Hilary Term
[2019] UKPC 4
Privy Council Appeal No 0033 of 2017

JUDGMENT

Cadet's Car Rentals and another (Respondents) *v* Pinder (Appellant)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Kerr
Lord Wilson
Lord Hodge
Lord Lloyd-Jones
Lady Arden

JUDGMENT GIVEN ON

28 January 2019

Heard on 17 October 2018

Appellant
Larell Hanchell
Craig Butler
(Instructed by Lojay Law Chambers)

Respondent
Nadia A. Wright
Clinton C. Clarke
(Instructed by Providence Law)

LORD LLOYD-JONES :

1. On 4 February 2013 the appellant, Mr Harry Pinder, was involved in a road accident on the island of Eleuthera in the Commonwealth of the Bahamas. A car driven by Mr Pinder collided with a car driven by Mr Walter Boname, which had been rented from the second respondent, Cadet's Car Rentals. Mr Boname died as a result of the accident and Mr Pinder suffered serious injuries, including a fracture dislocation of his right hip which left him with a permanent disability. Mr Pinder brought legal proceedings in the Supreme Court of the Commonwealth of the Bahamas against the estate of Mr Boname and Cadet's Car Rentals claiming damages in negligence for personal injury and consequential loss. When the case came to trial liability was not in issue but there remained a dispute as to the assessment of damages.

2. Mr Pinder was aged 32 at the date of the accident and 34 at the date of the trial. At the trial, Sir Michael Barnett, Chief Justice, found that at the date of the accident Mr Pinder was employed as a mason earning an average of $520.00 per week and that he had other employment at the weekend as a handyman from which he earned about a further $250.00 per week. At the date of trial, he was no longer employed. The Chief Justice found that, as a result of the accident, Mr Pinder, while able to work, could no longer work as a mason. He had only a high school education. The Chief Justice rejected a submission that Mr Pinder could earn more as a fisherman than he had as a mason; he accepted the medical evidence that work as a professional fisherman was not an option. The Chief Justice held that in his condition following the accident he was likely to earn about $400.00 per week. He concluded that as a result of the accident Mr Pinder had suffered a weekly loss of income of about $370.00 which translated into a loss of future income of about $20,000.00 per year.

3. The Chief Justice made an award of $380,000.00 in respect of loss of future earnings. He arrived at the figure by applying a proposed multiplier of 19.1 which he considered reasonable. He did not accept a submission on behalf of Cadet's Car Rentals that a *Smith v Manchester Corporation* (1974) 17 KIR 1 award was the proper approach to the assessment of loss of future earnings in this case.

4. The defendants appealed to the Court of Appeal, contending that a *Smith v Manchester Corporation* award should have been made instead of the award for loss of future earnings, alternatively that the use of a multiplier of 19.1 was against the weight of the evidence and wrong in law.

5. The Court of Appeal (Dame Anita Allen P, Isaacs and Crane-Scott JJA) held that the judge had been correct to make an award for loss of future earnings instead of

a *Smith v Manchester Corporation* award. However, it considered that the correct figure for the multiplicand should have been $19,240.00 instead of $20,000.00 and that applying the multiplier of 19.1 was wrong in principle. Using the UK Government Actuary's Department, Actuarial Tables for use in Personal Injury and Fatal Accident Cases, 7th ed (2011), ("the Ogden Tables") to derive a multiplier of 4.8461, it quashed the award of $380,000.00 and substituted an award for loss of future earnings of $93,238.96.

6. Mr Pinder now appeals against the decision of the Court of Appeal to the Judicial Committee of the Privy Council. In summary, he submits that the Court of Appeal erred in law:

> (1) in substituting its award for that of the Chief Justice, in circumstances where there was no basis for disturbing the award below;
>
> (2) in substituting a multiplicand of $19,240.00;
>
> (3) in holding that the Chief Justice was wrong in law in applying a multiplier of 19.1;
>
> (4) in its application and use of the Ogden Tables.

In his notice of appeal Mr Pinder asked that the order of the Court of Appeal be set aside and the order of the Chief Justice restored.

7. An appellate court will not, in general, interfere with an award of damages unless the award is shown to be the result of an error of law or so inordinately disproportionate as to be plainly wrong. In *Flint v Lovell* [1935] 1 KB 354 Greer LJ referred (at p 360) to the power of an appellate court to reverse a decision on quantum of damages in the following terms:

> "[T]his Court will be disinclined to reverse the finding of a trial judge 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. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of

> this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

Similarly, in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 the Board observed (at pp 613-614):

> "… before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell* [1935] 1 KB 354, approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601)."

8. In the courts below and on this appeal the parties have been content that, if an award for loss of future income is to be made (as opposed to a *Smith v Manchester Corporation* award) it should be assessed on the basis of the Ogden Tables. These actuarial tables are designed to assist in the calculation of lump sum damages for future losses in personal injury and fatal accident cases in the United Kingdom. They provide a multiplier which can be applied to an annual loss in order to produce a capitalised sum, taking into account accelerated receipt, mortality risks and, in relation to claims for loss of earnings and pension, discounts for contingencies other than mortality. In the Supreme Court the Chief Justice did not refer expressly to the Ogden Tables but purported to apply a methodology derived from the Tables. In the Court of Appeal, the President noted that the discount rate in the United Kingdom applied in the Ogden Tables is fixed by the Lord Chancellor pursuant to the Damages Act 1996. (At the date of the trial in these proceedings the discount rate was 2.5%. It was reduced from 2.5% to -0.75% with effect from 20 March 2017.) She considered (at paras 18-19) that the Tables could be a useful guide but cautioned against their wholesale application as if they had the force of law in The Bahamas. She drew attention to the fact that they are based on the yield on Index Linked Government Stock and on the mortality risks and other contingencies relating to the population of the United Kingdom. Similarly, Crane-Scott JA (at paras 91-92) noted that the Ogden Tables were of persuasive authority only in The Bahamas but had, in practice, provided a useful guide to practitioners and judges in arriving at awards for future pecuniary loss.

9. Neither party to the present appeal has suggested that the use of the Ogden Tables for the quantification of future loss of earnings was inappropriate in this case. Accordingly, the Board, in deciding this appeal, will seek guidance from those Tables.

The Board notes, however, that the Tables are intended to reflect the particular conditions prevailing in the United Kingdom which are likely to differ considerably from those in The Bahamas. The courts of The Bahamas may, therefore, wish to consider on some future occasion whether it is appropriate to refer to the Ogden Tables for guidance or whether it may be preferable to seek the assistance of actuarial tables designed to reflect the conditions prevailing in The Bahamas. In this regard the Board draws attention to the observations of Lord Kerr in *Scott v Attorney General* [2017] UKPC 15 (at paras 25-29) concerning the application in The Bahamas of the United Kingdom Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases.

10. Mrs Wright did, however, submit, in reliance on *West India Electric Co Ltd v Roberts* [1920] AC 1025 per Lord Buckmaster at p. 1028, that the Court of Appeal had regard to the different cost of living in The Bahamas and was satisfied that the amount awarded was not unduly small. While the President did caution against the wholesale application of the Ogden Tables as if they had the force of law in The Bahamas (at paras 18-19), the Board considers that the Court of Appeal nevertheless purported to apply the Ogden Tables without modification (at paras 39, 104). Moreover, the Board held in *Scott v Attorney General* that it was for the local courts to decide whether any adjustment should be made in the application of the UK Guidelines in The Bahamas.

11. It is convenient to refer next to the assessment by the courts below of an annual figure for loss of future income. The Chief Justice found on the evidence of Mr Pinder that his earnings at the time of the accident were $770.00 per week but that all he was likely to earn in the future was $400.00 per week, due to his location on a family island, his condition following his injury and his lack of formal education. The Chief Justice assessed his loss of future income at "about $370.00 per week or about $20,000 per year". The Court of Appeal considered, however, that the Chief Justice had erred in adopting the figure of $20,000.00 per year and substituted a multiplicand of $19,240.00 (i.e. 52 x $370.00). Mr Hanchell now seeks to appeal against this substitution arguing that it was open to the Chief Justice to increase the annual figure slightly in order to take account of the facts that the appellant was not employed at the date of trial and that his future prospects of employment were reduced. The Board is unable to accept this submission. There is no indication that the Chief Justice was influenced by these considerations in arriving at an annual figure for loss of future income. On the contrary, he seems just to have taken a round figure. Furthermore, these considerations are taken into account in the application of the Ogden Tables. The annual figure of $19,240.00 accurately reflects the finding of an average weekly loss of $370.00 which was proved at trial.

12. The Board is, however, satisfied that both the Chief Justice and the Court of Appeal erred in their application of the Ogden Tables and, as a result, made an entirely erroneous estimate of the appropriate level of damages.

13. The Chief Justice applied a proposed multiplier of 19.1 which he considered reasonable. Although the judge did not explain in his judgment how he arrived at this figure, in his submissions to the Court of Appeal Mr Hanchell explained that he had proposed this multiplier which had been arrived at mathematically using the Ogden Tables. Table 9 (Multipliers for loss of earnings to pension age 65 (males)) had suggested a basic multiplier of 21.07 as the appropriate multiplier for loss of earnings for a male aged 34. This had then been adjusted by reference to Table A (Loss of earnings to pension age 65 (Males – not disabled – employed)) which gave a figure of 0.91. 21.07 when multiplied by 0.91 had resulted in an "adjusted table multiplier" of 19.1.

14. In the Board's view, this was an erroneous approach. If the Ogden Tables were to be applied, the judge should first have calculated a capitalised figure for the value of the earnings Mr Pinder would have received if the injury had not been suffered employing Table 9 and Table A. He should then have calculated a capitalised figure for likely post-injury earnings employing Table 9 and Table B (Loss of Earnings to pension age 65 (Males – disabled – not employed). The difference between the two figures would be the appropriate award of damages for loss of future earnings.

15. The Court of Appeal considered that the approach of the Chief Justice was erroneous and that a multiplier of 19.1 was much too high given Mr Pinder's particular circumstances. It considered that the judge had correctly referred to Table 9 to obtain the basic multiplier of 21.07. However, referring to the fact that Mr Pinder was unemployed at the date of the trial, it considered that the judge should then have adjusted that multiplier by reference to Table B (Loss of earnings to pension Age 65 (Males – Disabled)) which in its view was the appropriate table where the claimant is a disabled male. Applying an adjustment factor of 0.23 it arrived at a multiplier of 4.8461. Applying that multiplier to a multiplicand of $19,240.00 it substituted an award of $93,238.96 for loss of future earnings.

16. In the Board's view, this too was an erroneous approach. If the Ogden Tables were to be applied, the court should have followed the procedure set out in para 14 above.

17. The Board considers that, if the Ogden Tables were to be applied, the calculation should have made a separate assessment for (a) the value of earnings the claimant would have received if the injury had not been suffered and (b) the value of the claimant's earnings (if any) taking account of the injuries sustained. The loss is arrived at by deducting (b) from (a) (Explanatory Notes to the Ogden Tables, paras 37-39). The calculation should have proceeded as follows:

(1) Table 9, on the basis of a 2½ % rate of return, gives a multiplier for a male aged 34 of 21.07.

(2) In order to take account of risks other than mortality, allowing for the appellant being employed, not disabled and having no educational qualifications at the date of the accident, Table A would require 21.07 to be multiplied by 0.89 resulting in a revised multiplier of 18.7523.

(3) The loss of earnings is therefore assessed as 18.7523 x $40,040 (former salary i.e. $770.00 x 52) = $750,842.09.

(4) Allow for mitigation of loss of earnings in respect of post-injury earnings. As before, Table 9 shows that on the basis of a 2½ % rate of return, the multiplier for a male aged 34 is 21.07.

(5) In order to take account of risks other than mortality, allowing for the appellant being unemployed, disabled and having no educational qualifications at the date of trial, Table B requires 21.07 to be multiplied by 0.23 resulting in a revised multiplier of 4.8461.

(6) The amount of mitigation for post-injury earnings is therefore assessed as 4.8461 x $20,800 (likely future salary i.e. $400.00 x 52) = $100,798.88.

(7) The award for loss of future earnings after allowing for mitigation is $750,842.09 - $100,798.88 = $650,043.21.

18. This, however, is not what the appellant is claiming in this appeal. By his notice of appeal, he seeks an order that the order of the Court of Appeal be set aside and the original order of the Chief Justice be restored. While the appellant's case, at para 6, sets out a calculation using the same methodology as that of the Board in the preceding paragraph and arrives at an award for loss of future earnings in the sum of $649,951.12, that document was served on the respondent only on 7 October 2018 i.e. some ten days prior to the hearing of this appeal. (The difference between this figure and that in para 17(7) above appears to result from rounding to two decimal points during the calculation.) In these circumstances the Board was concerned that it might be unfair to the respondent to allow the appellant to advance a case on this basis without adequate notice. However, the Board notes that the same methodology was employed by Mr Hanchell on behalf of the appellant in his closing written submissions before the Chief Justice dated 24 November 2014. As a result, the Board is satisfied that the respondent's legal team had prior notice of this case and will not be disadvantaged if the appellant is allowed to advance his appeal on this basis.

19. For these reasons the Board will humbly advise Her Majesty that the appeal should be allowed, the award of $93,238.96 in respect of loss of future earnings quashed and an award of $650,043.21 substituted. The Board invites submissions on costs.