Chong Hwa Wee (by his Committee of Person and Estate, Chong Hwa Yin) v Estate of Loh Hon Fock, deceased
[2006] SGHC 79

Case Number : Suit 416/2004, RA 74/2006, 84/2006

Decision Date : 11 May 2006

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Namasivayam Srinivasan (Hoh Law Corporation) for the plaintiff; Pavan Kumar Ratty (P K Ratty & Partners) for the defendant

Parties : Chong Hwa Wee (by his Committee of Person and Estate, Chong Hwa Yin) — Estate of Loh Hon Fock, deceased

Damages – Measure of damages – Personal injuries cases – Appropriate measure of damages for debilitated but fully-conscious plaintiff – Whether loss of amenities and damages for future care forming part of damages for pain and suffering – Circumstances under which loss of earnings of third party in caring for injured plaintiff may be claimed as damages

11 May 2006

Choo Han Teck J:

1 This was an appeal by the plaintiff against the award of damages made by Assistant Registrar Low Siew Ling on 21 February 2006. I dismissed the appeal on 24 March 2006. The plaintiff now appeals against my decision. The defendant had cross-appealed against Miss Low's decision. I dismissed his cross-appeal except for one item, namely, the claim by the plaintiff's mother for her loss of earnings assessed by Miss Low to be $7,048.48. The defendant has not appealed against my decision. The following grounds are, therefore, in respect of the plaintiff's appeal only.

2 On 22 January 2003, the plaintiff was riding pillion on the defendant's motorcycle when the defendant crashed into the rear of a motor lorry. The defendant died and the plaintiff suffered serious injuries. On 24 November 2004, the trial judge gave judgment in favour of the plaintiff. The trial judge also made no finding of contributory negligence on the part of the plaintiff. The plaintiff suffered two fractures of the skull and occipital bone, and as a result of the injury to his skull, suffered brain injury from which he continues to labour under a severe disability. He is unable to speak and can only write some words, very slowly, like his name. The plaintiff was dissatisfied with my dismissal of the following four items:

(a) his appeal to increase the sum of $120,000 awarded to him in respect of his head injuries;

(b) his appeal for future medical expenses consisting of future physiotherapy ($60,000), future epilepsy ($96,000) and cost of surgery for shunt revision ($10,000) amounting to a total of $166,600;

(c) his claim for his mother's loss of income in having to look after him during the pre-trial period; and

(d) the costs of his appeal which I fixed at $1,000.

3 In respect of the damages for pain and suffering, the plaintiff sought an award of $200,000 whereas the defendant argued in his cross-appeal that it ought to have been $90,000. The plaintiff

had also sought a separate award for scars. However, the assistant registrar made a global award that included the claim for the scars because she accepted that the scars were not caused directly by the accident but were surgical scars. The plaintiff's claim for $200,000 for pain and suffering in respect of his head injury was made mainly in reliance on *Toon Chee Meng Eddie v Yeap Chin Hon* [1993] 2 SLR 536 ("*Eddie Toon*") in which the court ordered damages of $160,000. Counsel submitted that the present case was more severe than *Eddie Toon*'s, but the assistant registrar did not think so, and I am in agreement with her. Counsel conceded to the observation made by the assistant registrar below that in *Eddie Toon* the plaintiff there proved that he was likely to suffer from post-traumatic epilepsy whereas the plaintiff here had not. Although the plaintiff's medical expert, Dr Ho King Hee ("Dr Ho") deposed that there was a significant risk of post-traumatic epilepsy, he clarified under cross-examination that the risk was highest in the first two years from the accident. In the present case, he examined the plaintiff 32 months after the event and noted no indication of post-traumatic epilepsy. In his oral testimony before the assistant registrar, Dr Ho revised his estimation of the likelihood of the plaintiff developing post-traumatic epilepsy, from 5–50%, to 5–20%, and so, the assistant registrar also declined to make an award for post-traumatic medical expenses. The main point made by Mr Srinivasan before me so far as the damages for pain and suffering were concerned, was that even without suffering any post-traumatic epilepsy, the plaintiff in the present case is "living the life of a quadriplegic" even though he is, technically, not one. Mr Srinivasan further argued that, by comparison, the plaintiff in *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR 543 ("*De Cruz Andrea*") was awarded $150,000 for pain and suffering in respect of the damage to her liver due to her consumption of a product promoted by the defendants. Counsel submitted that the plaintiff there could live normally and tend to her daily needs whereas the plaintiff here has to lead the life of a quadriplegic.

4 Let me consider, first, *Eddie Toon.* The plaintiff there filed an appeal to the Court of Appeal but there was no record that he went ahead with the appeal. Eddie Toon was about seven years old when he was knocked over by a motor car driven by the defendant. The boy suffered severe injuries including head injuries that required emergency surgery to remove blood clots from the brain. Then he developed a lung infection and another operation was performed the next day and ventriculo-peritoneal shunting was inserted to relieve fluid pressure in his brain as well as abdominal cavity. The surgeries did not help him much and he "remained retarded, his limbs were spastic and rigid. He was unable to talk, unable to call for toilet needs, but was able to swallow when fed". The difference between the condition of Eddie Toon and the present plaintiff was that Eddie Toon could not move his limbs whereas the plaintiff could, although weakly. The medical evidence showed that there was not much improvement when he was assessed a year later.

5 The more severe the injury, the more difficult it becomes to place a monetary value to it. In cases such as *Eddie Toon* and the present, we can, perhaps, agree that only a sum so low as $10,000 would be thought paltry and insufficient, and although one might readily agree that a sum of, say, $10,000,000 would be satisfactory, one would, nonetheless, hesitate to conclude that that would be the "correct", or even fair, compensation for the pain and suffering the injured endured. It is also relevant to note that compensation for pain and suffering is predominantly the compensation for the pain and suffering endured while it lasts. What sort of pain is felt and how long that lasts depends on the facts of each case. That is why it is artificial to treat loss of amenities as a separate head from pain and suffering. Hence, a person who is brain dead feels no pain, while a quadriplegic, who is fully alert, suffers the pain and frustration of a life without participation, and such a pain is not only of the deepest, it also lasts as long as his mind lasts. In between, there are innumerable variations of pain, all tied to the individual condition, which, in turn, depends on the personal history of the plaintiff. A control room security guard who spends much of his working hours looking at close circuit television monitors, and who dislikes physical activities, preferring to watch television programmes for entertainment may, arguably, suffer less frustration as a quadriplegic than an outdoor adventurer

would. On the other hand, he might not. He might, subsequently, regret a life wasted in front of a tiny screen. The courts will find it utterly difficult to evaluate such diverse individual circumstances. Damages for pain and suffering are also thus distinct from damages for future care.

6 *De Cruz Andrea* was a problematic case for comparison with the present case because, looking at it from where the two respective plaintiffs are now, one (De Cruz) is back in participation of life, whereas the other (the present plaintiff) is unable to speak or move. The former was awarded $150,000 and the latter $120,000. In *De Cruz Andrea* the Court of Appeal reduced the award of damages for pain and suffering from $250,000 to $150,000 after reminding itself (at [164]) that:

> [A]n appellate court will only interfere with an award of damages when it is convinced either that the trial judge acted upon some wrong principle of law or that the amount awarded is so manifestly high or low as to have been a wholly erroneous estimate of the damage ...

Counsel for the defendants in *De Cruz Andrea* submitted that the award of $250,000 was too high in comparison to the quadriplegic cases. De Cruz's counsel argued that the court should not compare her case with that of a quadriplegic. The Court of Appeal held that it was in agreement with the defendants, and that a comparison with quadriplegic cases can, in some limited but useful way, be made. Having so held, the court proceeded to compare the awards made in four cases and concluded at [177] that the damages awarded to De Cruz were "manifestly high and should be adjusted accordingly". *Eddie Toon* was one of the four cases used for comparison. The Court of Appeal then reduced the award in *De Cruz Andrea* to $150,000 for pain and suffering and loss of amenities but did not explain why it did so; perhaps it thought that the rationale, though clear, was implicit. If one places the three cases – *Eddie Toon, De Cruz Andrea*, and the present case – together, and examines them merely by the description of the injury (brain injury, physical incapacity versus liver damage and restrained lifestyle) and the known awards for the first two cases, the awards of $160,000 and $150,000, then the award of $120,000 does not appear manifestly disproportionate.

7 The plaintiff, however, deserves a fuller explanation as to how courts determine a proper sum in such circumstances. I should first refer to a short passage from the Court of Appeal's judgment in *De Cruz Andrea.* The court found the cases concerning the loss of a single kidney and lacerations of the liver to be irrelevant, and said at [178]:

> We fail to see how the sufferings accompanying lacerations of the liver or colon are on par with the travails of liver transplant patients. For one, it does not appear that any of the plaintiffs in the cases cited by the appellants suffered any debilitating long-term effects from their injuries, whereas [De Cruz] does face a host of problems, including increased susceptibility to illness and the risk of liver failure.

The severity of pain and suffering escalates according to the length of time the plaintiff will continue to feel the pain or suffer from it. And that, naturally, would depend on whether the plaintiff was conscious of the pain or suffering. A person who no longer feels pain by reason of an injury to the brain may appear to be a much more sorry case than a person who is debilitated but mentally alert (often spinal chord injury type of cases) because the latter would be fully conscious of his disability and continue to suffer it as a result. The former may attract as much, if not more, sympathy, but compensation for pain and suffering must be made on principle. In determining the award, sympathy has its place in the rounding off on a higher end of the range, but no further. The pain that one feels for an injured person is the pain of the sympathiser. It is not the pain of the patient. The law compensates the patient, not the sympathiser, for his pain. Thus, the only justifiable distinction between the brain damage (of the *Eddie Toon* type) and liver damage (of the *De Cruz Andrea* type) cases is that in the former, the patient was no longer conscious of pain and suffering nor his loss of

amenities, great and prolonged as they might be, because of the injury to his brain.

8 There was no medical evidence that the plaintiff was still in pain, and since no pain management medication was given, I think it fair to conclude that he was no longer in pain. Thus, the award need only reflect his sense of loss of amenities. Although the evidence showed that the plaintiff spent most of his time watching television, it appeared that he did so without full comprehension of what he was watching. The medical evidence of Dr Ho showed that the plaintiff developed "expressive dysphasia" due to his injuries and that meant that his ability to generate language in either speech or writing or any other symbolic language was impaired. It was not a physiological problem of the voice box. It was a condition afflicting the brain and, therefore, I think that it was reasonable to infer that his comprehension and articulation of the world was probably impaired. It is possible that that might not be the case, but, as the assistant registrar reminded herself, the court deliberates on probabilities, not on possibilities.

9 Damages for pain and suffering are thus ascertained using the broad brush, so to speak, and adjusted to the individual case. In *Eddie Toon* the court was of the view that $160,000 was a reasonable amount. In *De Cruz Andrea* the award was just below that amount, but in the latter, the plaintiff was mentally alert and conscious of her medical condition and more restricted lifestyle. In the present case, the assistant registrar had compared the plaintiff's circumstances with that of Eddie Toon's and concluded that $120,000 was a reasonable amount. The difference was a reflection of her estimation of the difference in the extent and degree of the respective injuries. It was an opinion within the bounds of her judicial discretion. No one understands the full meaning of pain and suffering save his own. If Miss Low, the assistant registrar, had erred on the figure, would I not be substituting my error for hers if I should interfere? For the reasons I have given, I am of the opinion that increasing the award could only be justified on the ground of sympathy; but that alone, unfortunately, is not a basis for developing judicial principles. Perhaps the compensation for pain and suffering for injured persons in the plaintiff's condition ought to be increased, but that would be a general policy decision that I was not able to undertake without better and wider evidence, and fuller, more specific, submissions, taking into account all other categories of injuries. This was not an appropriate case for such a broad and sweeping review. Compensation awards, such as this, require the judicial mind to keep in view peripheral, but relevant, factors such as the impact on the insurers and the rate of inflation, while keeping its direct focus on the principles and difficulties of determining a figure without demeaning the hurt of the plaintiff or his family, or drawing the law into disrepute if the layman were to think that a human being has parts that can be priced – that "a liver is worth $150,000.00", and so on. How could anyone know the worth of a liver, or the sight of one's eyes, or the ability to participate in life without major disabilities? Compensation for physical injury or psychological trauma can neither be adequate nor accurate. But the process of determining an award can be rational and fair. In that regard, I am of the view that the approach of the assistant registrar could not be faulted.

10 I now turn to the appeal concerning the future medical expenses. In respect of the epilepsy and shunt revision, the evidence did not justify any such claim. I had already dealt with the issue of post-traumatic epilepsy. There was no evidence that the plaintiff would probably require a shunt revision. Dr Tan Kheng Kooi ("Dr Tan") testified that in his opinion, the chances of the plaintiff requiring that procedure were very small. The assistant registrar accepted his evidence and I have no reason to disagree with her view. So far as future nursing care and physiotherapy were concerned, the evidence of Dr Tan was that physiological exercises had to be maintained, but that a domestic helper would be capable of being trained to provide that. A fully trained, professional physiotherapist would be a luxury. The assistant registrar also laboured under the absence of evidence of the specific cost of this item. I was therefore of the view that she had rightly rejected the claim for future physiotherapy costs as a separate item, but instead, took that into consideration when she made her

award on the costs of future nursing care.

11 The penultimate matter of the plaintiff's appeal against my decision concerned the award of $7,048.48 in favour of his mother by the assistant registrar. The assistant registrar rightly pointed out that the claim was made for the loss of earnings, not of the plaintiff, but a third party; in such cases, no award would be made unless there was medical evidence that the services of that third party was crucial to the plaintiff's recovery and rehabilitation. However, she allowed the claim on the basis that "somebody" had to look after the plaintiff. There seemed to be two problems with this approach. The first was that it was not proved how the mother's care would have helped the plaintiff's recovery from his injuries. In this case, no inference of that could be drawn given the nature of the injuries, unlike, say, that of a young child who was mentally alert and conscious and needed the presence of a parent for psychological comfort. Secondly, the mother's income as a rubber tapper was accepted as the costs of nursing care. If there was no evidence of what nursing care would cost this item could not be allowed using a rubber tapper's, or any other, income as the gauge.

12 Lastly, the plaintiff appealed against the award of costs against him. In this case, both parties had appealed against Miss Low's award below. I dismissed both appeals except for the claim of the plaintiff's mother. The defendant succeeded on that point. Given the balance of the nature of issues and the work done and arguments presented, I was of the opinion that the bulk of the costs would have been cancelled out except for a small sum to indicate that the defendant had succeeded in part. I thought that the sum of $1,000 would be fair and I so ordered.