COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2012/CLE/gen/00414

BETWEEN

DARREN RUTHERFORD

Plaintiff

AND

THE COMMISSIONER OF POLICE

THE ATTORNEY GENERAL

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Donovan Gibson of Munroe & Associates for the Plaintiff
Mr. Kirkland Mackey of the Attorney General's Chambers for the Defendants

Hearing Date: 31 March 2020 (Heard on written submissions)

Personal Injury - Negligence – Assessment of Damages – Pain and suffering – Reliance on Judicial College Guidelines – Guidelines not to be slavishly followed without requirement to the Bahamian society

The Plaintiff suffered personal injuries as a result of being shot by a fellow officer who was part of a team of eight officers instructed to execute a warrant on a robbery suspect, alleged to be armed with an AK-47 assault rifle, at a residence in New Providence.

At the trial, the Defendants denied liability alleging that the shooting was an accident and the officer who shot the Plaintiff was fearful for his life when he saw a handgun pointing in his direction.

The Defendants were found to be wholly liable for the injuries caused by the negligence and/or breach of duty of the Defendants. The Court ordered that damages be assessed. The only issue which is now before the Court is for an assessment of damages for pain and suffering.

HELD: The sum of $100,000 represents a fair and reasonable award for pain and suffering.

1. Damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care,

operations and treatment. The dicta of Lord Hope of Craighead at page 507 in **Wells v Wells** [1998] 3 All ER 481 considered.

2. Slavish adherence of the Judicial College Guidelines (formerly the Judicial Studies Board Guidelines) without regard to the requirements of Bahamian scoiety was denounced by the Privy Council in **Scott v The Attorney General and Another** [2017] UKPC 15. The guidelines can provide 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. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. However, if the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas.

3. The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases": **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.

4. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. In the present case, the sum of $100,000.00 for pain and suffering represents a fair and reasonable award to the Plaintiff.

RULING

CHARLES J:

[1] The application before me is to assess damages for pain and suffering in this personal injury action.

Brief background

[2] The Plaintiff ("Mr. Rutherford"), a Corporal of Police, was instructed by the servants and/or agents of the 1st Defendant ("the Commissioner of Police"), to execute a search warrant on an robbery suspect, alleged to be armed with an AK- 47 assault rifle, at a residence in New Providence. During the process of executing the warrant, he was shot by another police officer who was also part of the team of officers instructed to execute the warrant. Mr. Rutherford sustained injuries and

sued the Defendants for damages, alleging negligence and a breach of duty of care on the part of the 1st Defendant, his servants and/or agents.

[3] The Defendants alleged that they are not liable. They alleged that the shooting was an accident and the officer who shot Mr. Rutherford was fearful for his life when he saw a handgun pointing in his direction. The Defendants did not plead contributory negligence. Instead, they made an offer to Mr. Rutherford that they will accept 75% liability if he will accept 25%. Mr. Rutherford countered and offered 10%. No agreement having been reached, the matter proceeded to trial.

[4] On 31 July 2019, the Court found that the Defendants were wholly liable for the injuries caused to Mr. Rutherford who was gainfully employed by the 1st Defendant at the time of the incident.

[5] The single remaining issue before the Court concerns the assessment of damages for pain and suffering. I should state that the Defendants paid all medical expenses associated with Mr. Rutherford's hospitalization and surgeries.

The law

[6] The objective of the courts in assessing compensation for a victim was stated by Lord Blackburn in **Livingstone v Rawyards Coal Company** (1880) 5 App. Cas. 25 at 30, (an appeal from the House of Lords from Scotland) as follows:

> **"I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."**

[7] The practice is to award a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability.

[8] A conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions where the socio-economic conditions are similar. English awards and practice are looked at as guides.

[9] Above all, the award must be fair and reasonable. In **H West & Sons Ltd v Shephard** [1964] AC 326, Lord Pearce explained that "*The court has to perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum*."

[10] The Court is also mindful that damages are awarded to an individual and not to an average person of a certain class on an actuarial calculation. Since the defendant must take the plaintiff as he finds him and must compensate him so as to put him in as good a position, as he was prior to the tort, there must be taken into account and assessed the contingencies and chances for better or for worse inherent in the plaintiff at the time of the tort and the contingencies affecting him as an individual.

General Damages

Pain and suffering

[11] In **Wells v Wells** [1998] 3 All ER 481 at 507, H.L., Lord Hope of Craighead observed that:

> **"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases, as represents the court's best estimate of the plaintiff's general damages."**

[12] It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff's necessary medical care, operations and treatment.

[13] In the present case, the medical reports of Dr. Gene Deune of the Department of Orthopaedic Surgery, John Hopkins Outpatient Center, USA and those of Dr. Colleen Fitzcharles, Bahamas Centre for Plastic & Reconstructive Surgery are important; particularly those of Dr. Fitzcharles as they are more recent. She last examined Mr. Rutherford on 2 November 2016. She diagnosed him with right brachial plexus injury. Her diagnosis is consistent with the reports of Dr. Deune who first examined Mr. Rutherford.

[14] In her more recent report dated 2 November 2016, Dr. Fitzcharles wrote:

> **"…He suffered a near complete transection of his right brachial plexus. He also had severe vascular injury in this area and underwent emergency repair of these including the right subclavian artery. Mr. Rutherford was then sent to John Hopkins Hospital on November 22nd, 2012, where he had repair of the lateral and posterior cords of the right brachial plexus with bilateral Sural nerve grafts. The lower trunk to the medial cord was not repaired.**
>
> **His functions slowly begun to return, however, he had no recovery of his radial nerve injury. He returned to John Hopkins Hospital where he had tendon transfers for Radial nerve palsy. He was referred to me for continuation of care here in The Bahamas….**
>
> **At our last visit he complained of severe back pains. Examination show muscle spasms and cramps with mild curvature of the spine. His back spasms may be caused because of the imbalance in the muscles of his spine because of his original injury. He was start on back physiotherapy with Dr. Bashir at The Providence Rehabilitation and improved with this.**
>
> **Mr. Rutherford returns today with a complaint of pain and swelling in his left hand with numbness. This is worse at night. This has gradually been getting worse since he has returned to normal working hours.**
>
> **Examination today shows mild improvement in power of his right hand. He is now able to pinch the thumb towards the right finger. In the left hand he has no noticeable swelling but he does exhibit numbness in the radial three and one half fingers. His Tinel's and Phalen's signs are negative. I think that Mr. Rutherford is getting early carpal tunnel syndrome…."**

[15] Although the last report was about four years ago, I entertain no doubt that Mr. Rutherford suffered severe pain and still does from the primary injury- right brachial

plexus injury - which led to a few other medical complications. Based on the medical report of Dr. Fitzcharles, Mr. Rutherford also suffered minor back injuries and a minor injury to his left hand.

[16] Both Counsel relied wholly on The Judicial College Guidelines (formerly the Judicial Studies Board Guidelines) 2018. Under "Other Arm Injuries" – the range for a brachial plexus injury is stated as follows:

> "(a) **Severe injuries**
> Injuries which fall short of amputation but are extremely serious and leave the injured person little better off than if the arm had been lost; for example, a serious brachial plexus injury
> £76,650 to £104,370.
>
> (b) **Injuries resulting in permanent and substantial disablement**
> Serious fractures of one or both forearms where there is significant permanent residual disability whether functional or cosmetic.
> £31,220 to £47,720."

[17] From the medical reports of Dr. Fitzcharles, it seems to me that Mr. Rutherford's injuries fall somewhere between (a) – serious injuries and (b) – injuries resulting in permanent and substantial disablement. Using the UK Guidelines, an equivalent compensatory figure is (£76,650 + £31,220) to (£104,370 + £47.720). In other words, £53,935 to £76,045 or the equivalent of $66,595 to $93,826.03 (Bahamian dollars).

[18] Learned Counsel Mr. Mackey who appeared for the Defendants submitted that an award of $66,000.00 is reasonable whereas Mr. Gibson maintained that $200,000 is fair and reasonable in the circumstances. Mr. Mackey relied on the following English cases to support his position that the sum of $66,000.00 is reasonable. In **Middleton v South Yorkshire Transport Executive and Another** [1986] WL 12555146, a school teacher who suffered similar injuries, was awarded £37,500 for pain and suffering. That was over thirty years ago.

[19] In **Stote v Anderson** [1994] 12 WLUK 298, a male, aged 17 was injured in an accident with a chain saw resulting in comminuted fracture of the mid-shaft of the left, non-dominant, humerus with serious vascular and nerve damage. He was awarded £30,000 for pain and suffering and loss of amenities. That was nearly 26 years ago.

[20] In **Scott v The Attorney General and Another** [2017] UKPC 15, a case from this jurisdiction, the issue before the Board was what is the proper approach to the assessment of general damages for pain, suffering and loss of amenities; in particular whether damages assessed by reference to the English Judicial Studies Board Guidelines (now the Judicial College Board) should be adjusted upwards to reflect the higher cost of living in The Bahamas. In delivering the Opinion of the Board, Lord Mance stated at paragraphs 25 to 29:

> **"25. 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 backdrop 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. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.**[Emphasis added]
>
> **26. Cost of living indices are not a reliable means of comparing the two jurisdictions even if one is attempting to achieve approximate**

parity of value in both. Cost of living varies geographically and may well do so between various sectors of the population. The incidence of tax, social benefits and health provision (among others) would be relevant to such a comparison.

27. It is perhaps unfortunate that the Court of Appeal did not address the argument that the proper way to determine compensation for general damages was to fix the basic rate by reference to the JSB guidelines and apply a notional uplift. The lack of reference to that argument in the judgment should not be taken as an indication that it was not considered, however. It must be assumed that the Court of Appeal decided that this was not how general damages should be assessed, since, although the English JSB guidelines were followed, no uplift was applied. [Emphasis added]

28. It is likewise not to be assumed that the Court of Appeal decided that it need only apply the JSB guidelines to arrive at the appropriate amount, without regard to local economic conditions and the expectations of citizens of the Bahamas. As has been observed at para 25 above, if JSB guidelines happen to coincide with what is regarded as appropriate for the Bahamas, there is no reason that they should not be adopted. And the Board should be properly reticent about interfering with the Court of Appeal's assessment unless satisfied that a wrong principle of law was applied or that the award was so inordinately small or exceedingly great that it was plainly wrong. As the Board said in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 613:

> **"… before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell* [1935 1 KB 354]), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries, Ltd* [1942 AC 601]."**

29. The Board is not in a position to say that the choice of the Court of Appeal to order that general damages should be in line with the JSB guidelines involved the application of a wrong principle of law or resulted in an inordinately low award. As has been said (at para 25 above), this is primarily a matter for Bahamian courts, familiar with local conditions and the hopes and aspirations of the society which they serve".

[21] It is therefore incumbent on the Court not to slavishly adhere to the Judicial College Guidelines unless those guidelines happen to coincide with what is regarded as

appropriate for the Bahamas. If they are, then there is no reason why they should not be adopted. The guidelines can provided an insight but they cannot substitute for our own estimation of what levels of compensation are appropriate for this jurisdiction.

[22] I shall therefore look at the Judicial College Guidelines as well as some Bahamian cases (although not exactly on point) to assist me in arriving at an award which is fair and reasonable.

[23] In **Grand Bahama Construction Co. v Kemp** [1997] BHS J. No. 7, the respondent was severely injured in a road traffic collision. He was 53 years old. The injuries which he suffered included (i) fractures of his pelvis, the right acetabulum and ilium; (ii) three broken ribs on the right side with abrasions along them and two others; (iii) internal injuries to the bladder and lungs; (iv)extensive hemorrhaging, and (v) a deep punctured wound in his right leg. He spent three days in a hospital in Freeport and was then transferred by air ambulance to a Miami Hospital where he spent ten days in an intensive care unit. His total period of hospitalization was one month during most of which time his condition was considered to be critical. He underwent surgical repair to his pelvis and hip fractures and achieved good healing as well. He was awarded $150,000 for pain, suffering and loss of amenities. On appeal, the general damages were reduced to $75,000. This case was decided more than twenty years ago.

[24] In **Matuszowicz v Parker** [1987] 50 WIR 24, the plaintiff suffered a severe injury to his right arm. His forearm was crushed and amputated partially a little above the elbow. In his report, Dr. Sethi stated that “It [forearm] was only hanging by a little piece of skin laterally. Elbow joint was completely disarticulated. Distal one third of the humerus was crushed. Mr. Matuszowicz, who was 30 years old at the date of the accident, was awarded $80,000 for pain, suffering and loss of amenity. That was more than thirty years ago.

[25] Now, the only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases: **Bird v Cocking & Sons Ltd** [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live: **Senior v Barker & Allen Ltd** [1965] 1 W.L.R. 429. There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd** [1968] 2 Q.B. 363 at 364 that "*the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances*." The award of damages is not meant to be a windfall but fair and reasonable compensation for the injuries suffered.

[26] So, using the Judicial College Guidelines, I am looking at a figure somewhere between BAH $66,595 and $93,826. I will give this figure a little uplift to take care of the cost of living and medical care in The Bahamas. At the end of the day, I am of the considered opinion that the sum of $100,000 represents a fair and reasonable award for pain and suffering.

[27] The issue of costs was agreed between the parties at the sum of $20,000.00.

Dated this 29th day of May 2020

Indra H. Charles

Justice