Neutral Citation Number: [2012] EWCA Civ 1039

Case No: A3/2011/1846

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DERBY COUNTY COURT
(SITTING IN NORTHAMPTON)
Mr RECORDER BURNS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 July 2012

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
And
THE VICE-PRESIDENT OF THE COURT OF APPEAL

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Between:

CHRISTOPHER SIMMONS **Appellant**

- and –

DEREK CASTLE **Respondent**

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- -

David Sanderson (instructed by **Shoosmiths**) made written submissions for **the Appellant**
Andrew Davis (instructed by **Greenwoods**) made written submissions for **the Respondent**

Hearing date: 26 July 2012

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JUDGMENT

The Lord Chief Justice:

1. This is the judgment of the Court arising out of an application to approve a settlement of an appeal brought in a personal injury action.

2. Because the terms of settlement involve the appeal being allowed, albeit through an agreed variation in the order made by the court below, it requires the consent of the Court of Appeal. Normally, such consent is given in writing by a single Lord Justice, without the need for a hearing. However, the requirement for such consent on this appeal provides an appropriate opportunity for this court to announce an increase in general damages in most tort actions with effect from 1 April 2013.

3. The present appeal arises out an award of damages made by Mr Recorder Burns in the Derby County Court in favour of Christopher Simmons who suffered personal injuries as a result of being knocked off his motorcycle by a motor car driven by Derek Castle, who admitted negligence. The Recorder assessed general damages at £20, 000 and special damages of £2,730.37, each figure carrying an award of interest, and resulting in a total award of £24,712.72. The Recorder declined to make awards (i) of provisional damages, (ii) for handicap on the labour market, or (iii) to compensate Mr Simmons for the risk of future pecuniary loss caused by the risk of medical deterioration.

4. Following the grant of permission to appeal to appeal by Patten LJ to Mr Simmons, Mr Castle made a Part 36 offer, which Mr Simmons decided to accept. The terms of settlement maintain the award totalling £24,712.72, but go on to provide that, if Mr Simmons develops ‘fulminant septicaemia resulting in long term disabling illness or death, which causes … significant ongoing recoverable loss of earnings’, he ‘should be entitled to apply for further damages …’.

5. There is no reason not to approve this settlement. While it may not be necessary to say so (as Mr Simmons is an adult of full capacity), it appears to us that £20,000 seems a correct figure for general damages, and the figure agreed for special damages also appears to be right.

6. We turn, then, to the future approach to the measure of general damages in tort actions.

7. On 1 April next year, the reforms to civil costs contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 will come into force. Part 2 of the Act provides for the implementation of recommendations 7, 9, 14 and 94 of the Final Report on Civil Litigation Costs by Sir Rupert Jackson. These recommendations form part of a coherent package of reforms, one element of which is that general damages should rise by 10%: see recommendations 10 and 65 (i). The Lord Chief Justice, with the unanimous support of the Judicial Executive Board, has previously announced the judiciary’s support for this package of reforms, as has the Government following a consultation exercise. The 2012 Act has been introduced by the executive and enacted by the legislature on the basis that the reforms are a coherent package, and that the judiciary will give effect to the 10% increase in damages.

8. As Lord Diplock said in *Wright v British Railways Board* [1983] 2 AC 773 (‘*Wright*’), 785A-B, the Court of Appeal ‘with its caseload of appeals in personal injury actions’ is ‘generally speaking, the tribunal best qualified to set guidelines for judges trying such actions, particularly as respects non-economic loss’. Lord Woolf

MR said when giving the judgment of the court in *Heil v Rankin* [2000] EWCA Civ 84, [2001] QB 272 (‘*Heil*’), para 5, ‘it is clear that Lord Diplock also intended the Court of Appeal to have the responsibility for keeping guidelines up to date’.

9. As Lord Woolf MR went on to explain, such an exercise should be carried out by reference to the ‘existing legal principles as to the assessment’ of damages, which, in the case of general damages, involves ‘the difficult and artificial task of converting into monetary damages the physical injury, deprivation and pain and to give judgment for what it considers to be a reasonable sum– see *Heil*, paras 20 and 23, quoting Lord Pearce in *H West & Sons Ltd v Shephard* [1964] AC 326, 364. Much the same point was made by Lord Diplock, when he referred to ‘the inescapably artificial and conventional nature of the assessment of damages for non-economic loss’ – *Wright*, 784F.

10. As Lord Woolf MR also said in *Heil*, para 25, consistency of approach in the assessment of damages, whether special or general, is ‘important’, partly because it is a fundamental aspect of justice, and partly because it assists settlement (and see per Lord Diplock in *Wright*, 784G-H). Hence the valuable Guidelines for the Assessment of General Damages for Personal Injury published by the Judicial College (formerly Judicial Studies Board), which are produced approximately every two years, and which helpfully and clearly set out the appropriate guidelines for awards of damages in all types of personal injury action.

11. At paras 28-9 of *Heil*, Lord Woolf MR then emphasised ‘the continuous responsibility of the court’ both ‘to set damages’, and ‘to keep the tariffs up to date’. He then emphasised that changes could be justified by ‘changes which take place in society’, and should by no means be confined to changes in the value of money. Again this reflects what Lord Diplock said in *Wright*, 785C, that ‘guidelines should be altered if circumstances relevant to the particular guideline change’.

12. These observations make it clear that this court has not merely the power, but a positive duty, to monitor, and where appropriate to alter, the guideline rates for general damages in personal injury actions. Having said that, it must be acknowledged that the present circumstances are slightly different from those considered in *Heil*.

13. First, we are laying down a principle which will not take effect immediately, but only in some eight months time. However, there are now many cases proceeding towards a hearing, which include claims for such damages. Some of those claims may well not be due to proceed as far as a judgment until after 1 April 2013. Accordingly, it is appropriate for this court to state the position formally now, well ahead of the date when it will take effect. However, this has the advantage that proper prospective warning is give to parties in, or contemplating, litigation – which was not the case in *Heil*, causing the court some concern – see at paras 49-51.

14. Secondly, the increase in general damages we are laying down here extends to tort claims other than personal injury actions. We cannot see any good reason why the observations and reasoning in *Heil*, and in the cases cited by Lord Woolf MR in his judgment in that case, do not apply equally to general damages in all tort cases.

15. Thirdly, the increase we are laying down arises from a different set of facts from those in *Heil*. It is attributable to the forthcoming change in the civil costs regime initiated by Sir Rupert’s reforms, as accepted by the executive and enacted by the legislature. As already explained, the increase was recommended by Sir Rupert as an integral part

of his proposed reforms, which were unconditionally endorsed and supported as such by the judiciary publicly, and it was plainly on the basis that the 10% increase would be formally adopted by the judiciary that the 2012 Act was introduced and enacted.

16. This is, no doubt, an unusual basis on which to rest a judgment or to adjust guidelines. However the recommendation to adjust the level of damages arises from a report prepared by a judge, which was initiated by the judiciary (as it was Lord Clarke, who, as Master of the Rolls, initiated Sir Rupert's report) and which contains policy recommendations, which is itself unusual (and, we would add, can only be justified in relation to a topic as closely concerned with the administration of, and access to, justice, as legal costs). With the exception of the 10% increase in general damages, the great bulk of those policy recommendations have been adopted in full by the legislature in an Act sponsored by the executive, on the clear understanding that the judges would implement the 10% increase. It would therefore be little short of a breach of faith for the judiciary not to give effect to the 10% increase in damages recommended by Sir Rupert.

17. It is fourthly to be noted that, unlike in *Heil*, we have not been addressed by counsel on the issue of increasing the level of general damages. It does not seem to us to be appropriate, let alone necessary, for us to be so addressed. Quite apart from the points already made, Sir Rupert consulted widely before publishing his Interim Report and before publishing his Final Report, and the Ministry of Justice subsequently consulted on Sir Rupert's main proposals, and they have also subsequently been debated in (and out of) Parliament. Unusual though we accept that it is, it seems clear to us that there would simply be no point in incurring expense and time in going over ground which has already been well trodden in order to debate a point which will only involve future judgments and is part of a coherent package, the rest of which has already been brought into law.

18. It is worth referring in connection with all these points to another passage in the speech of Lord Diplock in *Wright* at 785B, where he explained that, at least as a matter of strict legal principle, a 'guideline as to quantum of conventional damages … is not a rule of law nor is it a rule of practice'. However, as he also explained at 784H, guidelines, such as those being laid down in this judgment, are 'addressed' to first instance judges, and it is highly desirable that parties to litigation and their advisers have 'confidence that trial judges will apply them'.

19. The only remaining question is precisely how the increase should be applied. We have concluded that it should apply to all cases where judgment is given after 1 April 2013. It seems to us that, while it can be said that this conclusion does not achieve perfect justice in every case, the same thing can be said about any other answer to the question, particularly in the light of a number of the forthcoming changes being made to the costs regime pursuant to Sir Rupert's recommendations. Our conclusion has the great merits of (i) providing a simplicity and clarity, which are both so important in litigation, and (ii) according with the recommendation of Sir Rupert, which is consistent with much of the rationale of the 10% increase in general damages.

20. Accordingly, we take this opportunity to declare that, with effect from 1 April 2013, the proper level of general damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals, will be 10% higher than previously. It therefore follows that, if the action now under appeal had been the

subject of a judgment after 1 April 2013, the proper award of general damages would be 10% higher than that agreed in this case, namely £22,000 rather than £20,000.