Tan Sia Boo v Ong Chiang Kwong
[2007] SGHC 131

Case Number : Suit 485/2004, SUM 651/2007

Decision Date : 16 August 2007

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Namasivayam Srinivasan (Hoh Law Corporation) for the plaintiff; Madam Assomull, Vivian Chew and Chong En-Lai (Assomull & Partners) for the defendant

Parties : Tan Sia Boo — Ong Chiang Kwong

Civil Procedure – Appeals – Registrar's appeal on assessment of damages to judge in chambers – Hearing before registrar akin to trial – Tortfeasor seeking to adduce further evidence of surveillance conducted after registrar's hearing – Whether judge in chambers should allow further evidence – Whether Ladd v Marshall principles applicable

16 August 2007

Choo Han Teck J:

1 The plaintiff sued the defendant for damages for personal injuries suffered in a road accident. The plaintiff was standing on a road shoulder along the Pan Island Expressway on 13 August 2003 when a taxi driven by the defendant hit him. The defendant consented to interlocutory judgment and the parties proceeded to an inquiry into damages. That was heard before the Assistant Registrar Dorcas Quek ("AR Quek") on 27 July 2006. The inquiry took four days, namely on 27 and 31 July 2006, and 4 and 12 September 2006. 12 witnesses were examined, including nine expert witnesses, two of which were for the defendant. The plaintiff was represented by Mr Srinivasan and the defendant was represented by Mr Fernandez. On 9 November 2006 AR Quek awarded damages at 65% of liability as follows:

A.	General Damages			
	(a)	Pain and Suffering		
	(i)	head injury	S$65,000.00	
	(ii)	injury to left knee	S$35,000.00	
	(iii)	multiple scars & lacerations	S$4,000.00	S$104,000.00
	(b)	Future Medical Expenses		
	(i)	physiotherapy for manage of vertigo	S$500.00	

(ii)	medication	S$9,600.00	
(iii)	medical consultation	S$5,760.00	S$15,860.00
(c)	Future Loss of Earnings	S$540,000.00	
(d)	Loss of Earning Capacity	S$20,000.00	
(e)	Pre-Trial Loss of Earnings	S$102,000.00	

B. Special Damages

(a)	Medical expenses	S$14,605.33	
(b)	Transport expenses	S$479.85	S$15,085.18
	Sub-Total (Damages at 100%)	S$796,945.18	
	Damages at 65%		**S$518,014.36**

C. Interest

(a) Interest on general damages for pain and suffering of S$67,600.00 at 6% per annum from the date of Writ of Summons to date of Judgment.

(b) Interest on pre-trial loss of earnings and special damages incurred before the date of Judgment of S$76,105.37 at 3% per annum from the date of accident to the date of Judgment.

D. Interim Payment

(a) Interim payment made till date in the sum of S$60,000.00 by the Defendant to be deducted from the total sum payable by the Defendant.

2 The defendant then changed solicitors and Mr Assomull took over as the defendant's new lawyer on 21 November 2006. The plaintiff appealed on 22 November 2006 against the award of damages and the defendant cross-appealed on 23 November 2006. The defendant then employed a private investigator to keep surveillance on the plaintiff and a surveillance report covering four days in February 2007 and one day in March 2007 was recorded by the investigator. The record included video recordings of the plaintiff by the investigator. On 12 February 2007 the defendant applied by summons for leave to adduce the new evidence at the hearing of the appeals. I directed counsel to present written submissions on the question of whether leave ought to be given to the defendant to

adduce the fresh evidence. This was done by Mr Srinivasan and Mr Assomull by 25 July 2007. I heard counsel on 26 July 2007. Mr Srinivasan had nothing further to add whereas Mr Assomull submitted that the plaintiff had refused to be further examined by the defendant's medical experts. That was a legitimate refusal since the inquiry had ended and the court below had handed down its decision. The defendant was not entitled, in any event, to subject the plaintiff to any procedure without his consent or a court order. Mr Assomull also informed the court that the private investigators were instructed on 2 February 2007 after he had been instructed to take over from the defendant's previous solicitors.

3 The defendant also sought to adduce fresh affidavits of the defendant's medical experts containing their further comments after viewing the new surveillance video clip. He had also requested that the plaintiff to be examined by these doctors but the plaintiff had refused. The issue before me was whether I ought to grant leave for that evidence, namely the video clip of the surveillance, to be admitted. Mr Assomull cited *Lassiter Ann Masters v To Keng Lam (alias Toh Jeanette)* [2004] 2 SLR 392 as the authority for the proposition that "the stringent principles of *Ladd v Marshall* [1954] 1 WLR 1489 do not apply to Appeals from a Registrar's Assessment of Damages". Both counsel also referred to *Ang Leng Hock v Leo Ee Ah* [2004] 2 SLR 361. The basic principle there was emphasized by the Court of Appeal in *WBG Network (S) Pte Ltd v Sunny Daisy Ltd* [2007] SLR 1133. Generally, *Ladd v Marshall* may not be strictly applied in cases concerning appeals from a registrar's decision. However, where the hearing before the registrar was akin to a trial in which witnesses are examined, the principles in *Ladd v Marshall* would more readily apply. In any event, as was stated in the cases cited above, the admission of such evidence is still at the court's discretion. Mr Assomull's main argument was that the evidence of the plaintiff's physical condition as recorded by camera after the assessment inquiry was not available during the inquiry, and that the fresh evidence has probative value and would have affected the quantum of damages assessed. The claim that the fresh evidence was not available is not a straightforward point. It is obvious that a footage taken after the assessment could not be shown during the assessment proceedings, but video and other surveillance can be done before the proceedings for use during the proceedings. The pertinent point was whether the defendant ought to have even attempted to conduct surveillance after the proceedings have ended? The defendant would think it right that such evidence should now be admitted to show what he would regard as the true state of the plaintiff's physical disability.

4 Rules and procedure are designed to facilitate the fair disposal of legal proceedings and every litigant is expected to comply with the rules. Finality is the specific aspect of fairness in issue. It is sometimes said that rules should not be followed "blindly". I think it equally important that this aphorism is not cited "blindly", that is to say, that the phrase is not cited merely to make a disregard of rules sound correct. It will be useful to remind ourselves why rules need to be obeyed. Procedural rules are designed to produce a fair result in litigation by making clear what the process is in legal proceedings. If rules are disregarded whenever one party says it is unfair or unjust to follow them, then, in effect, there will be no rules because anyone can make such a claim whenever a rule or result does not suit his purpose. Rules provide finality in the legal process. The public as well as the parties concerned will expect a point when proceedings must end. They will expect that when the rules have been complied with, the court will hand down its decision; and, subject to the rules relating to an appeal to a higher court, the proceedings end and will not be permitted to linger or be revived. No one ought to be allowed to re-argue his case save in accordance with the rules relating to the right of appeal. Mr Assomull argued that the principles in *Ladd v Marshall* do not apply in this case and that the defendant ought to be allowed to adduce the new evidence. I shall revert to this shortly.

5 Rules are also necessary for the enforcement of professional discipline and ethical conduct. Professional discipline in this regard includes the desire for achieving a high level of professional

competence. Evidence and argument must be adduced and made at the appropriate forum and stage. In this regard, it will be seen from the cases referred to above that the application of *Ladd v Marshall* is relaxed in cases involving an appeal from a registrar's decision not only because the High Court in hearing the appeal is bound to hear it *de novo* but also because the evidence below was admitted mainly by affidavit alone. If the hearing before the registrar was similar to a trial, that is to say, where oral evidence was adduced, as was the case here, the principles of *Ladd v Marshall* would be strictly applied. If omissions below caused injustice to the defendant it can seek redress from doctors and/or previous solicitors. The mere fact that a new solicitor has his own idea as to how to conduct his client's case does not warrant a change or disregard of the rules so as to accommodate the fresh approach. The new solicitors take the case as he finds it and must argue his appeal on the law and, if appropriate, on the facts such as were found by the court below. The new solicitor would not be permitted to present a case based on fresh evidence when the evidence should have been adduced below. A new counsel is not entitled to start anew in this sense. It is not sufficient to say that the fresh evidence will show that the disability was not as serious when there were no attempts to have a video recording of this nature in the court below. I accept that it is possible in some cases that evidence of malingering might elude the inquiry. No specific allegation of malingering was made in the present case, but the insinuation was so strong that it reeked through the submission. How would an appellate court know whether a plaintiff's disability was the same, less, or more than at the time of assessment before the Assistant Registrar? The fresh evidence may or may not be evidence of malingering, and it may or may not have had an impact on the award had it been adduced at the hearing below. Such questions cannot be answered without re-examining the witnesses. Should the defendant be permitted to do so? I am of the view that he should not (I have referred to the defendant as named although the true defendant is the insurance company and it is the company that had instructed Mr Assomull). If fresh evidence were to be permitted on this ground, every defendant will hope to regard this as a precedent for them to produce post-hearing surveillance evidence. Forensic and diagnostic medical opinion, as well as the legal expertise of counsel, is, in my view, sufficient for a fair assessment of the plaintiff's injuries, including an assessment of possible malingering. After all, the possibility of malingering must be foremost in the minds of the legal and medical experts gathered for the case. It is just as important in the interests of fairness that deadlines and limits are set for adducing evidence. In this regard, the doctors should not have been asked to comment on the video clip before leave to admit the video clip had been given. Consequently, the subsequent medical opinion based on the video clip also cannot be used as fresh evidence. By the same principle, a plaintiff will not be permitted to adduce fresh evidence of a medical diagnosis not adduced at the inquiry into damages just so as to show that his disability was worse than that found by the court at the inquiry.

6 I alluded to ideals of professional competence and ethical conduct at the start of the previous passage, and I now return to the point. Lawyers must discipline themselves in ensuring that they produce all the evidence they require at the inquiry or trial; no encouragement should be given to the indolent that they will always have a second attempt to produce what ought to have been produced or to do what ought to have been done at first instance. While I emphasize the point that it is the duty of lawyers to adduce all their evidence at trial, I am in no way suggesting that the defendant's previous solicitors were remiss. There was nothing before me to suggest that they were. A strict adherence to the rules compels lawyers to conduct their clients' causes expeditiously and comprehensively. That will only enhance the professional standards. The fairness of the legal and judicial process must be viewed in its entirety. The process, as a whole, has been developed for the advancement of everyone's interest, including those of individuals such as the present defendant. Everyone, including this defendant, will expect that the rules and procedure are followed for the sake of finality and that, when the final line is drawn, its mark applies to everyone. I would thus similarly not have allowed the plaintiff to adduce fresh evidence of a deeper wound. I am sure that had that situation arisen the defendant would have been in full agreement with me.

7 That brings me to the relevance of ethical conduct, which at the superficial level may seem only obliquely relevant, but in my view, is of great importance in the present context. Rules are obeyed by people who respect them and a strong ethical bearing in the lawyer is the stuff that helps ennobles his profession. I have no reason to think Mr Assomull had an ulterior motive, but resort to applications of this kind on the basis that the court will change its mind once it sees the fresh evidence paves the way for some lawyers to practise one-upmanship over their clients' previous solicitors. There are opportunities and time enough for all lawyers to prove their mettle and worth by honourable means. There was nothing to suggest that the previous solicitors were remiss in not getting a private investigation underway. It may be that they were then justified thinking that there was no need for one. Furthermore, the present plaintiff might have exerted himself beyond his endurance in desperation for a well-paying job. He might not be able to sustain this effort and might thus relapse quickly to the state as previously diagnosed (assuming he was in fact ambulating more than was previously thought possible for him). All these are questions that require scrutiny and debate, and are precisely the reason why finality is important. So even if the decision of whether or not this application should be allowed was left purely to my discretion, I would not allow the application if only to emphasize the point that unless the principles laid down in *Ladd v Marshall* are strictly observed such applications should not be made. Finally, should the post-hearing surveillance show that the plaintiff suffered greater disability than the court below was led to believe, would it not be counsel's duty to bring that to the court's attention? In other words, should a defendant be permitted to carry out post-hearing surveillance but only produce the results when they are in his favour but not otherwise? I do not think so. But should the defendant's solicitors feel morally and ethically bound to bring results unfavourable to their clients' case to the court's attention, they might be in a quandary *vis-à-vis* their clients.

8 For the reasons above I dismissed the defendant's application. Mr Assomull applied to stay the hearing of the appeals because he says with great confidence that the defendant will appeal against my decision above. I did not allow that application. Mr Srinivasan was ready to argue his appeal and the appeal was filed months ago. However, accepting Mr Assomull's word that he was not ready, I granted him the time he needed.

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