Privy Council Appeal No. 22 of 1984

Chan Wai Tong and Wong Shok Ting *Appellants*

v.

Li Ping Sum *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST NOVEMBER 1984

Present at the Hearing:

LORD FRASER OF TULLYBELTON
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD TEMPLEMAN

*[Delivered by **Lord Fraser of Tullybelton**]*

This is an appeal on the quantum of damages, liability having been admitted. It raises three questions of principle on the correct method of assessing damages for personal injuries.

The respondent (plaintiff) was injured in a road traffic accident on 30th January 1981. An interlocutory judgment of the High Court of Hong Kong, to which all parties consented, was entered for the respondent against the first and second appellants (who are first and second defendants) for 75 per cent of the respondent's claim, and against the third defendant for 25 per cent of the claim, and damages were ordered to be assessed by a Master of the Supreme Court in Chambers. The first and second appellants were the driver and owner respectively of a minibus in which the respondent had been a passenger at the time of the accident. The third defendant, who is not a party to this appeal, was the driver of a goods vehicle which collided with the minibus. The respondent is a young woman, who was aged 25 at the date of the accident. In consequence of the accident she sustained compression fractures of three vertebrae, she was off work for a time and she was left with a permanent disability, the exact extent of which is not agreed but which has

been assessed by different doctors at 25 per cent and 15 per cent.

Damages were assessed by Master Hansen in Chambers at a total of HK$31,395.00, made up of general damages for pain suffering and loss of amenity $27,500.00 and special damages $3,895.00. Against that award the respondent appealed. The Court of Appeal (Roberts C.J., Barker J.A. and Baber J.) increased the award very substantially. They increased the general damages for pain suffering and loss of amenity to $90,000.00. They added a new item in respect of future loss of earning capacity, for which they awarded $108,000.00. And they increased the special damages to $7,995.00. It is unnecessary to set out the details of the special damages awarded, either by the Master or by the Court of Appeal, as the appellants are willing to accept this part of the Court of Appeal's award. This appeal is solely concerned with the Court of Appeal's award of general damages for pain suffering and loss of amenity and for future loss of earning capacity. The respective awards are set out in the following table for ease of comparison:-

	Master's Award	Court of Appeal's Award
General damages for pain suffering and loss of amenity	$27,500.00	$90,000.00
Future Loss of Earning Capacity	-	$108,000.00
Special Damages	$3,895.00	$7,995.00
Total	$31,395.00	$205,995.00

The appellants complain that the Court of Appeal's award is excessive and they say that the Court erred in principle in three respects. First they say that the Court of Appeal wrongly paid regard to the level of awards for pain suffering and loss of amenity in jurisdictions outside Hong Kong, and particularly in England. Secondly they say that the sum of $90,000.00 awarded for pain suffering and loss of amenity was made upon an exaggerated view of the gravity of the respondent's injuries, and also that it included an excessive allowance for inflation. Thirdly they say that no award should have been made for future loss of earning capacity because such loss was not pleaded by the respondent, nor pursued in argument before the Master, and in any event was not supported by evidence. Their Lordships will consider these three matters in order.

The basis for the criticism that the Court of Appeal wrongly had regard to the level of awards outside Hong Kong is the following passage in their judgment, which was delivered by Barker J.A.:-

> " In our view, the Master's assessment of the general damages for pain, suffering and loss of amenities was a wholly erroneous assessment of damages.
>
> We were referred to the case of *Lee Ting-lam v. Leung Kam-ming* [1980] HKLR 657. That was a decision of the Court of Appeal in which the Court laid down general guidelines as to the amount of damages which should, in May 1980, be awarded for various categories of injuries. Before we deal with those injuries, we cannot refrain from quoting from one passage in Mr. Justice Cons' judgment at page 659 wherein he said this:-
>
> > 'We think it is now accepted without question that in this jurisdiction the appropriate standards are to be found in the decisions of the courts of this Colony and not in those of England and Wales or any other jurisdiction.'
>
> We respectfully but profoundly disagree with that observation. We think it is helpful in considering what kind of awards should be given in Hong Kong that the Court's attention should be drawn to decisions of other jurisdictions and, in particular, England. For it then rapidly becomes apparent that the awards for general damages for pain and suffering in England are of the order of three times as great as they are in Hong Kong. We are, of course, fully aware and accept that it is not correct to take an English decision and simply translate that from sterling into Hong Kong dollars but it is difficult to understand why there should be such startling disparity between the level of awards in the two jurisdictions.
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> Be that as it may, and we return now to Lee Ting-lam, the first category dealt with by Mr. Justice Cons is headed "Serious Injuries" and it reads: ..."

Although that passage contains a clear expression of the Court's opinion in favour of paying attention to the level of awards outside Hong Kong and especially in England, it does not appear that their opinion on that matter affected the reasons which led to the actual decision in the case. Their Lordships draw attention to the words near the beginning of the quotation "before we deal with those injuries" and to the words in the last paragraph of the quotation "be that as it may". It appears that the reasons stated by the Court of Appeal for increasing the learned Master's award for pain suffering and loss of amenity from $37,500.00 to $90,000.00 were not dependent upon

comparison with English decisions but were that they took a different view of the gravity of the respondent's injuries and they made a larger allowance for inflation. Similarly their award of $108,000.00 for future loss of earning capacity does not appear to have been related in any way to English awards. Accordingly the criticism of the Court of Appeal judgment on this head is academic.

Nevertheless their Lordships think it right to refer to the substantial body of authority, both in the Court of Appeal of Hong Kong and in this Board, to the effect that a court should in general have regard only to awards in the same jurisdiction or in a neighbouring locality where the relevant conditions are similar. In *Jag Singh v. Toong Fong Omnibus Co Limited* [1964] 1 W.L.R. 1382, 1385 Lord Morris of Borth-y-Gest delivering the advice of the Board says this:-

> "In deciding this appeal their Lordships think that three considerations may be had in mind:... (3) That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."

That was said in an appeal from Malaya. The passage which includes that statement was quoted with approval by Lord Scarman, when delivering the advice of the Board in *Ratnasingam v. Kow Ah Dek* [1983] 1 W.L.R. 1235, 1237, an appeal from Malaysia. It was also quoted in Hong Kong by Kempster J. in *Toshie Bond v. Tung Shao Lin* in a judgment delivered on 20th January 1984 (so far unreported). The view expressed in the quotation is supported also by the opinion of the Board delivered by Lord Scarman in *Selvanayagam v. University of the West Indies* [1983] 1 W.L.R. 585, 590 an appeal from the Court of Appeal of Trinidad and Tobago, in which the Board refused to assess damages in an appeal from that country, because the members of the Board "... lack the knowledge that a judge of the High Court would have of social and economic conditions in Trinidad and Tobago and the scale of awards in other comparable cases" among other reasons.

Conversely reference may be made to the case of *Allan v. Scott* 1972 S.C.59 in which the Court of Session held that courts in Scotland could properly pay attention to awards in similar cases in England. Economic and social conditions in the two jurisdictions are of course similar and the only reason which had at one time prevented the Scots courts paying regard to English awards had been a difference in the principles of assessing damages.

In the light of that body of authority their Lordships consider, with respect, that the dictum of Cons J. in *Lee Ting-lam* was well founded and that it ought to be followed, unless and until the courts in Hong Kong are satisfied that social and economic conditions, including especially the rate of earnings, in Hong Kong are similar to those in England, or in such other jurisdiction as they wish to use for comparison.

The second ground of appeal is that the Court of Appeal's award of $90,000.00 for pain suffering and loss of amenity is excessive. The appellants say that the Court of Appeal took an exaggerated view of the effects of the respondent's injuries. The Court of Appeal, like the Master, had three medical reports before them. Two, dated respectively 7th November 1981 and 28th December 1981, were from Dr. Dickinson FRCS (Ed) who examined the respondent on her own behalf. The third, dated 3rd August 1982, was from Dr. Chan FRCS who examined her on behalf of the appellants. In Dr. Dickinson's first report dated 7th November 1981 after narrating that the respondent had sustained compression fractures of the 11th and 12th thoracic vertebrae and the first lumbar vertabra he said:-

> "Opinion: she used to work full time as an accountant but since the accident finds that she is unable to sit for long periods and now she can only manage to work half days. Her walking distance is limited to half an hour because of back pain and she is also unable to carry heavy shopping. I would not expect her symptoms to improve at this stage and feel she will have a permanent disability as regards ability to lift, sit and walk."

Dr. Dickinson's second report was quite short and he assessed her permanent disability at 25 per cent. Dr. Chan's report was made eight months later and he records some improvement in the respondent's condition since Dr. Dickinson's report in the previous December. He expressed the opinion that the respondent would be left with some permanent disability. He explained that healing and adaptations of bones and related muscles might take some time to occur after an accident and he proceeded:-

> "These evidently have occurred since the patient was last seen by Dr. Dickinson in November 1981;- e.g. she can now work full days; and her walking distance is now approximately three hours....
>
> In this patient the injury produced wedging of three vertebrae in the dorsal-lumbar region where there is normally a kyphosis curve:- in other words the normal mechanics is not changed significantly. In addition the patient is a young individual whose power of adaptation should be great; thus with good

remedial exercises, good postures and with time, further improvements may still occur.

Based on the above observations and reasoning I think the amount of permanent disability should perhaps be reduced to 15 per cent."

The Court of Appeal approached the assessment of damages by considering whether the respondent's permanent disability fell within certain guidelines laid down by the Court of Appeal itself (differently constituted) in *Lee Ting-lam's* case. The judgment of Barker J.A., immediately after the passage which has been quoted above, proceeds as follows:-

"Be that as it may, and we return now to *Lee Ting-lam*, the first category dealt with by Mr. Justice Cons is headed 'Serious Injury' and it reads:
'This is the lowest category. It covers those cases where the injury leaves a disability which mars general activities and enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving a recurrent pain. The general range of awards is from $60,000.00 to $80,000.00.'"

The Court held that the respondent's disability fell into the lowest category referred to in that quotation and they made an assessment on that basis.

Their Lordships consider that reference to guidelines is proper and useful and is to be encouraged. It tends to produce consistency in awards, and it assists practitioners to negotiate settlements of the many claims which are settled either in the early stages of proceedings before going to trial, or which never reach the courts at all. But the use of guidelines cannot do away with the need to compare the facts of the particular case under consideration with the facts of reported cases in which damages have been awarded by the courts. If attention is concentrated entirely on the description of the categories of injuries contained in the guidelines, without regard to the facts of actual decided cases, there is a risk that the description may be treated as if it had been contained in a statute, and may divert attention from proper comparisons.

There are some indications in the judgment of the Court of Appeal in this case that the Court might have concentrated on the question whether the respondent's injuries fell within the description of "serious injury" given in *Lee Ting-lam's* case, without paying sufficient regard to comparable cases. But the Court gave careful consideration to the medical reports and their decision that the injuries

of the respondent "come at the bottom of the bracket in *Lee Ting-lam's* case" shows that the learned judges did not rely exclusively on the description. Their Lordships consider that the respondent's present disability is less grave than the disability in many of the reported cases drawn to their attention, in which the awards fell within the range applicable to "serious injury" in the guidelines, but they are not disposed to say that the learned judges erred in placing the respondent's disabilities in that category. The learned Master found that the respondent, who gave oral evidence before him, had "greatly exaggerated" her condition of disability. Counsel for the appellants rightly said that that was a finding which he was entitled to make and counsel complained that it had been ignored by the Court of Appeal. But the Court of Appeal proceeded entirely on the medical evidence, and if there was any exaggeration by the respondent in her evidence to the Master that was irrelevant to their decision. Their Lordships consider that they should not interfere with the decision categorising the respondent's injuries as "serious injury".

The award of $90,000.00 under this head was also criticised by counsel for the appellants on the ground that it included an excessive allowance for inflation between the date when the guidelines were laid down in May 1980 and the date of the Court of Appeal's judgment in October 1983. There was no dispute that some allowance for inflation during that period of approximately three and a half years was appropriate, and the Court of Appeal referred to the Hong Kong Monthly Digest of Statistics for August 1983 and decided that the range of awards stated in *Lee Ting-lam* should be increased by about 50 per cent. Their Lordships do not consider that that figure is unreasonable. They are not disposed to enter into a detailed consideration of the figures of inflation. Accordingly, while their Lordships regard the award of $90,000.00 under this head as somewhat on the high side, they will not disturb it.

The third question is whether the Court of Appeal was entitled, in the circumstances of this case, to make an award for loss of future earning capacity. This item of loss was not pleaded. It was not mentioned in the judgment of the learned Master, and it was admittedly not raised in argument before him. There is some authority for the view that loss of future earning capacity is included in general damages and does not need to be specially pleaded - see *British Transport Commission v. Gourley* [1956] A.C. 185, 206 per Lord Goddard, where however the point was not in issue and had not been the subject of argument. It may be that it is not essential to plead this head of damages, but their Lordships consider that as a matter of good practice it ought,

as a general rule, to be pleaded in order to give fair notice to the defendant. A more important matter is that the item was not raised in argument before the Master who assessed damages, and it was therefore never considered by him. That being so, it could only be in some highly exceptional circumstances that the claim could properly be considered and upheld by the Court of Appeal. No such circumstances exist here. What seems to have happened is that the respondent, who had been refused legal aid for her appeal to the Court of Appeal, drafted her own notice of appeal, and appeared before the Court of Appeal in person. In the notice of appeal she included a claim for loss of future earning capacity and supported it with averments which amounted to rather vague evidence that she had lost a chance of employment at a salary that was higher than she was then earning. Their Lordships were informed that counsel for the appellants objected to the admission of this "evidence", upon which the respondent had of course not been cross-examined, and that counsel's objection was sustained by the Court of Appeal. Once that evidence, such as it was, had been excluded, there was in their Lordships' opinion no evidence at all on which the Court of Appeal would have been entitled to hold that the respondent suffered any loss of earning capacity in the future.

Counsel for the respondent submitted that she was entitled to at least a conventional award under this head, without any evidence being required. But that submission rests on a misconception. A claim for loss of future earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk - see *Moeliker v. A Reyrolle & Co Limited* [1977] 1 W.L.R. 132, 140 where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on *inter alia* the claimant's age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant's earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an

accountant. In the present case there is no evidence at all on these matters. Accordingly their Lordships are of opinion that the sum of $108,000.00 awarded by the Court of Appeal under this head was unjustified and must be deleted.

Having regard to that finding, it is strictly unnecessary to consider the method by which the Court of Appeal arrived at the sum of $108,000.00, but it may be useful if their Lordships explain why the method was erroneous. The Court of Appeal first referred to the fact that one doctor had assessed the respondent's disability at 25 per cent and the other at 15 per cent. They took a "midway percentage figure" of 20 per cent. In so doing they erred by failing to have regard to the fact that the figure of 15 per cent was assessed by Dr. Chan eight months later than the 25 per cent assessed by Dr. Dickinson and at a time when, contrary to Dr. Dickinson's prognosis, the respondent's condition had improved. They also made a more serious error of principle by assuming that a 20 per cent disability necessarily implied a 20 per cent loss of future earning capacity. For the reasons which their Lordships have already explained, that is not so. The effect of the disability on a particular claimant's earning capacity may vary greatly according to the age and particularly to the nature of the employment of the particular claimant, and that matter seems to have been ignored by the Court of Appeal.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the award made by order of the Court of Appeal dated 13th October 1983 should be varied by deleting head (c) damages for loss of future earning capacity in the sum of $108,000.00. Heads (a) and (b) will stand. As to costs the order of the Court of Appeal should stand. There will be no order for costs before the Board.