

Tan Kok Lam, next friend of Teng Eng, a patient in this action v Hong Choon Peng
[2000] SGHC 201

Case Number : Suit 1252/1999, RA 600115/2000
Decision Date : 29 September 2000
Tribunal/Court : High Court
Coram : Lim Teong Qwee JC
Counsel Name(s) : Kang Kim Yang (Joseph Tan Jude Benny) for the plaintiff; Low Tiang Hock (Chor Pee & Partners) for the defendant
Parties : Tan Kok Lam, next friend of Teng Eng, a patient in this action — Hong Choon Peng

JUDGMENT:

Grounds of Judgment

1. This appeal from the decision of an assistant registrar on assessment of damages for personal injuries suffered by the plaintiff raises a point as to loss of amenities as an item of loss or damage. For general damages the assistant registrar allowed \$80,000 for loss of amenities. I allowed the appeal. I allowed \$21,500 and varied the award accordingly. The plaintiff has given notice of appeal by leave granted by the Court of Appeal and these are my written grounds.

2. The assistant registrar has helpfully given reasons for the award in her note of the proceedings before her. She said:

"General Damages:

(a) Loss of amenities - \$80,000.

Notwithstanding that plaintiff is now in persistent vegetative state, the case authorities show that an award can still be made for loss of amenities, as opposed to for pain and suffering (see, *inter alia*, *Lim v Camden AHA*). I have however taken into account plaintiff's age in deciding on the amount which should be awarded under this head (*NutBrown v Sheffield HA*)."

Other than for the cost of future care no other amount was allowed for general damages. She also allowed other sums for special damages making a total of \$215,803.47 and awarded the plaintiff half of that in terms of the judgment. This appeal concerns only the item of loss of amenities and the resulting interest.

3. The plaintiff was knocked down by a motor cycle driven by the defendant on 24 September 1996. She was then about 67 years of age. She was brought to the Singapore General Hospital and admitted the same day. The medical report dated 13 November 1997 states:

"Examination on admission showed that

1) She was drowsy with a Glasgow Coma Scale of 10 (E₂ V₃ M₅).

2) The pupils were equal and reactive.

3) Her blood pressure was 182/84 mmHg.

4) There was a small occipital scalp laceration.

5) She was able to move all limbs.

6) An urgent CT brain scan showed a left frontal brain contusion with fronto-temporo-parietal acute subdural hematoma.

7) Cervical spine X-rays showed no fracture.

8) Chest X-rays showed no fracture.

She underwent an immediate craniectomy and evacuation of the acute subdural hematoma."

The plaintiff subsequently underwent a number of other surgical procedures and medical treatment.

4. A score of 9 to 12 on the Glasgow Coma Scale indicates moderate brain injury as opposed to severe brain injury indicated by a score of 8 or less and mild brain injury indicated by a score of 13 to 15. "E₂" means eyes opening on pain stimulation, "V₃" means verbal response which can be understood by the examiner but is inappropriate to the questions asked and "M₅" means the patient localises pain or knows where the pain is inflicted. The plaintiff's condition would have deteriorated until the operation was carried out.

5. The medical evidence was that from the time of the first operation which was carried out immediately on the day of admission the plaintiff was unable to respond to visual and verbal stimulation. She could respond to pain but was not aware of it. As a result of the injury sustained she had a reduced life expectancy of two to five years and while she might live beyond five years she would not live 10 years. As the assistant registrar found the plaintiff was in a persistent vegetative state.

6. The defendant brings this appeal on the basis that the plaintiff was unconscious from the day of the accident and that general damages should not be allowed for pain and suffering and for loss of amenities of life or alternatively that only a "small sum" should be allowed. Mr Low suggested \$6,000. He referred to *Low Yoke Ying & Anor v Sim Kok Lee & Ors* [1990] SLR 1258 and *Sim Hau Yan v Ong Sio Beng & Anor* (Unreported. Judgment of Goh Joon Seng J dated 6 November 1996 in Suit No 511 of 1996).

7. In *Low Yoke Ying* the plaintiffs as administrators of the estate of the deceased brought the action for the benefit of the estate and the dependants. The deceased was involved in a collision between the car he was driving and a lorry driven by the first defendant. He was pronounced dead an hour later and there was no evidence that he was conscious in that time. No award was made for pain and suffering. *Sim Hau Yan* was also an action brought for the benefit of the estate and the dependants. The deceased was knocked down by a van driven by the first defendant and died three days later. The court found that he was unconscious in that time and made no award for pain and suffering. Both cases were not concerned with damages for loss of amenities and I do not think they are of any particular assistance to the defendant in this case.

8. Mr Kang said that \$80,000 was allowed for the injuries as well but from the learned assistant registrar's note it is clear that it was for loss of amenities but I accept that loss of amenities can also result from injuries other than the brain injury. I was referred to *Toon Chee Meng Eddie v Yeap Chin Hon* [1993] 2 SLR 536, *Ng Song Leng v Soh Kim Seng Engineering & Trading Pte Ltd & Ors* (Unreported. Judgment of Lai Kew Chai J dated 6 November 1997 in Suit No 1760 of 1994) and *Ahmad Daman Huri bin Hussein v Koo Chin Yau* [1990] 3 MLJ 53. It was submitted that \$80,000 for loss of amenities was not excessive. I was also referred to *H West & Son Ltd & Anor v Shephard* [1964] AC 326.

9. Damages which are awarded for a wrongful act are those "which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act". See *Admiralty Commissioners v S.S. Susquehanna* [1926] AC 655 at p 661. In *H West & Son Ltd & Anor v Shephard* Lord Morris of Borth-y-Gest said at p 349:

"If someone has been caused pain then damages to compensate for the enduring of it may be

awarded. If, however, by reason of an injury someone is made unconscious either for a short or for a prolonged period with the result that he does not feel pain then he needs no monetary compensation in respect of pain because he will not have suffered it."

He will endure no pain and there will be no suffering on account of the pain. In such cases no award will be made for pain and suffering.

10. In that case the plaintiff who was 41 years of age was knocked down by a lorry driven by the second defendant. She sustained severe head injuries resulting in cerebral atrophy and paralysis of all four limbs. In the action for damages the trial judge awarded 17,500 for general damages. In arriving at this sum the judge referred to the award of 15,000 in *Wise v Kaye & Anor* [1962] 1 QB 638 (where the plaintiff remained in an unconscious state) and considered that the present plaintiff's case was worse since she must have some knowledge of her condition; he also took into account the fact that she might die within five years. The Court of Appeal held that there was no error in the assessment and dismissed the appeal. The defendants appealed to the House of Lords. Lord Morris of Borth-y-Gest went on to say at p 349:

"Apart from actual physical pain it may often be that some physical injury causes distress or fear or anxiety. If, for example, injuries include the loss of a leg there may be much physical suffering, there will be the actual loss of the leg (a loss the gravity of which will depend upon the particular circumstances of the particular case) and there may be (depending upon particular circumstances) elements of consequential worry and anxiety. One part of the affliction (again depending upon particular circumstances) may be an inevitable and constant awareness of the deprivations which the loss of the leg entails

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."

Turning to the case before the House His Lordship said at p 351:

"Accepting the estimate as to the plaintiff's expectation of life, damages were to be given to cover a period of over seven years. At the age of 41 everything that life held for her was taken away from her. For a period of about seven years instead of having life's activities and amenities she will have mere existence but little else, save that, to the extent that I have described, she may have the torment of a realisation of her helplessness. If in some degree she has processes of thought she has the agony and frustration of being unable to convey her thoughts or to give them expression. All these matters constitute grave and sombre deprivations for which in my view she is entitled to receive substantial compensation."

While the fact of unconsciousness will not eliminate the actuality of the deprivations of the amenities of life it is, with respect, difficult to see that the loss or damage suffered by the plaintiff as a result of these deprivations will not to a great extent be affected by the fact of unconsciousness. And it does appear that some of the matters which were taken into account and which constituted grave and sombre deprivations can only exist by being felt or thought or experienced.

11. In the same case Lord Devlin said at p 354:

"This deprivation may bring with it three consequences. First, it may result in loss of earnings and they can be calculated. Secondly, it may put the victim to expense in that he has to pay others for doing what he formerly did for himself; and that also can be calculated. Thirdly, it produces loss of enjoyment, loss of amenities as it is sometimes called, a diminution in the full pleasure of living. This is incalculable and at large. This deprivation with its three consequences is something that is personal

to the victim

What has to be considered in the present case is the method of compensation for the third of these consequences, loss of enjoyment or pleasure

There are two ways in which this loss of enjoyment can be considered. It can be said that from beginning to end it is really all mental suffering. Loss of enjoyment is experienced in the mind and nowhere else. It may start with acute distress at the inability to use a limb in games or exercise as before or just in getting about, and may end with a nagging sense of frustration. If this is the true view, then total unconsciousness as in *Wise v Kaye* relieves all mental suffering and nothing can be recovered for a deprivation which is not being experienced.

The other way to look upon the deprivation of a limb is as the loss of a personal asset, something in the nature of property. A limb can be put both to profitable use and to pleasurable use. In so far as it is put to profitable use, the loss is compensated for by calculating loss of earnings and not by assessing mental pain. On the same principle, it can be said, a sum must be assessed for loss of pleasurable use irrespective of whether there is mental suffering or not

My Lords, as might be expected, English law has not come down firmly in favour of either of these two ways to the exclusion of the other. It favours a compound of both, as was agreed in argument and as I shall show later by reference to the authorities. The elements to be compounded have been called the objective and the subjective. The loss of property element is objective; it requires some sort of valuation that is in no way dependent on the victim's sense of loss. The other element is subjective because it depends entirely on mental suffering actually experienced. Is the main - or at least a very substantial - element in the compound the objective so that an evaluation must be made of it with an addition for mental suffering when proved? Or is the main element mental suffering laid upon an objective bedrock, so that some sum is always recoverable even where there is no mental suffering at all?"

Lord Devlin considered the authorities and said at p 362:

"I think that deprivation should be measured mainly, if not wholly, by the sense of loss."

12. By a slim majority the House of Lords (Lord Reid and Lord Devlin dissenting) dismissed the appeal. Lord Tucker agreed with Lord Morris of Borth-y-Gest. Lord Pearce said at p 368:

"The loss of happiness of the individual plaintiffs is not, in my opinion, a practicable or correct guide to reasonable compensation in cases of personal injury to a living plaintiff."

And at p 369:

"I venture to think that an alteration of the current principles of assessing damages for personal injury would be an embarrassment to a practice which in spite of its difficulties does in the main produce a just result."

He agreed that the appeal should be dismissed. Lord Reid said at p 341:

"... I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life

If that is so, then I think it must follow that if a man's injuries make him wholly unconscious so that he

suffers none of these daily frustrations or inconveniences, he ought to get less than the man who is every day acutely conscious of what he suffers and what he has lost."

13. In *Wise v Kaye & Anor* the plaintiff then a 20 year old woman suffered serious brain injuries in a car accident caused by the negligence of the defendants. She became unconscious and there was no prospect of recovery. The court awarded 15,000 for general damages. The Court of Appeal (Sellers and Upjohn LJ, Diplock LJ dissenting) held that general damages must be assessed on an objective basis and should be in the nature of compensation for the injury suffered so far as money was appropriate. Sellers LJ said at p 654:

"It was further submitted that because the plaintiff has been throughout unconscious and has so far no knowledge of her condition and, as far as can be foreseen, never will have any knowledge of the wreck that she is, no damages or very limited damages should be awarded. In these circumstances there is no room for an award for pain and suffering but otherwise I regard it as an untenable submission."

Diplock LJ said at p 668: "that consciousness of deprivation is, if not the sole at least a major causative factor in the unhappiness resulting from a disabling injury".

14. The decision in *H West & Son Ltd & Anor v Shephard* has not been well received by at least one well known textbook writer. *McGregor On Damages* (16th Ed, 1997) states at para 1709:

"This decision of the House of Lords is one which is to be regretted, and the hope was expressed in the 13th edition of this work that the House would one day be prepared to adopt the approach taken by Lord Reid and Lord Devlin in their cogent dissents, and perhaps even to return to the pre-1950 position by discarding loss of amenities of life not indeed as an element – and a most important element – of loss but as a separate head of damage. But that such a day is unlikely to come is attested to by the House's refusal in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 to depart from *West v Shephard*. Lord Scarman, in a speech with which the other members of the House agreed, considered that any reversal of *West v Shephard* would, in the first place, 'cause widespread injustice' since both settlements and judicial awards had proceeded for nearly 20 years on the basis of the decision, and, in the second place, 'should be done not judicially but legislatively within the context of a comprehensive enactment dealing with all aspects of damages for personal injury'."

See at p 189. Earlier at p 188 Lord Scarman said:

"The effect of the two cases (*Wise v Kaye* being specifically approved in *H West & Son Ltd v Shephard*) is two-fold. First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend upon the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation – a substantial loss, whether the plaintiff is aware of it or not."

With respect I think this sets out succinctly the position in England but so far as I am aware this position has not been adopted in Singapore.

15. In *Skelton v Collins* (1966) 115 CLR 94 the plaintiff suffered multiple injuries including severe injury to the brain which left him totally unconscious. The High Court of Australia (Kitto, Taylor, Windeyer and Owen JJ, Menzies J dissenting) held that in assessing damages for loss of amenities to a plaintiff who had been rendered permanently unconscious regard must be had to the fact that he was insensible of his deprivation. *Wise v Kaye & Anor* and *H West & Son Ltd & Anor v Shephard* were not followed.

16. Kitto J referred to the speech of Lord Morris of Borth-y-Gest and said at p 103:

"... in relation both to death and to unconsciousness surely it is true that what ought to affect the quantum of damages is not the actuality of the deprivations but their value: what would 'the ordinary experiences and amenities of life' (in the future) have added up to, if the plaintiff had not been cut off from them? The trouble is not just that the assessment of compensation is difficult; it is that there is simply no way of forming any reliable idea, any 'confident estimate', as to what the thing would have been like for which the compensation is to be assessed; and therefore an award so substantial as necessarily to imply that the judge (or jury) has in fact formed such an idea must be unsupportable."

Taylor J said at p 113:

"The expression 'loss of the amenities of life' is a loose expression but as a head of damages in personal injury cases it is intended to denote a loss of the capacity of the injured person *consciously* to enjoy life to the full as, apart from his injury, he might have done."

Menzies J in his dissenting judgment said at p 124:

"Loss of capacity – total or partial, permanent or temporary – to live the life that could otherwise have been lived is, apart from damages for pain and suffering, the fundamental loss for which general damages for personal injury are awarded. *It is from this loss that other losses stem* (Italics added)."

I think the "other losses" would have included the awareness of the loss of capacity and the resulting frustration, distress and suffering. The task of the court is then to find the relationship or balance between the loss of capacity – the objective element – and the other losses – the subjective element.

17. The plaintiff in the case before me has been reduced to a "persistent vegetative state". I have read the medical evidence and I have seen the photographs. There were photographs of her with her family taken before she was knocked down by the defendant and there were photographs taken after. They can only tell part of the horror that the accident has caused in the life of this lady and in the lives of members of her family who daily have to attend to her and to see the wreck that has become of her. When the medical expert examined her on 11 May 1999 she was not aware of her surrounding, she could not speak and occasionally she could only respond to her relatives by staring blankly at them. She was not aware of pain. Her life expectancy has been reduced to two to five years. What damages so far as money can compensate will give this 67 year old lady – not her family or anyone else – reparation for the wrongful act of the defendant?

18. I think loss of amenities as a head of damages means loss of the capacity to enjoy the amenities of life. The injured person has been deprived of the means of enjoying life to the full that he would be able to but for the injury or deprivation. With respect I agree with Lord Devlin in *H West & Son Ltd & Anor v Shephard* that in assessing damages under this head both the objective and the subjective elements must be considered and that deprivation should be measured mainly by the sense of loss. Where as in this case the injured person is unaware of the loss and is spared the frustration, distress and suffering resulting from an awareness of the loss damages should only be moderate and conventional.

19. The assistant registrar has allowed \$80,000 for loss of amenities in this case. I think she has proceeded on a wrong principle and assessed this head of damages without any or sufficient regard for the fact that the plaintiff is unaware of the deprivation. In my judgment loss of amenities should be seen as a mix of the objective element – the loss of the means to enjoy life as fully as the plaintiff could but for the injuries sustained – and the subjective element – the sense of frustration, distress and suffering.

20. If the victim dies as a result of the injuries received and is not only reduced to the human wreck as the plaintiff has been an award used to be made for loss of expectation of life. Death deprives the victim of everything including the capacity to enjoy life. The deprivation is total. A conventional award of about \$5,000 used to be made for loss of expectation of life. Since 1987 an action for damages for a wrongful act causing death may include a claim for damages for bereavement but such a claim can only

be made for the benefit of a class of persons who survive the victim. Such damages are fixed at \$10,000. Mr Low suggested that the conventional sum for loss of amenities should be \$6,000 following the sum arrived at in *Skelton v Collins*. I cannot agree with that. I think such a sum should not be less than \$10,000.

21. In *Toon Chee Meng Eddie v Yeap Chin Hon* \$160,000 was awarded for pain and suffering and for loss of amenities but without apportionment between the two heads. The plaintiff was a young boy of about 7 when the injuries were inflicted on him including injury to the brain. With the best nursing care he could be expected to live up to 40. The evidence of the neurologist adduced by the plaintiff was:

"[The plaintiff's] functional level is similar to a six-month to one-year-old child. It is my professional opinion that he can feel the emotions of joy, anger, frustration and happiness – mainly in response to bodily needs and their satisfaction but also to a minor degree in human interaction with his mother. I do not think he is able to fully appreciate the extent of his injuries and disability. This is in part due to the severity and extent of these injuries but also in part due to the young age at which he suffered these injuries."

Although much of what the neurologist said was not specifically referred to by the learned judge in his summary of the plaintiff's disabilities I think the subjective element over the remainder of his life expectancy of 40 years was a substantial factor that was taken into consideration. There was no appeal to the Court of Appeal as regards damages for pain and suffering and for loss of amenities.

22. In *Peh Diana & Anor v Tan Miang Lee* [1991] SLR 341 the plaintiff suffered brain injury in a road accident. She was then a 14 year old girl. Her residual disabilities included intellectual impairment to the extent of borderline mental retardation, personality change with a tendency to be aggressive and a slight slurring in her speech. Chao Hick Tin J (as he then was) said at p 347:

"Considering the precedents referred to above, in my judgment, the appropriate compensation payable to the first plaintiff for the head injury and the consequential disabilities that resulted therefrom, and taking into account inflation, should not exceed \$70,000."

The precedents referred to have been conveniently summarised in the judgment. With the exception of \$160,000 in *Toon Chee Meng Eddie* \$45,000 to \$100,000 have been awarded for pain and suffering and for loss of amenities without apportionment in brain injury cases. See at pp 346, 347. In all these cases the injured party was and would have been aware of the state he or she was in for the remainder of his or her life.

23. Taking \$70,000 as a starting point I would think that a substantial part would have been for pain and suffering and for the subjective element in loss of amenities. I have to do the best I can to find a sum that would represent the objective element. It cannot be less than \$10,000. It cannot be as much as \$70,000 as that would include pain and suffering and the subjective element. In the circumstances of this case I would disregard the plaintiff's age and her life expectancy as she has no awareness of the loss. They are relevant as regards other heads of damages for which sums have been awarded and which are not concerned in this appeal and they would also be relevant in assessing damages for pain and suffering and the subjective element in loss of amenities. On the whole I think \$20,000 would be appropriate. There were other minor injuries and there has been a loss of consciousness which have contributed to the loss of amenities with some measure of overlap and for all of these I would allow another \$1,500. In my judgment the damages for loss of amenities should be reduced to \$21,500 and I accordingly allowed the appeal.

Lim Teong Qwee

Judicial Commissioner

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