THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 61 OF 2009
H.C.A. No. S-1623 of 2004

BETWEEN

AMIN MOHAMMED

Appellant

V.

ALVIN PANALAL

First Respondent

ANNEIL PANALAL

Second Respondent

NEW INDIA ASSURANCE COMPANY LIMITED

Co-Defendant/Respondent

PANEL: **A. Mendonça CJ (AG)**
P. Weekes, J.A.
G. Smith, J.A.

APPEARANCES: **Mr. S. Persad for the Appellant**
Mr. R. Jagal, for the Respondent

DELIVERY DATE: October 27th, 2012

JUDGMENT

Delivered by A. Mendonça, Acting Chief Justice

1. On December 13th, 2003 the Appellant was walking along the Tabquite Road, when he was struck by motor vehicle TBM 5436 owned by the first Respondent and driven by the second Respondent and insured by the Co Defendant/Respondent (collectively referred to as the Respondents). The Appellant recovered default judgments against the Respondents. Damages were assessed by the Master on March 10th, 2009 and on March 18th, 2009, further orders were made with respect to costs and interest.

2. Damages were assessed as follows:

a) Special damages in the sum of $21,075.65;
b) General damages in the sum of $110,000.00; and
c) $6,000.00 for the cost of future medical case.

So far as interest is concerned the Master awarded interest on the special damages at the rate of 6% per annum and on the general damages at the rate of 12% per annum. It is usual for the Court to order the payment of interest on an award of special damages from the date of the accident to the date of judgment and on general damages from the date of service of the writ to the date of judgment. The Master however was of the view that the Appellant had been guilty of delay in the prosecution of this matter from January 11th, 2006 to September 22nd, 2006 and as a consequence, ordered that interest should not run during that period. Save for that period interest was ordered to run, at the usual rates, on the general damages for the date of the writ to the date of judgment and on the special damages from the date of the accident to the date of judgment. With respect to costs the Master ordered that the Respondent pay the Appellant's costs of the assessment.

3. There is before the Court an appeal and cross appeal. The appeal is from the refusal of the Master to make an award for the cost of future surgery and also from the reduction in the period for which interest was awarded on the damages. The Respondents' cross appeal relates to the award of general damages, the discounted period for interest and the costs order made by the Master. We will first consider the Master's refusal to make an award for the cost of future surgery.

4. The Master gave three reasons why this cost was disallowed: First, there was an apparent contradiction between the medical reports and the evidence of the doctor, who gave evidence on behalf of the Appellant, as to the necessity for the surgery and whether it would be performed; secondly, the Appellant gave no evidence that he would undertake the surgery even if it were recommended and thirdly, the operation could be done locally, at no cost, in the public hospitals.

5. With respect to the first reason we are of the view that the evidence read as a whole supports the view that the doctor recommended the surgery - namely a knee replacement sometime in the future. His evidence was however contradictory as to the necessity for the surgery. In one of his medical reports he states that the Appellant's condition is likely to improve with future surgical intervention. In a later report he states the very opposite, and says that the Appellant was not likely to improve with surgical intervention. In cross examination the doctor was asked whether the Appellant's degree of impairment was not likely to change in the immediate future. His response was that the Appellant needed surgery. He did not however say whether the Appellant's condition would improve with the surgery. In re-examination he seemed to reiterate what he said in the later medical report that the Appellant's impairment level would remain the same even if the Appellant undertook the knee replacement surgery. In view of the doctor's evidence it is difficult to conclude that the surgery is a necessity or that it would be reasonable for the Appellant to undertake the future surgery. We therefore think that the Master, in the face of the medical evidence, was correct to refuse to award the cost of the future surgery.

6. With respect to the second reason it is correct to say that the Appellant gave no evidence that he would undertake the surgery, even if it were recommended. Such evidence in our view

is necessary where an operation is elective and recommended and would be of some benefit to the Appellant. His failure to give such evidence is a ground on which the cost of the surgery can be refused. Further, as in this case, it cannot reasonably be concluded that the surgery would be of any benefit to the Appellant, then even if he said that he was prepared to undertake the surgery that would not advance his case.

7. As to the third reason given by the Master, there is clear evidence that knee replacement surgery is available locally, and at no cost, in the public hospital. When it came to the first operation that the Appellant had undergone the Master held that there was good reason for that operation to be undertaken in a private institution because the Appellant was in considerable pain and would have had to wait a year before he could have undertaken the surgery in the public hospitals, whereas in the private hospitals the surgery was available in short order. By undertaking the surgery in the private institution the Master found that the appellant acted reasonably and therefore awarded the costs of that surgery. In this case however, the future surgery is not urgently required so the waiting time in the public hospitals is not a factor.

8. Other reasons were given by the Appellant's doctor as to why someone would wish to have an operation in a private hospital and not a public hospital, but we do not see this as advancing the Appellant's case. The doctor gave as the other reasons dissatisfaction with hospital care and attitude of the hospital staff. These statements were, however, of a very general nature and were intended to explain what might lead a patient to have an operation in a private institution. They were not intended to reflect the views of the Appellant and there is no evidence that they were considered by the Appellant to be relevant.

9. In our judgment, therefore, there was a sufficient basis for the Master to refuse the award of the cost of future surgery and we cannot fault her decision.

10. With respect to the award of general damages for pain suffering and loss of amenity, it was the contention of the Respondents on the cross appeal that the award is inordinately high. We do not think there is any dispute as to the approach of the Court of Appeal on an appeal from an assessment of damages. The following statement found in **Flint v. Lovell**, [1935] 1

K.B. 354, 360 properly summaries the approach of an appellate court:

> *"... this 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 and 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."*

In essence, therefore, the Court of Appeal will only interfere with an award of damages where the Judge or Master proceeded on a wrong principle of law or the award is an entirely erroneous estimate of the damages to which the plaintiff is entitled.

11. As a result of the accident the Appellant sustained the following injuries:

1. fracture tuberosity of the left humerus;
2. fractured subluxation of left patella and knee joint;
3. left knee grade 111 medial and lateral collateral ligament injury; and
4. grade 111 anterior and posterior cruciate ligament injuries.

There was also evidence, which the Master accepted, of ligament injury to the Appellant's left shoulder.

12. In a case where there are multiple injuries, or injuries of a different character, as in this case, I think the proper approach of the Court to the assessment of damages can be found in the case of **Sadler v. Filipiak** [2011] EWCA Civ. 1728 (at paragraph 34) where it was stated:

> *"It is in my judgment always necessary to stand back from the compilation of individual figures whether assistance has been derived from comparable cases or from the JSB guideline advised to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured persons recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the*

majority, an adjustment and occasionally a significant adjustment may be necessary."

13. So far as the injuries to the patella and knee are concerned the cases which seem to us to provide some assistance are HCA S. 630 of 1978 **Singh v Allum's Supermarket** and HCA S. 1085/86 **Bagwandeen v Moonan** and HCA No. 442 of 2000 and **Baldeo v Prestige Car Rentals Ltd.** Of those cases the lowest award for general damages is in the case of **Allum's Supermarket** which (adjusted to December 2010) is $109.000.00. The injury in that case and its impact to the plaintiff appear to be less serious than in this case. In the **Baldeo** case in which the injuries may be regarded as more serious, the award, when adjusted to December, 2010, is $308,507.00. With respect to the other injuries in the cases of HCA S733 of 1992 **Wylie and Others v Sorzano** and HCA 4102 of 1980 **Ramsaran v Ramnath** are of some assistance. However, even if one were to focus only on the injuries to the patella and knee we think it is clear, in the light of previous awards, that the award of $10,000.00 made by the Master in respect of general damages cannot be considered to be high. We therefore cannot regard the award as an erroneous estimate of the damages to which the Appellant was entitled, which we would have to find before we can interfere with the award. We, therefore, see no merit in this ground of appeal.

14. We turn now to the appeals from the order of the Master that interest should not run for the period of time mentioned earlier. Both parties challenge this order. The Respondents submit that the Master was too conservative in her approach in disallowing only a part of the period. They say the Appellant should not have been allowed any interest The Appellant, on the other hand, argues that even the period for which interest was disallowed should have been allowed.

15. Interest is usually awarded on general damages from the date of service of the writ, and on special damages, from the date of the accident and it runs to the date of judgment. It is awarded on the basis that the plaintiff has been kept out of his money. The Court, however, may, in exceptional cases, alter the period for which interest is allowed, and where there is unjustifiable or gross delay by the plaintiff in bringing the action to trial or in the prosecution of it, the Court may order that interest does not run during the period of unjustifiable or gross delay. The Court may, therefore, in those circumstances, reduce the period during which

interest is to run. Unjustifiable delay is therefore treated as an exceptional case where the Court may properly reduce the period for which interest accrues on the award of damages.

16. We see no merit in the Respondent's argument that in determining whether to deprive the Appellant of interest a relevant consideration is whether the Respondents might have been awarded their costs of any day that falls in the period during which it was ordered that interest should not accrue on the award of damages. The fact of the matter is that the principles on which the Appellant was deprived of his interest and the Respondents awarded their costs are different. The Appellant was deprived of his costs because of unjustifiable delay in the prosecution of the matter. The Respondents were awarded costs, in essence, to reimburse them for the costs they incurred in having their Attorneys attend court on days when the matter could not proceed because of the fault of the Appelant.

17. We have looked at the manner in which the matter progressed and we support the Master's assessment that the period which she disallowed can be said to be unjustifiable delay warranting the denial of interest. There is one other period, however, which we think ought also to be included in that categorization of unjustifiable delay. That relates to the period shortly after the period which the Master disallowed. The assessment of damages was listed for the 23rd February, 2007. On that day it was adjourned on the application of both sides to a date in June. For reasons that are not clear, the assessment of damages did not come up for hearing until 24th October. What happened on that date is that it is only then that the Appellant sought to amend the statement of claim and that occasioned a further delay in the matter to allow for the hearing of the application to amend on the 11th February, 2008. On that date the appellant obtained leave to amend and the assessment of damages was adjourned to the June 26th, 2008 to proceed. We think that the period from the 24th October, 2007 to the 11th February, 2008, should also be included in the period discounted by the Master, so that interest should not run on the award of damages during that period as well.

18. Lastly, we come to the question of the order for costs and, of course, the Court has a discretion as to costs. In exercising its discretion, the Court ordinarily will take into account any payment of money into court by the defendant pursuant to O. 22 of the Rules of the Supreme Court, 1975 (which apply to this matter) in satisfaction of the the plaintiff's claim. All

things being equal, a defendant who pays money into court which exceeds the sum eventually awarded to the plaintiff is the successful party and should be paid his costs as from the date of payment in. In this case, money was paid into court, but the damages awarded were greater than the sum paid in. The Respondents argue that they should still be paid their costs because at the time of the payment into court, the sum paid was greater than what would have been awarded having regard to the claim as pleaded at that stage. The claim was subsequently amended to add further particulars of injuries suffered and, also, to itemize the claim for special damages. The payment into court was less than the amount to which the Appellant was entitled on the amended claim but it was argued that the Court should have regard to the claim as originally pleaded, and not the amended claim. The Master's discretion, it was submitted, should, therefore, have been exercised by reference to the case as originally pleaded and if that were done the payment into court would have exceeded the damages to which the Appellant would have been entitled. The Appellant should therefore have been ordered to pay the Respondents' costs and interest after the date of the payment into court.

19. There is authority to support the proposition that the Court should, in certain circumstances, disregard the claim as amended. At 25/5/4 of The Supreme Court Practice, 1997, which was referred to by the Respondents, it is stated:

> *"Where an amendment is allowed <u>at the trial</u> to enable plaintiff to add fresh allegations of damage, the discretion as to costs must be exercised by reference to the case as originally pleaded and not as amended."*

And one can understand the reason for that. So that if at the morning of the trial, as happened in the authority to which reference is made in The Supreme Court Practice, that is to say, **Cheeseman v Bowaters Ltd.** [1971] 1 W.L.R. 1773, new claims are introduced, then obviously what has happened is that the defendant has been deprived of the opportunity of assessing the position and making the appropriate payment into court in the light of that. In this case, however, that is not the position. The amendment was made with leave on the 11th February, 2008, and the assessment of damages was then adjourned to 26th June, 2008. There was therefore ample time for the respondent to reassess the payment into court. O. 22 specifically refers to increasing of the payment into court and this may be done at any time.

20. In the circumstances of this case, we think it was appropriate, as the Master did, to exercise her discretion by reference to the case as amended. There is no dispute that on the amended case, the payment into court did not exceed the damages to which the Appellant was entitled and he was therefore entitled to be paid his costs. The exercise of the Master's discretion cannot be faulted.

21. In the circumstances, the appeal is dismissed. The cross appeal is allowed, in part, by varying the period for which interest was disallowed. On the question of costs, the Respondents have succeeded in part on the cross appeal, whereas the Appellant has failed on the appeal. However the other grounds raised by the Respondents on the cross appeal were not successful and, in fact, the Respondents were only partially successful on the interest ground. We think the Court must take those circumstances into account and we consider it would be appropriate to make no order as to costs on the appeal and the cross appeal.

22. The Court also orders that the sum of $81,141.74, paid into court by the Respondents, as a condition to the grant of a stay of execution, be paid out to the Appellant.

A. Mendonça,
Chief Justice (Ag.)

P. Weekes,
Justice of Appeal

G. Smith,
Justice of Appeal