Case Nos: 551/2015 and 511/2016

IN THE COURT OF APPEAL OF ST. HELENA
ON APPEAL FROM THE SUPREME COURT OF ST. HELENA
CHIEF JUSTICE EKINS

Date: 05/10/2017

Before:

SIR JOHN SAUNDERS, PRESIDENT OF THE COURT OF APPEAL
MR JUSTICE YELTON
MS JUSTICE DRUMMOND

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Between:

THE ATTORNEY GENERAL OF ST. HELENA
- and -
AB, AC and NK

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BENJAMIN CHANNER (instructed by the Attorney General of St Helena) for the Appellant, the Attorney General
MARC WILLEMS QC and STEFANIE COCHRANE (instructed by Amira Abdul Aziz, Public Solicitor, St. Helena) for the Respondents, AB, AC and NK

Hearing date: 18 September 2017

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JUDGMENT

SIR JOHN SAUNDERS, PRESIDENT:

1. This is the judgment of the Court, to which we have all contributed. The Chief Justice made anonymity orders in relation to the Claimants and they remain in force.
2. The Facts: While these are two separate actions, some of the factual background is the same and they raise an issue of law which is common to both. In addition to the common issue there is in each case a discrete issue. The facts are disturbing and arise from the activities of Dr. du Toit who at all material times was the Senior Medical Officer employed by the Government of St Helena. It is accepted that the Attorney General is vicariously liable for his actions. Dr. du Toit carried out caesarean sections on both the female Respondents, after which he sterilised them without their consent. In Ms AB's case the caesarean section was negligently carried out as it was performed too early and sadly the baby died. The Chief Justice found, and it was not in dispute, that as a result of the death of the baby and the premature sterilisation, Ms AB suffered considerable physical pain as well as profound psychological consequences. Mr. AC, who was Ms AB's partner and the father of the child who died, also suffered psychological consequences.
3. Their entitlement to damages was not disputed by the Attorney General. The only matter in dispute at trial was the quantum of damages. The assessment of damages was by no means an easy exercise.
4. There were a number of heads of damages in Ms AB's claim. We are only concerned with two of those, which are the subject of this appeal. They are the quantum of damages for pain, suffering and loss of amenity and her entitlement to damages for loss of earnings. In Mr. AC's case the head of damages which is relevant to this appeal is damages for pain suffering and loss of amenity.
5. Ms NK sues through her litigation friend as she suffers from a mild intellectual disability and has developmental problems. Ms NK has found it difficult to come to terms with her sterilisation, which has had a considerable effect on her mental well-being. Because of her lack of capacity, Ms NK requires the assistance of a financial deputy to manage

the damages which she receives. The issues for us in her case relate to the damages for pain, suffering and loss of amenity and whether she should receive damages to pay for the appointment of a deputy in the UK or whether they should be limited to the costs of the appointment of a deputy in St. Helena.

6. Assessment of damages for pain, suffering and loss of amenity. The Chief Justice used the Judicial College Guidelines for England and Wales as the basis for his assessment of damages for pain suffering and loss of amenity. It was not in dispute before the Chief Justice, nor is it in dispute before us, that those Guidelines should remain the basis for assessing damages in St. Helena. Without some basis from which to work, the assessment of damages could become arbitrary and unpredictable. In two cases decided in the 1990s the Supreme Court of St. Helena decided that the Guideline figures should be discounted to reflect the lower level of earnings in St. Helena than in England and Wales. In Harvey v Phillips [SC 503 of 1996] Chief Justice Martin awarded damages of one sixth of the amount of damages which would have been awarded in the UK to reflect the evidence that he heard that average wages in St. Helena were one sixth of the amount paid in England. In Lawrence v Solomon and Company (St Helena) plc [SC 532 of 1999] the same Judge divided the general damages which would have been appropriate in England by 4. While the general level of wages in St Helena was still approximately one sixth of English wages, for carpenters they were one quarter. Mr. Lawrence was a carpenter, so the Judge decided it was appropriate to take the specific difference in wages payable to carpenters rather than the general level.
7. Neither judgment includes any reasoning as to why this approach was adopted but it may be that there was no argument before the Judge to suggest that it was not the correct one.
8. Other jurisdictions have adopted a somewhat different approach. In Bernal v Riley [Claim No 2015, Ord 50], Jack J, sitting in the Supreme Court of Gibraltar, decided that the Guidelines for England and Wales were unsuitable for use in Gibraltar and instead used the guidelines for

Northern Ireland which are higher than those in England and Wales. He did that for a number of reasons, one of which was that the standard of living in Gibraltar, reflected at least in part by the relative incomes, was higher than in England and Wales.

9. In the cases before them both Chief Justice Martin and Jack J followed the decisions of the Privy Council in Jag Singh v Toong Fong Omnibus Co Ltd [1964] 1 WLR 1382 and Chan Wai Tong v Li Ping Sum [1985] AC 446, which held that damages need to be appropriate for local conditions and if comparisons are to be made with other awards they should be with other local jurisdictions.
10. In Archer v UBS (Cayman Islands) Limited [2009 CILR 531] Quin J applied the Judicial Studies Board (as the Judicial College was then called) Guidelines but applied an uplift to reflect the higher cost of living in the Cayman Islands than in England and Wales.
11. The decisions in the Supreme Court of Gibraltar and the Cayman Islands are not binding on us but we have taken note of the reasoning which was applied.
12. In this case the Chief Justice declined to follow the decisions of his predecessor and decided that there should be no discount from the Judicial College Guidelines. The evidence before him was that average earnings in St Helena were one third of those in England and Wales, although there were criticisms of the methodology used to make this assessment on behalf of the Claimants, that the Judge accepted. For example the calculation did not include the wages of technical co-operation officers which are higher than the average and ignored those whose declared incomes fell below the poverty line. Also, while incomes are lower, the cost of living in St. Helena is higher, by 25%.
13. The Chief Justice accepted that he was bound by the decisions of the Privy Council, as Chief Justice Martin had been, but nevertheless he declined to make a discount to reflect the lower wages. In so far as the Privy Council decisions specify that comparisons with other awards should be made with other local decisions rather than decisions in the UK, the reasoning cannot apply to St. Helena, where there are no local

decisions with which to compare. In any event it has been accepted by both sides that the Judicial College Guidelines should form the basis of any award and the only relevance of local conditions is in deciding whether to apply an uplift or a discount or make no change.

14. The reasons that the Chief Justice gave for making no discount appear in para 14 of his judgment where he said this: *The answer to the dichotomy, in my view, lies in a proper analysis of developments since the decision in Jag Singh, Chan Wai Tong and the decisions of Martin CJ in Henry and Lawrence. Since the decisions…St Helena and the status of St Helenians has radically changed. Prior to the 21st century, citizens of British Dependant Territories were not full British citizens. That changed in 2002. In 2009, St Helena adopted a new Constitution. One of the rights under the Constitution is protection from discrimination. If the proper method of assessing general damages remains as indicated by Martin CJ, then by logical extension it ought to be the proper method of assessing damages for the residents of deprived northern inner city residents in the UK because every available statistic would show, I am satisfied, that by whatever measure, their standards of living, wages and cost of living would be appreciably lower that the residents of, for example, Belgravia. I am not aware that any such approach has been adopted in the UK and there would rightly be outrage if such a measure was adopted. The overwhelming majority of those living on St Helena are full British citizens. I ask a rhetorical question: why should they be judged differently from other British citizens of comparable economic status in the UK? Were I to perpetuate the approach previously adopted then it seems to me that it would be discriminatory. I am satisfied, therefore, that the circumstances have now changed so as to render the ratios of Jag Singh and Chan Wai Tong obsolete insofar as a proper measure for assessing damages on St Helena, which for the future should be assessed solely in accordance with Judicial College Guidelines without discount.*

15. Having considered the arguments presented to us on this appeal, we are respectfully of the view that the reasoning of the Chief Justice does not provide the answer to the "dichotomy". We are not satisfied that to

discount the award of damages amounts to discrimination forbidden by the new constitution. It is inevitable that British citizens who live on St Helena are treated in different ways to other British Citizens living elsewhere in the world including in the UK. They live in a different place which brings different problems and solutions. Such different treatment would not amount to discrimination contrary to the constitution. In our judgment the basis on which the Chief Justice reached his decision was not correct in law.

16. However that is not the end of the matter. A recent decision of the Privy Council, Scott v The Attorney General of Bahamas and another [2017] UKPC 15, has reviewed the way in which cases such as this should be approached. That case concerned the awards of damages for pain, suffering and loss of amenity in the Bahamas. In that jurisdiction there had been a series of cases in which damages had been assessed following the Judicial College Guidelines or their predecessors and then an uplift had been applied to reflect the higher cost of living in the Bahamas than in England and Wales. There had been other cases which had not applied an uplift. The Privy Council was asked to decide what was the correct approach.
17. In the course of his judgment, Lord Kerr reviewed the purpose of general damages. At para 17 he said: *They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay.* At para 18 he quoted the judgment of Dickson J in the Supreme Court of Canada in Andrews -v- Grand and Toy Alberta Ltd [1977 83 DLR 452] who said: *The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.*
18. This approach is reflected in the decision of the Court of Appeal in England in Heil v Rankin [2000] EWCA Civ 84 at para 23 where it is said: *There is no simple formula for converting the pain and suffering, the loss of function , the loss of amenity and disability which an injured person has*

sustained into monetary terms. Any process of conversion must be essentially artificial.

19. We interpret those quotations as meaning that fair compensation requires payment of money which will provide the Claimant with benefits which are intended to balance out, as far as is possible, the suffering resulting from the tort. Of course it never can, which is why the process of conversion is described as being "essentially artificial".
20. To this analysis we would add that the method of assessment of damages needs to be clear, so that insurance companies and lawyers advising litigants have a reasonable prospect of accurately assessing what the damages will be. If the assessment is arbitrary that will inevitably lead to more litigation and will make the job of insurance companies in assessing premiums impossible.
21. As was said in Heil v Rankin at para 25: *Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements.*
22. The Privy Council, having reviewed the authorities, said at para 23 in Scott: *What is a reasonable sum must reflect local conditions and expectations.* In relation to the Bahamas, Lord Kerr said: *The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the back drop to the examination of how those changes can be accommodated but they cannot, of themselves, provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for.*
23. The Privy Council did not approve in that case of the automatic use of the Guidelines with a fixed uplift or discount. It left a considerable amount of discretion to local Judges to arrive at an assessment which was fair in that it reflected local circumstances.

24. In our judgment the same must apply to St. Helena. The Chief Justice did not have the assistance of this decision from the Privy Council when he reached his decision. There was evidence before him that incomes of those who live on St. Helena are catching up with those in England and Wales. In 1999 the wages on St Helena were generally one sixth of those in England and Wales, they are now one third. The opening of the airport makes it likely that that process will continue and accelerate. If a discount was made to the damages awarded now, it is likely the discount will be inappropriate in the relatively near future but will have affected the amount of the damages which would not then be capable of adjustment. St Helenians are now British citizens and there can be little doubt that their justifiable expectation is to be treated in the same way as other citizens of England and Wales for whom the Guidelines are intended. There will be an increase in movement between St Helena and the UK which will be reflected in the expectations of the inhabitants of St Helena. We also take into account the higher cost of living in St Helena.
25. We are satisfied that the level of damages should remain tied to the Judicial College Guidelines. That provides some degree of clarity as to what the level of damages will be which is important for the reasons set out above. We have also decided in the light of all the evidence given before the Chief Justice that it is not appropriate to apply a discount as that would not properly reflect the conditions in St. Helena and the present expectations of its inhabitants. It follows that while we disagree with the reasons given by the Chief Justice, we agree with the result, on this aspect of the case.
26. The second issue on this appeal relates to the claim by Ms AB for damages for loss of earnings. At the time of the events which gave rise to the claim, Ms AB was working as a teacher of children with special needs. The Chief Justice found in paragraph 13 of his judgment at A164 that her emotional fragility after her experiences at the hands of Dr du Toit was such that she could not continue with that work and that to leave that employment was reasonable.

27. Ms AB was clearly, as the Chief Justice found, a woman who showed considerable fortitude. She not only found alternative employment but alternative employment at a higher salary.
28. She had been earning £8154 per annum, but was then employed from May 2013 as a journalist and production assistant at a salary of £10700. However she found it difficult, because of the after effects of what had happened to her, to cope with that work and accepted a reduction. The plaintiff said in her oral evidence that her salary was reduced to £8000 per annum (A201), but the notice of appeal refers to £8500.
29. Thereafter she was twice promoted and at the time of the trial was earning £9500.
30. The claim for loss of earnings was put on the basis of the difference between £10700 and £9500, on a continuing basis. The same argument is relied upon today in the skeleton argument of the Respondents to the appeal (the plaintiffs) at paragraph 40.
31. The principle on which the multiplicand in cases for loss of earnings is calculated is set out in *McGregor on Damages,* 19th Edition, paragraph 38-074: *The starting point in the calculation of the multiplicand has long been the amount earned by the claimant before the injury. However, since the decision in Cookson v Knowles [1979] AC 556…the starting point …became the amount the claimant would have been earning at the date of trial had he not been injured.*
32. In this case, the plaintiff made it clear that she left her employment as a special needs teacher as a consequence of the events which caused her to bring the proceedings. Her counsel says that the flaw in the Appellant's argument is that the Chief Justice refused to find that the plaintiff would inevitably have remained at her previous employment but for the events of November 2012 (paragraph 15 of the judgment, pA165). He also found that her subsequent reduction in salary was attributable to those very events (paragraph 16).
33. However on the balance of probabilities, on those facts the only conclusion to which the Chief Justice could come on the evidence was that, but for the events in question, the plaintiff would have been earning

at the date of trial the sum she would have earned as a special needs teacher, which was probably slightly in excess of that which she earned at the date of the negligence of Dr. du Toit. He could not take the sum at which she was taken on as a journalist and production assistant as the multiplicand because £10700 was not a sum she would have earned at the date of trial but for the negligence.

34. It follows from that conclusion that the plaintiff had not shown a loss of earnings caused by the events in question, save perhaps for the short period when she was earning £8000 per annum instead of £8154, if the former figure is correct.

35. There is a clear argument to the effect that the plaintiff had suffered a handicap in the labour market. Damages can be awarded under that head even where, as here, a claimant is earning more after the accident, as in Tait v Pearson [1996] PIQR Q92 and Lau Ho Wah v Yau Chi Biu [1985] 1 WLR 1203. However that was not the plaintiff's case at trial and there is no cross-appeal or Respondent's notice. An award was made by the Chief Justice for loss of employability, which did not ultimately form part of the sum awarded. However the Respondent's counsel indicated at the appeal hearing that he did not wish to argue that any such head should be included.

36. The final issue is the costs of a financial deputy. As part of Ms NK's claim she sought to be awarded the costs of appointing a financial deputy under the Court of Protection in England who would manage the award of damages on her behalf. In his judgment, the Chief Justice noted that no financial deputies had yet been appointed in St Helena under the Mental Health and Mental Capacity Ordinance, 2015 ("the Ordinance") although appointments were to be made shortly. Mrs ER, the litigation friend, was not willing to act where large figures of the sort in this case are involved and the Chief Justice took the view that the regime in St Helena had not sufficiently matured to provide a system of safeguards adequate to meet a case of this sort. He found in fact that he: *would be failing in his duty to Ms NK as a protected party were [he] to do other than order the appointment of a professional financial deputy in the UK.* He

thereafter ordered that: *the sum awarded to Ms NK in damages should be payable to the client account of the Public Solicitor pending a successful application to be made by the Plaintiff's Financial Deputy, Miss Ruth Wright, to the Court of Protection in the United Kingdom for the appointment of Ruth Wright as the Plaintiff's Deputy, thereupon said judgment sum and any accrued interest will be transferred to the Court of Protection in the United Kingdom by the Public Solicitor.*

37. In this appeal the Attorney General argued that it was wrong in fact for the Chief Justice to find that the regime established by the Ordinance was not sufficiently mature or able to provide a system of safeguards adequate to meet Ms NK's case. The Ordinance creates a statutory framework for the appointment and regulation of deputies thereby allowing the finances and affairs of those lacking capacity to be safeguarded in St Helena without the need to involve an outside jurisdiction in which Ms NK is not resident. That Ms ER was not prepared to take on the role of deputy did not mean that a suitable deputy was not available on St Helena. Ms NK is habitually resident in St Helena and her damages were awarded by a St Helenian court. The jurisdiction of the Court of Protection had been artificially created by ordering that the damages be transferred into UK accounts.

38. On behalf of Ms NK it was argued both at the appeal hearing and in a further note submitted after the hearing, that there was no dispute that a financial deputy needed to be appointed for Ms NK. The issue arises in the context of private law proceedings between two parties in which the Chief Justice was determining an award of damages arising out of the Appellant's tort. Section 115 of the Ordinance did not oblige a civil court hearing a private law matter to appoint a deputy under that section. The Chief Justice was concerned with ensuring that Ms NK's award of damages was suitably protected, which was achieved by the order made which allowed her to instruct a deputy and seek appointment in the UK. The Appellant never produced any evidence of the costs of a deputy appointed on St Helena. The only evidence available was that of Ms Wright. The Appellant did not attempt in cross examination to establish

that there was a suitable system for appointing a professional deputy on St Helena with comparable protections in terms of professional indemnity insurance and/or a security bond for the protection of funds. The Appellant had failed to persuade the Chief Justice that the appointment on Island would provide sufficient protection for Ms NK.

39. Having considered those competing arguments, we take the view that the Chief Justice erred insofar as he considered that the appointment of a deputy under the Ordinance would provide insufficient protection for Ms NK's award of damages. At the time of trial, the Ordinance had come into force relatively recently, on 29 February 2016. However, in our view that is not of itself a reason to conclude that its provisions cannot provide sufficient protection. The legislative framework equips the St Helena court with the power to appoint a financial deputy and a wide power to make such further orders or give such directions, and confer on the deputy such powers or duties, as it thinks necessary or expedient for giving effect to such an order or appointment (s115(5)). Under section 118 the powers of a financial deputy include the power to execute a will for the person lacking capacity, and under section 119(10) the court may require a deputy to give to the Public Guardian such security as the court thinks fit. It seems to us that these provisions provide adequate safeguards to meet a case such as Ms NK's.

40. The fact that Ms ER was not prepared to take on the role of deputy on island does not detract from the fact that there were other deputies about to be appointed who might have been able to act. In any event, the Appellant had identified that Ms Wright was willing to act and suitable for appointment. There is nothing to preclude Ms Wright in due course from making an application to the St Helenian court to be appointed as Ms NK's deputy. The practicalities of her acting as deputy whether appointed by the St Helena court or by the Court of Protection remain the same: she is acting as financial deputy based in the UK for a person resident in St Helena. We do not consider that it was appropriate or reasonable for the Chief Justice to award the costs of a deputy appointed by the Court of Protection in England when the damages were being

awarded by a St Helenian court in favour of a St Helenian resident who could be adequately protected by a financial deputy appointed under St Helenian law. In our view, in assessing the amount of damages recoverable it is reasonable to award the costs of appointment of a financial deputy appointed under the Ordinance rather than under the Court of Protection in England and we restrict the costs accordingly. We leave it to parties to advise the court of any difference that will result in the amount awarded. It appears to us, as it did to the Chief Justice, that Miss Wright is a suitable and experienced person to act on behalf of Ms NK, and that therefore it seems that the claim should be reduced only by the amount of the additional costs involved in using the Court of Protection.