

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.M. 105 of 1997

BETWEEN ORAL MORGAN PLAINTIFF

A N D GOODYEAR JAMAICA LIMITED DEFENDANT

Mr. N. O. Samuels for Plaintiff

Mr. D. Henry instructed by Messrs. Nunes,
Shoefield, DeLeon and Company for Defendant.

Heard: 9th, 10th, 11th December, 1997
June 26th, 1998

MARSH, J

ASSESSMENT OF DAMAGES

The delay in handing down this judgment is greatly regretted.

Assessment of damages is the sole task herein assigned
as liability is not an issue.

The Plaintiff is currently unemployed but up to May 17, 1996 he obtained his living as a U2 Machine Operator at Defendant's Company at Morant Bay, St. Thomas. He also added to his income by operating a poultry farm on a fairly limited scale. He was born on January 30, 1968 and is now married with a family. On November 14, 1995 while operating the abovementioned machine at defendant's plant, the machine malfunctioned and this resulted in his receiving serious injury. He was, he testified, struck to the ground and later found himself in hospital with a doctor standing over him putting stitches into his left ear and that he could not move. This was at the Princess Margaret Hospital, St. Thomas. There was pain from his neck down to his hands. A few hours later, he was taken to Medical Associates Hospital in Kingston. He was examined, given medication and referred to Dr. Chutkhan, who was absent he was seen by a Dr. Vaughan of Dr. Chutkhan office. Dr. Vaughan prescribed medication and a course of physiotherapy. He was then taken home and next day he was taken to defendant's facilities' Medical Clinic at Morant Bay. This is when the

the referral was made to Dr. Chutkhan and Plaintiff seen by Dr. Vaughan. He also saw Dr. Lyle Harper, Dr. Graham, Dr. Horace Hall, Dr. Hal Shaw and Dr. Randolph Cheeks.

MEDICAL EVIDENCE

Drs. Hal Shaw and Randolph Cheeks were called to give evidence while Dr. Chutkhan's Report and that of Dr. Graham were, by agreement, tendered in evidence. Exhibit 1 was a report from Eureka Medical Limited concerning an MRI(Magnetic Resonance Imaging) of the plaintiff's spine (cervical) performed by Dr. D. Graham.

The findings were as follows:

"There is a slight cervical scoliosis.

The odontoid process appears in a normal relationship with the anterior arch of C1. There is a small sub-ligamentous disc bulge at C6 - C7 level. This bulge does not appear to cause significant effacement of the underlying thecal sac and the cord itself is not deformed.

There is no evidence of abnormal cervical cord signal to suggest ischemia or myelomalacia.

Impression-

1. Slight cervical scoliosis.
2. Small subligamentous disc bulge at the C6 - C7 disc level. This bulge does not appear to cause significant thecal sac or cord deformity.

Referring physician was Dr. D. Graham.

Exhibit 2 -

Dr. Winston Chutkhan's medical report - Dr. Chutkhan saw plaintiff as a patient on December 7, 1995 Report outlined the reported history of how plaintiff obtained his injury. His clinical findings were as follows:-

There was some decrease in the range of movements in the cervical spine but no abnormal neurological signs. An X-ray of the neck failed to reveal any bony injury.

Plaintiff returned to see Dr. Chutkhan on January 10, 1996. On this occasion, examination revealed that plaintiff "would allow very little movement of his neck and shoulders." Medication was prescribed and physical therapy advised.

When again seen by Dr. Chutkhan, on February 7, 1996, plaintiff stated he was still having pain when he turned his neck and was also having cramps to his right hand. Another visit was made to Dr. Chutkhan on 13th March, 1996. At this time, plaintiff was advised to return to work. Dr. Chutkhan then discharged him from his care.

On 3rd October 1996, plaintiff saw Dr. Chutkhan again, indicated he was feeling much better, but that he had pain in his left upper limb and numbness in his left hand. There was slight tenderness over the trapezius, full range of movement of his cervical spine with slight pain at the extremes of movement. The same was true of his left shoulder and there was slight pain in full abduction.

In summary injury was to neck, both muscular and ligamentous. A full recovery was expected.

Dr. Randolph Cheeks, Consultant Neurosurgeon gave viva voce evidence and his medical report of August 8, 1996 was also available to Court as an exhibit, tendered by consent. Dr. Cheeks opined that plaintiff's was "not a serious head injury." Injury to neck was ligamentous and involved the annular ligament of the C6/7 intervertebral disc. The resultant disability is rated at 5% of the whole man for all deranged cervical disc, plus one percent for the loss of 30° of lateral rotation. His permanent partial disability, using the guidelines of the American Medical Association. In short, permanent partial disability is rated at six percent of the whole man. Dizziness

"Blackouts" is a consequence of the diffuse head injuries" which he sustained. It would resolve itself in about nine - twelve months.

Dr. Hal Shaw, an E.N.T. Specialist first saw and examined plaintiff on 6th, 12th of July 1996, and testified of his findings relevant to such examination. Audiograms showed that there was severe mixed hearing loss. Plaintiff complained of ringing in his left ear, since January, 1996. Plaintiff's hearing loss was about 60 - 70% of left ear and permanent. Hearing aid would be unhelpful in this case. The ringing in the ear, "one of the most disabling complaints a patient may be suffering from" is sometimes treatable.

Dr. Shaw testified that in the instant case, ringing in the ear is not treatable. Plaintiffs hearing loss will definitely lower his performance on a job. Spoken words would have to be repeated to him and his safety may be jeopardized, in cases where it is important to know exactly from where sound is generated. Both ears are needed. Ringing in the ear or "Tinnitus" may disturb sleep or disturb physical performances in the daytime.

Dr. Shaw stated that plaintiff was suffering from a skull fracture of the left middle cranial fossa. However he admitted to question if he had any other of plaintiff's record available he said 'no'. He has not therefore satisfied this court as to why he concluded that plaintiff had fracture of the cranial fossa.

By letter dated May 8th, 1996, defendant terminated the employment of plaintiff as a result of "your inability to perform your normal duties since November 1995." This letter was tendered by consent as Exhibit 4.

Plaintiff's evidence is that up to the time he testified in Court, "there has been no improvement in my condition since accident." This seems an exaggeration of the situation, bearing in mind the medical evidence, specially of Dr. Chutkhan.

Plaintiff indicated that he found himself in hospital and generally gave the impression that after accident, there was a period when he was not conscious of what was happening, until he discovered he was in hospital.

Dr. Cheeks was of the opinion in cross-examination that the plaintiff was not rendered unconscious by the blow as the blow was not enough to render him unconscious but enough to 'disturb his mental state.' Plaintiff will suffer exacerbations of painful stiffness in the neck and pain in the right arm and forearms, intermittently and at times of heavy exertions. This situation, in years to come will be worsened by normal normal wear and tear.

Because of compression damage to the spinal cord at the nerve to his right arm plaintiff may come to require spinal operation. This is already being irritated by contact with his disc bulging out of its normal anatomical position. There is a 10% chance that the operation may become necessary. He is certainly going to develop early osteo-arthritis of the vital spine.

Dr. Cheeks suggested that the kind of work which plaintiff is advised to do should not involve bending, crouching or lifting more than 20lbs. weight.

Mr. Samuels for plaintiff submits that there is a dearth of learning in our jurisdiction re cases involving hearing loss and tinnitus. He referred Court to some English decisions, cited, he said, not for quantum of damages but to assist the Court by showing how English Courts have approached awards for such injuries.

Bailey vs. I.C.I. 1a Vol. 2 Kemp and Kemp on Quantum of Damages at p. 5461 et seq.

Robinson vs British Gas P.L.C. Kemp Vol. 2 Damages 54432.

Albert Bixby's case p. 544278 (supra)

These cases are unhelpful in the instant circumstances.

Taking all the injuries sustained by Plaintiff into consideration, what should be a reasonable sum to compensate him for the pain, suffering and loss of amenities?

Mr. Samuels submitted that an award of \$3,000,000 is a starting point in the instant case. He cited for support the following cases.

Hinds v Smith et al Khan's vol. 4 at p. 4

Cologne v Ramcharan Khan's Vol. 4 at p. 152

Bell v. Attorney General Khan's Vol. 4 at pl 175

Bell v Attorney General (supra) found particular favour with Mr. Samuels who suggested that the award in Bell would serve as a starting point in the Award for pain, suffering and loss of amenities in the instant case.

On the other hand, Mr. Henry for the Defendant countered by citing the following cases as being more appropriate guides.

Anderson v Watson Khan's Vol. 2 p. 188

McLennon v. Williams et al Khan's Vol. 4 p. 161

Brown v. Bryan etal Khan's vol. 4 p. 168

Consequently he suggested, award for Pain, Suffering and loss of amenities should attract an award no higher than a figure of \$650,000 - \$700,000.00

AWARD MADE IN THE INSTANT CASE

For Pain and Suffering and Loss of Amenities is \$750,000.00.

PROSPECTIVE MEDICAL CARE

Dr. Cheeks had testified that the annular ligament injury to Plaintiff's neck immediately in front of the spinal cord and nerves of the upper limbs is going to cause exacerbations of painful stiffness in the neck and pain in the right arm and forearm intermittently and at times of heavy exertions. Normal wear and tear in years to come will further worsen the situation. A 10% chance exists that plaintiff will require spinal operation because of compression damage to spinal cord or nerve to his right arm which already is being irritated by contact "with

his disc bulging out of normal anatomical position." The purpose of this operation is to prevent paralysis. Plaintiff is "certainly" going to develop osteo-arthritis of the vital spine. Close monitoring of his nuerological state is recommended by Dr. Cheeks. The condition will progress regardless of the type of work - heavy physical work will aggravate it.

At today's rates, the recommended operation would cost about \$375,000.00. Monitoring of plaintiff's neurological state should be done at intervals of three months. Each visit would cost \$1,500.00 if it was done by a neurosurgeon and \$1,000.00 if done by a general practitioner.

This is unchallenged evidence which I am constrained to accept. There was no evidence from Dr. Cheeks as to how long a period the monitoring should take place. I would make the period six (6) years although plaintiff's counsel has submitted this should be for ten (10) years. The rate would be \$1,000.00 per visit since there is no neurosurgeon in St. Thomas and it would be easier if the monitoring was done by a general practitioner.

I therefore make the award for \$375,000 for the cost of the operation. The amount awarded for the monitoring of plaintiff's neurological state is \$20,000.00 .
\$395,000.00

PROSPECTIVE LOSS OF POULTRY FARM

Loss to plaintiff of his poultry farm consequent on the accident was set at \$380.00 per week. Mr. Samuels for plaintiff suggested that multiplier of 12 years be used - total loss would therefore be \$237,120.00.

Mr. Henry for defendant submitted that Plaintiff had not proved a causal nexus between the accident and the alleged losses in his poultry farm business.

Both plaintiff and his wife operated the chicken farm. Feeding of the chickens would have been done by the wife, not only on the days she was not working but in the morning and

evening of the days when she was. But for the 2-3 days per week when sought employment she was at home. Plaintiff has himself indicated that some of the chickens died and some got old. The chicken farm could have continued and its discontinuation was not as a direct result of the injuries plaintiff received in the accident. I shall therefore make no award for this area of loss.

HANDICAP ON THE LABOUR MARKET

There can be no contest as to the plaintiff's position, as a result of his injuries, with regards to his suffering financial damage because of his disadvantage on the labour market. Defendant's letter dated 8th May, 1996 to plaintiff terminating his employment is clearly indicative of the position- this was because of "injury on the job which resulted in your inability to perform your normal duties." Plaintiff has therefore been thrown on the labour market, with the difficulties actual and contemplated which have arisen as a result of his accident. Drs. Shaw and Cheeks have described these in their testimony. Plaintiff was twenty four years old when the accident occurred on November 14, 1995. He worked then as a machine operator building tyres in defendant's factory. Currently he is 29 years old. He has severe hearing loss, between 60-70% in the left ear, ringing in the ear or tinnitus, which Dr. Shaw described as "one of the most disabling complaints a patient could be suffering from." This latter condition Dr. Shaw stated, is untreatable.

"The weakening of the plaintiff's competitive position in the open market..... what are the chances of obtaining comparable employment in the open labour market?"

The test I apply is as pronounced by Scarman L. J in **Smith v. Manchester Corporation** 118 Sol. Jo. 597:

"The court has to look at the weakness so to speak 'in the round', take a note of various contingencies, and do its best to reach an assessment which will do justice to the plaintiff."

In the circumstances I made an award under this head of \$70,000.00

SPECIAL DAMAGES

The sum agreed and the award made is \$20,300 with interest thereon of three percent from 14th day of November, 1995 to date.

Damages are assessed as hereunder

1. **GENERAL DAMAGES:**

- i. Pain, Suffering and loss of amenities -
\$750,000.00.
- ii. Cost of future surgery and neurological
monitoring \$395,000.00
- iii. Handicap on the labour market - \$70,000.00
with interest on the sum of \$750,000 of six
percent per annum from the date of service of
the writ to today.

2. **SPECIAL DAMAGES**

In the sum agreed of \$20,300 with interest thereon of
3% per annum from the 14th day of November 1995 to today.
Costs to the plaintiff to be taxed if they are not agreed.