of continuing loss of earnings merges in the award for general damages. In my view therefore the award for prospective loss of earnings should operate from the date when the trial commenced in 1976.

Apart from that aspect, there are two areas of uncertainty arising from the learned Commissioner's award: firstly, there is the question of the multiplicant to be determined and secondly, the basis of the selection of a multiplier of 12 is not stated. If one divides the figure of K75,000 by 12 it will be seen that the multiplicant chosen by the learned Commissioner was K6,250. That approximately equates to the appellant's existing emoluments of K6,240 per annum and one might be tempted to assume that the Commissioner accepted the latter figure as the basis for his calculations. That figure however makes no allowance for deductions for income tax, despite the fact that evidence was given, and apparently accepted by the learned Commissioner in his ruling, that the appellant was subject to income tax at the approximate rate of 25 per cent of gross salary: to foil to make a deduction for income tax would be an entirely erroneous approach. The passage from the learned Commissioner's ruling quoted above indicates that he accepted that the appellant had had good prospects of increased salary and benefits. I can only assume that he accepted the higher salary, namely K10,200 per annum, as the basis for his calculations, which I consider he was justified in doing, and made a suitable deduction for income tax. I accept Mr Stacey's submission that an increased salary will attract an increased rate of income tax. Nonetheless, in deducting tax from the enhanced salary figure of K10,200 to arrive at the multiplicant of K6,250, it appears that the learned Commissioner used a tax figure of some 40 per cent of gross salary and practically 100 per cent of the actual increase in salary. Such approach is in my view entirely erroneous. It seems to me that a tax figure of 30 per cent of gross salary would be more realistic and I would therefore fix the multiplicant at K7,140.

As to the multiplier, the learned Commissioner did not state the basis of his calculations. The appellant was aged 27 years at the trial. The learned Commissioner gave the appellant a working life expectancy of some 28 to 33 years. He accepted that the appellant's expectancy of life had not been affected by his injuries. A working life expectancy up to the age of 65 years has always been widely accepted however, particularly where the plaintiff, as in this case, is not engaged in any hazardous

employment - see e.g. the actuarial tables at pp 6067 of Vol I of Kemp and Kemp. If one consults the tables of multipliers used by the courts in the "traditional method" of assessment in such cases, to be found at pages 136/139 of Vol I and pages 611 and 615 of Vol II of Kemp and Kemp, it will be seen that a multiplier of not less than 15 was used in the vast majority of cases where the plaintiff was of a similar and indeed greater age: further it will be seen that almost all of those plaintiffs had been in non-sedentary and some in hazardous occupations. The learned authors of Kemp and Kemp obviously favour "the Diplock approach", that is, the actuarial approach, as stated in Mallet v McMonagle (10) at p. 176 - see *Administrator - General in ReGrove (deceased) v Albasini* (11) at pp. 18/19. In the case of Mitchell v Mulholland (12) Widgery, L.J., observed (at p. 82):

> "If it could be shown that assessment made by conventional methods produced wholly different results from those based on actuarial calculations, it might be necessary to look at the traditional methods again, . . . ".

The learned authors of Kemp and Kemp (at p. 52 Vol. I) observe:

> ". . . we venture to suggest that awards for future loss of earnings in the case of plaintiffs aged 30 and under do show a sufficiently different pattern of results produced by the two methods to warrant some reconsideration of the traditional method, at least as far as plaintiffs within this age range are concerned".

The case of *Administrator - General v Albasini* (11) illustrates the lack of difference in the two methods in the case of a deceased aged 57 at the time of his death. The actuarial tables at pages 60/67 of Vol I of Kemp and Kemp, in the case of a plaintiff aged 27 years, indicate the use of a multiplier ranging from 17.9 to 21.7. Giving the appellant working life expectancy up to the age of 65 years, that is 38 years, and adopting the actuarial method employed in Administrator - General v Albasini (11) at pp.19/20, in capitalising over 38 years at 4 per cent the multiplier is 19.368 (see the Quantum of Damages by Corbett & Buchanan 2 Ed. at p. 83). It will be seen therefore that the multiplier adopted by the learned Commissioner was entirely erroneous.

As I see it, the view of the learned authors of Kemp and Kemp in the matter commends itself to good sense: quite clearly in the appellant's case there is a sufficient difference in the results produced by the traditional and actuarial methods to warrant some reconsideration of the 'traditional' method. Using the latter method the minimum multiplier to be used is no less than 15. The average multiplier using the actuarial method is somewhere around 19. The average between the 'traditional' and actuarial methods is a multiplier of 17 and that is the multiplier which I propose to adopt. I would assess damages therefore for prospective loss of earnings in the amount of K121,380. I would allow the appeal and substitute that amount for the amount of K75,000 awarded by the learned Commissioner. The appellant's damages would then be as follows:

General Damages:	**K**		
Pain and suffering and loss of amenities		K35,000	
less 80 per cent liability	**..**	**..**	**..** 7,000
Loss of earnings K121,380 loss 80 per cent			24,276

Special Damages:
Medical expenses (Fee for medical report)
K30 less 80 per cent 6

TOTAL DAMAGES .. 31,282

In accordance with the principles contained in the case of United Bus Company of Zambia Limited v Shanzi (13) at pp. 421/422, I would award interest at the rate of 7 per cent on the damages for pain and suffering and loss of amenities from the date of the service of the writ, i.e., 27th January, 1976, to the date of the assessment of damages i.e., 6th November, 1978. I would award interest at the rate of 3 &1/2 per cent on special damages from the date of the accident, 21st August, 1973, up until the date of assessment, 6th November, 1978. I would also award costs in both courts to follow the event.

Judgment
GARDNER, AG. D.C.J.: I concur.

Judgment
BRUCE-LYLE, J.S.: I also concur.

Appeal allowed