



[2013] JMSC CIVIL 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009HCV04420

BETWEEN	ROBERT JOHNSON	CLAIMANT
AND	TANKWELD CONSTRUCTION COMPANY LIMITED	DEFENDANT

Miss Christine Mae Hudson instructed by K. Churchill & Co for the claimant

Mr. Brian Moodie instructed by Samuda & Johnson for the defendant

**Assessment of Damages – Crush injury to hand-fractures – unable to play
rugby – 17% whole person disability**

HEARD: 12th December 2012 and 18th January 2013

CORAM: JUSTICE DAVID BATTS

[1] This assessment of damages came on for hearing on the 12th December 2012. The claimant's evidence in chief was by way of a witness statement dated 3rd October 2012. In that statement he describes how his injury occurred on the 17th September 2008 as he pushed his hand beneath a funnel in order to clear a blockage. A truck hit the funnel and one side of the funnel fell clamping his right hand between the truck and the funnel. An alarm was raised and the truck driver reversed the truck releasing the funnel from his hand.

[2] He details the pain he felt. He said it was terrible and he "pulled" himself up. When he removed the gloves from his hand he noticed that the bone near the wrist of his right hand was sticking out through a large cut on his wrist. It was bleeding and his wrist became swollen. He was taken to the Kingston Public

Hospital. He was admitted and two (2) days later surgery was done. On another occasion further surgery to apply an external fixator was done. The external fixator, he describes as very heavy and uncomfortable. There were two (2) further surgeries to remove and reposition it.

[3] After discharge from hospital he had to attend the outpatient clinic. He describes his hand when the cast was removed as “kind of turn inwards, the finger curled up and stiff up and painful. I could not turn my wrist as normal or stretch out my elbow and the doctor sent me to do physiotherapy.”

[4] He stated that he did about fifteen (15) sessions of physiotherapy. He describes in detail the methods used by the therapist. He felt a lot of pain during these sessions.

[5] After a year however he was still unable to make a fist with his hand, and still unable to hold anything in his right hand. He was still going to the outpatient clinic and taking pain killers.

[6] He went to see Dr. Dundas some fourteen (14) months after the accident. He now used his left hand but he is right handed. Sometimes the right hand trembles as if nervous and he has no control over it. He can't use the hand to pickup small things. He can't lift anything too heavy. The tips of his four (4) fingers especially the thumb is very sensitive. He says he has scars on the wrist but the hand band he wears covers them up.

[7] He still feels pain and takes advil or panadol. He is no longer able to play rugby anymore. It is a sport he played for fifteen (15) years. He played for Tivoli Comprehensive High School and was a member of the national team and was an assistant coach to the Denham Town Boys Club in 2004-2005. He assisted to

coach teams at Denham Town High School, St Anne's High School and Kingston Senior. He was also a rugby referee.

[8] Since the accident he went to training twice but could not manage. The sport is a high contact one and he cannot risk doing further damage to the hand. He misses playing the sport. He says he earned \$20,000.00 per month as an assistant coach for the period October to March. His referee duties earned him (\$30,000.00) per session. He missed the 2008-2009 seasons as referee and coach due to the injury. He said rugby slowed down as a sport in 2010 after the president Jacob Thompson died.

[9] At the time of his accident he worked at Tankweld Construction Company as a construction worker. He earned an average of (\$14,000.00) per fortnight. He had been working with the company for a year. After the accident his salary was reduced to (\$10,000.00) per fortnight which he received for two (2) months. He then received (\$4,000.00) per fortnight for a month. He never received any more salary after November 2008.

[10] He says it has been very difficult to find a job. He did not pass any subjects when he left school. He is now attending St. Mary EAC on Molyne's Road in Kingston to learn to read. He is a construction worker but his hand cannot manage that kind of work anymore.

[11] He says he can no longer manage work as a labourer. He has dropped off job application forms at Honey Bun, Half Way Tree, Mothers and Burger king but up to now he has not been called.

[12] He has bought medication for pain totaling \$13,822.79. His lawyers paid \$93,880.00 for medical expenses on his behalf. Exhibit 1 was tendered and admitted being a bundle of medical receipts. Exhibit 2 was a letter from the Jamaica Rugby Union dated 15th June 2010.

[13] The claimant was cross-examined by Mr. Brian Moodie Counsel for the Defendant. The witness answered that he last worked as a rugby coach in 2004-2005. He started as an assistant coach and if the coach was not there his job involved instructing the boys and telling them what to do. In 2005-2008 he was working with Tankweld so he mainly did the coaching after work. He also worked as a referee with schoolboys. He said that since 2010 the referee union broke down between 2009-2010 he did not try to work as a referee or as a coach. He is not able to work as a bearer because he cannot read but he is going to an institution on a one year (September to September) course to learn to read. He lives with his mother and baby mother.

[14] In answer to the court he said the injury does not prevent him working as a coach but the rugby association is not now very active. He thinks a competition is going on as the boys at Denham Town are now in training.

[15] The claimant's submissions on quantum were reduced to writing and were supported by a bundle of authorities. The court expresses appreciation for the care taken in the presentation. The medical reports are contained in a bundle tendered and admitted as Exhibit 3. The report to the Kingston Public Hospital records that the claimant presented with the following injuries on the 17th September 2008:

- a) right forearm swollen and deformed
- b) 5 cm x 5 cm jagged wound on flexor compartment with bone sticking out. X-rays revealed a transverse fracture of the distal ulna, a comminuted fracture of the distal radius and disruption of the distal radio ulnar joint. He was diagnosed with a crush injury to right distal forearm with open fracture to distal radius/ulna. Treatment was by external fixation.

[16] Dr. Grantel Dundas of Orthopaedic associates gave three (3) reports dated 20th September 2009, 10th May 2010 and 5th September 2010 respectively. The reports indicate that when he saw the claimant on the 18th September 2009 he complained of pain in the wrist, numbness in right hand, inability to make a fist in right hand and stiffness in fingers of the right hand. He was at that time still an outpatient at the KPH. After examining the claimant the doctor on 18th September 2009 made the following diagnosis:

- a) Healed compound fracture right radius and ulna.
- b) Tethered flexor tendons.
- c) Ulnar and median nerve injury, incomplete. The doctor then felt he had not reached maximum medical improvement.

[17] In his report of the 10th May 2010 Dr. Dundas states that the claimant on 7th May 2010 was complaining of:

- a) Stiffness in the right hand.
- b) Inability to make a fist.
- c) Pain in the right wrist and hand continuously.

Examination revealed among other things sensory deficit in the middle fingers and blunting of sensation in the thumb, palm, index and ring fingers. There was hyperaesthesia in the fifth digit. Intrinsic function was described as weak but he had no clawing. Fist formation was about 50% of normal. There was a positive Tinel's sign over the median and ulnar nerves in the area of the scars to the distal $\frac{1}{4}$ of his forearm.

The diagnosis was:

- a) Scarring around the deflexor tendons right wrist.
- b) Median and ulnar neuropathy (post traumatic).
- c) Malunion fracture distal radius and ulnar.
- d) Arthrofibrosis interphalangeal joints of digits of right hand. The doctor concluded with the following words,

"This young man is unlikely to improve beyond his current status with surgical intervention. Even then it should be

noted that at this stage the results of surgical intervention might not be as rewarding as they might have been had he under gone earlier intervention.

Using the American Medical Associations guide for the evaluation of Permanent Impairment 6th edition the residues computed amount to 28% of the right upper extremity of (sic) 17% of the whole person.”

[18] The report by Dr. Dundas of the 5th September 2010 answers specific questions as follows:

- a) The ideal time for exploration and nerve repair would be within three (3) weeks of injury. Dr. Dundas is aware the claimant underwent several surgeries but has no information as to what those procedures were. He was left with an ulnar malalignment.
- b) Dr. Dundas' second evaluation 7th May 2010 was two (2) years after the accident. Irreparable nerve degeneration had already taken place.
- c) Earlier intervention carried a better prognosis then later intervention.
- d) The claimant had a significant impairment, unable to form a fist. This along with the restriction of range of motion of his digits and sensory impairment will significantly hamper his ability to engage in heavy manual labour.

[19] The claimant's counsel indicated that special damages were agreed with the defendant at \$392,621.00 comprised as follows:

\$300,000.00 extra help

\$ 92,621.00 special

[20] She submitted that an appropriate award for pain suffering and loss of amenities is \$5 million. For Loss of future earnings the claim was \$2,080,000. For loss of future household help the claim was \$1,950,000.00.

[21] The authorities referred to in written submissions were as follows:

- (i) **Ottey v Defreitas (1968) 13 WIR 498** to support the proposition that when determining an appropriate award the court need not rely on a case in which the injury was exactly the same. Test is for a “reasonable measure of similarity.”
- (ii) **Jamaica Folly Resorts Ltd v Thomas Crandal** unreported SCCA 102/98 to demonstrate caution when applying the rather terse reports in **Khan and Harrison** which do not give the fullest exposition of the facts.
- (iii) **Munkman Personal Injury Awards** 10th edition – page 188 that there is no doctrine of precedent for damages the court looks to authorities as a general guide.
- (iv) **Phillips Granston v Attorney General** HCV 1680/2003 delivered 10th August 2009 and the following quotation:
“In assessing damages, there is a subjective and an objective component. The subjective aspect is the specific effect on the particular claimant. The objective element focuses on similar injuries in the past. The goal of looking at past awards is to make sure that the awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases.”
- (v) **Khan** volume 4 page 227 for the distinction between disability and impairment.
- (vi) **Pogas Distributors Ltd v McKitty** SCCA 13/94 **Khan** vol 4 page 227:
“The learned judge misdirected himself by looking at percentages and did not properly assess the injuries and the period of total incapacity and the permanent partial disability.”

- (vii) **Courts Jamaica Ltd v Biggs** SCCA 24/10 decided November 2012 in which the Honourable Norma McIntosh JA made the following comment:

*“I find merit in the submission of the Respondent Counsel concerning a trend toward higher awards and agree that consideration ought to be given to change in direction of the court in making awards some 19 years after the **Owen Francis** award.”*

- (viii) **Joslyn James v Pre-Cast Concrete Ltd.**, Khan vol 4 page 111. Claimants counsel concedes the similarity of the injuries (and disability of 17%) but argues the case was decided 15 year ago and does not reflect the current trend toward higher awards. The award of \$500,000.00 made in April 1997 now revalues to \$2,205,402.89.
- (ix) **Leroy Whyte v Waldron** - Khan vol 5 page 103, \$500,000.00 in May 1999 now \$1,911,586.59 injury to hand 4% whole person disability.
- (x) **Hinds v Edwards** - Khan vol 4 page 100, disability 6% whole person consequent on an injury to the right elbow. Award was \$ 674,414.12 in May 1997 updated amounts to \$2,953,388.04.
- (xi) **Trevor Clarke v Partner Foods Ltd** - Khan vol 5 page 112 fractured finger, disability 4% whole person. Award \$565,000.00 in June 2000 now revalued to \$1,980,000.00.
- (xii) **Michael Jolly v Jones Paper Co. Ltd** - Khan vol 5 page 120. Injuries to the hand resulting in 7% whole person disability. Award \$800,000.00 in November 1998 revalued to \$3,074,149.94.

[22] Claimant’s counsel in her written submissions, which she also elaborated on orally, urged the court to award \$5 million dollars for pain suffering and loss of amenities. She submitted that the **Joslyn James** case was 15 years old and was not in keeping with the recent trend of awards. Further, the injury there was to the non-dominant hand whereas her client’s dominant hand had suffered the injuries. She pointed to the other cases cited and in particular the **Michael Jolly** case and urged the court to note that in **Michael Jolly** the disability rating was

7% as compared to her client's 17%. Further, the claimant in **Jolly** suffered no fractures whilst her client had multiple fractures. In **Jolly** the claimant had a grade 5 grip strength whereas her client was unable to form a fist. In **James** there is no reference to loss of amenity whereas her client can no longer play rugby, and has continuous pain and numbness and cannot do his personal laundry.

[23] The claimant's counsel also submitted for loss of future earnings and lost earning capacity. She submitted that a multiplier multiplicand approach was best suited as the claimant was no longer employable as a labourer. He was unable to read and was really unsuitable for other employment without retraining. She relied on **Campbell v Whyllie** (1959) WLR 327 in support of that approach. For the multiplicand the claimant's counsel advocated use of the national minimum wage of \$5,000.00 per week and relied on **Mark Scott v Jamaica Pre Pak Ltd and Monex v Mitchell** SCCA 83/96 decided 15th December 1998. For the multiplier she submitted for 8 years given the age of the claimant (32 years) and discounting the multiplier in **Godfrey v Stone** SCCA 7/88. The claim is therefore \$2,080,000.00 being (\$5000 x 52 x 8).

[24] For the cost of future household help the claim was \$2,500.00 per week. She advocated for a multiplier of 15. This is because life expectancy is what is relevant not expected working life. The claim therefore is \$1,950,000.00 (2,500 x 52 x 15). Counsel relied upon **Munkman** on Damages for Personal Injuries 10th edition page 1 and **Licildo Osbourne v MMTH** HCV 294 of 2005.

[25] The defendant's counsel submitted that \$3 million is an appropriate award for pain, suffering and loss of amenities. He found great comfort in the **Joslyn James** award referred to above. With respect to handicap on the labour market he submitted for a conventional award. He submitted that the claimant could still coach and referee rugby and hence it was a potential source of earnings. He

urged that \$400,000.00 be awarded under this head. As regards the cost of future household help he argued that one helper every 2 weeks should suffice and submitted for $(2500 \times 26 \times 11) = \$715,000.00$.

[26] This court expresses appreciation to both counsel for the assistance rendered and the industry demonstrated in presentation of this case. Having considered the evidence and the authorities I agree with the claimant's counsel that the **Joslyn James** award is out of sync with the current trend of awards for injuries to the hand. Further that it is distinguishable on the bases *inter alia* that in the case before me, the claimant's dominant hand has been injured. If he is to learn to read and write, it is his left hand that must do the writing. This court is mindful that damages can never adequately compensate a claimant. Indeed no amount of money can restore his loss. In looking at past awards one is really seeking assistance to arrive at an award that will enable a defendant to hold his head high and say he has done right by the claimant. Previous awards are a way of judging the society's consensus in that regard and ensuring that as far as possible like cases are treated alike. It is not a perfect science but a court must do the best it can on the evidence it has.

[27] In this case, I observed carefully the demeanour of the claimant in the witness box. When taking the Oath, he tried and was barely able to hold the Bible in his right hand when taking the Oath. The fact that he made the effort to do so impressed me. He was unable to make a fist with that hand. He candidly admitted that the sport of rugby was in the doldrums since the death of the president but that he anticipated a revival. He felt he might be able to operate a cook shop or a stall. I accept him as a witness of truth and that he is interested in returning to gainful employment. I accept the submissions of the claimant and regard the award outlined below as fair.

[28] I therefore make the following award of damages:

- (a) Pain, suffering and loss of amenities - \$4,500,000.00
- (b) Loss of earning capacity - \$2,000,000.00
- (c) Cost of future household help - \$1,950,000.00
- (d) Special damages (agreed) - \$ 392,621.00

Interest will run on general damages from the date of service of the claim form at 3% to date of judgment and on special damages at 3% from the 17th September 2008. Costs to the claimant to be taxed if not agreed.

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David Batts
Puisne Judge