Neutral Citation Number: [2019] EWCA Civ 1846

Case Nos: B3/2018/1863, B3/2018/1863(B),
B3/2018/2142(B),B3/2018/2142,1863(A),B3/2018/2142(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr David Pittaway QC
Sitting as a High Court Judge
[2018] EWHC 2314 (QB),

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2019

Before :

MASTER OF THE ROLLS
LORD JUSTICE HAMBLEN
and
LORD JUSTICE HOLROYDE

- -

Between :

MR KHUZAN IRANI	**Appellant/ Claimant**
- and -	
MR OSCAR DUCHON	**Respondent/ Defendant**

Mr John-Paul Swoboda (instructed by **Ardent Law**) for the **Claimant**
Mr Pankaj Madan (instructed by **Keoghs LLP**) for the **Defendant**

Hearing date : 23 October 2019

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Approved Judgment

Lord Justice Hamblen:

Introduction

1. On 23 July 2013 the appellant, Mr Irani ("the Claimant"), suffered serious injuries in a road traffic accident whilst riding his motorcycle. On 24 September 2014 the respondent, Mr Duchon ("the Defendant"), admitted liability for the accident.

2. On 18 July 2018 Mr David Pittaway QC, sitting as a Deputy High Court Judge, awarded the Claimant damages totalling £406,688, following a trial conducted between 10-13 July 2018.

3. The Claimant appeals against the damages awarded.

4. He contends that the judge was wrong to award damages by way of a lump-sum *Blamire* award in respect of future loss of earnings and a *Smith v Manchester* award in respect of disadvantage on the open labour market. It is submitted that the judge could and should have quantified damages for loss of earnings by making a conventional award based on the adoption of a multiplier and multiplicand (ground 1).

5. It is further contended that the judge was wrong to reject the Claimant's evidence on his residual earning capacity and that he was bound to accept that evidence as it was unchallenged and untested in cross-examination (ground 2).

6. It is said that the amount of damages which should have been awarded is £1,259,256 (if both grounds of appeal succeed), alternatively £800,393 (if only ground 1 succeeds).

7. The Defendant resists the appeal and cross-appeals. He contends that the judge applied the wrong test of causation to the losses flowing from an apparent redundancy leading to the future loss of earnings *Blamire* award. It is said that the amount of damages which should have been awarded is £219,188.

Factual background

8. The Claimant, who was born in November 1986, graduated from the University of Pune, India, with a first-class degree and distinction in engineering. He came to the UK in September 2010 and completed a Master of Science degree at the University of Hertfordshire in automotive engineering. He began working for BNL (UK) Limited ("BNL") in Knaresborough, Yorkshire, in September 2012 in its New Technology Centre on a starting salary of £22,000 per annum. BNL manufacture polymer bearings.

9. On 23 July 2013 he was injured in a road accident with the Defendant. The Claimant sustained serious injuries. He was treated in hospital over a substantial period of time. His leg was in an ilizarov frame for nearly six months.

10. The judge found that the physical injuries that the Claimant had sustained in the accident could be summarised as follows: a displaced grade 3B open fracture of the left tibia and fibula, treated by open debridement, external fixator, and application of vacuum assisted closure; chronic leg pain; extensive scarring to the left leg; scarring

to the right elbow following an arthroscopy; a mixed anxiety and depressive disorder or a chronic adjustment disorder; a cracked fracture T7 vertebrae; a soft tissue injury to the right elbow; and loss of a dental crown.

11. The judge further found that the Claimant had undergone an arthroscopy of his right elbow where he now has a fixed flexion deformity of 5 degrees less than expected; that he continues to suffer pain on contact with the outer aspect of the elbow which does not affect his day to day function apart from heavy lifting, and that the crack fracture to the T7 vertebrae was treated conservatively and resolved spontaneously. He also had substantial scarring, primarily on his left lower leg.

12. There was an issue at trial relating to the pain or perception of pain from which the Claimant suffered, in particular, that it became worse sometime after the fracture was united in January 2014, and the ilizarov frame was removed, and was continuing. The orthopaedic experts considered that, from an orthopaedic standpoint, he had made a good functional recovery from a serious leg injury but deferred to the pain consultants and psychiatrists' opinions. The judge's conclusion on this issue was as follows:

> "…I do not consider that he is consciously exaggerating the level of pain from which he is suffering. I accept Dr Simpson's evidence and, to a lesser extent, Dr Edwards's evidence that to manage his pain he will benefit from a course of pain management after which, whilst not pain free, any residual pain should be managed without substantially interfering with his activities. Nevertheless, he may require to rest his leg more than he would have been expected to do if the orthopaedic pathology had been achieved."

13. Following the accident, the Claimant returned to work on light duties in November 2013 two days per week, and from April 2014 four days per week. He took Wednesday off work each week to rest his left leg because of ongoing pain and discomfort. He transferred to a Tier 2 general visa sponsored by BNL in March 2014 at a salary of £23,600. He was made redundant on 5 June 2015 when his department, New Technology Centre, was closed down. It was restarted under a different name, Research and Development Department, with different staff in September 2015. The Claimant was paid by BNL in full until November 2014 and thereafter for the days he worked up until June 2015.

14. After a gap of some months, he obtained employment at Queen's University Belfast starting in December 2015 based at Polytec Car Styling Bromyard Limited, Herefordshire. He became directly employed by Polytec in December 2017 with a salary of £32,000 per annum. He was granted further leave to remain in the United Kingdom with a Tier 2 visa which expires on 24 March 2020. It was common ground between the immigration law experts that the break in the continuity of his employment between 5 June 2015 and 1 December 2015, and his inability to find another position within 60 days, "scuppered" an application for indefinite leave to remain.

15. The judge stated that one of the most difficult issues in this case concerned the circumstances in which the Claimant was made redundant by BNL in June 2015, an

issue of particular relevance because it broke the continuity of employment required to make an application for indefinite leave to remain.

16. The judge found that the redundancy process adopted by BNL was a "sham redundancy" and that the fact that the Claimant had not returned to work "some considerable time after the accident, impacting on his ability to work, was a material consideration behind the decision to close the department". Whilst the judge recognised that there may have been other reasons relevant to the decision, he found that these did not "undermine the contribution made to it by the fact that Mr Irani had been unable to return to work fulltime". In the circumstances he accepted that the Claimant's inability "to renew his Tier 2 visa after March 2020 has arisen as a result of his accident".

17. It was against the background of these findings that the issue of the Claimant's loss of earnings fell to be considered. The claim was calculated on the basis of the earnings survey for managerial or professionals, ASHE SOC 2129 (Engineering Professional), compared to an employee in India earning £10,000 per annum. The judge was satisfied that the calculation of the Claimant's earnings in the UK was an acceptable methodology but said that the "same cannot be said for the method adopted for assessing his residual earnings". He found that the evidence before him did not provide "a proper basis to find the level at which he will be earning in India". It was in these circumstances that the judge held that he should make a *Blamire* and *Smith v Manchester* award rather than awarding damages on the basis of a multiplier/multiplicand approach.

The appeal

Ground 1

18. The general method of assessment of future loss of earnings is to use a multiplier/multiplicand methodology and the current Ogden Tables and guidance.

19. The multiplicand is the net loss of earnings, being the amount the claimant would have earned had it not been for the injury ("but for earnings") less the amount the claimant is likely to earn given the fact of the injury ("residual earnings"). The multiplier is the number of years the loss of earning capacity will last, discounted for various factors such as accelerated receipt.

20. This method is to be preferred to the broad-brush approach of awarding an overall lump-sum figure after consideration of all the circumstances as in *Blamire v South Cumbria Health Authority* [1993] PI QR 1 – a *Blamire* award. It should be adopted unless the court is driven to conclude that there is no real alternative to a *Blamire* award – see *Ward v Allies and Morrison Architects* [2012] EWCA Civ 1287 at [20] per Aikens LJ (with whom the other judges agreed), citing *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194 at [17] and [21].

21. In *Bullock* Keene LJ summarised the proper approach as follows at [19],[21]:

> "19. …All assessments of future loss of earnings in personal injury cases necessarily involve some degree of uncertainty. As far as possible, the task of the court is to seek to arrive at the

> best forecast it can make of the scale of such loss, normally on the well-established basis of multiplying an anticipated annual loss by an appropriate multiplier.
>
> ….
>
> 21. Merely because there are uncertainties about the future does not of itself justify a departure from that well-established method. Judges therefore should be slow to resort to the broad-brush Blamire approach, unless they really have no alternative."

22. There will be no real alternative to a *Blamire* award if, for example, there is insufficient evidence or there are too many imponderables for the judge to be able to make the findings necessary to support the multiplicand/multiplier approach.

23. In order to calculate the multiplicand it is necessary for the claimant to establish on the balance of probabilities (i) the but for earnings and (ii) the residual earnings. This will include consideration of both the type of work and the level of remuneration over time.

24. The *Ward* case provides an example of a case where the court was driven to conclude that there was no real alternative to a *Blamire* award. The claimant, who had just graduated with a degree in model making for design and media, was injured while working as a model maker on a short-term placement. The trial judge was not satisfied on the balance of probabilities that the claimant had demonstrated that she would have been able to establish herself and retain a long term position as a theatrical model maker but for her injury, nor what she would do now given her injury. He accordingly made a *Blamire* award. The Court rejected the submission that the *Blamire* approach principally applied where the claimant was in business and there was wholesale uncertainty as to future earnings. It held at [25] that the judge was entitled to conclude that there were "too many imponderables to enable him to hold, on a balance of probabilities, what the likely career pattern and earning capacity of the appellant would have been but for the accident and what it was likely to be as a result of the accident or that she would be likely to suffer a loss of earnings in the future". In such circumstances the Court concluded that the judge was justifiably "driven" to adopt the *Blamire* approach.

25. Mr Swoboda for the Claimant submits that in the present case the judge had a real alternative to making a *Blamire* award. In particular, he could and should have dealt with any uncertainties about the future by discounting the multiplier/multiplicand figure rather than abandoning that conventional method of assessment. This is borne out by the fact that the judge stated at [47] that the appropriate discount figure would have been 50%.

26. Mr Madan for the Defendant submits that the judge was entitled to conclude that he was unable on the evidence to find what the multiplicand should be and therefore had no real alternative to making a *Blamire* award.

27. In the present case the judge directed himself as follows at [44]:

> "While, as a matter of principle, I accept that the *Blamire* approach should only be used where other methodology is not practicable (see *Bullock v Atlans Ward Sructures [2008] EWCA Civ 194* per Keene LJ), it seems to me, to use HHJ Hughes QC's words in *Kennedy v London Ambulance Services NHS Trust [2016] EWHC 3145* that there is a real risk that it will create an "obviously unreal result".

28. Mr Swoboda criticises the judge's approach as confusing issues of practicability of methodology and reality of the result. In my judgment the important point is that the judge has expressly referenced and therefore directed himself in accordance with the guidance given by Keene LJ in *Bullock* and thereby recognised that the *Blamire* approach should only be adopted if there is no real alternative. The other terms used by him were simply another way of expressing this.

29. This is borne out by the findings the judge made which show why he considered that in this case he had no real alternative.

30. The judge accepted at [41] that there was an acceptable methodology of calculating what the Claimant's earnings would have been in the UK but for the injury. He then found that "the same cannot be said for the method adopted for assessing his residual earnings". In other words, he found the methodology used for residual earnings to be unacceptable.

31. The judge then summarised the evidence relied upon in support of the Claimant's residual earnings as follows at [41]:

> "The figure of £10,000 per annum is based on a letter from Mr Summet Shinde whom I am informed has similar qualifications to Mr Irani and is employed in polymer sales and marketing. Mr Shinde did not provide a witness statement or give oral evidence. There are also a number of job advertisements, obtained by Mr Irani from the internet, which are relied upon as providing evidence of similar earnings in India."

32. The letter from Mr Shinde, a friend of the Claimant, claimed that he earned £9,000 per year as an assistant manager having struggled to find a job in a field related to his qualifications, which were similar to those of the Claimant. It was a snapshot of his current salary rather than his likely future earnings and gave little detail of his present role. As the judge pointed out, there was no witness statement from him, nor was he called to give evidence. The judge was understandably unimpressed by this evidence, commenting at [45] that:

> "The evidence put before me, untested in cross-examination in the absence of Mr Shinde, consists of scant details of the role he performs which is, in any event, in sales and marketing. It is evident from his letter that he is not working within the area of [his] specialism."

33. The job advertisements consisted of print-outs from the internet from a website called "Monster-India". These are barely intelligible or understandable. As the judge noted,

none of the jobs reflected the Claimant's qualifications. In so far as this snapshot from one website at one point in time was being relied upon to support the assertion that there were and would be no jobs in the whole of India to match the Claimant's qualifications, it is apparent that the judge was not prepared to accept this assertion. He was equally not prepared to accept the Claimant's assertion that "in India there will be "little opportunity for career progression", or that "his injuries will stop him from gaining promotions", or that "he will continue to earn £10,000 per annum until retirement" [45].

34. Faced with an evidential case in relation to residual earnings based on a letter from a friend, a snapshot of unsuitable jobs presently available from one Indian website and various assertions made by the Claimant, a number of which were specifically rejected, it is not surprising that the judge should conclude, as he did, that there was no proper evidential basis for making a finding as to the level of residual earnings which would be made in India. As the judge found at [46]:

> "While Mr Swoboda submits that the evidence before me provides a proper basis to find the level at which he will be earning in India, I have concluded that it does not do so."

35. The assessment of the evidence and the weight to be given to it was a matter for the judge. He was entitled to find that the evidence provided "no proper basis" for determining a residual earnings figure and therefore the multiplicand. On any view, this was a factual conclusion which was open to him and cannot be said to be one which no reasonable judge could have reached.

36. Whilst the insufficiency of the evidence was the primary reason for the judge's conclusion that he had no real alternative to making a *Blamire* award, the judge further found that there was in any event uncertainty about whether the Claimant would return to India, stating at [45] that:

> "While I have accepted that Mr Irani will probably return to India, it is by no means certain. He is a highly educated young man with specialist qualifications. He may choose to make his future in any number of Commonwealth or other countries, however difficult that may prove to be."

37. Central to Mr Swoboda's argument on the appeal is his submission that, notwithstanding the detailed reasoning and conclusions of the judge set out above, he in fact held that he could adopt a multiplier/multiplicand approach, but with a substantial discount for uncertainty. He relies on [47] in which the judge stated:

> "If I had adopted a multiplier/multiplicand approach, I would have had to discount the final figure substantially to reflect the chance that Mr Irani may be able to obtain better paid employment in India or elsewhere. The deduction I would have made would have been 50 percent."

38. In my judgment, all that the judge is here stating is that, if he had been able to find what the multiplicand was and therefore to adopt a multiplier/multiplicand approach, he would have discounted it by a very substantial amount. In other words, if the only

issue had been one of uncertainty rather than the wholescale insufficiency of evidence, he would have been able to address it in this way. This does not detract from his clear and reasoned prior conclusion that on the evidence there was no "proper basis" for finding what the residual earnings would be. He had just addressed in detail why that was so. The idea that the judge, having held that there was no "proper basis" for a finding as to the multiplicand, was in the very next paragraph of the judgment accepting that he could in fact adopt a multiplier/multiplicand approach, is unreal. It involves a selective reading of the judgment, fails to consider the judgment as a whole, supposes that the judge was contradicting himself, ignores the damages awards which the judge actually made and should be rejected.

39. Subject to the arguments raised under ground 2, I accordingly conclude that the judge was entitled to find that this was one of those cases in which it was not appropriate to adopt a multiplier/multiplicand approach and that there was no real alternative to making a *Blamire* award. If so, as Mr Swoboda accepts, he was also entitled to make a *Smith v Manchester* award.

Ground 2

40. In support of this ground Mr Swoboda submits that the judge erred in rejecting the Claimant's evidence on his residual earning capacity, that he was bound to accept that evidence as it was unchallenged and untested in cross examination, and that as a result the Claimant was deprived of the opportunity of explaining why the Defendant's criticisms of his residual earning capacity were unfounded. Further, had that evidence been accepted, the judge would have found that there was a proper evidential basis for making a finding as to residual earnings and therefore the multiplicand.

41. Reliance is placed on the general principle summarised in *Phipson on Evidence* 19th Ed at 12-12 (Cross-examination; requirement to challenge evidence) as follows:

> "In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point".

42. The footnote to that passage refers to *Browne v Dunn* (1894) 6 R 67, *Markem Corp & anor v Zipher Ltd & ors* [2005] EWCA Civ 267 (at para 50-61) and *Allied Pastoral Holdings v Federal Commissioner of Taxation* (1983) 44 ALR 607, to all of which we have been taken.

43. It is important, however, to analyse the nature of the evidence which it is said should have been challenged. The Claimant's evidence was that he believed that he would earn £10,000 per annum if he returned to work in India. This was a statement of his opinion or belief. It was not a statement of fact relating to residual earnings. The Defendant was not suggesting that the Claimant may not have had that opinion or belief. His case was that the Claimant's opinion or belief as to his future earning capacity was not probative evidence.

44. The Defendant's position in relation to the claim for future loss of earnings was clearly set out in his pleaded Counter Schedule as follows:

> "i. There is inadequate evidence of any loss of earnings.
>
> ii. There is no expert evidence."

In relation to earnings in India it was specifically stated that:

> "There is no proper or reliable evidence of the Claimant's earnings in India before the Court".

45. This remained the Defendant's position at trial. Against that background the Defendant was entitled to adopt the stance that there was no need to cross examine the Claimant as to his opinion or belief as to his earnings in India. There was no material evidence of fact which the Claimant had given on that issue, nor was he in a position to do so. There was not, for example, any evidence that he had made job applications or enquiries himself in India. Nor could the Claimant speak to the material sought to be relied upon from other sources, such as the letter of Mr Shinde or the internet job advertisements. Indeed, the main examples given by Mr Swoboda at the oral hearing of answers that might have been given by the Claimant in cross-examination only served to highlight the lack of probative value of any such evidence.

46. The judge noted in his judgment at [42] that Mr Swoboda submitted that there was no reason why the Claimant's evidence should not be accepted in the absence of challenge. It is apparent from the criticisms he made of that evidence, and of various of the Claimant's assertions, that he rejected that submission. In my judgment he was entitled to do so.

Conclusion on appeal

47. I accordingly reject both grounds of appeal and would dismiss the appeal.

The cross-appeal

48. In support of the cross-appeal Mr Madan submits that in order for the judge to find that the Claimant had lost his right to indefinite leave to remain as a result of the accident (leading to the future loss of earnings *Blamire* award and associated heads of damages) it was necessary for the judge to be satisfied on the balance of probabilities that, but for the accident related injuries, the Claimant would not have lost his employment. It was not enough to find that the redundancy was a sham.

49. It is submitted that the judge did not make the requisite "but for" finding. His finding was that the Claimant's injuries were a "material consideration" to the termination of the Claimant's employment. It is said that this is insufficient and involves the application of the wrong test of causation to the losses flowing from the redundancy.

50. The judge noted Mr Madan's submission on causation at [30]:

> "Mr Madan submits that I should approach this issue on the basis that it is a question of fact to be decided on the balance of probabilities that had it not been for Mr Irani's injuries, he would not have been made redundant."

51. Although the judge observed at [31] that he did not find this an easy issue, he accepted that it involved making a finding on the balance of probabilities as to what had happened in the past and stated at [32] that:

> "I am able by reference to the oral evidence of Mr Goldsmith and the documentation to reach a decision on whether the underlying reason or one of the reasons for Mr Irani's redundancy was as a result of the injuries he sustained in his accident."

52. Having found that the redundancy process was a sham redundancy the judge found that:

> "[34]…. I am satisfied that the fact that Mr Irani had not returned to fulltime work some considerable time after the accident, impacting on his ability to work, was a material consideration behind the decision to close the department….
>
> [35] There may have been other reasons associated with Mr Smith being passed over by Mr Goldsmith for promotion which were relevant to the decision, but they do not undermine the contribution made to it by the fact that Mr Irani had been unable to return to work fulltime…."

53. His conclusion at [36] was that:

> "In those circumstances, I accept Mr Swoboda's submission that Mr Irani's current predicament that he will not be able to renew his Tier 2 visa after March 2020 has arisen as a result of his accident."

54. I accept Mr Swoboda's submission that, considering the judgment as a whole, the judge was finding that the accident was an operative or effective cause of the Claimant's redundancy.

55. The judge stated in terms that he was able to determine whether the underlying reason or one of the reasons for the Claimant's redundancy was as a result of the injuries he sustained in his accident. He then explains how and why it was "one of the reasons" for the redundancy. This is what the judge meant when he said that it was a "material consideration" behind the redundancy decision and that its causative contribution was not undermined by the fact that there may have been other reasons for the decision. It was not the only reason for the decision, but it was a material reason for it and, as such, an operative cause of it.

56. That the judge was satisfied that the accident was an operative cause of the redundancy and its consequences and not merely a contributory factor is borne out by the clear finding in [36] that the Claimant's predicament "has arisen as a result of the accident". Mr Madan submitted that this was a conclusion based on false reasoning, but in my judgment the judge's reasoning and conclusion are to be read together and are consistent with each other. At the outset of this part of the judgment (where he says he is able to make a decision as to whether the injuries was one of the reasons for

the redundancy), during the discussion of the detail (where he finds that the injuries were a material consideration to the decision made and therefore one of the reasons for it) and in his conclusion as to the result of the accident, the judge is addressing the issue of causation and doing so appropriately, and in the manner Mr Madan had submitted that he should.

57. In my judgment the judge has found that the Claimant's injuries were an operative or effective cause of the redundancy. As Mr Madan accepts, that is equivalent to and justifies the conclusion that the redundancy would not have occurred but for the accident. He has made no error of law in reaching the conclusion which he did.

58. I would accordingly dismiss the cross-appeal.

Conclusion

59. For the reasons outlined above I would dismiss both the appeal and the cross-appeal.

Lord Justice Holroyde:

60. I agree, both as to the appeal and as to the cross-appeal.

Sir Terence Etherton MR:

61. I also agree.