

HJH ROSMAHWATI BTE HJ BAKAR

Appellant/Defendant

AND

DONI BIN AKUP

Respondent/Plaintiff

[suing as the administrator of the estates of
And on behalf of the dependants of
MUHAMMAD AZMI BIN DONI (deceased) and
MUHAMMAD AZIM BIN DONI (deceased)]

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 13 of 2007)

Power, P., Mortimer and Chong, JJ.A.
14th May, 2008.

Assessment of damages – pain and suffering and loss of amenities – principles applicable
– appeal – approach of appellate court – whether there has been a “wholly
erroneous” estimate of the damages suffered such as to warrant interference.

Mr John Lee (M/S Y.C.Lee & Lee) for Appellant/Defendant.
Mz Naz Parveen Rasheed (M/S Sandhu & Co.) for Respondent/Plaintiff.

Cases cited in the Judgment:

Andrews v Freeborough [1967] 1 Q.B.1.
Benham v Gambling [1941] A.C. 157
Davies & Anor v Powell Duffryn Associated Collieries Ltd. [1942] AC
601
Fong Yii Tak (as administrator) *v Miya Umar s/o Mira Khan* [2001] JCBD
54
Hajah Umai Binti Haji Jalut (Suing as administratrix of the estate of *Haji
Sihran Bin Pangis*) *v Haji Khairul Azmi Bin Haji Ali Akbar & Others*
[1998] JCBD 309
Heaps v Perrite Ltd. [1937] 2 All ER 60
H. West & Son Ltd. v Shephard [1964] A.C. 326
Kemp v Kemp, *The Quantum of Damages*, Vol.1, p.3001
Lee Ah Lai (in his personal capacity and as administrator of the estate of
his late daughter *Lee Soo Wei* (the 1st deceased) *v Hj Sirat Bin Duah* (in
his personal capacity and as administrator of the estate of *Mohd.
Noorzharfan Bin Yahya* (2nd deceased) [2004] BLR 92
Lim Pek Tan & Anor v Ataur Rahman & Anor [2001] JCBD 387
Lim Poh Choo v Camden and Islington Area Health Authority [1980] A.C.
174
*Rahmah Binti Hj Abd Hamid & 4 Ors. V Ak Md Ali Indra Putra Bin Pg
Dato Hj Hamzad & Anor* [2000] JCBD 247
Rose v Ford [1937] AC 826

Siti Rozidah Binti Jalani (as administratrix of the estate of *Jalani Bin Zainuddin*) v *Wong Kok Sung & Anor* [1999] JCBS 395
Wise v Kaye [1962] 1 Q.B. 638

Chong, J.A.:

Introduction

1. This is an appeal by the defendant against the decision of Hayati, J. on 16 August 2000 in respect of the following awards for pain and suffering and loss of amenities: (i) \$20,000 for Muhammad Azmi Bin Doni (Azmi); and (ii) \$30,000 for Muhammad Azim Bin Doni (Azim).
2. The plaintiff is the administrator of the estates of his two sons, Azmi and Azim. The brothers succumbed to the injuries they suffered in a tragic road traffic accident in front of their school on the afternoon of 31 March 2004. They were knocked down by a vehicle driven by the defendant.
3. A writ was issued on 4 April 2006. At first the defendant disputed liability. Subsequently, on 30 January 2007, the defendant conceded liability and the action proceeded for assessment of damages.

The facts

4. The facts are uncontroversial and are as follows. Azmi was 8 years old at the time of his death. He suffered head injuries and was conscious for 15 minutes to half an hour after the accident. There was evidence he was groaning in pain during part of the journey to the hospital. He died 2 days after the accident.
5. Azim was 7 years old. He, too, suffered head injuries and was conscious and groaning in pain during the half hour journey to the hospital. He was “reacting to pain” when he was examined by a doctor an hour later. Emergency surgery was carried out and he was unconscious for 13 days before he died.
6. Mr. Lee who appears for the defendant submits that the awards are excessive, out of line with comparable awards of recently decided cases, and a reasonable award for Azmi would be \$5,000 and between \$5,000 to \$10,000 for Azim.
7. On behalf of the plaintiff, Ms Naz argues that the awards are in line with the current trend of awards and not so excessive that they ought to be disturbed.

Principles applicable

8. The claim for pain and suffering and loss of amenities is made pursuant to section 3(1) of the Fatal Accident and Personal Injuries Act which states:

“If death is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.”

Pain and suffering

9. The law is well established. The plaintiff is entitled to compensation for pain and suffering which is attributable to his injury: *Heaps v Perrite Ltd.* [1937] 2 All ER 60; *H. West & Son Ltd. v Shephard* [1964] A.C. 326. However, if the plaintiff suffered no pain or mental anguish because he was unconscious, no damages may be recovered under this head: *Wise v Kaye* [1962] 1 Q.B. 638; *H. West & Son Ltd v Shephard* above; *Andrews v Freeborough* [1967] 1 Q.B.1.

Loss of amenities

10. This head of damages embraces everything which reduces the plaintiff's enjoyment of life: *Kemp v Kemp*, *The Quantum of Damages*, Vol.1, p.3001. Whether the injured person is aware of the deprivation of an amenity or amenities is irrelevant. In *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] A.C. 174, Lord Scarman, with whose speech the other members of the House of Lords agreed, said at p.188:

“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 plaintiff's 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] A.C. 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.”

Comparable cases

11. It is useful to look at comparable cases but we do not propose to set out all the authorities which counsel have referred to. In *Hajah Umai Binti Haji Jalut* (Suing as administratrix of the estate of *Haji Sihran Bin Pangis*) v *Haji Khairul Azmi Bin Haji Ali Akbar & Others* [1998] JCB 309, the deceased who was 40 years old was conscious for about 1 ½ hours after the accident before he died. An award of \$10,000 was made by Roberts, C.J.

12. In *Siti Rozidah Binti Jalani* (as administratrix of the estate of *Jalani Bin Zainuddin*) v *Wong Kok Sung & Anor* [1999] JCBS 395, the deceased was 63 years old. He was dead on admission to hospital. Roberts, C.J. made reference to *Rose v Ford* [1937] AC 826 and awarded “a nominal sum” of \$10,000 as there was nothing to suggest the deceased was conscious at any time after the accident.
13. An award of \$5,000 was made by Roberts, C.J. in *Fong Yii Tak* (as administrator) v *Miya Umar s/o Mira Khan* [2001] JCBD 54, where the deceased was killed in the collision.
14. We pause here to make this observation. With great respect to Roberts, C.J. we do not see how any award for pain and suffering and loss of amenities can be made in *Siti Rozidah* or *Fong Yii Tak* in the absence of positive evidence the deceased was conscious or had lived at any time after the accident. We agree with the view of Leonard, J.C. in *Lee Ah Lai* (in his personal capacity and as administrator of the estate of his late daughter *Lee Soo Wei* (the 1st deceased) v *Hj Sirat Bin Duah* (in his personal capacity and as administrator of the estate of *Mohd. Noorzharfan Bin Yahya* (2nd deceased) [2004] BLR 92, that *Rose v Ford* is no authority for awarding damages “nominal or otherwise” for pain and suffering where an injured person has not been proved to have been conscious at any time after sustaining the injury and the case is relevant only to the question of quantum. No award was made for pain and suffering in *Lee Ah Lai* as there was no evidence the deceased was conscious after sustaining the fatal injuries.
15. In *Rahmah Binti Hj Abd Hamid & 4 Ors. v Ak Md Ali Indra Putra Bin Pg Dato Hj Hamzad & Anor* [2000] JCBD 247, the deceased was 38 years old. He suffered multiple injuries and was alive for 16 days. He was conscious for 7 days before he died. Roberts, C.J. awarded a sum of \$30,000 on the basis that the deceased “must have suffered considerably before he died” and the fact that he was conscious for 7 days was an “aggravating factor”.
16. In *Lim Pek Tan & Anor v Ataur Rahman & Anor* [2001] JCBD 387, Findlay J.C., awarded \$5,000 where the deceased died from his injuries half an hour after the accident.

Approach of appellate court

17. The principles on which an appellate court will interfere with a lower court’s assessment of damages are well settled. In *Davies & Anor v Powell Duffryn Associated Collieries Ltd.* [1942] AC 601 Lord Wright said at p.616:

“An appellate court is always reluctant to interfere with a finding of the trial judge on any question of facts, but it is particularly reluctant to interfere with a finding on damages which differs from an ordinary finding of fact in that it is generally much more a matter of speculation and estimate. No doubt, this statement is true in respect of some cases than others. The damages in some cases may be

objective and depend on definite facts and established rules of law, as, for instance, in general damages for breach of contract for the sale of goods. In these cases the finding as to amount of damages differs little from any other finding of fact, and can equally be reviewed if there is error in law or in fact. At the other end of the scale would come damages for pain and suffering or wrongs such as slander. These latter cases are almost entirely matter of impression and of common sense, and are only subject to review in very special cases.”

18. Lord Wright went on to say at p.616, 618:

“It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Green L.J. in *Flint v Lovell* (I). In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.”

Conclusion

19. In assessing the damages to be awarded the judge had the benefit of comparable cases before her and she made reference to the principles expounded in *Lim Poh Choo*. She rightly pointed out that the tendency is for a single award to be made for pain and suffering and loss of amenities. But we are unable to agree that in the present case a “substantial part of the award” in respect of both Azmi and Azim should be for loss of amenities.
20. It must be remembered that *Lim Poh Choo's* case concerned a living plaintiff who, because of the extensive and irremediable brain damage she suffered, was barely sentient but her expectation of life remained substantially the same. It was in that context the court held the fact of deprivation was a “substantial loss”. Here, Azmi and Azim died shortly after the accident. In our judgment the substantial part of the award must surely be for pain and suffering instead of loss of amenities.
21. Generally, it is difficult and unnecessary to say how much relates to pain and suffering and how much to loss of amenities. What is important is to assess the nature and severity of the injury and the impact on and consequential disability of the particular injured person. In deciding on an appropriate award in a particular case how long the pain and suffering has been and will be endured and how long the injured person has been or will be deprived of those amenities is an important consideration.
22. There is no suggestion that the judge had misapprehended the facts. The injuries sustained by Azmi and Azim were undoubtedly severe and there must have been

considerable pain and suffering. But given the short period in which they were conscious and alive we think the awards are on the high end. However, we have not been persuaded that there has been a “wholly erroneous” estimate of the damages suffered such as to warrant our interference.

23. The appeal is dismissed.

Order Nisi as to costs

24. There will be costs to the plaintiff to be taxed if not agreed. This Order will become absolute within 7 days unless counsel apply to be heard on costs.

POWER, P.
President, Court of Appeal

MORTIMER, J.A.
Judge, Court of Appeal

CHONG, J.A.
Judge, Court of Appeal