

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. No. 3864 of 1993

BETWEEN

TONY ALLISTER HOLDER

Plaintiff

AND

FRANKIE PATADEEN

and

THE ATTORNEY GENERAL OF TRINIDAD & TOBAGO

Defendants

BEFORE: THE HONOURABLE MADAM JUSTICE A. TIWARY-REDDY

Appearances:

Mr. Darryl Allahar for the Plaintiff

Ms Sharon Sharma for the Defendants

JUDGMENT

INTRODUCTION

1. The Plaintiff sought damages for personal injuries as a result of the negligence of the First Defendant, acting as servant and/or agent of the Second Defendant. The Plaintiff sustained injuries when he was shot by the First Defendant, a policeman, at the Plaintiff's home in 1992.

BACKGROUND

2. The Writ of Summons was filed on 14.5.1993 and Statement of Claim on 3.11.1993. The Defendants filed their Defence on 21.12.03 and the Plaintiff's Reply followed on 1.11.94. A Summons for Directions was filed on the 22.11.1994 and heard on the 12.12.1994.

3. In 2005 the matter was set down for trial, which was expected to last three days, but the trial never took place. On 5.4.2005 the parties agreed to a Consent Order wherein judgment was entered for the Plaintiff and the Defendants were ordered to pay the Plaintiff's damages to be assessed by the Master in Chambers. Assessment of the damages is still pending. In the said Consent Order the Defendants were also ordered to pay the Plaintiffs' costs to be taxed in default of agreement.

TAXATION

4. On the 9.6.2005 the Plaintiff's costs were taxed before the Taxing Registrar, Ms. Mohammed and the Plaintiff was allowed costs in the sum of \$47,547.50, to which the Plaintiff made objections on the 23.6.2005.

5. The objections were in respect two claims:
 - i) Item 79 for the sum of \$325.00 for "Drawing brief to Senior Counsel for hearing with observation and authorities".
 - ii) Item 82 for the sum of \$60,000.00 for "Senior Counsel's Fee on brief".Neither of these sums was allowed. After a Review on the 12.4.06 no change was made to the total taxed costs. The Taxing Registrar provided her reasons on 27.6.2006. Before this Court the Defendants' have submitted that if the Court finds it was reasonable to retain Senior Counsel, the Defendants will consent to Item 79 being allowed.

REASONS OF TAXING REGISTRAR

6. In her reasons the Taxing Registrar identified three issues based upon which she dismissed the Plaintiff's application. Firstly, she considered the level of preparedness which would have been required by the Plaintiff at the trial stage, notwithstanding the eventual entry of a Consent Order. The Taxing Registrar determined that retaining Senior Counsel was not necessary to ensure that justice was attained for the Plaintiff and said at page 6:

*“Having examined the pleadings, it was clear that the facts were in dispute, **but the issues of fact I did not consider to be complex.** The facts pleaded appeared to be usual in any matter of this nature and a competent Counsel who was not a Senior Counsel but with the skill and expertise in matters of this nature was capable of conducting this matter including the cross-examination of police officers in this matter in order to attain justice in this case for the Plaintiff.” (my emphasis)*

7. Secondly, she disagreed that this matter was one of importance to persons other than the Plaintiff, since the law in respect of the relief claimed was “clear and well settled”. Finally, she concluded that the quantum of damages sought by the Plaintiff at the time of her Review, though likely to increase, did not necessitate the services of Senior Counsel. The sum claimed for Special Damages at the time of the Review was \$65,000.00.
8. Attorneys for the parties have agreed that the sole issue for the determination of this Court is whether the Plaintiff is entitled to costs fit for Senior Counsel.

PLAINTIFF'S SUBMISSIONS

- (a) Failure of the Taxing Registrar to Properly Consider the Quantum of Damages**

9. The Plaintiff argued that at the time of the Review the Taxing Registrar had failed to properly consider the quantum of damages being claimed by the Plaintiff and had placed unfair emphasis on the sum of \$65,000.00 claimed as Special Damages as being the total value of the Plaintiff's claim. Further, although the Taxing Registrar had accepted that general damages were yet to be assessed, she did not consider its estimated value.
10. In his affidavit filed on 1.5.06 on which the Plaintiff is relying in respect of the instant review, the Plaintiff has been advised that he is entitled to the sum of \$400,000.00 for pain and suffering and loss of amenities. Further his loss of income to date is in excess of \$1,000,000.00. The Plaintiff has therefore concluded that his general damages will be in the region of \$1,400,000.00. It is to be noted that the Plaintiff's permanent partial disability has been assessed at 60% and his expenses to date were approximately \$175,000.00. Thus his claim for special damages incurred was not \$65,000.00 as claimed, but rather \$175,000.00.
11. The size of the claim is an important factor in determining the skill and knowledge required by Counsel. In **Peter Seepersad v Theophilus Persad & Capital Insurance Limited (Seepersad) Privy Council Appeal No. 86 of 2002** where the damages awarded before the Board were three times the amount awarded at first instance, the Board ordered costs fit for two counsel instead of one. Lord Carswell stated at paragraph 26:

“...It is apparent from this re-assessment of the size of the claim that the skill and knowledge demanded of counsel and the weight and responsibility resting upon them were rather higher than the courts below assumed. This factor is a potent one in determining whether it was reasonable and proper to instruct two counsel...”

(b) Reasonable to Retain Senior Counsel

12. It must be reasonable in the circumstances of the particular case to retain the services of a Senior Counsel. In **Alphie Subiah v The Attorney General of Trinidad and Tobago H.C.A S-48 of 2001 (Subiah)**. Justice Tam said at page 6:

“...the appropriate question for the Court was not whether the case was well within the capabilities of Junior counsel, but rather, whether or not it was reasonable to instruct Senior Counsel as well. The true test then was that of reasonableness ...”

and at page 7:

“ ...The Court accepted the submission of Counsel for the applicant that until the date when the consent order was recorded, the applicant and his legal advisors were entitled to believe that the motion would be heavily contested ...”

Here it was held that retaining Senior Counsel had been reasonable in circumstances where the Applicant had prepared for a trial, which did not materialise because of the entry of a consent order.

13. In the instant case the Plaintiff submitted that having regard to the Defence filed on 21.12.1993, it was reasonable to retain Senior Counsel to cross examine the police witnesses at trial to disprove the defence of reasonable force.

(c) Importance of Matter to persons other than the Plaintiff

14. The Plaintiff argued that this case involved an issue likely to be of importance to the public, namely, in what circumstances in an action for wrongful entry and shooting can a police officer raise the defence of reasonable force.

DEFENDANTS' SUBMISSIONS

(a) Unreasonable to Retain Senior Counsel

15. The Defendants' primary submission was that it was unreasonable and unnecessary for the Plaintiff to have retained Senior Counsel, whose services were a *'luxury'*. It was also argued that the facts in dispute on the issue of negligence were not complex and the Plaintiffs' case could have been conducted by any experienced Junior Counsel.

(b) If Fees for Senior Counsel Awarded the Amount must be based on Junior Counsel Fees

16. The Defendant submitted that if the Court was of the opinion that retaining Senior Counsel was necessary and reasonable, that the costs be based on the sum allowed for "Junior Counsel" since the Taxing Registrar had allowed the sum of \$15,000.00 to be "paid to Junior Counsel fee on Brief" (item 83), the maximum which should be allowed for Senior Counsel is \$37,500.00.

REVIEW OF AUTHORITIES

17. **Order 62 Rule 28 (2)** provides that parties are only entitled to those costs, which were necessary to pursue their claim. The rule states:

“28. (1)...

(2) *Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there **shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.** ...”*

18. The following cases were considered:

- (i) **Anthony Skerrette v The Attorney General of Trinidad and Tobago H.C.A No. 2004 of 1999**
- (ii) **Attorney General of Trinidad and Tobago v Curtis Thomas C.A No. 73/2000**
- (iii) **Peter Seepersad v Theophilus Persad & Capital Insurance Limited Privy Council Appeal No. 86 of 2002.**

19. *Skerrette* was a constitutional motion in which a consent order was entered. Justice Best found the employment of Senior Counsel by the Applicant to be an unnecessary ‘*luxury*’ because of the nature of the case and the matter’s lack of importance to persons other than the Applicant.

20. *Curtis Thomas* was another a constitutional motion in which a consent order was entered. On the issue of whether to order costs fit for Senior Counsel, the court applied the reasoning of **In Re W.T. Potts ex parte Epstein v The Trustee and The Bankrupt, 1935 1 Chancery 334 at 339-340** per Farwell J:

“The truth of the matter is that each case must depend upon its own facts, and in order to see whether the employment of leading counsel is justified or not, one has to consider the whole of the facts, remembering always that leading counsel may be a luxury for which the opponent, should not be made to pay, and that on the other hand, in some cases the employment of leading counsel may be a proper precaution to take, in order to ensure that the case of the person in question may be fully and properly presented to the Court, and that the Court may have every assistance possible in a difficult case in arriving at a proper conclusion.”

The Court of Appeal held that the facts raised in the Constitutional Motion were simple and the law quite settled and therefore did not allow costs for Senior Counsel.

21. **Order 62 Rule 35 RSC 1975** makes provision for the second review of the decision of a taxing officer by way of review by a Judge in Chambers.

“(1) Any party who is dissatisfied with the decision of a taxing officer to allow or to disallow any item in whole or in part on review under rule 33 or 34, or with the amount allowed in respect of any item by a taxing officer on any such review, may apply to a Judge for an order to review the taxation as to that item or part of an item, if, but only if, one of the parties to the proceedings before the taxing officer requested that Officer in accordance with rule 34 (4) to state the reasons for his decision in respect of that item or part on the review.

...

(4) Unless the Judge otherwise directs, no further evidence shall be received on the hearing of an application under this rule, and no ground of objection shall be raised which was not raised on the review by the taxing officer but, save as aforesaid, on the hearing of any such

application the Judge may exercise all such powers and discretion as are vested in the taxing officer in relation to the subject matter of the application.”

22. Before this Court the Plaintiff has raised an objection on the issue of quantum, which had not been argued before the Taxing Registrar on the 12.4.06. This new objection concerned the Registrar’s failure to properly consider the estimated value of the Plaintiff’s general damages, by affidavit filed on 1.5.06 the Plaintiff had deposed that general damages were estimated to be in the region of \$1.4 million. This affidavit had been filed in support of an application for an interim payment of the sum of \$150,000.00 and had not been presented before the Registrar. By Notice filed on 2.5.07 the Plaintiff gave notice of his intention to rely on this Affidavit at the Second Review and the Defendants raised no objection.

Whether Retaining Senior Counsel was Reasonable

23. In **Seepersad** (above) at page 26 the learned Law Lords referred to the commentary in the Supreme Court Practice 1999 on the case of **Juby v London Fire and Civil Defence Authority** (1990, unreported) in which Evans J. listed the most likely factors affecting the decision to retain Senior Counsel. These factors were set out at pages 5-6 by Tam J. in **Alphie Subiah v The Attorney General of Trinidad and Tobago H.C.A S-48 of 2001.** They include:

- “(a) the nature of the case, including in accident cases,*
- (i) the nature and severity of the plaintiff’s injury;*
 - (ii) the likely duration of the trial;*
 - (iii) difficult questions regarding the quantum of damages, including medical evidence and questions of law;*

- (iv) difficult questions of fact, including expert engineering evidence, or issues as to causation;*
- (b) its importance for the client;*
- (c) the amount of damages likely to be recovered;*
- (d) the general importance of the case, e.g. as affecting other cases;*
- (e) any particular requirements of the case, e.g. the need for legal advice, or for special expertise, e.g. examining or cross examining witnesses;*
and
- (f) other reasons why an experienced and senior advocate may be required.”*

24. In **Subiah** (above) a further factor was the degree of distress experienced by the Plaintiff. There the Court considered it reasonable to retain Senior Counsel where, on the facts admitted by the Respondent, there was evidence that the Applicant had been severely traumatised, humiliated and incurred medical expenses as a consequence of the Respondent’s actions.
25. In the instant case the Plaintiff sought relief for gun-shot injuries sustained in 1992 as a consequence of a police shooting. These injuries resulted in the Plaintiff suffering severe paralysis, physical discomfort and grave emotional distress, all requiring continuous treatment. The first Defendant, a police officer denied all aspects of the Plaintiff’s case save and except for an admission of the shooting where he alleged that reasonable force had been applied.
26. The defence of ‘reasonable force’ while not a novel point of law is not necessarily settled as it depends on the circumstances of each case. Certainly, as a prerequisite to proving his claim, Counsel for the Plaintiff would have had to cross-examine the police officers and present expert medical evidence of the several injuries sustained. All along the Defendants had vigorously contested liability until the entry of the consent order on 5.4.05. Thus the

Plaintiff was obliged to continue to prepare for a hotly contested trial which was expected to last three days.

DECISION

27. Having considered the facts of this case, the submissions on both sides and the factors in **Juby** and **Subiah** (above) this Court finds that it was not unreasonable for the Plaintiff to have retained Senior Counsel. I therefore make the following Orders:

- (a) The sum of \$50,000.00 be allowed for Senior Counsel's fee on Brief.
- (b) The sum of \$325.00 be allowed for drawing brief to Senior Counsel.
- (c) The Registrar's allocatur be amended accordingly.
- (d) The costs of and incidental to these review proceedings are assessed in the sum of \$ 4,500.00 and are to be paid by the Defendants to the Plaintiff.

Dated this 8th day of February, 2008

AMRIKA TIWARY-REDDY
JUDGE

Aisha Peters-Francis (JRA)