[2012] JMSC Civ. 60

IN THE SUPREME COURT OF JUDICATURE

CIVIL DIVISION

CLAIM NO 2010 HCV 00766

BETWEEN	**NAVAL PENN**	**CLAIMANT**
AND	**KEITH HAGIGAL**	**DEFENDANT**

Ms. Andrea Walters-Isaacs for the Claimant

Ms. Tashia Madourie instructed by Nunes, Scholefield, Deleon & Co. for the Defendant

Ms. Michelle Shand representing the defendantõs insurers, present

Assessment of Damages-Fifth and Seventh Edition American Medical Association Guidelines–Comparable Cases- Permanent Impairments Ratings –Injuries of same nature and type – Handicap on Labour Market

Heard: 4th and 25th May 2012

Campbell, J.

Assessment of Damages

[1] On the 6th October 2006, Naval Penn, Security Guard, aged 36, was involved in a motor vehicle collision. The defendant was the driver of the other vehicle. He was treated by Dr. Singh the following day and in turn seen by Dr. Gilman and, Dr. Grantel Dundas. He said he was given a number of sick days from work as a result of the accident. Four months later, he was involved in a second accident. He testified he cannot recall having told Dr. Gilman, his personal physician, that he had lost consciousness at the time of the first accident, and

that this affected his sex life. He said that it was not necessary to tell the doctor of cuts he had received because it was obvious, neither can he recall if he told Dr. Gilman of injuries and, cuts he had received to his face. When he saw Dr. Dundas in 2007, he cannot remember telling him about his loss of consciousness, or of radiating pain he was suffering.

Claimant's case

[2] Counsel for the claimant enumerated the claimant's injury; (a) fourteen months of neck and back pain; (b) whiplash; (c) that the second accident had no impact on his prior injuries; (d) 15% permanent partial disability. She relied on the case of **Yvonne Black v Othniel Morgan**, 6 Vol. Khan, and based on the updated award, $4,046,000.00, and **Icilida Osborne v George Barnes &Smith et al 2005 HCV 249,**, when updated, amounted to an award of $4,780,000.00. Counsel further submitted that the claimant has made significant life changes, cannot sit still for long periods. Counsel invited the court to ask the question. In the event he loses his job, where does he go? He was not able to earn his customary overtime and claims $18,000 for lost overtime. In respect of transportation, the claimant tendered five receipts amounting to $26,000.

Defendant's Case

Defendant's counsel submitted there was no legal right to overtime, relied on the Junior Doctors Association case. No pay slips were submitted. There was no claim of inability to work for overtime. Court should not consider claim for transportation, as receipts purport to be issued for visits to Kingston whereas the claimant's physicians are Mandeville based. The two receipts issued by doctors in Mandeville, bear no relation to the dates of consultations.

It was further submitted that the claimant's complaint is inconsistent. Absent from Dr. Singh's report was information about abrasion on forehead. Any report of loss of consciousness was absent from Drs. Singh and Dundas' reports. In respect of the issue of **5th Edition American Medical Association**, evolution of the guide, as outlined in the 7th Edition, cautions approach to impairment ratings.

Counsel relies on **Dawnette Walker's** case, page 11, for the submission that the emphasis should be on the injuries and not on the impairment ratings.

[3] Counsel for the defendant argued that in 2007, the claimant had complained of 14 months period of pain. However, in 2011, the complaint was reduced to intermittent pain. In cross-examination, he admits that he reported to Dr. Dundas that the pain was ñon and offò This is contrasted with, his earlier complaint of, no day without pain. The claimant was found to have a painï free range of motion. There was no finding of impairment due to pain. Table 17.2 of the 7th Edition, deals with soft tissue, non-specifics concerns. Those factors, it was submitted, were important in determining the nature and extent of injuries, even when impairments ratings are set aside. Reference was made to Dr. Gilmanôs report dated 9th September 2009, which states, ñToday he is doing well, occasional flare-up.ò See also, 2nd report of physio-therapists, March 23, 2007, on completion óonly report of slight pain continuing pain in the back.ô In 2011, in respect of range of motion, that has increased when compared to the results of the 2007 examination, done by Dr. Dundas. In 2011, cervical spine described as, non-deformed and non-tender. Counsel relied on the cases of **Iris Smith**, award updated is $1,100,000.00, and **Dawnette Walker**, updated $1,944,215.00. She submitted that an award of $900,000 to $1,100,000.00. Counsel also relied on **Barbara Brady and Patricia Nelton**.

[4] Claimantôs Counsel, argued that (a) in all four cases cited by the defendant, the impairment assessed would have been pursuant to the 5th Edition of the AMA Guide. The instant claimant, Naval Penn would have to be treated therefore as 15% impairment, in order to properly make the comparison, (b) **Iris Smith** is at the lower end of the spectrum with 5% impairment. **Dawnette Walker** is also a 5% impairment case and **Patricia Nelton** is a 3% case.

Discussion

[5] The large gulf in the figures tendered before this court by the parties, came about as a result of the discrepancy between the two reports issued by Dr. Grantel

Dundas, in respect of examinations done on the claimants on two separate dates. The discrepancy is in the area of his expert assessment of the permanent impairment rating ascribed to the claimant. There was agreement that the two ratings were based on different criteria. The report of 2007 was based on the 5th Edition of the American Medical Association; the latter 2011 report was based on the 7th Edition.

[6] The first report opined to a rating of 15% whole person impairment; the latter report assessed the impairment at 4% of the whole person. The claimantôs counsel submitted that the court should be guided by the impairment ratings of the cases. That to give effect to comparability the court must place the emphasis on the impairments ratings. Defendantôs counsel countered that the important focus was the comparability of the injuries. Counsel for the claimant relied on the cases of **Icilida Osbourne v George Barnes & MMTH et al** 2005 HVC 249, delivered in February 2006, **Yvonne Black v Oshnell Morgan & Renford Williams** 2006 HVC 00939, both with a rating of 10% impairment. Based on these cases, counsel submitted that the claimant be granted an award of $4,780,000.

[7] On the other hand, the defendantôs counsel relied on cases of **Iris Smith v Arnett McPherson & Donald Oldfield** Khan Vol. 5 246, **Barbara Brady v Barlig Investment Co. Ld. & Vincent Loshusan & Sons Ltd.** KHAN Vol. 5 252; **Patricia Melbourne v Warren Riley** 2006 HCV 2934 and **Dawnette Walker** SCCA No. 158/2001. Counsel submitted that an award of $900,000 - $1,100,000.00 is appropriate in this case.

[8] What should the court direct its attention to, the impairments ratings or the actual injuries itself? *Restitituo in tegrum* is the object of damages awarded for pecuniary loss and compensation the object of damages for non-pecuniary loss. In **British Transport Corporation v Gurley** {1955} 3 ALL E R 796, the House of Lords had an appeal on the assessment of damages, the observations are apposite in assessing personal injuries claims, Earl Jowitt, at page 799:

> *The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries (see per Lord Blackburn in* Livingstone v Rawyards Coal Co *(1880), 5 App Cas at p 39). The principle is sometimes referred to as the principle of restitutio in integrum; but it is manifest that no award of money can possibly compensate a man for such grievous injuries as the respondent in this case has suffered. The principle, therefore, affords little guidance in the assessment of damages for the pain and suffering undergone and for the impairment which results from the injuries; and in fixing such damages, the judge can do no more than endeavour to arrive at a fair estimate, taking into account all the relevant considerations.*

[9] The Court of Appeal, in **Dawnette Walker v Hensley Pink**, in dealing with the issue, whether the award by the trial judge ówas unreasonable and inconsistent with awards for similar types of injuryôper Harrison J.A. at page 8:

> *A court making awards for pain and suffering in personal injury cases does so on the basis of awards in comparable cases where the injuries are reasonably of the same nature and type. An appellate court will not disturb an award of damages unless it is either inordinately low or extremely high.*

[10] The learned Court of Appeal, after an examination of several cases detailing comparable injuries that had been submitted at the trial, awarded **Dawnette Walker** with a 5% impairment disability, the sum of $650,000, for pain and suffering, although her permanent disability was the same as the claimant in **Kean v Officer et al**, whose award, updated, would be $898,953.00. The Court referred to **Earle Graham & Kean v Officer** with a 6% whole person disability, whose updated award, in 2001 would be $1,343, 000.

[11] The Court is obliged to take the relevant considerations, based on comparable cases where the injuries are reasonably of the same nature and type. **In S and Another v Distillers Co. Ltd. and others (Biochemical) Ltd.; J and Others (Others) Ltd. 1969 3 ALL ER 1412,** the infant plaintiff claimed damages for personal injuries due to the negligence and breach of duty on the part of the defendants for marketing a drug, thalimode, which, when taken by pregnant women, caused deformities in their children. Hinchcliffe J. said:

It is on this evidence that the court has to determine what in all the circumstances of the case is fair and reasonable compensation not only for the plaintiffs but also for the defendants. In every case where a person has been severely injured by the negligence of another the assessment of damages is not an easy matter. Mathematical accuracy is impossible, and there is no yardstick by which the court can measure the disability. But an assessment has to be made, and a fair and moderate value has to be placed on the disability and on the consequential loss. Actuarial aids are sometimes helpful, but they are not the be-all and end-all of this difficult matter. In the long run it is the court which takes into consideration all the circumstances of the case, that is to say, the deprivation, the loss of earning capacity and the cost of special expenses, and then decides what is fair compensation to both parties. The assessment of the global sum is based on experience and by the application of reasonable common sense and according to social standards as reflected in the general level of awards by the courts. In these two cases the problem is more difficult since there are no awards in ***comparable cases*** *to guide the court. These children were born deformed, they have never known what it is to have their limbs or to be accepted by their fellow creatures; they will never know what it is to play games with other children or be treated as normal.*

[12] See also the comments of Lord Morris in **H. West & Sons Ltd. v Shephard** (1963) 2 ALL E.R, 625, at page 633 D-G, quoted with approval in **Icilda Osbourne** (supra) per Sykes J. paragraph 3.

[13] All the case submitted by counsel bear in different degrees reasonable relationship ñin nature and typeò to that of the claimant injuries. They all deal with neck and back pain, which are consistent with ñwhiplashò injuries. On an examination of **Icilda Osbourne**, the injuries were listed:

(a) as whiplash injury;

(b) tenderness to the posterior aspect of the neck; and

(c) painful swelling of the lower back.

She was sent home for fourteen days, but after one week at work, she had to go off again, given a second period of two weeks. She was given a further two weeks off from work, with the same result. Her services were terminated. She was diagnosed as suffering from ñchronic mechanical

lower back painò Straight leg raising 75 bilaterally with onset of pain. Increased lumbar lordosis with mild spondylolisthesis. The chin does not reach around to her shoulder which would be 90 degrees from looking ahead. She was restricted in looking and up and down. In **Icilda Osbourne** case, the court found that, her injuries were life long injuries.

[14] In Naval Penn, there were normal cervical spine contours. There were no structural deformations or deficit. Dr. Dundasô second examination of Penn showed there was an improved range of motion to his first examination. He had maintained his job, rides a motorcycle occasionally, but complains that he has to do less strenuous chores. I find that the injuries of **Icilda Osbourne** are much more serious than the instant claimantôs injuries. There are features such as the prognosis, which tend to make them not of the ósame nature and typeó

[15] In respect of **Yvonne Black**, Dr. Roseôs prognosis is that õshe would be plagued by intermittent neck and lower back pains aggravated by sudden movements of the neck, lifting objects, bending and prolonged sitting as well as any injudicious activities. I daresay that if Naval Penn had such a prognosis, he would have been unable to perform without complaint of discomfort, so as not to arouse the concerns of his employer as he claims he did.

[16] In **Dawnette Walker**, claimant, police officer, involved in a traffic accident, injured, x-rayed, the same day, Dr. Dundas treated by the physio-therapist, for over seven months, in constant pain to neck shoulder and upper back, and numbness to her fingers. She missed work for about one year; on resumption was reassigned to less physical work. She had painful restriction of left lateral rotation of the cervical spine. There was diminution of pinpricks sensation at the right thumb, index and middle finger. The cervical spine shows evidence of damage to the C3-4. The prognosis is that her symptoms will settle. If further deterioration took place, surgery may be necessary.

[17] Counsel for the defendant submitted that the injuries in **Dawnette Walker's** case are more severe than those suffered by Naval Penn. The injuries are of the same nature and type, but I agree with counsel that **Dawnette Walker's** injuries were more severe. Updated, the award of $650,000 in **Dawnette Walker** is $1,944,215. I would discount that sum and make an award of $1,750,000. For pain and suffering, I should indicate that wherever the evidence of the claimant conflicted with the documentary evidence, I preferred the documentary evidence. Thus, I did not accept that Mr. Penn incurred a cost by travelling to Kingston for medical treatment for his injures. I did not accept that he told his physicians about his loss of consciousness and, therefore, draw the inference that, inadvertently or otherwise, the medical practitioners all omitted to record this, as a part of his medical history in their reports, as they would be expected to do. I did not accept his testimony that his sexual life had been negatively impacted by his injury, yet, he failed to tell even his personal doctors. His ability to sit through a prolonged period in the witness-box without an inkling of discomfort, made his claim of being unable to sit for long periods difficult to accept. I found the witness less than forthright and was unimpressed with his demeanour.

[18] Counsel had submitted that that the court ought to take into the consideration the new guidelines of the American Medical Association. There was no admissible evidence before the court on which the court could act as to the effect of the 7th Edition of the American Medical Association impairments in relation to ratings under the guidelines of earlier editions.

Handicap on the Labour Market

[19] The claimant has not demonstrated through evidence, that although he has resumed his occupation at the same wage, his injury is of such a nature that a risk exists that he may lose his job in the future. Neither is there evidence that, if the risk materializes and he is thrown out on the labour market because of his injury, he would be at a disadvantage in competing for a job with other

injury-fee persons (**Moonex Ltd et al v Grimes (unreported)** SCCA No. 83/96. (See **Dawnette v Walker**, page 11, Harrison, P (AG.))

[20] There is no medical evidence to support such a risk. He has managed to, comport himself on the job in such a manner that his employers have no concerns about his health. His absence from work, due to illness, has not been done with any greater specificity than ña few sick daysò I make no award under this head.

Special Damages

[21]

Cost to D. Gilman	-	$10,900.00
Medical Receipt form Dr. Dundas	-	30,000.00
Assorted Medical Receipt	-	9,598.25
Cost of physiotherapy	-	56,230.00
	-	$106,728.25

There is no award made out to Microlabs. Loss of overtimes has no documentary support. The claimant works at an established company, should be able to prove his loss by a comparison of pay slips.

The transportation cost is disallowed on the basis that receipts tendered are not relevant to these proceedings.

I make the following orders:

General Damages

Pain and suffering	$1,750,000
Special Damages	$106,728.25