JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 69/87

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	ASTON PITTEN	PLAINTIFF/APPELLANT
AND	BLACK'S BLOCK FACTORY LIMITED	
AND	KEN HENRY	DEFENDANTS/RESPONDENTS

Terrence Ballantyne & P. Alexander Beswick
for Appellant

W.K. Chin See, Q.C. & Dennis Morrison
for Respondents

October 9, 10, 11, 29, 1990

CAREY, J.A.

This was an appeal against a judgment of Wolfe J., in the Supreme Court dated 17th June, 1987 whereby he found the plaintiff (the appellant) 60% to blame and made the following awards:

1.	Special damages	$ 2,945.00
2.	Cost of prosthesis	22,500.00
3.	General Damages	
	(i) Loss of future earnings	145,000.00
	(ii) Loss of Amenities	8,000.00
	(iii) Pain and Suffering	86,000.00
		$258,945.00

Judgment was entered in the sum of $103,578.00 being 40% of the total damages.

The appellant prayed the court to vary the award to such greater sum as it thought fit. There was an attempt to extend the ambit of the appeal to the question of liability but having regard to the inordinate delay in seeking leave to appeal out of time and the absence of any reason for the delay, the appellant was confined to the area of damages delineated by his prayer.

A great many grounds were filed but essentially, the appellant's attack was directed to the judge's choice as to the appropriate prosthesis and his refusal to allow a claim for loss of earnings between January 3, 1983 and the date of trial; the significance of the former date will be made clear hereafter. There was some faint attempt to argue that the award under the head of pain and suffering and loss of amenities of $36,000.00 was inordinately low. As to that, it is enough to say that counsel was not able to demonstrate that this award was so out of line with similar awards that this court would be entitled to interfere.

On 4th May, 1982 the appellant who was employed to the respondent company, which operates a block making factory, as a forklift operator, was severely injured resulting in the above elbow amputation of his right arm. The judge found that the accident was caused by a breach of the respondent's statutory duty to securely fence a dangerous part of a concrete-mixer as required by the Factories Regulations 1961. The judge found that at the time of the accident the appellant was not engaged in assisting another employee (the second defendant in the action) in cleaning the equipment. He had placed his hand inside the machine perhaps to clear debris but that was no part of his functions. When the equipment was energized, that caused the blades to rotate to enable

debris stuck on the blade to come free. The appellant was hospitalized by his injury but returned to work in September 1982. Although he was disabled, he returned to work as a forklift operator and performed satisfactorily.

In January 1983, he was dismissed because for some three months prior to that, he had displayed a lack of interest in his job. He would go off to gamble. The judge found his dismissal justifiable. The appellant made no effort to find alternative employment because he said he did not think anyone would employ a handicapped forklift-operator.

The judge acting on the evidence of medical experts called on behalf of the respondents, allowed the cost of a mechanical prosthesis. He did not accept the evidence of the appellant's expert medical consultant who gave as his opinion that a myo-electric prosthesis was to be preferred.

Mr. Beswick for the appellant challenged the learned judge's finding in favour of the mechanical as against the myo-electric prosthesis on the basis that it was unreasonable.

The appellant called two witnesses who spoke to this item. Dr. Cedues Dundas, a consultant orthopaedic surgeon, was the appellant's doctor and he recommended the myo-electric device. But apart from his opinion that it was more suitable for the patient, he gave no reasons for the view save to say that the myo-electric prosthesis was a few decades ahead of the mechanical. He acknowledged under cross-examination that the myo-electric device was subject to corrosion from sweat, especially in a tropical country.

The other witness was a manufacturer of prostheses. He recommended a myo-electric device for the appellant.

For myself, I do not think the judge should have allowed the witness to make any such recommendation. Dr. Dundas had stated quite clearly that it was the surgeon's responsibility to determine the type of device to be recommended. Further, the qualifications given by the manufacturer, made it plain that he was a manufacturer i.e. he designed, fitted and maintained artificial limbs. He did say he formulated prescriptions for artificial limbs but that did not demonstrate that he had the skill of an orthopaedic surgeon and therefore capable of recommending which device suited a particular patient. Howsoever that might be, the reasons he gave for his choice was the lifting capacity of the device 50 - 75 lbs and its superior "pinch force," which meant that it could hold an egg or crack a walnut. There was a greater range of motion and actualization.

Arrayed against these witnesses, was Professor John Golding, acknowledged to be an eminent and experienced orthopaedic surgeon and indeed the former lecturer of Dr. Dundas, and Dr. Errol Bennett also a former pupil of the professor and himself an orthopaedic surgeon. Since 1984, he is an assistant professor at John Hopkins University and worked as a consultant to a social security administration organization. His function is to review cases for determination of impairment of functions. Professor Golding gave a number of reasons for his recommendation for a mechanical prosthesis. He said (inter alia) that his experience is that the myo-electrical devices go bad repeateuly which necessitates repairs and this occurs in hot weather. Then he said this -

> "For someone living in Jamaica I would say the myo-electric would be unsuitable most of the time. This is because of the complicated nature of the unit. These units give rise

> "to all sorts of troubles which we cannot cope with here."

He pointed out also that although the myo-electrical device was continuously being improved, it was still considered experimental. The appellant's technician Mr. Saunders himself said that the myo-electric was certified in 1980. The action was being heard in 1987. Dr. Dundas' assertion that the myo-electric was decades ahead of the mechanical, could hardly be regarded as accurate.

Dr. Bennett pointed out the disadvantages of the myo-electrical device, namely that it is a sophisticated electronic appliance which is delicate and prone to frequent break-downs which require trained expertise to repair. In a factory environment, its use would be severely hampered because it was sensitive to dirt, dust, heat and humidity. The contacts between skin and prosthesis are prone to corrosion because of perspiration or other contamination. He then indicated the advantages of the other device. The mechanical device was he said, reliable. It could stand hard wear and tear, without component failure. It required infrequent servicing and such servicing was quite uncomplicated. There was one other point which he made with regard to lifting power. He observed that although the myo-electric device was capable of generating more lifting power, this was not a consideration seeing that a person with a prosthesis was not expected to function as a frequent heavy lifter.

I have been at pains to detail the evidence which the learned judge had to consider in determining which recommendation he should accept. In my view, the weight and quality of the evidence was all one way. The appellant, on

whom the burden of proof lay, failed to show any reason whatever for claiming that the myo-electric prosthesis was advantageous to him in a Jamaican work or living environment. Dr. Dundas made a recommendation unsupported by reasons and Mr. Saunders spoke of the qualities of the device in the U.S. milieu.

In my opinion, the learned trial judge's finding that the mechanical device was the more suitable, entitled him to make the award he did for the costs of such a device. There was nothing to the point that in his reasons for judgment, he quoted only the disadvantages of that device, for he did say he considered all the medical evidence. That medical evidence included the evidence of Mr. Saunders the trained prosthetist whom the judge regarded as medically qualified to express a view on the matter.

The other matter which we were required to give consideration was the refusal of the judge to allow the claim for loss of use between the period of dismissal and the date of trial.

The learned judge dealt with the matter in this way at page 27 (supplemental) -

> "The traumatic injury which the Plaintiff received must have affected his mental attitude to work. In addition thereto the question of compensating the Plaintiff seemed to have been proceeding, in the Plaintiff's view, very slowly. Hence his approach to his job, as outlined by Mr. Black, is understandable. Notwithstanding, he was injured on the job the Company was entitled to demand of him a fair day's work for a fair day's pay and if he failed to perform accordingly the Company was entitled to dismiss him. I find that it was under these circumstances that he was dismissed and in my view he is therefore not entitled to an award for loss of income, during the period from 1st March, 1983 to date of hearing.

> "In any event a Plaintiff is under an obligation to mitigate his loss. The Plaintiff himself said that he was able to operate a forklift. However, he failed to seek other employment because he was of the view that no one would employ him because of his handicap."

He then referred to **James v. Woodhall Duckham Construction Co.** [1969] 1 W.L.R. 903 and then continued -

> "The claim for loss of earnings for the period 1st January, 1983 to present time is therefore denied. The Plaintiff was out of a job not because of the injury received but because he was justifiably dismissed."

Mr. Beswick contended that the judge having found that the mental attitude of the appellant resulted in his dismissal, ought also to have apprehended that his dismissal was a direct result of the injury. The test, he argued was whether the appellant was capable to work? Finally he said, that the judge had failed to consider the psychiatric evidence of Dr. Aggrey Irons.

The evidence was that after hospitalization, the appellant returned to work and performed satisfactorily. There came a time when discussions regarding compensation were in train but so far as the appellant was concerned, were proceeding with less than deliberate speed. He was dismissed because he refused to work and adopted a nonchalant attitude about his work. He said he did not seek work because he did not think he would be employed.

So far as the appellant was concerned, the reason for unemployment was his reluctance to be disappointed in his quest for a job by reason of his disability. The psychiatric evidence must therefore be looked at in order to ascertain whether it provides the causal link between injury and the loss of earnings.

Dr. Irons did not see the appellant until some 3 years after his dismissal. In his evidence, he detailed the mental state of his patient at the time of his visit. He was anxious: he was depressed and showed a marked degree of regression. He explained these terms, which for purposes of the judgment it is not necessary to set out. Then he said this "I found the causal relationship between the symptoms (i.e. the condition he found) and the traumatic incident." But the doctor never condescended to particulars. No evidence was led to demonstrate the validity of his opinion. He accepted that unemployment is a cause and effect in the depression. As Mr. Morrison so graphically suggested, this was a chicken and egg situation. Unemployment causes depression, depression is the effect of unemployment.

Mr. Morrison submitted that on the evidence before the judge, there was ample material to support the conclusion that the apppellant had recovered from his injury so as to be able to return to work. He had indeed returned to work and performed satisfactorily. Further his dismissal in 1983 had nothing to do with his injury but had to do with the fact that he had failed to perform. In fine he had developed "an attitude."

"The attitude" to which counsel adverted was not a mental attitude caused by an injury but his attitude to work because of the slow pace of the compensation talks. I think these arguments to be sound. There really was no basis stated or to be implied in Dr. Irons' evidence to show the required causal link. Such proof was on the appellant and he fell far short of discharging that onus.

It would have been tidier if the judge in his judgment had expressly stated that Dr. Irons' evidence proved naught which was of assistance rather than to make no comment on it. But we were told that he was addressed on it. So it would not be correct to say that that evidence was not considered. The evidence was valueless and the judge ignored it. What has been said is, in my view, sufficient to show that there was no merit in this ground as well.

For these reasons I concluded that the appeal should be dismissed.

In the course of argument, we were advised that a sum of $1,440.00 which the judge found was properly to be awarded under loss of earnings had been omitted in his computation. Save for that modification to the judgment, the judgment below was affirmed.

FORTE, J.A.

I concur.

DOWNER, J.A.

I concur.