Tan Kok Lam (next friend to Teng Eng) v Hong Choon Peng
[2001] SGCA 27

Case Number : CA 83/2000

Decision Date : 19 April 2001

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ

Counsel Name(s) : Kang Kim Yang and Aileen Boey (Joseph Tan Jude Benny Anne Choo) for the appellant; Low Tiang Hock (Chor Pee & Partners) for the motorcyclist

Parties : Tan Kok Lam (next friend to Teng Eng) — Hong Choon Peng

Damages – Compensation and damages – Whether "pain and suffering" and "loss of amenities" under separate heads of damages – Whether unconsciousness prevented victim from claiming substantial damages for loss of amenities

Tort – Negligence – Damages – Whether "pain and suffering" and "loss of amenities" under separate heads of damages

(delivering the grounds of judgment of the court): On 24 September 1996, Teng Eng (`Teng`), whom the appellant, Tan Kok Lam (`Tan`) is next friend to, was knocked down by a motorcycle driven by the respondent, Hong Choon Peng (`Hong`). Teng was then 67 years of age. A CT brain scan showed a `left frontal brain contusion with fronto-tempero-parietal acute subdural haematoma`. A craniectomy and evacuation of the acute subdural haematoma were undertaken at the Singapore General Hospital.

The evidence showed that Teng was not able to respond to visual and verbal stimulation. She could respond to pain, but was not aware of it. Her life expectancy was reduced and while she might live beyond five years she will not live up to 10 years. The assistant registrar found Teng to be in a `persistent vegetative state`.

Interlocutory judgment was entered in the High Court against Hong for 50% of the damages to be assessed. An assessment was duly carried out by the assistant registrar who awarded Tan, among others, $80,000 for the loss of amenities. The assistant registrar felt that the fact that Teng was and is in a persistent vegetative state did not preclude her from making a substantial award for loss of amenities, as opposed to an award for pain and suffering.

Hong appealed against that award to the High Court and the trial judge, being of the view that unconsciousness should preclude the award of a substantial amount for loss of amenities, reduced the amount under this head to $21,000. He stated that:

> *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.*

Having heard the appeal on 19 February 2001, we disagreed with the approach taken by the trial judge and restored the award of $80,000 granted by the assistant registrar. We now give our reasons.

Issues on appeal

The present appeal raised primarily a question of law as to whether our courts should adopt the majority decisions in **Wise v Kaye** [1962] 1 QB 638 and **H West & Son v Shephard** [1964] AC 326, where it was held that notwithstanding that the victim had remained unconscious as to his surroundings because he had, due to the accident, been reduced to a persistent vegetative state, he is still entitled to claim for substantial damages in relation to loss of amenities. In the alternative, Hong argued that even if West v Shephard were followed in Singapore, $80,000 was high or excessive. But, it was not seriously contended that it was so high as to be a wholly erroneous estimate necessitating the intervention of this court.

The authorities

We will begin examination of the question with the leading case, ***Wise v Kaye*** , where a young woman, aged 20, suffered serious brain injuries from a motor accident. She was hospitalised for 3[half] years, helpless and unconscious. There was no prospect of recovery and she would never have any knowledge of her condition. Liability in that case was not in question. The trial judge awarded, inter alia, o15,000 as general damages. No claim was made for pain and suffering. The majority of the Court of Appeal held that general damages must be assessed on an objective basis and the fact that the victim was ignorant of the loss suffered was irrelevant and therefore the award of general damages given by the first instance judge at o15,000 was not excessive. Sellers LJ, delivering the main judgment of the majority, said (at p 651):

> *Unless authority directs, I would be reluctant to apply a standard or basis which required that the happiness of a living person has to be assessed, as it would have to be assessed, to use the common expression, subjectively. I know of no authority which supports this view and have heard no evidence adduced which would in any case permit of its true solution. The head of claim for pain and suffering would come nearer to considerations of happiness - but not, I think, in any deep sense - than would a claim for loss of limbs or faculties.*

Sellers LJ distinguished **Benham v Gambling** [1941] AC 157 on the basis that the latter case was concerned with an action on behalf of a dead child`s estate for the restricted claim for loss of years of life. Sellers LJ refused to treat an injured party as if the latter were dead and to award compensation only for loss of expectation of life and nothing else by way of general damages. He felt that while in common law pain and suffering and loss of amenities are invariably lumped together, they are distinct and separate heads of claim.

The second member of the quorum, Upjohn LJ also reiterated that damages suffered by a living plaintiff were assessed upon entirely different principles from those applicable to a claim for damages on behalf of a deceased person. In respect of a claim for a living person, the fact that she was ignorant of the grave loss was irrelevant because `the injury to her has been done; the damage has been suffered`. In this respect, loss of amenities should be distinguished from pain and suffering. He said (at p 660):

> *If a plaintiff suffers personal injuries from the wrong-doing of another his cause of action accrues though he may be ignorant of the fact that he has been damaged:* ***Cartledge v E Jopling & Sons Ltd****. It is difficult to see why, in general, damages for such injury should be affected by ignorance unless the ignorance prevents the head of damage arising as in the case of pain and suffering.*

Upjohn LJ also relied upon an earlier Australian case **McGrath Trailer Equipment v Smith** [1956] VLR 738 to come to the conclusion he did. In ***McGrath Trailer*** , the plaintiff became childlike because of severe brain injury. Herring CJ rejected the subjective test advanced by the defendant and stated (at p 741):

> *The matter has to be treated objectively - what has the plaintiff lost as a result of his injuries, how great is the diminution of his capacity to enjoy life? ... The measure of his loss is not affected by the fact that he does not now by reason of his injuries realise what he has lost and does not miss his inability to live a normal life. It matters not that he now seems content with the cabbage-like existence, that his injuries have forced upon him, although, in truth, we have no knowledge if this is so in fact.*

The majority of the court in ***Wise v Kaye*** (supra) also thought it irrelevant the fact that the plaintiff would not be able to use the compensation awarded.

However, the third member of the court, Diplock LJ, felt that the extent to which a particular plaintiff was likely to be deprived of pleasure or happiness, which but for the disability he would have enjoyed, was a matter to be taken into account. In other words, unconsciousness by the plaintiff of his predicament was a factor which should adversely affect the quantum of damages to be awarded.

The next leading case is ***West v Shephard*** (supra), where the plaintiff, aged 41, was knocked down in a motor accident and sustained severe head injuries resulting in cerebral atrophy and paralysis of all four limbs. Her life expectancy was reduced to five years. She might, to some extent at least, have appreciated the condition which she was in. The trial judge, relying upon the award of o15,000 in ***Wise v Kaye*** (supra), awarded general damages at o17,500 as he felt the plaintiff here was worse off than the plaintiff in ***Wise v Kaye*** since the plaintiff here must have some knowledge of her own condition. The Court of Appeal, and the House of Lords (by a 3-2 majority), dismissed the appeal. The majority of the House endorsed the views taken by the majority in ***Wise v Kaye*** .

Four of the Law Lords (Reid, Tucker, Morris and Pearce) in ***West v Shephard*** were of the view that the guidance enunciated in ***Benham v Gambling (supra)*** applied only to the assessment of damages for loss of expectation of life, and that it did not extend to any other class of cases. Three of the Law Lords (Tucker, Morris and Pearce) felt that unconsciousness did not eliminate the actuality of the deprivation of amenities of life. But all the members of the House thought that the court was not concerned to consider the use which would thereafter be made of the money awarded.

We shall now look at the approach taken by some of the Law Lords on the issue of unconsciousness vis-.-vis loss of amenities. We shall start with the minority judgment of Lord Reid, where he said (at p 341):

> *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. I do not say that he should get nothing. This is not a question that can be decided logically. I think that there are two elements, what he has lost and what he must feel about it, and of the two I think the latter is generally the more important to the injured man. To my mind there is something unreal in saying that a man who knows and feels nothing should get the same as a man who has to live with and put up with his disabilities, merely because they have sustained comparable physical injuries. It is no more possible to compensate an unconscious man than it is to compensate a dead man.

Lord Devlin, the other member of the minority, thought that the approach taken in ***Benham v Gambling*** (supra) was correct and that that approach was applicable even in a case, such as that in West v Shephard, where death did not intervene. While there are two elements in considering the question of loss of amenities in such a case, the objective and the subjective elements, he felt that as between the two, the objective element should be `very moderately assessed`. He said (at p 362):

If it were not that the objective element has already by the authorities been given a place in the assessment, I should question whether it ought to be there at all. I think that deprivation should be measured mainly, if not wholly, by the sense of loss. I cannot help feeling that the contrary view is coloured by the thought that a wrongdoer should be made to pay damages commensurate with the gravity of the physical injury he has inflicted rather than with the suffering he has caused.

The views of the majority Law Lords were otherwise. Lord Morris of Borth-y-Gest put the question of the relevance of unconsciousness in these terms (at p 349):

An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. 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.

Lord Pearce emphasised that the ruling in ***Benham v Gambling (supra)*** should be viewed in its proper context when he said (at p 366):

*In **Benham v Gambling** this House was called on to answer a particular problem that had recently caused grave difficulty in the courts. It had little direct connection with the daily cases concerned with injuries that disable the living body. The problem simply stated was `Is life a boon`? And, if so, what is `the money value of all that which we lose by death?`*

Lord Pearce then proceeded to reiterate that the traditional method of assessing injuries should continue:

> *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. A man of fortitude is not made less happy because he loses a limb. It may alter the scope of his activities and force him to see his happiness in other directions. The cripple by the fireside reading or talking with friends may achieve happiness as great as that which, but for the accident, he would have achieved playing golf in the fresh air of the links (p 368).*
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> ...
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> *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. Common law courts should not lightly abandon a method of estimation that works reasonably well and achieves a certain amount of precision, for a method that is nebulous, variable and subjective. I cannot read* ***Benham v Gambling*** *as having by implication intended such a result (p 369).*

By contrast, in **Skelton v Collins** [1965] 105 CLR 94, the Australian High Court, by a majority of 4-1, departed from the majority decision in ***West v Shephard*** (supra) and ruled in that case that, where the plaintiff`s expectation of life had been reduced and who had been rendered permanently unconscious by the injuries, in assessing damages, regard must be had to the fact that the plaintiff was insensible of his deprivation. It therefore held that, for loss of expectation of life and the loss of amenities of life, only moderate sums should be awarded. Kitto J said he was unable to agree with the majority in ***West v Shephard*** (supra) that the guidance enunciated in ***Benham v Gambling (supra)*** should only apply to cases involving death. He put it as follows (at p 102):

> *(* ***Benham v Gambling****) treated of life not as a state of being a mere physical phenomenon, but as a thing to be lived and lived consciously. Thus, what was meant by every reference to loss of expectation of life was, in truth, loss of the possibility of conscious experience. The whole burden of the Lord Chancellor`s speech was the legal impropriety of attempting to place any but the most modest figure on a human being`s capacity to experience the varied quality of life; and I cannot bring myself to say that although the law sees the impropriety where a person has died it does not see it where he has lost all capacity for thought and feeling.*

Kitto J, in reference to Lord Morris` remark that unconsciousness does not eliminate `the actuality of the deprivations` countered it with this argument (at p 103):

> *What is here said of the fact of unconsciousness may equally be said of the fact of death; but 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?*

Kitto J was unable to distinguish a case where the person was physically dead as opposed to only dead to all experiences.

Another member of the quorum, Taylor J, was also of the same view and while recognising that the expression `loss of amenities of life` was a loose expression, said (at p 113):

> *... 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.*

However, in the dissenting judgment of Menzies J, he basically agreed with the majority decision in ***Wise v Kaye*** (supra) and ***West v Shephard*** (supra). He said (at pp 124-125):

> *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. Thus, for instance, loss of earnings arises from loss of capacity to work. Moreover, the fullness of a man`s life cannot be measured simply by the happiness which it brings to him; capacity to live fully includes capacity to suffer, to master adversity, to endure as well as to enjoy. Thus, unconsciousness is basic incapacity which ought not to be regarded as insignificant in itself and as depriving other injuries of their significance. Remarkable though it may be, a quadriplegic with a lively mind can live a life which seems worthwhile both to himself and to others, whereas a person whose incapacity includes loss of consciousness seems to me to have lost everything. If, therefore, damages are awarded as such compensation for injury as money can provide and part of the injury which a person suffers is brain injury, it seems to me odd that a disabled man who is conscious but not in pain should be awarded o15,000 while a man additionally injured can recover but o5,000 damages because he has been rendered permanently unconscious. The difference cannot, I think, be satisfactorily explained merely in terms of unhappiness from awareness of injury. From its very nature, however, unconsciousness does negative pain and suffering.*

The next significant case that had come before the English courts where this point was again addressed was ***Lim Poh Choo v Camden*** & **Islington Area Health Authority** [1980] AC 174, where a senior psychiatric registrar with the National Health Service, aged 36, suffered severe brain damage following her admission to hospital for a minor operation. In the words of Lord Scarman, who delivered the sole judgment of the House, `she is now the wreck of a human being, suffering from extensive and irremediable brain damage, which has left her only intermittently, and then barely, sentient and totally dependent upon others.` The trial judge described her condition thus: `she is so intellectually impaired that she does not appreciate what has happened to her` - [1979] QB 196 at 201. However, her life expectancy remained substantially unaffected. The trial judge awarded her a sum of o20,000 for pain and suffering and loss of amenities. This sum was upheld and the House reiterated the majority decision in ***West v Shephard (supra)*** . This was how Lord Scarman put it (at p 188):

> *I think it would be wrong now to reverse by judicial decision the two rules which were laid down by the majority of the House in **H West & Son Ltd v Shephard**, namely: (1) that the fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experiences and amenities of life (see the formulation used by Lord Morris of Borth-y-Gest, at p 349); (2) that, if damages are awarded upon a correct basis, it is of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. 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 plaintiffs` 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. Secondly, they establish that the award in* ***Benham v Gambling*** *[1941] AC 157 (assessment in fatal cases of damages for loss of expectation of life) is not to be compared with, and has no application to, damages to be awarded to a living plaintiff for loss of amenities.*

Position in Singapore

As far as Singapore is concerned, it would appear that there has not been any case where the court had to consider the element of loss of amenities of life in its own right, distinct and separate from that of pain and suffering; and neither has the court had the occasion to examine the question of whether an unconscious plaintiff is entitled to claim for loss of amenities of life where, in view of his condition, he would not be able to experience pain or the loss. However, in **Au Yeong Wing Loong v Chew Hai Ban** [1993] 3 SLR 355 , KS Rajah JC did make this comment (at p 361):

> *Pain and suffering and loss of amenities are usually quantified together and a single award is usually made without indicating how much is awarded under each head, partly because it is difficult to separate them.*

While as a matter of practice the courts in Singapore have often lumped the claim for `pain and suffering` together with that for `loss of amenities` they are not the same and neither is one subsumed under the other. The example given by counsel for Hong is apt: suffering pain from a fracture of a leg is different from the consequential disability (if any), the latter giving rise to the loss of amenities. A fractured leg would not necessarily give rise to a loss of amenities other than for the short period the fracture required to heal: much would depend on whether there is any residual disability. One local case where the two claims were given separate awards was **Lai Wee Lian v Singapore Bus Service (1978)** [1984-1985] SLR 10 [1984] 1 MLJ 325 . The Privy Council did not make any adverse comment that this was wrong.

Our decision

Like the learned judge below, counsel for Hong relied upon the dicta of Lord Devlin in West v Shephard (cited in [para]16 above) to argue that as Teng, because of her unconsciousness, could no longer appreciate any loss, the sum awarded should be moderate. Further, arguing from the fact that just as no damages are allowed for pain and suffering which is not felt, similarly no damages should be allowed for loss of amenities which is also not felt. The principle for awarding damages is to give the injured party reparation for the wrong done. Accordingly, the learned judge below preferred the minority view in ***West v Shephard*** (supra) and the majority view in ***Skelton v Collins (supra)*** .

However, on our part, we felt otherwise. In our view, the majority view of the court in ***West v Shephard*** (supra) is more in line with the ends of justice, which is to compensate the plaintiff for the injuries he has sustained, as well as pecuniary losses which he has suffered or is likely to suffer.

We recognise and accept that for a claim for pain and suffering, unconsciousness on the part of the victim would negative that claim and thus render an award in respect of that claim inappropriate. A

claim for pain necessarily suggests that the victim has consciousness, otherwise there is no question of him enduring any pain for which he should be compensated. However, the same cannot be said for loss of amenities. Whether or not there is loss of amenities is an objective fact. It cannot and should not depend on an appreciation of the loss by the victim. Perhaps the point can be better illustrated by a simple example, where in an accident the victim not only loses a leg, he also loses his mental faculty. Are we to say that because the victim cannot appreciate his present condition, no substantive award should be made even for the loss of the leg? We should think not. Has he not lost the ability to move about freely, even with the help of an artificial limb? And if a substantive award should be made for the loss of the leg, why should it be otherwise for the complete loss of the mental faculty? While it might be thought that we are treading on dangerous ground to make comparisons between injuries, we think there is no greater injury or loss, as far as a living person is concerned, than to be turned into a cabbage.

It seems to us that the dissenting judgments in ***Wise v Kaye (supra)*** and ***West v Shephard*** (supra) were greatly affected by the approach taken by the House of Lords in ***Benham v Gambling (supra)*** where it was held that for loss of expectation of life, only a small sum should be given. In those dissenting judgments, the judges equated a person who is permanently unconscious with one who is dead, and thus that person has effectively lost no more than the expectation of life. It is clear that ***Benham v Gambling*** was decided in the way it was to arrest the trend then of juries making large awards for the loss of expectation of life as a separate head of damage: see (1954) 70 LQR 179. The decision in that case should not be extended by analogy to cases where there is no death.

In our view, what Lord Devlin referred to as feelings of frustration and anguish for the loss should appropriately be considered to fall under the head of pain and suffering. One can suffer on account of pain from a physical injury. But that is not the only way in which suffering could come about. Feelings of frustration and anguish are as much sufferings, although the cause or source of those feelings may be different from that of physical pain. There is no logic to confine suffering to only physical pain.

The authors of ***Winfield & Jolowicz on Tort*** (14th Ed) state at p 607 that `pain and suffering includes the suffering attributable to the injury itself and to any consequential medical treatment, and worry about the effects of the injury upon the plaintiff`s way of life and prospects.`

In this regard, we think the caution uttered by Lord Pearson in ***West v Shephard*** (supra) is germane, namely, that it would `be lamentable if the trial of a personal injury claim puts a premium on protestations of misery and if a long face was the only safe passport to a large award.`

Judgment

In the result, we preferred the approach taken by the majority in ***Wise v Kaye*** (supra) and ***West v Shephard*** (supra) and held that notwithstanding unconsciousness, a person, who as a result of another`s negligence suffers from brain damage leading to unconsciousness, is entitled to substantial damages. Accordingly, we restored the quantum of damages awarded by the assistant registrar to Tan.

Outcome:

Appeal allowed.