Hilary Term
[2020] UKPC 1
Privy Council Appeal No 0034 of 2018

JUDGMENT

Attorney General of St Helena (Appellant) *v* AB and others (Respondents) (St Helena)

From the Court of Appeal of St Helena

before

Lady Hale
Lord Wilson
Lord Briggs
Lady Arden
Lord Sales

JUDGMENT GIVEN ON

20 January 2020

Heard on 18 November 2019

Appellant
Caroline Harrison QC
Benjamin Channer
(Instructed by Attorney General of St Helena)

Respondent
Marc Willems QC
Stefanie Cochrane
(Instructed by Public Solicitor's Office)

Intervener
Caoilfhionn Gallagher QC
Fiona Murphy
Susie Alegre
(Instructed by Equality and Human Rights Commission for St Helena)

LORD BRIGGS:

Introduction

1. This appeal arises out of two very serious personal injury cases about grave medical malpractice and negligence by a doctor employed on the island by the Government of St Helena. In both cases the plaintiffs were awarded substantial general damages for pain, suffering and loss of amenity ("PSLA"). The trial judge, the Chief Justice of St Helena, quantified those damages by the application of the *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases* ("the JC Guidelines") published at the material time in England and Wales, in relation to injuries of the type suffered by the plaintiffs. He did so without any adjustment of the relevant amounts for PSLA by reference to any difference in local conditions as between St Helena and England and Wales, thereby departing from a practice which had grown up in earlier personal injuries cases in St Helena, whereby the amount of damages derived from the application of the JC Guidelines had been discounted by reference to the disparity between average earnings in St Helena and those in England and Wales.

2. On the Government's appeal, represented by the Attorney General, the Court of Appeal of St Helena affirmed the Chief Justice's quantification of PSLA damages but for different reasons. The Attorney General appealed to the Board, primarily on the ground that the application of the JC Guidelines without discount is unfair to defendants in St Helena. An unfortunate consequence of these appeals has been that two thirds of the plaintiffs' PSLA damages have been withheld since judgment was given in their favour in February 2017, in respect of the grave injuries which they sustained in late 2012 and early 2013. For reasons which will become obvious, the anonymity of the plaintiffs has been preserved throughout this litigation and the Board has ordered that this essential protection for them should continue.

The Facts

3. In the first claim (Case 551/2015), AB was admitted to the Jamestown Hospital on 5 November 2012 and misdiagnosed by Dr Du Toit as being in labour. He wrongly assessed her baby as being at 33 weeks gestation when in truth it was only 30 weeks and then negligently performed a caesarean section. At the same time and without her consent, he sterilised AB by tubal ligation. Alas, the baby died a few days later. At trial, AB was awarded PSLA damages of £130,000, together with other substantial damages for pecuniary loss which are not in issue on this appeal. Her partner AC received PSLA damages of £15,000.

4. In the second case (Case 511/2016) NK, a young woman with a mild learning disability, was delivered of her fourth child by caesarean section on 29 March 2013, again by Dr Du Toit. At the same time and without her knowledge or consent, he sterilised her by tubal ligation. At the trial of her claim, she was awarded PSLA damages of £120,000. Due to her learning disability, NK has been represented by a litigation friend throughout the domestic proceedings and before the Judicial Committee.

5. Dr Du Toit was, on both occasions, employed by the Government of St Helena, and acting in the course of his employment. Accordingly, although the Government was not accused of any separate complicity in the grave wrongs done to the plaintiffs, it was liable in damages to them as Dr Du Toit's employer.

The litigation

6. At the combined trial of both claims before the Chief Justice it was common ground, as it has been throughout the subsequent appeals, that the JC Guidelines and their predecessors the Judicial Studies Board Guidelines ("the JSB Guidelines") had been, were and would necessarily continue to be the starting point for the quantification of PSLA damages in St Helena. It is a very small and isolated community of less than 5,000 people living on a tiny island in the middle of the South Atlantic. It is unreal to suppose that the courts in St Helena could, by reference to their own case law, develop guidelines of their own and, although St Helena has its own elected legislative council, there appears to be no prospect that the assessment of PSLA damages will be placed on a statutory footing, or any compelling reason why it should be.

7. The parties were nonetheless sharply divided about the question whether any, and if so what, adjustment should be made to the rates of PSLA damages to be derived from the JC Guidelines so as to render them appropriate in St Helena. For the Government the Attorney General resolutely maintained in his submissions to the Chief Justice that PSLA damages should be discounted from those otherwise to be derived from the JC Guidelines in accordance with what he called the "wages rule", as applied by the St Helena Supreme Court in *Henry v Phillips* SC 503 of 1996 (unreported) 9 April 1996 and *Lawrence v Solomon & Co (St Helena) plc* SC 532 of 1999 (unreported) 28 March 2000. This simple rule compared the average wages earned in England with those earned in St Helena. In 1999 the average in St Helena was only one sixth that of England, so the PSLA damages in that case were one sixth of those which would otherwise have been derived by the application of the (then) JSB Guidelines. Relying on expert evidence about comparative average wages, the Attorney General invited the Chief Justice to award PSLA damages at one third the rate to be derived from the JC Guidelines.

8. The Chief Justice was having none of it. In his judgment delivered in February 2017 he concluded in summary as follows:

> i) Differences in earnings were in principle irrelevant to compensation for PSLA. A poor person suffered from personal injuries no less, and no more, than a rich person.
>
> ii) English law made no such distinction, awarding PSLA damages based on the JC Guidelines as much to claimants living in the North East of England as in Belgravia.
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> iii) Cost of living might be a better benchmark, and appeared to be 25% higher in St Helena than in the UK.
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> iv) The wages rule had no foundation in principle and ought not to be followed.
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> v) Now that residents of St Helena had full British citizenship, it would be discriminatory to quantify their PSLA damages on any different basis than was done in England and Wales.

Accordingly he applied the JC Guidelines without any discount.

9. In May 2017 the Board gave judgment in *Scott v Attorney General of The Bahamas* [2017] UKPC 15, a Bahamian appeal which raised the closely related issue whether PSLA damages derived from the JSB Guidelines should be uplifted by reference to the higher cost of living and higher level of public expectations in the Bahamas, compared with England and Wales. The Board will have more to say about the *Scott* case in due course, because it has occupied a central place in the relevant legal analysis.

10. Nonetheless, in his skeleton argument in support of his appeal to the St Helena Court of Appeal the Attorney General made no more than a mention of the *Scott* case, preferring to pursue single-mindedly the argument that the wages rule continued to be the best means of adjusting the JC Guidelines so as to make them suitable for the quantification of PSLA damages in St Helena. It was submitted that British citizenship was in principle irrelevant and that the judge had been wrong to conclude that any adjustment of the JC Guidelines for St Helena was discriminatory.

11. The Court of Appeal (Sir John Saunders P, Yelton and Drummond JJ) handed down a judgment of the court in October 2017. It treated the *Scott* case as fully applicable to St Helena. While it accepted that the Chief Justice had been wrong to base his conclusion on citizenship and discrimination, the Court of Appeal nonetheless concluded that on the evidence available, including both differences in average earnings and the cost of living, and taking into account the need for clarity, there was no justification for a departure in St Helena from the application of the JC Guidelines, by way of an adjustment to take into account local conditions and expectations. On the contrary, the court concluded that, at para 24:

> "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."

12. On appeal to the Board, the Attorney General's case has undergone something of a sea change. Far from continuing to assert that the wages rule represented the appropriate basis for adapting the JC Guidelines for use in St Helena, it is now submitted that:

i) The principles set out in the *Scott* case are fully applicable.

ii) The Court of Appeal failed properly to apply them.

iii) In particular the Court of Appeal failed to consider whether the non-discounted application of the JC Guidelines was "fair to the defendant".

iv) The Court of Appeal reached unsupportable conclusions about local conditions and expectations because the available evidence did not support them.

v) The Court of Appeal continued, like the Chief Justice, to rely on citizenship as an inappropriate basis for their assessment of local expectations.

The relief mainly sought by the Attorney General was that the case should be remitted to St Helena so that the *Scott* analysis could be properly conducted, upon the basis of a full presentation of relevant economic and other evidence to, and review by, the local court.

13. For their part the respondent plaintiffs seek to uphold the decision and reasoning of the Court of Appeal. In that endeavour they were assisted by the written and oral

intervention of the Equality and Human Rights Commission of St Helena, for which the Board is grateful.

The Law

The Law - Applicable in St Helena

14. Generally speaking, English law is applicable in St Helena, by reason of the English Law (Application) Ordinance 2005. Sections 2 and 3 provide as follows:

> "2. In this Ordinance, 'Adopted English Law' means:
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> (a) the common law of England, including the rules of equity; and
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> (b) the Acts of Parliament which are in force in England at the time of commencement of this Ordinance.
>
> 3. (1) Subject to subsection (2) and other provisions of this Ordinance, the Adopted English Law applies in St Helena.
>
> (2) The Adopted English Law applies to St Helena only in so far as it is applicable and suitable to local circumstances, and subject to such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

15. The remaining sections of the 2005 Ordinance make provision for specific provisions of the Adopted English Law to be disapplied but none of them is of any relevance to this appeal.

16. It is common ground that, in general, the quantification of PSLA damages in St Helena is a matter governed by the common law of England. It is not therefore suggested that English common law is simply inapplicable or unsuitable to local circumstances. Framing the issue in terms of section 3(2) of the 2005 Ordinance, the question is whether local circumstances render it necessary for English common law to be adapted for use in St Helena, by the application of a discount to the JC Guidelines.

17. This is not therefore a case where, as frequently happens, the Board is seeking to ascertain and determine what is the law (usually the common law) of an overseas jurisdiction for which it is the final appellate court, with an open mind as to whether that law is necessarily the same as English law. There are now many jurisdictions around the world where the common law has developed in different ways, even if it may once have originated in England. In St Helena by contrast, the relevant common law is English common law save where it is wholly inapplicable or unsuitable to local circumstances or where it is only applicable with modifications, adaptations, qualifications and exceptions rendered necessary by local circumstances.

18. The use in section 3(2) of the 2005 Ordinance of a necessity test suggests that, in a situation where (as here) an aspect of the English common law is not generally inapplicable or unsuitable, the burden lies on a litigant seeking to persuade the court that English common law requires adaptation for use in St Helena to demonstrate by argument and any necessary evidence that this is so.

19. Furthermore, it follows from the fact that any proposed adaptation of English law depends entirely upon local circumstances that the local courts rather than the Board are best placed to conduct that evaluation. This much is common ground, and is the reason why the Attorney General seeks to have this case remitted for a rehearing in St Helena, upon the basis that the evidence thus far adduced before the local courts did not enable that evaluation to be satisfactorily carried out. But it also follows that the Board should treat with respect the view of the local courts about whether a particular aspect of local circumstances needs to be proved formally by evidence or whether it can be treated as something of which the court can take judicial notice. In a tiny community like St Helena an experienced local judge may properly conclude that he or she knows enough about local circumstances for some particular aspect of them not to need to be proved by the potentially disproportionate and expensive processes of the preparation and forensic testing of the evidence of expert witnesses.

The JC Guidelines

20. There can be no doubt that the JC Guidelines (as they are now called) have become firmly embedded in the common law of England and Wales. In his foreword to the 1st edition of the (then) JSB Guidelines in March 1992 Lord Donaldson of Lymington said:

> "What it is intended to do, and what it does quite admirably, is to distil the conventional wisdom contained in the reported cases, to supplement it from the collective experience of the working party and to present the result in a convenient, logical and coherent form."

The distillation to which Lord Donaldson refers came from a very large number of decided cases (some indifferently reported) in which judges were required to quantify PSLA damages where, as Lord Donaldson said, no monetary award can compensate in any real sense, so that the damages could not be assessed by a process of calculation.

21. In the more than 25 years since the JSB Guidelines were first published, they have come to acquire a life of their own. Whereas Lord Donaldson had said in 1992 that deciding on PSLA damages was "one of the commonest tasks of a judge sitting in a civil court", Irwin LJ said in his foreword to the 14th ed of the JC Guidelines in June 2017:

> "His [Lord Donaldson's] was a voice from a different era. In 2017, certainly in the higher courts, judges will only from time to time be called on to take such a decision. … these Guidelines have operated so as to diminish hugely the incidents of unsettled arguments as to damages for PSLA."

Of course it is true that every fresh edition of the JC Guidelines captures any relevant learning about PSLA from recent cases. But, for the most part, the guidelines have come to be a substitute for contemporary judicial law-making, and the main changes to be found in them reflect changes in the value of money (ie inflation) and the impact of specific statutory reforms upon the general level of damages, such as the Jackson Costs Reforms. They are not of course binding on a judge, but their success in originally distilling and latterly replacing a stream of decided cases means that, in practice, judges have little else upon which to base a current quantification of PSLA damages, in the rare cases where it has not already been agreed between the parties. They have become, in other words, not merely a distillation but a main source of the common law in relation to the quantification of PSLA damages. They are therefore, subject to section 3 of the 2005 Ordinance, part of the Adopted English Law in force in St Helena. The concession that the JC Guidelines must be the starting point for any quantification of PSLA damages was therefore rightly made.

The purpose of PSLA Damages

22. The core function of PSLA damages, like any other type of damages for the commission of a tort, is that identified by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39:

> "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 …"

In *Heil v Rankin* [2001] QB 272, after citing that passage, Lord Woolf MR continued, at para 23, as follows:

> "23. This principle of 'full compensation' applies to pecuniary and non-pecuniary damage alike. But, as Dickson J indicated in the passage cited from his judgment in *Andrews v Grand & Toy Alberta Ltd*, 83 DLR (3d) 452, 475-476, this statement immediately raises a problem in a situation where what is in issue is what the appropriate level of 'full compensation' for non-pecuniary injury is when the compensation has to be expressed in pecuniary terms. 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. Lord Pearce expressed it well in *H West & Son Ltd v Shephard* [1964] AC 326, 364 when he said:
>
> > '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. It does not look beyond the judgment to the spending of the damages.'
>
> 24. The last part of this statement is undoubtedly right. The injured person may not even be in a position to enjoy the damages he receives because of the injury which he has sustained. Lord Clyde recognised this in *Wells v Wells* [1999] 1 AC 345, 394H when he said: 'One clear principle is that what the successful plaintiff will in the event actually do with the award is irrelevant.'"

23. An important part of the purpose of PSLA damages is that they should reflect what society as a whole considers to be fair and reasonable compensation for the victim or, as the Supreme Court of Canada put it in *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229: "reasonable solace for his misfortune."

24. This is captured in Sir Thomas Bingham MR's observation in *John v MGN Ltd* [1997] QB 586, 611, 614, that:

> "Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little. That is so whether the award is made by judge or jury … Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike …"

After citing that passage, Lord Woolf MR continued in *Heil v Rankin*, at para 27:

> "The level must also not result in injustice to the defendant, and it must not be out of accord with what society as a whole would perceive as being reasonable."

25. And at para 29:

> "However, the changes which take place in society are not confined to changes in the RPI. Other changes in society can result in a level of damages which was previously acceptable no longer providing fair, reasonable and just compensation, taking into account the interests of the claimants, the defendants and society as a whole. For this reason, it is clearly desirable for the courts at appropriate intervals to review the level of damages so as to consider whether what was previously acceptable remains appropriate."

26. The Court of Appeal in *Heil v Rankin* was alert to the fact that, in setting the quantification of PSLA damages within the context of society as a whole, the same common law principles may fall to be applied in widely differing societies, with different results. At para 38, Lord Woolf MR said:

> "The decision has to be taken against the background of the society in which the court makes the award. The position is well illustrated by the decisions of the courts of Hong Kong. As the prosperity of Hong Kong expanded, the courts by stages increased their tariff for damages so that it approached the levels in England: see *Chan Pui-Ki v Leung On* [1996] 2 HKLR 401, 406-408."

27. In the *Scott* case, giving the judgment of the Board, Lord Kerr of Tonaghmore expanded on this theme at para 24, as follows:

> "The *Chan Pui-Ki* decision followed that given in the earlier Hong Kong case of *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2 HKLR 650 where the Court of Appeal responded positively to the argument that awards fixed in a 1980 decision in *Lee Ting Lam* should be reviewed and increased. In giving the judgment of the court in *Lau Che Ping*, Cons ACJ said at 654F:
>
> > 'Apart from … automatic adjustment for inflation, a general adjustment of the guidelines may be necessary on account of change in social and economic conditions … Changes inevitably take place in the everyday life of any growing society and the expectations of the average person and family tend to increase as each year goes by. Hong Kong is no exception, and those changes must be reflected in the general standards of awards, otherwise the awards will cease to be regarded as fair and reasonable compensation.'"

Fairness to the defendant

28. In both *Heil v Rankin* and the *Scott* case it is recognised that the quantification of PSLA damages must be fair, or at least not unjust, to defendants. Lord Woolf MR said (in the passage already quoted from *Heil v Rankin* at para 27) that "the level must also not result in injustice to the defendant". In the *Scott* case, at para 17, Lord Kerr said:

> "General damages must be compensatory. 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 - *Armsworth v South Eastern Railway Co (2)* (1847) 11 Jur at p 760."

This short dictum was the sheet anchor of the Attorney General's main ground of appeal in the present case.

29. The passage in the summing up to the jury by Baron Parke in the *Armsworth* case to which Lord Kerr referred is as follows:

> "There is always a little temptation to juries to exceed the law and be blinded by matters of feeling, when the defendants in actions like the present are very rich and the plaintiffs are very poor; and I cannot for my own part help saying that in the minds of juries the consideration of such circumstances may lead to an improper mode

> of administering justice under this statute. I therefore advise you to dismiss from your minds who the parties in this case are, and look at it as if the conductor of the engine which caused the accident had been conducting it on his own account for his own profit …"

That was an early case under the Fatal Accidents Acts, in which the deceased had been killed by being thrown out of a railway truck due to the negligence of the driver of the steam engine. The point of Baron Parke's observation was to discourage the jury from having regard to the wealth of the defendant railway company in assessing damages.

30. In *Heil v Rankin* it is plain that Lord Woolf MR's observations about the need to avoid injustice to the defendant had nothing to do with the identity of the individual defendant in any particular case. At para 33 he said:

> "We are well aware that, in making a decision in a particular case as to what the damages should be, the court must not be influenced by the means of a particular defendant. As Mr O'Brien submitted for the defendants, in making an award the court is not concerned with whether the claimant is a pauper or a millionaire. The award for the same injury should be the same irrespective of the defendant's means. This is clear from the authorities."

31. At para 36 he said:

> "… Awards must be proportionate and take into account the consequences of increases in the awards of damages on defendants as a group and society as a whole. The considerations are ones which the court cannot ignore. They are the background against which the fair, reasonable and just figure has to be determined."

It is evident from elsewhere in Lord Woolf MR's judgment that he was thinking in particular of the effect of a proposed increase in the level of damages upon insurance premiums. Justice to the defendant also generally requires the avoidance, save in special cases, of any punitive element in the assessment of general damages.

32. There were veiled suggestions in the submissions of Miss Harrison for the Attorney General that the Board should have regard to the fact that a rise in the level of PSLA damages awarded against the Government of St Helena might lead to a corresponding scarcity in its resources for provision of its other services and activities on the island. In response Ms Gallagher pointed to the Foreign and Commonwealth

Office's statements in its report to Parliament "The Overseas Territories - Security, Success and Sustainability" in June 2012 (Cm 8374), highlighting the UK Government's international obligations to ensure the security and good governance of its dependent territories and their peoples and the statement that:

> "The reasonable assistance needs of the Territories are a first call on the UK's international development budget. A consequence of these responsibilities is that the UK Government carries significant contingent liabilities in respect of the Territories."

33. In the Board's view this particular contest misses the point. Fairness or justice to defendants is not about an individual defendant, but about defendants as a whole. They may be governmental, they may be multinational corporations or private individuals, insured or uninsured, rich or poor, solvent or insolvent. The cost to society of a fault-based system of defendant liability for causing pain and suffering may well have a bearing upon the level of compensation for PSLA which society may regard as fair, just and reasonable, but the concept of fairness to defendants does not require a form of equitable balancing of the type contended for by the Attorney General in his written submissions. This is an aspect of pure common law, in which equity plays no part.

Average Earnings v Cost of Living

34. The reported cases do not speak with one voice about the relative importance and reliability of these factors as part of a judicial approach towards the identification of levels of PSLA damages suitable for local conditions and expectations in any particular society. In some societies, such as in St Helena before this litigation, average earnings were treated as a single and conclusive determinant of the discount which ought to be applied to the JC Guidelines for the quantification of PSLA damages there. The Board shares the common view of the Chief Justice and of the Court of Appeal that a slavish adherence to a wages rule cannot be right. Pain and suffering is experienced equally by the wealthy and the poor, and the application of the same guidelines across the whole of England and Wales leaves no room for the notion that differential average earnings in a particular locality can be a determinant of a just level of compensation. For example, suppose that average earnings in the Isle of Wight were half those of the English mainland viewed as a whole, that would afford no basis for discounting the PSLA damages arising from an accident on the island between two of its residents below those applicable across England and Wales.

35. In other jurisdictions, such as the Bahamas, the cost of living has, at least until recently, tended to be a determining feature but, as Lord Kerr warns in the *Scott* case at para 26:

> "Costs of living indices are not 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."

36. Alternative indicia for changes within a society over time or differences between geographically widely spaced societies (such as England and St Helena) may include appropriate measures of relative prosperity, which may in turn include reference to GDP per capita. But there is no single solution to the problem of choosing among or between these different indicia and weighing their relative importance, as a matter of law. In every case, as the Board advised in para 25 of the *Scott* case, the local courts will be best placed to make that adjudication, applying such criteria as, upon the evidence which the parties choose to put before the court, appear to be most suitable for the purpose.

37. At the end of the day, the court's task is to attribute some appropriate value to money as an admittedly inadequate means of compensation for the non-monetary injuries represented by pain, suffering and loss of amenity. The search is for a necessarily conventional level of necessarily artificial exchange. It is obvious, for example, that in reality a particular sum of money, such as £100,000, may have a radically greater potential effect in improving the life of a poor person than it would in improving the life of a multi-millionaire. But the common law treats each of them equally when quantifying damages for PSLA.

Analysis

38. It will already be apparent that the Board is not persuaded by the first ground of the Attorney General's appeal, namely that the Court of Appeal's quantification of damages took no account of the requirement for fairness or justice to the defendant. The Court of Appeal was plainly concerned to apply the principles set out in the *Scott* case for the purpose of answering the question whether the JC Guidelines, without discount or other adjustment, afforded a fair, reasonable and just measure of compensation for PSLA in accordance with local conditions and expectations, and concluded that they did. If the Court of Appeal's analysis is not vitiated by any other error, then it follows in the Board's view that its conclusion was as fair and just to defendants in St Helena as the JC Guidelines are (by common consent) agreed to be to defendants in England and Wales. No special circumstances affecting defendants as a class within St Helena were identified, either in the evidence or by submissions. The fact that, in giving judgment in which it expressed itself minded to follow the *Scott* case, the Court of Appeal did not expressly refer to that requirement, is in the Board's view of no significance.

39. It is next submitted for the Attorney General that the Court of Appeal lacked the comprehensive evidence about the economy of St Helena sufficient to equip it to carry out that comparative task. It is certainly true that the only detailed written evidence before the Court of Appeal, as before the Chief Justice, was the Attorney General's own expert evidence about average earnings. In reaching conclusions about the higher cost of living in St Helena, compared with England and Wales, and about the likely effect upon the community's prosperity to be attributed to the opening of the new airport, the Court of Appeal was confined to such limited evidence from the Attorney General's expert as could be extracted during oral examination in chief and cross examination and, in particular in relation to the airport, supplemented by the court's own perception of the probable consequences of an event which was bound to have some consequences for the local economy, even if problems of wind-shear over the runway may have reduced that contribution below that for which its planners hoped.

40. But these alleged shortcomings in the evidence were, so far as the Board can see, entirely the consequence of the limited way in which the Attorney General chose to present the Government's case that local conditions required a modification of the JC Guidelines in their application to St Helena. As noted above, the Attorney General's case, both before the Chief Justice and in the Court of Appeal, was designed simply to preserve the wages rule as an acceptable means of adjustment of the JC Guidelines. Unsurprisingly, the evidence was therefore focused upon only one, and arguably the least persuasive, of the relevant potential economic indicia.

41. The Court of Appeal was not carrying out a judicial enquiry of its own motion, with power to commission reports, carry out public consultation and summon witnesses. It was resolving a private law dispute between the parties, upon such evidence as they chose to put before the court. It was not for the plaintiffs, who merely wished that the court should adhere to the JC Guidelines as part of the applicable Adopted English Law under the 2005 Ordinance, to put forward evidence of relevant local conditions, in particular because it was common ground that the JC Guidelines were an appropriate starting point for use in St Helena. It was for the Attorney General, if he wished to do so, to adduce evidence showing that an adaptation of those Guidelines was rendered necessary by local circumstances, under section 3(2).

42. Still less is it appropriate for the Board to accede to the Attorney General's request that this appeal should be allowed, and the case remitted for further hearing upon more comprehensive evidence, for example about the possible effect of damages awards upon insurance premiums. The *Scott* case was available to the parties long before the matter came on for hearing in the Court of Appeal (albeit after the appeal was launched) and it would not be just to the plaintiffs to require the case to be reheard with an opportunity given to the Attorney General to adduce fresh expert evidence about the St Helenian economy, when no attempt to do so was made on his behalf in the local courts which, as is common ground, are the best qualified for dealing with that issue. The plaintiffs have already been kept out of two thirds of their general damages for

PSLA during the period of three years following the judgment at first instance. It would be a manifest injustice to extend that period of delay for the sole purpose of enabling the Attorney General to present a better evidential case about the relevant local circumstance and expectations.

43. A specific ground of appeal, concisely presented by Mr Channer, following Miss Harrison, was that the Court of Appeal wrongly assumed that a historic differential in average earnings would disappear in the reasonably near future, whereas the expert evidence demonstrated that this might take as long as 1,000 years. While it is true that a precise mathematical comparison between tables of UK and St Helenian median average earnings over a four year period between 2012 and 2015 inclusive did suggest a convergence of only £80 per annum over four years, ie only £20 per annum per year, this ground of appeal was neither based upon an accurate interpretation of the Court of Appeal's finding about this, nor of the expert evidence as a whole, following oral examination and cross-examination.

44. The Court of Appeal said, at para 24:

> "There was evidence before him [the Chief Justice] 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. …"

45. The Board does not interpret this passage as conveying an understanding by the Court of Appeal that the one third disparity in average wages demonstrated by the evidence was likely to disappear altogether in the reasonably near future. Rather, the passage suggests an appreciation that to fix the discount by reference to a current disparity in average earnings would be to ignore an improving trend, and facts known to be likely to affect the economy in the near future, such as the opening of the airport, which might cause that disparity to change faster than in accordance with a purely historic trend analysis, and in relation to compensation for pain and suffering which, from the particular injuries suffered by the plaintiffs, was likely to endure for a long period of time.

46. The Board was taken to passages in the examination in chief and cross-examination of Dr McLeod, the Attorney General's expert witness, suggesting that her

view was that current volatility in the St Helenian economy, coupled with the improved qualifications and education of its working community, were likely to produce much faster convergence in earnings than might be derived from a purely historic mathematical analysis, and that the measurable growth in GDP on St Helena between 2009/10 and 2014/15 of 16.5% per annum suggested a much more rapid convergence with the UK in economic prosperity than a mere £20 per annum convergence in average wages. Accordingly this ground of appeal comes nowhere near being sufficient to disturb that aspect of the Court of Appeal's analysis.

47. Next it was submitted that the Court of Appeal's reliance upon the probable economic effect of the opening of the airport was unsupported by evidence. Again, if the evidence was insubstantial this was primarily the consequence of the way in which the Attorney General's case was deployed before the Chief Justice. But in any event, the construction and imminent opening of the airport was a major economic development for St Helena, requiring very substantial capital investment about which the local court could to that extent take judicial notice. Whether it was likely to improve the prosperity of the island's inhabitants beyond historic trends was, in one sense, a matter for speculation but it was hardly something which the court could just ignore. A conclusion that prosperity was likely to be increased by the opening of the airport cannot be said to have been contrary to the balance of probabilities, even if the extent of that increase in prosperity may turn out to be less than had been hoped for.

48. The Court of Appeal concluded, at the end of para 24, that:

> "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."

It was submitted that the Court of Appeal wrongly relied upon citizenship as a relevant factor, notwithstanding their criticism of the Chief Justice for having done so himself. In the Board's view it was legitimate for the Court of Appeal to conclude that a perception by St Helenians that they were British citizens would probably lead to an expectation on their part of being treated, for the purposes of PSLA damages, in the same way as inhabitants of England and Wales. This was not to treat common citizenship as a reason in itself for applying the JC Guidelines without adjustment, but to treat it as a sufficient evidential basis, in the absence of any evidence to the contrary, that such was indeed the likely expectation of the typical member of the St Helenian community.

49. In summary, the Court of Appeal concluded, on the evidence available to it, that a current disparity in average earnings was in effect cancelled out by the higher cost of

living in St Helena (itself established by cross-examination of the Attorney General's expert) and that, coupled with the likely expectation of equal treatment, there was therefore no case for concluding that a downward adjustment of the JC Guidelines for use in St Helena was rendered necessary by local circumstances.

50. The Board cannot fault that conclusion, made by the appropriate local court when upholding, although for different reasons, the same conclusion by the experienced Chief Justice, as having been vitiated by any error of law or wrong turning which would make it appropriate for the Board to advise that it be set aside on a second appeal.

51. Accordingly the Board will humbly advise Her Majesty that this appeal should be dismissed.