Case No: 2002/1037

Neutral Citation Number: [2002] EWCA Civ 1803
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (MR JUSTICE MUNBY)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 12th December 2002

Before :

LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE MAY
(Vice-President of the Queen's Bench Division)
and
LORD JUSTICE CLARKE

- -

Between :

THE QUEEN on the application of LINDA ANN SOPER	Appellant
- and -	
CRIMINAL INJURIES COMPENSATION APPEALS PANEL	Respondent

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

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Ms Elizabeth-Ann Gumbel QC & Mr Henry Witcomb (instructed by T.V. Edwards) for the Appellant
Mr Robin Tam & Mr Jeremy Johnson (instructed by Treasury Solicitor) for the Respondent

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Judgment
As Approved by the Court

Lord Justice May:

1. This is an appeal by the claimant, Linda Ann Soper, against a decision in the Administrative Court by Munby J on 2nd May 2002 in judicial review proceedings in which Mrs Soper challenged the rationality and lawfulness of an award to her of compensation by the defendant Panel. Pill LJ gave permission to appeal.

2. Mrs Soper was born on 24th November 1947. On 26th November 1992, just after her 45th birthday, she was injured while she was working as a cleaner at Tower Hamlets Technical College in Poplar High Street. She tripped on a wire which had been placed by a person who was never identified some 8 inches above the ground in the area of lavatories. She fell and was seriously injured.

3. She made an application to the Criminal Injuries Compensation Board in March 1993. Her application was initially refused on the basis that her injuries did not result from a crime of violence. She appealed against this decision. On 7th October 1997 the Board found that she was eligible for a full award. They adjourned the case for further evidence so that the amount of the award could be assessed. A hearing for this purpose took place on 6th March 2001 before the defendant Panel chaired by Miss Leeona Dorrian QC. They awarded Mrs Soper £8,013. Mrs Soper brought judicial review proceedings to challenge this award. Munby J dismissed the claim.

4. It is regrettable that it has taken very nearly 10 years from Mrs Soper's injury and more than 9 years from her original application to the Criminal Injuries Compensation Board for her appeal to reach this court.

5. The award was made under the 1990 Criminal Injuries Compensation Scheme. Paragraph 12 of the Scheme provided that compensation would be assessed on the basis of common law damages. Paragraph 19 provided that compensation would be reduced by the "full value of any present or future entitlement to (a) United Kingdom Social Security benefits ...". The defendants accept that only benefits which are or will be received as a result of the injury are to be deducted.

6. The Panel had medical evidence to the effect that Mrs Soper suffered from incapacitating fibromyalgia as a result of her injury. She also had carpal tunnel syndrome and lumbar spondylosis. These conditions were not in any way related to the accident nor did they contribute to her incapacitating condition in January 2001.

7. The Panel assessed her putative common law damages as £195,968. This included £25,000 as general damages for pain and suffering and loss of amenity; £32,120 for future loss of earnings to the age of 60; and £72,720 for future care. The care figure was calculated using a multiplicand of £4,848 and a multiplier of 15. The Panel deducted from the £195,968 a total of £187,955 for social security benefits which had been or would be received as a result of the injury. The resulting £8,013 was thus substantially less than the general damages amount. This anomaly is an acknowledged possibility under the 1990 Scheme. We were told that the present Scheme eliminates this possibility by making an award of general damages immune from deduction..

8. The Panel's assessment of the benefits to be deducted included a calculation for future benefits resulting from the injury. This part of the calculation was:

"£8,921 x 9.5 to 65 years	£84,749	
£4,942 x 10 for life		£49,420"

9. These figures were separated because it was reckoned that the benefits to which Mrs Soper would be entitled as a result of the injury would reduce after she became 65. The sum of the two multipliers is 19.5. This contrasts with the multiplier of 15 taken in the calculation of the costs of future care. It is contended on Mrs Soper's behalf that this discrepancy is irrational.

10. The claimant's judicial review claim form understandably, but mistakenly as it now appears, supposed that the Panel had used different discount rates for calculating the multipliers. Other grounds in the claim form were that benefits which she was likely to have received after the age of 60 apart from the accident should not have been deducted; and that she should not have been taken as entitled to Disability Living Allowance after 24th October 2003 when her present entitlement to that allowance is to be reassessed.

11. Disability Living Allowance is payable under sections 71 to 74 of the Social Security Contributions and Benefits Act 1992. It can consist of a care component and a mobility component. A person may be entitled to either component or both of them. Section 72 prescribes conditions of severe physical or mental disablement which entitle a person to the care component. Section 73 prescribes the criteria for the mobility component. Section 75 provides that, except as provided otherwise by regulations, no person shall be entitled to either component of a Disability Living Allowance for any period after he attains the age of 65 otherwise than by virtue of an award made before he attains that age.

12. The defendant's Acknowledgement of Service contained summary grounds for contesting the claim. It was explained that the same multiplier of 19.75, taken from Ogden tables for a woman aged 53 at a discount rate of 3%, had been used as the starting point for the calculation of both the future care costs and the deduction for future benefits. This was reduced to 15 for the future care costs because "it was accepted by the claimant's representative that this multiplier should be reduced to reflect the increased requirement for care as the claimant grew older and because of her pre-existing spondylosis." For the deduction for future benefits, the full multiplier from the tables was adjusted slightly in the claimant's favour "for other contingencies". In total, the adjustment was only 0.25%. The Panel deducted the benefits that the claimant would receive as a result of the incident. They considered that "on the balance of probability" Disability Living Allowance would continue in payment after 24th October 2003.

13. Miss Dorrian made a witness statement which explained how the Panel reached their decision. In paragraph 10 she stated:

> "Counsel for the Claimant suggested a multiplier of 15 to be applied to future care costs. This was considered by the Panel to be a reasonable and fair figure having regard to the terms of Table 20 where the 3% discount rate showed a life multiplier of 19.75 for a woman of 53. The reduction to 15 in our view properly reflected the fact that in any event the claimant would have had an increased requirement for care as she grew older and as the effect of the degenerative changes in her spine were felt with age."

14. She described in terms equivalent to those in the Acknowledgement of Service how the multipliers for the deduction of future benefit were arrived at. She explained that for future benefits the Panel deducted the benefits which they considered would have remained in payment to the claimant which she would receive as a result of the incident. In paragraph 13, she said:

> "The Panel considered that Disability Living Allowance would continue in payment as the effects of the injuries on the claimant were unlikely to diminish with time; and deducted the future entitlement to Disability Living Allowance after applying an

appropriately adjusted multiplier. The Panel had a number of reports from Dr Chikanza which made it clear (a) that the pursuer's symptoms arose from her fibromyalgia, which was precipitated by trauma; and (b) that she would continue to have pain from the fibromyalgia and to require treatment for this for the foreseeable future. I refer to his report of 19th March 1999 and to his report of 10th January 2001 in which he states "The symptoms of carpal tunnel syndrome that she now has and the degenerative changes in her lumbar spine i.e. lumbar spondylosis are not in any way related to the accident and in my opinion do not in any way contribute to her current symptoms." He expressed a similar view in a follow up letter dated 27th February 2001. In the circumstances we felt (i) that the claimant was likely to continue to have problems from fibromyalgia for the rest of her life and to receive Disability Living Allowance accordingly; and (ii) that had it not been for her fibromyalgia her other conditions were not of such a degree that she would have been likely otherwise to qualify for Disability Living Allowance. Further, although we considered that she would in any event have required increased care with the effects of ageing, the evidence did not suggest to us that her condition would have led to an entitlement for Disability Living Allowance had it not been for the accident. The continuation of Disability Living Allowance would thus be wholly attributable to the accident and as such required to be deducted."

15. When the matter came before the judge, the claimant's challenge to the Panel's award had been refined to two grounds:

(1) that the defendant was wrong in law or irrational to adopt different multipliers for the future cost of life time care and for the future receipt of care-related benefits; and

(2) that the defendant applied a wrong legal test in determining the amount to be deducted for future benefits.

16. The judge's understanding of the submissions of Ms Gumbel QC for the claimant was that there was no challenge to the defendant's evaluation of the medical evidence as summarised in paragraph 13 of Miss Dorrian's statement, nor to the defendant's finding that but for the injury the claimant would never have become entitled to benefit. Before this court, Ms Gumbel explained that the second part of the judge's understanding was only correct insofar as it referred to Disability Living Allowance. She maintained that on the Panel's findings the claimant was likely to have become entitled to Attendance Allowance at some stage after the age of 65.

17. Of the choice of a multiplier of 15 for the claimant's care costs, the judge said at paragraph 13:

"Ms Gumbel and Mr Johnson are, in effect, agreed that the defendant's selection of a multiplier of 15 for the claimant's care costs to reflect the increased care which the claimant would in any event have needed as she got older for her spondylosis means that after the expiry of the appropriate period represented by that multiplier – according to Mr Johnson at about the age of 72 – there will be a need for care unrelated to the injury. In other words, until she is about 72 the claimant will need care solely as a result of the injury; from about the age of 72 the claimant would have needed care in any event as a result of her pre-existing condition."

18. The claimant's case was that, in using two different multipliers, the defendant did not deduct like from like. If there would come a time when there was a need for care unrelated to her injury, Disability Living Allowance for that period could not properly be said to have resulted from the injury. Logically the two multipliers should be the same.

19. The defendant's case was that a need for care and an entitlement to future Disability Living Allowance were not logically or legally equivalent. Not every person who needs care is entitled to Disability Living Allowance, for which specific statutory criteria have to be fulfilled. A multiplier of 15 for future care costs, reduced from 19.75, to reflect the fact that, even if the claimant had not suffered the injury, she would have needed care at some time in the future in any event, was unimpeachable. The multiplier of 15 had been proposed by the claimant's own counsel. As to the multipliers for the calculation of future benefits, it was contended that:

(a) apart from the injury, the claimant would not have become entitled to Disability Living allowance after the age of 65 because she would not have been awarded it before the age of 65 – see section 75(1) of the 1992 Act; and

(b) the defendants were entitled to find that, although apart from the injury the claimant would have at some stage required care, she would not have qualified for Disability Living Allowance.

20. The judge considered that there was no necessary inconsistency between the findings in paragraphs 10 and 13 of Miss Dorrian's statement. He held that each of these findings was open to the defendants on the evidence before them. There was nothing irrational, illogical or unlawful in their reasoning. He recorded the defendant's submission based on section 75 of the 1992 Act but did not refer to it explicitly in support of his conclusion.

21. The claimant's case on her second ground of challenge was that the defendants were wrong in law to assess the deduction for future benefits by applying a balance of probabilities test. They should have assessed the chance of the benefits accruing and made an assessment in percentage terms to reflect that chance. Ms Gumbel referred to the judgment of Stuart Smith LJ in *Allied Maples Group Limited v. Simmons & Simmons* [1995] 1 WLR 1602 at 1610C and to its application in subsequent decisions of this court in *Doyle v. Wallace* [1998] PIQR Q 146 and *Langford v. Hebran* [2001] PIQR Q 13. As an extension of this ground, it was submitted that there should have been a reduction in the assessment of future benefits to reflect the possibility that there would at some time be a reduction in or loss of the claimant's entitlement to Disability Living Allowance. The claimant's entitlement is to be reviewed on 24th October 2003. Then or at some future date her benefit might be reduced. Improvement in equipment provided to her might reduce her dependency on others or a change in legislation might reduce the benefit payable. As to possibilities of this kind, the judge accepted submissions on behalf of the defendant that the practical reality was that it was overwhelmingly likely that the claimant would continue to receive the benefits found by the defendant and that they were entitled so to find. As to the more general submission, the judge held that Ms Gumbel had articulated the correct legal basis for assessment. But he considered that, if the tribunal of fact found that the chance of something not happening was merely speculative or fanciful, it was open to it to make the relevant assessment at or close to 100%. He held that on the totality of the evidence, the defendants were entitled to conclude that the claimant would remain in receipt of benefit for the rest of her life as a result of the injury and that the very modest adjustment to the multiplier made in her favour sufficiently reflected the overwhelming realities. As to possible changes in the legislation, the judge considered that the possibility of a reduction in benefit was balanced by the possibility that it would increase.

22. The claimant's grounds of appeal to this court, contained in a skeleton submission prepared by Ms Gumbel for that purpose, contend that the judge was wrong to find against the claimant on the two submissions made to him. First, the judge was wrong in law to find that the Panel could properly apply different multipliers to the calculation of the cost of future care and the deduction for future benefits. Second, having concluded that the Panel had wrongly applied a balance of probability test to the calculation of the deduction for future benefits, the judge was wrong to conclude that the chance of the benefit continuing to be paid at the present rate was virtually 100%.

23. As to the multiplier, the grounds of appeal contend that the multiplier of 15 for future care costs predicates a finding that Mrs Soper would have needed care from the age of 72 anyway because of her pre-existing condition. That cannot rationally stand with the implicit finding that benefits resulting from the injury would continue until she was aged 81. Conversely, if benefits as a result of the injury would continue after the age of 72, so should the care costs assessed on the basis of common law damages. The fact that a new claim for Disability Living Allowance could not be made after the age of 65 was irrelevant because benefits payable after that age simply have a different description.

24. As to the application of a balance of probability test, the Panel can only be taken to have decided that there was a 51% chance that the claimant would continue to receive benefits. The judge was speculating in his assessment of what he regarded as overwhelming reality. In the light of possible contingencies, including those mentioned in Mrs Soper's witness statement, the chances of her payment continuing at the current rate were substantially less. The matter should be remitted for further consideration on a correct legal basis.

25. In a supplementary skeleton submission, prepared shortly before the hearing of this appeal, and in her oral submissions, Ms Gumbel sought to introduce further matters not canvassed before the Panel or the judge. The documentary evidence shows that the Panel's calculation of future benefits took account of Incapacity Benefit and Industrial Disablement Benefit, as well as Disability Living Allowance. Disability Living Allowance was the main focus of the Panel's decision and the only benefit extensively discussed before the judge and in his judgment. Ms Gumbel's admittedly new contention in the supplementary skeleton argument was that, although apart from the injury Mrs Soper might not have received Disability Living Allowance because of section 75 of the 1992 Act, she would nevertheless on the Panel's findings have received Attendance Allowance. This is payable under section 64 of the 1992 Act to a person aged 65 or over who is not entitled to the care component of Disability Living Allowance but who satisfies the day or night attendance conditions in subsections (2) or (3) of section 64. Ms Gumbel further referred to details of the medical evidence before the Panel in support of her submission that a greater allowance should have been made in assessing benefits which would have been payable anyway apart from the injury. The Panel found that Mrs Soper would not have worked after the age of 60 because of her pre-existing condition, but did not look at the benefits that she would then have received. Ms Gumbel pointed out that the respondent's submission based on section 75 of the 1992 Act did not feature as a reason for the Panel's decision, but only surfaced during the oral application for permission to apply for judicial review.

26. Mr Tam, for the respondents, objected to Ms Gumbel's attempt to introduce for the first time a few days before this court's hearing the possibility of Mrs Soper receiving Attendance Allowance or other State Benefits apart from Disability Living Allowance. These matters had never previously been advanced or considered and it was too late to do so now. On the matters which the judge did deal with, Mr Tam submits by reference to paragraph 10 of Miss Dorrian's statement and paragraph 13 of the judgment that there was no precise finding as to the amount of care which Mrs Soper would have needed apart from the injury, nor did there need to be. Adopting a multiplier of 15 for the cost of future care did not predicate a particular level of care from the age of 72. On the other side of the equation, the Panel found that but for the injury no benefits would have been payable. They were entitled to do so. Mr Tam accepts that section 75 of the 1992 Act was not mentioned by the Panel, but because of that section the Panel were in truth bound to find as they did. In calculating the future benefits payable as a result of the injury, the Panel clearly regarded it as overwhelmingly likely that Disability Living Allowance in particular would continue to be paid for Mrs Soper's life. A near full multiplier was therefore appropriate. They had medical evidence over a substantial period and were entitled to conclude that the possibility of change was very small. There was no material to suggest that the statutory provisions for Disability Living Allowance would change.

27. In my view, the parties' submissions to the judge recorded in paragraph 13 of the judgment and Ms Gumbel's submissions in this court misinterpret the Panel's finding about the multiplier of 15 for the costs of future care. The multiplier was suggested by the claimant's counsel and, as Miss Dorrian said in paragraph 10 of her statement:

> "The reduction to 15 in our view properly reflected the fact that in any event the claimant would have had an increased requirement for care as she grew older and as the effect of the degenerative changes in her spine were felt with age."

28. The reduction of the multiplier to 15 is an entirely orthodox means of reflecting future contingencies which does not imply that there would have been particular care needs from the age of 72. It can and, in my view, should be seen as an agreed recognition that there would have been expenditure on some care during the actuarial period selected from the Ogden tables. In particular, it is not an implicit finding that Mrs Soper would have required the same intensity of care as she will now regrettably need from the age of 72. This conclusion is reinforced by the part of paragraph 13 in which Miss Dorrian states:

> "... had it not been for her fibromyalgia her other conditions were not of such a degree that she would have been likely otherwise to qualify for Disability Living Allowance. Further although we considered that she would in any event have required increased care with the effects of ageing, the evidence did not suggest to us that her condition would have led to an entitlement for Disability Living Allowance had it not been for the accident."

29. Thus Mrs Soper would have required some care over the years apart from the injury, but would never have qualified for Disability Living Allowance. Subject to Ms Gumbel's second submission, the differing multipliers accord with these findings and are not in my judgment amenable to judicial review. Reference to section 75 of the 1992 Act is not necessary. It did not form part of the Panel's reasons and the judge was correct not to rely on it. I would accept Mr Tam's submission that it is too late to bring other benefits than Disability Living Allowance into play. Until very recently the challenge has been advanced only by reference to Disability Living Allowance. I note in this context that the judge recorded in paragraph 12 of his judgment that there was no challenge to the defendant's finding that but for the injury the claimant would never have become entitled to benefit.

30. As to the second ground of challenge, I am not convinced that the Panel applied a wrong test. Balance of probabilities is certainly mentioned in the Acknowledgement of Service. But the expression used in paragraph 13 of Miss Dorrian's statement is "likely" (twice) and "unlikely" (in the first sentence). Taken as a whole this paragraph is certainly not a decision that the chances are 51%, nor do I consider that a fair reading suggests that it is a balance of probabilities finding which could not be discounted for contingencies – which is what assessing chances amounts to. On the contrary, the finding explicitly depends on quoted medical evidence which is not expressed in terms of probability. A likelihood can be very strong, even overwhelming. Taken as a whole, I read Miss Dorrian's statement as recording a decision that the chances of Mrs Soper continuing to receive Disability Living Allowance as a result of her injury are very high. This either means that the Panel did not apply a wrong test or that, if they did, the judge's decision that the modest adjustment sufficiently reflected the overwhelming realities was correct.

31. I would dismiss this appeal, remembering that these are judicial review proceedings and not a rehearing on the factual merits.

Lord Justice Clarke:

I agree.

Lord Justice Simon Brown:

I also agree.

Order: Appeal dismissed. Order as per draft order.

(Order does not form part of the approved judgment)