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IN THE PRIVY COUNCIL No.3 of 1982

ON APPEAL

FROM THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

BETWEEN :-

PONNAMPALAM SELVANAYAGAM Appellant

- AND -

THE UNIVERSITY OF THE WEST INDIES Respondent

CASE FOR THE APPELLANT

RECORD

1. This is an appeal by final leave to appeal granted to the Appellant by the Court of Appeal of Trinidad and Tobago on the 9th March, 1981 and entered on the 10th March, 1981 against the judgment of the Court of Appeal (Corbin, Kelsick and Hassanali JJA) given on the 31st July, 1980 whereby the appeal of the Respondent was allowed and the cross-appeal of the Appellant dismissed and whereby 90 86

1.1 a finding that the Appellant as Plaintiff was one-third to blame for the personal injury which he had suffered was substituted for the finding of the trial Judge that there had been no contributory negligence;

1.2 it was held that the Appellant's failure to undergo certain surgery was unreasonable, contrary to the finding of the learned trial judge that it had not been unreasonable;

1.3 damages were accordingly re-assessed by the Court of Appeal.

History

2. The Appellant was employed by the Respondents as professor of civil engineering. On the 5th August, 1975, when he was aged about 54, the Appellant was walking along a passageway in a campus building occupied by the Respondents when he fell into an open pit extending the width of the corridor and suffered injuries to his neck and left ankle. The pit, which was unguarded and unmarked,

had been made in the course of constructing a staircase in the near vicinity.

3. The ankle injury has left the Appellant with substantial disability, and the neck injury with further disability. The Appellant is diabetic and having been advised that his condition created a particular risk if he was operated on, he declined to undergo surgery to relieve the disability of the neck.

Proceedings

1 - 6 4. By a Writ and Statement of Claim issued on the 17th February, 1976 the Appellant claimed damages for negligence and nuisance. By its defence the Respondent denied all
7 - 8 liability and pleaded contributory negligence

5. At the trial before Scott J

26 l. 1-10 5.1 The learned Judge refused to allow Counsel for the Appellant in the course of his case to recall either the Appellant or his surgeon Dr. Ghouralal to give evidence as to the Appellant's reasons for declining to undergo surgery to his neck.

36 l. 14-17 5.2 At the conclusion of the evidence the Respondents admitted that they had been in breach of their duty of care to the Appellant.

6. The learned Judge found that:

54 l. 45-50
55 l. 16-19 6.1 The hole was very dark and that the reinforcements in it could only be seen by artificial light.

54 l. 36-44 6.2 Assuming that he were to accept the evidence called for the Respondents that the Appellant had previously walked along the corridor when the pit was there, that would have happened at least one month before the date of the accident and would have been the only occasion on which the Appellant had been in the material part of the corridor at any relevant time.

55 l. 20-24 6.3 Accordingly the hole constituted on unusual danger, and mere inattention on the part of the Plaintiff would not render him contributorily negligent.

56 l. 2-19 6.4 The Appellant had been advised both by the orthopaedic surgeon Mr. Lalla and by the neuro-surgeon Mr. Ghouralal that his diabetes increased the risks of undergoing surgery; accordingly the Appellant had not been unreasonable in declining Mr. Ghouralal's recommendation that he should undergo surgery to his neck.

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6.5 The Appellant's professional life was ruined as he could no longer undertake the work of a consultant. He would suffer permanent disability and constant pain. — 57 l. 9- 56 l. 37- 57 l. 40-

6.6 General damages should be awarded to the Appellant in the sum of $ 75000 together with agreed special damage in the sum of $ 2527.92 and interest. Execution was stayed pending appeal save as to the special damage and $ 25000 of the general damages. — 58 l. 1-16; 58 l. 16-22

Appeal

7. The Respondents gave notice of appeal on the 28th January, 1977 against the learned Judge's findings that there was no contributory negligence and that the Appellant's refusal to undergo surgery was not unreasonable, and against the level of damages assessed by him. The Appellant cross-appealed on the grounds that the award of damages was too low on principle and wrongly computed, and that the Appellant's condition had further deteriorated since trial (as to which notice was given that he would seek to lead fresh evidence). — 69-70; 71

8. By their judgment, delivered by Corbin J A, the Court of Appeal held that: — 72-86

8.1 The trial Judge had made no finding about the depth of the trench or the state of light in the passage. — 73 l. 41-45; 77 l. 17-20

8.2 In considering findings of fact on appeal a distinction must be drawn between the finding of a specific fact and evaluation of the evidence. — 76 l. 4-6

8.3 The trial Judge had omitted to make specific findings fundamental to the issues and had only recited the evidence given by each witness. — 76 l. 30-34

8.4 The trial Judge had made no finding about the conflict of evidence between the Appellant and the witness Bruce as to the Appellant's possible prior knowledge of the presence of an open trench in the passage. — 77 l. 20-43

8.5 The trial Judge had simply attributed inattention to the Appellant without making a finding as to whether he knew about the trench, if he did see or should have seen the obstacles in his way, and if he would have been able to do so had he been paying proper attention. — 77 l. 44- 78 l. 2

8.6 In the absence of the material findings of fact it was open to the Court of Appeal to draw proper inferences from the evidence on the record. — 78 l. 3-7

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78 l. 7-17

8.7 It seemed evident that the light in the passageway was sufficient for the Appellant to have seen the trench if he was paying proper attention, and there was also physical features like the staircase which should have alerted him to the need for caution.

78 l. 18-29

8.8 The correct inference was therefore that the Appellant fell because he was negligent in the way he was walking, all the more so if the lighting and visibility were poor as he had testified.

78 l. 30-31

8.9 Accordingly the Appellant should bear one-third of the blame.

81 l. 36-47

8.10 The orthopaedic surgeon's advice against an operation related to its probable orthopaedic result and not to the Appellant's diabetes, and the trial Judge misunderstood this aspect of the evidence.

82 l. 28-44

8.11 The learned Judge's finding that the Appellant was not acting unreasonably in not accepting Mr. Ghouralal's recommendation of surgery was not supported by the evidence: the Judge appeared to have placed more emphasis on the Appellant's right to decide than on the reasonableness of his decision and the effect of it.

82 l. 45-
83 l. 25

8.12 The Appellant had not said in evidence that he had refused further surgery out of fear because of his diabetes; he had given no reason for his refusal and there was no evidence that the doctors had put any fear into him; the only material evidence was Mr. Ghouralal's testimony that he would have recommended the operation, which the Appellant had not denied although there was ample opportunity for him to do so, no application having been made to examine him further in order that he could explain his reasons.

83 l. 26-37

8.13 The trial Judge having thus erred in his evaluation of the evidence and in his conclusion on it, the question was at large and the Court should infer that the Appellant had not shown that, viewed objectively, he acted reasonably in not undergoing the operation.

84 l. 45-47
86 l. 3-5

8.14 Accordingly the Appellant's damages were to be assessed as if he had undergone the operation, and were then to be reduced by one-third.

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9. The Court of Appeal accordingly allowed the appeal and dismissed the cross-appeal with costs in the Court of Appeal, and substituted an award of $31001.95 with interest.

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Submissions

10. It is respectfully submitted that the Court of Appeal erred in the following respects:

10.1 The trial Judge made as many findings of fact as were relevant and necessary. The Respondents had admitted that they were in breach of their duty of care to the Appellant. That breach had been causative of his injuries. The question was whether, given the fact that they had put the Appellant at risk by leaving an unguarded and unmarked trench in a corridor, the Respondents could nevertheless show sufficient neglect by him of his own safety to render the Appellant partly liable for his own injuries.

10.2 The learned Judge expressly accepted the evidence of the witness Suite that the hole was very dark. He further found that if the evidence of the witness Bruce were true it would only establish that the Plaintiff had been in the material corridor when the pit was there on a solitary occasion at least one month before his accident occurred. 54 l. 45-50; 55 l. 16-19; 54 l. 34-44

Upon these express findings the learned trial Judge rejected the allegation of contributory negligence by means of a proper comparison between the extent of the danger presented by the pit on the one hand and the degree of inattention which the evidence against the Appellant was capable of establishing on the other. It was thus unnecessary for him to make any express further finding as to the conflict between the Appellant and Bruce. 55 l. 20-24

10.3 The Court of Appeal therefore had no ground upon which to substitute its own evaluation of or inferences from the evidence for those of the trial Judge. In particular the Court of Appeal erred in holding that the trial Judge had omitted to make specific findings fundamental to the issues.

10.4 If, contrary to the last contention, the trial Judge had omitted to make specific findings fundamental to the issues and had only recited the evidence given by each witness, it was impossible for the Court of Appeal to make the necessary findings instead. In purporting to make findings and draw inferences from them, rather than in ordering a new trial, the Court of Appeal exceeded its jurisdiction and erred in law.

10.5 The trial Judge did not hold that "mere inattention does not amount to contributory negligence": 77 l. 44-46

55 l. 20-24 he correctly confined his finding to the relationship between such inattention as the evidence was capable of showing on the Appellant's part and the character of the danger which the hole constituted.

10.6 The learned Judge had not misunderstood the
15 l. 45-49 medical evidence concerning the effect of diabetes on
19 l. 46-48 the Appellant's suitability for surgery. He found, as
20 l. 38-51 was the fact, that both the orthopaedic surgeon and the
21 l. 9-11 neurosurgeon had advised that it created a risk. He
55 l. 25-35 made a finding that on the evidence before him the
55 l. 43- Appellant was not shown to have acted unreasonably in
56 l. 19 making his decision, a legitimate finding of fact with which the Court of Appeal ought not to have interfered.

10.7 The learned Judge did not place more emphasis on the Appellant's right to decide than on the reasonableness of his decision and the effect of it.
20 l. 51-2 It was the witness Mr. Ghouralal who spoke of the
56 l. 8-10 patient's right to decide. The learned Judge correctly
56 l. 11-19 appraised the reasonableness of the Appellant's decision in relation to the warnings which he had received of the enhanced risk caused by his diabetes.

82 l. 45- 10.8 Insofar as the Court of Appeal placed weight on
82 l. 25 the want of evidence from the Appellant as to his reasons for not undergoing surgery, they were wrong to do so because

7-8 (a) no such failure to mitigate damage had been pleaded;

61-68 (b) the issue was not mentioned in the disclosed and agreed medical reports;

15 l. 45-48 (c) when the medical witness Mr. Lalla was interposed
16 l. 4-45 during the Appellant's evidence and mentioned the complications of diabetes he was not cross-examined about it;

18 l. 43 (d) the medical witness Mr. Ghouralal, when interposed
19 l. 32-36 at the conclusion of the Appellant's
l. 46-51 evidence in chief, gave evidence of the risk and
20 l. 38-44 of the chances of success. He was cross-examined about the chances of success and testified that he had recommended surgery, but was not cross-examined (nor therefore re-examined) about the reasonableness of the Appellant's decision either directly or indirectly;

21 l. 3-11 (e) the Appellant, who was then cross-examined, was likewise asked only about Mr. Ghouralal's recommendation, not about his reasons for deciding against it;

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(f) the Appellant was accordingly not re-examined about his decision, but — 26 l.1

(g) his Counsel asked leave to lead further evidence about the Appellant's decision in view of what had been elicited from Mr. Ghouralal; — 26 l. 3-6

(h) Counsel for the Respondent objected to such further evidence being called, and the learned Judge upheld the objection. — 26 l.7, 26 l.8

10 In the premises it was not open to the Respondent to contend that the Appellant had acted unreasonably when the Respondent had been instrumental in denying him the opportunity to explain his decision; nor was it open to the Court of Appeal in these circumstances and on the evidence to hold that the onus of showing him to have acted unreasonably had been discharged by the Respondent.

10.9 The Court of Appeal failed altogether to consider or adjudicate on the cross-appeal. They ought
20 to have held that the trial Judge had not approached the assessment of damages upon correct prinicples that he ought to have separately quantified the damages for pain, suffering and loss of amenity from those for loss of future earnings or earning capacity, quantifying the latter so far as practicable by finding a multiplicand and multiplier. The evidence showed that but for the accident the Appellant could have expected to earn some $48,000 or more a year for another 10 years. — 6 l. 22-24; 17 l. 47 - 18 l. 4; 13 l. 32-
30 14 l. 8

11. In the exercise by Your Lordships of the powers of the Court of Appeal, the Appellant will

11.1 seek leave at the hearing of this appeal to adduce evidence of his present medical condition in relation to the assessment of damages for pain; suffering and loss of amenity; and

11.2 invite Your Lordships to review and to fix upon proper principles the damages to which he is entitled, quantum of damage in Trinidad being related to
40 comparable English awards (with a dollar multiplier of about 4): see Doss v. Doss 10 Moore's Indian Appeals 563; 14 L.T. (N.S.) 648; 19 E.R. 1085.

12. The Appellant therefore respectfully submits that the judgment of the Court of Appeal of Trinidad and Tobago should be set aside and that this appeal should be allowed, and that the judgment of Scott J should be restored subject to the determination by Your Lordships of the Appellant's appeal on damages, and that the Appellant

should be awarded his costs of this appeal and in the Courts below, for the following amongst other

R E A S O N S

(1) Judgment was given at first instance for the Appellant upon findings of fact which were adequate and tenable on the evidence and unimpeachable in law.

(2) The Court of Appeal in the premises ought not to have interfered, save in order to give effect to the Appellant's cross-appeal on damages.

(3) The Court of Appeal interfered with the findings and decision of the learned trial Judge upon grounds which are unsound in fact and bad in law.

(4) The Court of Appeal failed to revise the damages awarded to the Appellant upon proper principles.

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