[2016] JMSC Civ. 137

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2013 HCV 05048

BETWEEN	**ANDREW MORGAN**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL**	**1ST DEFENDANT**
AND	**THE COMMISIONER OF THE FIRE BRIGADE**	**2ND DEFENDANT**

IN CHAMBERS

Mr. Jason Jones for the Claimant, instructed by Nigel Jones & Co. Attorneys-at-Law.

Ms. Marlene Chisholm for the Defendants, instructed by the Director of State Proceedings

Heard: March 7, 2016 and May 6, 2016

Assessment of Damages - Personal Injury- Firefighter injured on the job - handicap on the labour market - method of quantification of damages - permanent partial disability - issue as to quantum of damages

BERTRAM-LINTON, J (AG.)

BACKGROUND

[1] On or about September 15, 2007 the Claimant, a firefighter, who was employed to the Jamaica Fire Brigade sustained injuries while at work. At the time of the incident the Claimant was stationed at the Portmore Branch of the Jamaica Fire Brigade.

[2] On or about September 15, 2007, the Claimant was scheduled to work on the 10:00pm to 7:00 am shift. At approximately 10:40pm the Portmore Fire Station received a call from the Spanish Town Fire Station to aid in the extinguishing of a fire that was engulfing a tree on a premises on Johns Road, in the parish of Saint Catherine .The claimant and his colleagues were required to mount the fire truck and project the water towards the fire which was in the top of the tree.

[3] The pump which was on the truck the Claimant was using was said to be defective as the Rev Lever was not working and the driver of the truck who is also another employee, placed a piece of metal on the gas pedal and braced it against the driver's seat in an attempt to maintain the constant flow of water through the hose which the Claimant was using. The water pressure in the hose fluctuated, caused the Claimant to fall backwards hitting his back on the truck and this resulted in him to sustaining serious injuries.

[4] As a result of the accident the Claimant sustained the following injuries:

(i) Chronic lower back pain affecting both lower extremities

(ii) Chronic Degenerative Facet Joint L5/S1

(iii) Chronic Degenerative Disc Disease (Herniated Disc L5/S1)

(iv) Chronic Degenerative Changes L4/L5

(v) Sacral Cyst

(vi) Aching sensation across his lower back, symptoms are 75% axial

(vii) At lowest 9% PPD and at highest 14% PPD

[5] The claimant claims

(a) Damages for negligence and/or breach of statutory duty and/or breach of contractual duty

(b) *Special damages amounting to in excess of $50,000.00 and continuing*

(c) *Interest*

(d) *Costs*

[6] The defendants filed a Defence limited to quantum on March 18th, 2014, which was out of time. Master Rosalee Harris however granted permission for the defence to stand and sent the issue of damages for Assessment.

[7] The claimant heard from three witnesses "viva voce"; the claimant as well as Dr. Adolpho Mena and Dr. Rory Dixon

SUBMISSIONS

[8] The Claimant relied on the authorities of **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Co. Ltd** reported in Ursula Khan Volume 6 at page 200, **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** reported in Ursula Khan Volume 6 at page 198 and **Gary Reid v Kern Paul Anthony Braham** Claim No. 2011 HCV 04669

[9] Counsel for the Claimant further submitted that the Mr. Andrew Morgan now has a handicap on the labor market. He relied on the cases of **Campbell et al v Wylie** JM 1999 CA 64 for the issue of the multiplier/multiplicand. Additionally the cases of**, Kiskimo Ltd v Deborah Salmon** S.C.C.A 61/89**, Curlon Lawrence v Channus Block and Marl Quarry Limited et al** Claim No. 2006 HCV 03638**, AND Victor Campbell v Samuel Johnsons et al,** reported in Khan's Volume 4 at page 89 were cited.

[10] The Claimant seeks the following awards from the court:

(i) Handicap on the labour market for a total of $10,697,945.28

(ii) Pain and suffering $ 7,000,000.00

(iii) Special Damages $261,300.00

(iv) Future Medical Expenses $300,000.00

[11] The defendants contend that there are several issues relevant to the quantum of the damages. They question the severity of the injury and suggest that the claimant had a pre existing degenerative condition .The Claimant herein had a subsequent fall on June 25th, 2010, when he slipped on the wet tile floor in his home while preparing for work, and they submit that it was as a result of this fall and the degenerative changes that existed why the Mr. Morgan has a 14% PPD and that the true assessment was that of Dr. Rory Dixon who opined that there is about 9% whole person impairment. They have invited the court to find that the fall in 2007 fell within the category of a sprain/ strain type injury and consistent with the muscle spasms and Dr. Dixon's assessment.

[12] In particular the defendants have highlighted that Dr. Mena agreed that the fall in 2010 could have contributed to the degenerative changes seen in the subsequent MRI, but because there was none done at the time of that incident, he was unable to say whether the significant degenerative changes were as a result of the initial or later incident or just a feature of the natural degenerative changes that come with age.

[13] They have cited the cases of The Attorney General v Phillip Granston [2011] JMCA Civ1, Denton Stewart v JUTC Claim # 2008 HCV04481 and Attorney General v Ann Davis SCCA 114/2004. As well they have relied on the Candy Naggie, Schaasa Grant and Curlon Lawrence cases mentioned above.

[14] They submit that awards under the relevant heads of damages should be as follows;

(i) Pain and suffering and loss of amenities in the range of $4.5M-$5.2M

(ii) Special damages

Medical expenses $61,300.00

Transportation $10,000.00

(iii) Future costs: (no interest)

Physiotherapy $180,000.00

Handicap on the labour market $500,000.00

[15] ISSUES

(1) What is the diagnosis that the court is prepared to accept with regard to the claimant's injuries.

(2) Whether the claimant's current condition is fully attributable to the fall and injuries received on September 15, 2007.

(3) What is the amount of damages due to the Claimant in the present circumstances?

Discussion and Analysis

Issue 1

[16] The court after looking at the assessments and findings of Doctors Mena and Dixon is inclined to accept that Dr. Mena had more of a full assessment of the issues and tests with regard to the claimant. While Dr. Dixon saw the claimant on only one occasion and referred to MRIs done in 2008, 2012 and 2013 and 2014 he was unsure of the finding in relation to the accident, and the origin of the injuries. Specifically he could not conclude that the bulging disc was due to the trauma as opposed to progressive degeneration. He agreed though that there were degenerative changes that were outside of what was normal for a man of the claimants' age.

[17] Dr. Mena, in addition to the above MRIs, had at his disposal copies of medical reports from Emory Healthcare as to treatment done over the period from May 2013 to October 2014, the report of Dr. Amerally of March 2014 and April 15th 2015 and Dr. Rory Dixon's assessment.

[18] I therefore find that on a balance of probabilities, Dr Mena's assessment, diagnosis and prognosis is in keeping with the evidence and accept his finding of a whole person disability of 14%.

Issue 2

[19] It is vital that before we launch into an assessment as to quantum of damages due from the defendants, we settle the issue of what is the injury to be regarded as attributable to the job accident on September 15th; 2007.The amount awarded will depend on the court's ability to separate this from the effects of the subsequent incident if any in June 2010 and any natural degenerative changes.

[20] The claimant has not provided the court with a medical assessment or report done in the direct aftermath of the incident in 2007 when he was seen at the Spanish Town hospital this is quite significant as it would have provided a starting point for the post accident assessment of his injury.

[21] However we have evidence that Dr. Deane was consulted in the immediate post accident period from September 18th, 2007 and up to May 2010 for treatment for recurring back pain that had to be medically managed over this period.(Medical report marked as exhibit 3)

[22] Dr. Mena also stated that in his assessment of the MRI done in 2008 and the one done in 2014 that it was unusual for the level and progression of degenerative changes he saw, to be present in such a young person as the claimant naturally. In his opinion, he considered it to be degeneration that could be set in motion by the injury in 2007. When asked by the court whether there could be degenerative changes without any other fall , he said "yes in the normal course there are changes, once the degenerative process was set in motion, if

there is another fall then depending on the severity there will also be changes." When asked whether there would have been changes with or without a subsequent fall he said yes. When asked if the changes seen were in his experience consistent with normal and expected changes he once again said yes and he further added that if there was a serious injury subsequently he would be able to tell the difference.

[23] The second fall occurred on June 25th 2010 and Mr. Morgan was assessed by Dr. Dixon on June 5th 2014 who assessed him to have 9% permanent partial disability. Dr. Dixon quite significantly also expressed the view that it was not reasonable to conclude that the subsequent fall had any implication for the disc bulging in the 2012 MRI, "because bulging disc in the entire population as we age can be a normal finding as evidence of degeneration of the disc" (viva voce evidence given in Examination in Chief on the 6th May 2016). Dr Dixon saw the claimant on June 5th 2014.Later, on June 1st 2015 approximately one year later Dr. Mena assessed his impairment at 14%.

[24] In light of this the court is of the view that on a balance of probability the 14% is acceptable as the PPD as it was likely that after the Claimant herein saw Dr. Dixon his condition had deteriorated. The evidence also reveals that since September 18, 2007 the Claimant has been visiting a Dr. Deane and this continued up to May 2010. So clearly the Claimant's injuries were as a result of the accident in 2007, had not subsided and were progressive.

[25] It is therefore my finding that the claimant's current condition is as a result of the work related injury in 2007 and that there is no evidence to suggest that the fall in 2010 has influenced the present level of degeneration .

Issue 3

[26] The case of **Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Co. Ltd** reported in Ursula Khan Volume 6 at page 200 was submitted for consideration in deciding the amount that should be awarded for damages for pain and suffering. In that case the Claimant was a 29 years old bus conductress

who was flung from her seat when the bus driver suddenly applied brakes. She was diagnosed with Chronic Cervicothoracic pain with subjective cervical radiculopathy, chronic mechanical low back pains with subjective lumbar radiculopathy and PPD of 10% whole person.

[27] The difference in injuries with **Schaasa Grant** and the Claimant here is that Ms. Grant sustained injuries in her right shoulder and neck and Mr. Morgan did not. Ms. Grant PPD was 10% and Mr. Morgan PPD was assessed by one Doctor to be 14% and another as 9%. The Claimant suffered injuries to his lower limb which were absent in Schaasa Grant's case. The updated award for Schaasa Grant case using the March 2016 Consumer Price Index of 229.3 amounts to $5,279,355.33.

[28] In **Candy Naggie v The Ritz Carlton Hotel Company of Jamaica** reported in Ursula Khan Volume 6 at page 198, the Claimant also sustained injuries to her back similar to the Claimant herein. In Naggie's situation a Dr. Rose opined that she would be plagued by intermittent lower back pains aggravated by prolonged sitting, standing, bending and lifting.

[29] In **Phillip Granston v Attorney General** [2011] JMCA Civ .1, a firefighter, in the course of his duties, was travelling in a fire truck along the Williamsfield main road in the parish of Saint James, driven by its duly authorized driver, Sergeant Liston Reid. The truck was involved in an accident and overturned, as a result of which the respondent sustained severe back injuries.

[30] These are similar to the case at bar where Dr. Mena stated that because of his injuries, Mr. Morgan will have challenges climbing stairs, pushing or pulling heavy equipment and bending. He further stated that the Claimant herein would have some limitations and He should not lift more than twenty pounds occasionally. **Candy Naggie** was left with a 10% whole permanent person disability, the updated award using the March 2016 consumer price index amounts to $4,239,566.83.

[31] I find that an award for damages for pain and suffering in this case would be more falling somewhere between the cases of **Schassa Grant v Salva Dalwood and Jamaica Urban Transit Co. Ltd,** And the **Phillip Granston** case**.** This is as a result of the similar nature of the injuries sustained by both Claimants. The difference was that Grant suffered shoulder injuries while Mr. Morgan suffered injuries to his lower limbs while **Granston** seemed more severe since he was apparently dealing with consistent debilitating pain which required a pain pump to be installed on his person.

[32] Therefore, both Claimants had an additional injury although different in nature. The fact that Mr. Morgan's injuries were also a bit more serious than Miss Grant makes it favorable that the award can be increased.

[33] In this regards the court says that $6,500,000 is considered an appropriate sum for the pain and suffering sustained by Mr. Andrew Morgan and relates favourably to the updated awards in both the Schaasa Grant and Philip Granston cases.

Handicap on the Labour Market

[34] The leading authority on this aspect of the claim is Moeliker v. A. Reyrolle 8 Co. Ltd., [I 9771 1All ER 9 and Smith v. Manchester City Council (1 974) 11 8 Sol. Jo. 597. In the case of Noel Davis v tank-Weld Limited CLAIM NO. 2009 HCV 00687, Justice Morrison stated that

"*I glean from the cited authorities that the correct approach is to quantify the present value of the risk of future financial loss. The risk must be significant and its value depends on how great it is and how far into the future it is projected to reach".*

[35] It would be difficult to argue that Mr. Andrew Morgan, a fire-fighter who has sustained the above mentioned injuries is not impaired on the labour market. He is unable to carry out his duties as a fire-fighter. Additionally, he is also inclined to back pains which prevents or will impact on him sitting for long hours. In his case

where this has been the only permanent job he had and he is not equipped or skilled to perform any other job. Mr. Morgan if he is being placed on the labour market to compete with other able-bodied men and he will be at a disadvantage.

[36] In the medical report of Dr. Adolfo Mena, dated June 1st 2015 he stated that Mr. Morgan is unfit for further service as a firefighter and that will some limitations for example heavy duty work. He further opined that the Claimant herein should not lift more than twenty pounds occasionally and will have challenges climbing stairs, pushing or pulling heavy equipment and bending. He then went on to say that even if surgery was done Mr. Morgan's impairment will be the same.

[37] The evidence of Dr. Rory Dixon also supports the point that Mr. Andrew Morgan is not able to continue his duties as a firefighter. He also purports the Claimant will feel pain if he is required to sit around a desk all day.

[38] The issue now arises as to what assessment would be made in relation to Mr. Morgan being handicapped on the labour market. Should the multiplier/multiplicand method be used? In **Campbell & Others v. Wylie (1959) WIR 327** the Court of Appeal held that,

'I... on the assessment of damages for loss of earnings capacity where there is a real risk that the Plaintiff, as a consequence of those injuries, will be unable to continue working in her profession until normal retirement age the multiplier/multiplicand approach to assessment is appropriate".

[39] In the case of **Curlon Lawrence v Channus Block Marl Quarry ltd claim No 2006 HCV 03638** a multiplier of 14 was used and in this case the Claimant was 28. In the case of **Victor Campbell v Samuel Johnsons et al** a case for loss of future earnings where a multiplier of 7 was used and Ellis J quoted Lord Denning in **Fairley v John Thompson ltd 1973 2 Lloyds Report 40** that before the court can award damages for loss of future earnings, loss must be "real assessable loss sufficiently proved by evidence".

[40] The medical evidence when taken along with the evidence of the claimant as to his physical condition suggest that that there is a strong likelihood that he will not be able to continue working in his present place of employment as a result of his disability. However I find that the injuries sustained in both the Channus Case and the Victor Campbell far exceed Mr. Morgan's and the PPD in the Channus case was also greater than in the case at bar.

[41] I find that the lump sum method is more reasonable in this case. It is important to note that Mr. Andrew Morgan is still relatively young and albeit that it will be hard for him to do another job it is not impossible. He could consider a change in career path even if it is as a part time worker. Mr. Morgan is 39, earns a monthly salary of $81,045.04 which amounts to a net income of $972,540.48 per annum. It is not hard to imagine that he could find fields of endeavour which would facilitate his issues requiring pain management. There is no evidence to suggest that he could not be equally well paid for a desk job and the evidence is that the risk of unemployment has not yet materialized even though he has been off work since sometime in 2014.

[42] I also find that the Claimant herein did all he reasonable could to mitigate his losses. He continued at work for as long as he could where he was assigned.

[43] I find that a reasonable sum to be awarded under this heading would equate with the awards in both the **Phillip Granston** and **Schaasa Grant cases** when updated using a CPI of 229.3. this would amount to $900,000.00.

Future Medical expenses

[44] In the evidence of Dr. Dixon he stated that he recommended that Mr. Andrew Morgan does further physiotherapy with emphasis on core strengthening and functional rehabilitation. He also suggested Mr. Morgan be referred to the pain clinic for further management which may include facet joint injections for the lower back pain. Dr. Dixon gave an approximation of four thousand dollars to about five thousand dollars per physiotherapy session. The Claimants claim a

total of three hundred thousand ($300,000.00) which depicts the three sessions per week at five thousand per session for twenty weeks.

[45] I think that is reasonable and would therefore award this sum under this heading.

Special Damages

[46] The claimant claims transportation cost for treatment overseas of $ 200,000 and medical expenses incurred amounted to $61,300.00 which amounts to a total of $261,300.00.

[47] The Claimant was recommended by Dr. Philip Waite, Orthopaedic Surgeon, to do surgery in the form of removal of disc and lumbar fusion L5/S1. However, Dr. T. Deane advised not to do the surgery but to seek further medical opinion. The Claimant then went to a Dr. Diana Sodiq, Physiatrist, at Emory Health Care Spine Centre in Atlanta, Georgia USA.

[48] The figure for the medical treatment is not contested by the defendants; it is my finding that the amount requested for transportation is not supported by the evidence. However despite there being no evidence to support the exact figure incurred for transportation, the defendants have conceded that the expense is a genuine one and case law suggests that the award can still be made once it is reasonable to do so. The defendants suggest a figure of $10,000.00.I do not find that this is reasonable in all the circumstances. The claimant travelled to treatment overseas and locally for several years and although there is no indication as to the modes of transportation it is reasonable to expect that at least while in the United States substantial amounts relative to local currency must have been expended to access his treatment provider. I find that a reasonable figure in all the circumstances is $100,000.00.

Conclusion

[49] The Court awards judgment to the Claimant as follows

(a) *Special Damages in the sum of $161,300 with interest at 3% from September 15, 2007 the date of the accident to the date of this judgment 21st July 2016*

(b) *Future Medical Expenses in the sum of $300,000.00 (no interest)*

(c) *Handicap on the labour market $900,000.00 (no interest)*

(d) *General Damages for pain and suffering $6,500,000.00 with interest at 3% from September 13, 2013 the date of service of the claim form to the date of judgment.21st July2016*

(e) *Cost to the Claimant to be agreed or taxed.*