Judgment Book

IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW

SUIT NO. C.L. B089/88

BETWEEN	KENNETH BUCKERIDGE	PLAINTIFF
AND	JAMAICA PUBLIC SERVICE COMPANY LTD.	DEFENDANT

P. Beswick, T. Ballentyne and C. Dunkley for plaintiff

Mrs. P. Benka-Coker Q.C. instructed by C. Honeywell of Clinton Hart & Co. for the defendant

Hearing on November 28, December 4, 5, 1990, January 7, 8, July 22, 30, 1992 and January 8, 1993

Judgment

BINGHAM, J.

Opening remarks

The hearing of this action occupied some seven days extending over a period of eighteen months. The formal evidence was concluded on 30th, July, 1992. This, however, did not bring the matter to a finality to enable the evidence to be examined, assessed and a judgment prepared for delivery. When the viva voce evidence was concluded just prior to the end of the Trinity Term in July 1992, counsel who had not yet made their final addresses agreed to prepare and deliver to the Court written submissions within twenty-one days. Although the submissions of the defendant's attorney-at-law were received into the Registry of the Supreme Court on 19th August this did not come to hand until 12th October. The written submissions of the plaintiff's attorneys-at-law were received on 4th September. The result of all this meant in effect that the evaluation and assessment of the evidence and the submissions could not commence until 12th October 1992 when both submissions were now available to the Court. It is against this background that any suggestion of a delay in the preparation of this judgment has to be considered.

The facts

The plaintiff Kenneth Buckeridge a temporary worker employed to the defendant company for some thirteen years and now in his forthieth year was on 28th November 1984 seriously injured while working at the defendant's power plant at Hunts Bay

in the parish of Saint Andrew. While engaged in maintenance work at the said power plant the plaintiff's right hand, this being his dominant limb, got caught into a rotar blade injuring it just below the left elbow. The machine to which the rotar blade was affixed was unfenced and unguarded which meant that there was a strong presumption of negligence being raised up on the part of the defendant's servants or agents to protect workers such as the plaintiff in the course of their employment from injury or harm. Liability was at first denied by the defendant, but was when the matter came on for hearing on 28th November 1990 admitted by the defendant and the hearing was continued as being one where the sole issue remaining was as to the quantum of damages to be awarded to the plaintiff.

As a result of the incident on 28th November, 1984 the plaintiff suffered the several injuries described in the evidence given by Dr. Horace Jackson as a result of examinations carried out on him on July 1985 and November 1990. On examination of the plaintiff Dr. Jackson observed the following injuries:

1. Right deltoid area (shoulder) posteriorally. There is a 7.5 centimetres vertical linear scar.

2. The right forearm extensor aspect. There is an 18.75 centimetres curved linear scar along the subcutaneous ulva border crossing the dorsal aspect of the wrist joint. This scar is keloid, hypertropic (overgrown) and highly pruritic (itches a great deal).

3. The right hand dorsal aspect (back of hand). There is a 9 centimetres linear scar extending into the second web space and into the central palm.

4. There is a six centimetres linear scar extending into the first web space and the central palm.

5. There is a 4.5 centimetres keloid curv linear scar on the distal-radial aspect.

6. There is a one centimetre keloid scar on the radio-volar aspect of the distal forearm.

7. The right thumb. This digit exhibits a full range of movements with pain at the extremes of movements when the thumb is extended, opposition is intact on all fingers except the right middle finger

and the missing fifth finger.

8. The right index finger. This digit exhibits a full range of movement at the proximal and distal inter-phalangeal joints. The metacarpo-phalangeal joint has a limited range of movement - about 5^{o} extension and 5^{o} reflexion from the natural position of movement.

9. The right middle finger. This digit is very short showing a deficiency in length of about four centimetres. The corresponding metacarpal-phalangeal joint appears to have been converted into a pseudoadrosis (a false joint) following excision of the original joint. This false joint is very tender. There is no flexion at the metacarpol-phalangeal joints. The proximal and distal metacarpo-phalangeal joints showed a fixed flexion deformity of about 15^{o}.

10. The right ring finger. This digit shows a flexion deformity of the proximal inter-phalangeal joint shows a full range of movement.

11. The right fifth finger. This digit is absent. The head of the fifth metacarpol projects and it is tender.

Grip. The grip for two fingers when the plaintiff is asked to hold two fingers is zero. The grip for the wrist was very poor.

The above reproduces the evidence of Dr. Jackson of his examination of the plaintiff in July 1985. At that time he assessed the plaintiff's total functional disability at 60%. Following an examination of the plaintiff in November 1990, done no doubt with the pending hearing of this claim which commenced later in the same month, Dr. Jackson revised this assessment to 50%.

Although the extent of the plaintiff's injuries have now left him with a limited use of his right hand, he is not entirely without some use of the hand. Apart from being able to attend to himself, as the plaintiff has shown he can manage some form of work having been engaged as a casual worker at the office of the defendant company

at Hunts Bay for a period of six weeks, earning a salary of $200.00 per week. The plaintiff also admitted to being capable of performing some type of work from August 1985. In this regard as he would be under a duty to take some steps to mitigate his loss, on the question of the award for damages in the area of his claim for loss of earnings; and loss of future earnings, both of these heads of the claim will have to be considered against the background of the fact that the plaintiff was capable of some form of work from August 1985. As to the claim for loss of future earnings any award made would have to be posited on that of a reduced earning capacity and not one of a total loss of earnings situation as contended for by his attorneys-at-law in their written submissions.

When the totality of the evidence is examined therefore the damages falls to be assessed under the following broad heads:-

1. Special damages
2. General damages for:-
   a) Corrective Surgery
   b) Pain and suffering and loss of amenities
   c) Loss of future earnings

Special damages

There can be no question as to the fact that the items claimed in the particulars of special damage all admit of some award. The precise amount, however, as in all instances where special damage is claimed is dependent on the evidence given in support of the claim. In this regard the dictum of Lord Goddard, C.J. in Bonham-Carter v. Hyde Park Hotels Vol. 64 (1948) T.L.R. 177 at 178 is of relevance. Being in the nature of special damages such claims must be specifically alleged and strictly proven.

When the above yardstick is applied to the items claimed the result is as follows:-

Cost of household helper

The period for which the plaintiff can recover his loss is limited to the claim from December 1984 to March 1987. After this date the plaintiff's relationship with his helper had altered to that of a common-law union. During the period under review the plaintiff testified to paying her wages of $60.00 per week at one time and $70.00 per week on another occasion.

The Statement of Claim having pleaded the lower sum, in the absence of any amendment by the plaintiff's attorneys-at-law, he is limited in his recovery to that sum. On the basis of a total period of 116 weeks, being that period from December 1984 to March 1987 at $60.00 per week results in the sum recoverable under this head being $6,960.00. The fact that following March 1987 the status of the plaintiff's helper was elevated to that of a more intimate nature the tasks of general house-keeping which she now performed were of a nature which would be incidental to that which one would ordinarily expect a person placed in such a position to perform on behalf of the entire household. In this regard the case of Parry v. Cleaver (1969) Lloyds Rep Reports 183 referred to by learned attorneys-at-law for the plaintiff is not directly in point. The facts is that case are more applicable to a situation where the condition of the plaintiff was of such a nature and the assistance being rendered to him so essential that without it he would not be able to perform those tasks for himself. The plaintiff in the instant case after March 1987 was quite capable of being able to do the housework. The fact that he did not do it as he stated was due more out of a dislike for that type of work.

(iii) Transportation Expenses

The pleadings alleged some 69 visits to the clinic at the Kingston Public Hospital at a cost of $40.00 per visit. Under cross-examination the witness called by the plaintiff Derwin Edwards testified to the defendant providing transportation to the hospital for the plaintiff at his request on at least twenty (20) occassions. The plaintiff while not agreeing in toto with this account, agreed that the defendant company had provided him with such transportation at his request on a number of occassions. The evidence of Mr. Edwards was allowed to go unchallenged and I am minded therefore to accept his account with the result that the claim is allowed only in respect of forty-nine (49) visits and the sum recoverable under this head is therefore limited to $1,960.00.

(iii) Loss of pants and shirt

Although these two items were claimed separately they can be conveniently dealt with together. They are not disputed and the evidence of the plaintiff supported the fact that they were both damaged in the incident and that the amount of $120.00 and $60.00 which he valued them for are consistent with the sums pleaded. They were allowed at the sums pleaded.

(iv) Cost of Medical Examination and Reports

The above items appear under this head as being part of the claim for special damages and claiming the sums of $50.00 and $750.00 respectively are not allowed. Neither of these costs have a direct relationship to the incident out of which the claim arose. The cost of the reports can be seen as being costs incurred by the plaintiff as part of the preparation for the hearing of the claim and costs which would ordinarily fall to be recovered by way of attorneys costs upon a taxation following judgment. Such expenses to be recoverable would be for example sums expended by way of hospitalization and medical treatment as well as medication and other incidental expenses consequential upon the injury suffered. These sums are for the reasons given, therefore, not allowed.

(v) Loss of Earnings

As this item represents the bulk of the claim as well as the final item in the special damages claim it is best left to be considered at this stage.

There is no issue that the average net income for persons in the employment category of the plaintiff between 1985 and 1992 is $21,150.00. The total loss of earnings at the date of completion of the hearing in July 1992 is therefore $160,387.50. Issue is taken, however, as to whether the plaintiff is entitled to recover this entire sum for loss of earnings or whether given the authority of James vs. Woodhall Duckham Construction Co. Ltd. (1969) 2 All. E.R. 794 relied on by learned counsel for the defendant he ought to be limited in his entitlement to his actual and proven loss. To borrow the word of Lord Justice Winn in the case cited which words I adopt as my own:-

> (p. 798) "I agree that as Salmon, L.J. has said a claim for special damages must be based on an affirmative proof that it was the tort of the defendants which prevented, during the period in respect of which the claim is made the earning by the plaintiff of his pre-accident wage or any part of it."

In this regard the submission of learned counsel for the defendant that given the evidence that the plaintiff was capable of earning some income from August 1985 or certainly by January 1986 has considerable merit. Following the accident the evidence is clear that the plaintiff worked at the defendant's plant at Hunts Bay for six weeks at a salary of $200.00 per week. Dr. Jackson was also of the opinion that apart from the injury to his right hand, the plaintiff was a person who is otherwise in in a physically fit condition. Given the evidence therefore, which supports the fact that the plaintiff was capable of some form of work from August 1985 the efforts on his part to seek employment have been so few and far between as to prompt learned counsel for the defendant to describe these attempts as being lackadasical conduct on his part. On the basis that he is required to take some steps to mitigate his loss and in the light of the evidence of Dr. Jackson as to his general physical condition his claim under this head falls to be reduced to the extent that with some more genuine efforts on his part the plaintiff could at least have been capable of earning the minimum wage despite his present condition. In this regard the submission by learned counsel for the defendant that the claim for loss of earnings up to trial ought to be reduced by the sum which the plaintiff was capable of earning as income from January 1986 has some merit. The sum of $200.00 per week representing the amount which the plaintiff earned while employed to the defendant for six (6) weeks will be used as the base figure. This sum when calculated yeilds an income of $10,400.00. The period under review being from January 1986 to July 1992, amounting to six years and seven months when computed amounts to a gross sum of $68,466.66. To this sum is to be added a further amount of $5,287.50 being salary paid to the plaintiff for the period January to March 1985. The result is that the total sum deductible from the net earnings of the plaintiff for the period under review is as follows:-

1.	Potential earnings	$ 68,466.66
2.	Salary - January to March 1985	5,287.50
3.	6 weeks salary received at $200.00 per week	1,200.00
	Total	$ 74,954.16

The award for loss of earnings is therefore as follows:-

1.	Total loss of earnings from January 1985 to July 1992	$ 160,387.50
2.	Less income both actual and potential	- 74,954.16
		$ 85,433.34

Learned counsel for the plaintiff submitted that additional awards of $159,120.00 for future household help and $12,000.00 for psychiatric treatment ought to be allowed. The former is not allowed for reasons predicated along similar grounds to that given for limiting the award for extra household help to March 1987. The latter cannot be seen as having any direct relationship to the accident suffered by the plaintiff but as being more the result of the long and protracted period that the claim has taken in being brought to the stage of a court hearing and this when coupled with his prospects of obtaining an award in his favour. As the evidence then revealed, although the incident took place in November, 1984 the plaintiff took no steps to consult Dr. Irons until in 1989. This was after the claim had been filed and the matter at that stage was a contested suit. In that respect having regard to the long lapse of time almost five years there could be no nexus between the injuries and the plaintiff's mental state at the time of Dr. Iron's examination and any such claim for compensation must fail as being too - remote.

Also thrown up for good measure and conveniently considered at this stage as part of the plaintiff's claim was a claim for 'reduction of enjoyment of sexual intercourse and sexual libido". The veiled suggestion being that the injury to the plaintiff's hand had resulted in him becoming impotent or that his sexual prowess had been somewhat affected. The fact that from March 1987 on the plaintiff's own admission he was enjoying an active and intimate sex life with his former household helper, which has now produced two children puts paid to any genuiness as to this claim. The total sum recoverable as special damages is therefore $94,533.34.

General damages

The three doctors who examined the plaintiff and canvassed an opinion as to the degree of his disability as a result of his injuries were Dr. Horace Jackson, Dr. Leighton Logan and Dr. Guyan Arscott. They are all plastic surgeons and their assessments varied from a high of 60% (Dr. Jackson) to a low of 40% (Dr. Logan). An approximate mean average of 50% will therefore be used as the criteria in assessing the

damages to be awarded for pain and suffering and loss of amenities. When the medical evidence is examined the claim for general damages falls to be considered under the following heads:-

1. An award for corrective surgery
2. An award for pain and suffering and loss of amenities
3. An award for loss of future earnings

Corrective Surgery

The plaintiff was recommended for corrective surgery to his right hand following examinations carried out by Dr. Horace Jackson and Dr. Guyan Arscott. The plaintiff was, however, seen by both doctors at periods which varied by as much as several years apart. Dr. Jackson first saw the plaintiff in June 1985 with an updated assessment for court purposes in November 1990. Dr. Arscott's examination on the other hand was conducted in July 1992 shortly before the hearing into this matter was concluded. Given the evidence of these two eminent plastic surgeons there is no issue as to the fact that the plaintiff's right hand was seriously injured and warranted the need for corrective surgery and that either doctors has the necessary skill and competence to carry out the surgical procedures required. Indeed their opinions are in agreement as to most areas varying only as to the procedure to be adopted in one area of the affected limb. Dr. Jackson would utilise the tissue expansion method in respect of all the affected areas of the hand, whereas Dr. Arscott would employ that method only in relation to a scar on the plaintiff's right forearm. He prefers the direct revision method for the scar over the arm being of the opinion that that site is unsuitable for the use of tissue expansion. Dr. Jackson for his part, with the advent of the tissue expansion method sees this new state of the art procedure as rendering all other former methods obsolete. Dr. Arscott who has utilised both procedures and who has been using the tissue expansion method since 1984 does not, however, share Dr. Jackson's view. He expressed the view that there were other methods still available besides tissue expansion and that he usually would choose that which was most suitable to the patient bearing in mind the location of the scar being treated. While not taking anything away from the undoubted competence of Dr. Jackson I found the opinion of Dr. Arscott to be more acceptable. It is of significance that neither counsel sought to take issue with his opinion. Learned counsel for the plaintiff elected to accept Dr. Arscott's estimate of the cost of corrective surgery as being that to be awarded

under this head as to which of the two estimates are the more reasonable it is in the area of the estimated costs for the corrective surgery that the variation between both doctors is at variance to a marked degree.

In January 1992 when he gave evidence Dr. Jackson deponed to the following costs which given the rising costs due to inflation a factor which he acknowledged at that time, his estimate was as follows:-

1.	Anaesthetic	$ 12,000.00
2.	Hospital	25,000.00
3.	Doctors and nurses	270,000.00
4.	Tissue expanders US$1,200.00 converted to Jamaican at a rate of $22.50 to US$1.00	27,000.00
		$ 334,000.00

Dr. Arscott's evidence in July 1992 when his estimate of the costs included the entire surgical management of the plaintiff and including surgery to his palm was as follows:-

1.	Cost of 1 tissue expander US$600.00 converted at the rate of $22.50 to US$1.00	$ 13,500.00
2.	Surgeons fee	50,000.00
3.	Anaesthetic fee	20,000.00
4.	Hospital cost	20,000.00
5.	Assistant surgeon fee	12,000.00
6.	Follow-up treatment	5,000.00
		$ 120,000.00

The evidence of Dr. Arscott did however, vary to some degree as before giving his breakdown of the costs of surgery he had given an estimate of $130,000.00. This would appear in the circumstances to have been more in the nature of an educated guess and the sum of $120,000.00 which indicated the estimated costs item by item is the sum which ought to be accepted. Apart from this observation, of more significance is the great disparity in the costs between the estimates given by the two doctors. While not taking anything away from Dr. Jackson (he does operate from his own state of the art private clinic with all the necessary ultra-modern facilities) I am of the view that what the plaintiff is in need of is the services of a skilled and competent plastic surgeon and he has this in Dr. Arscott and this at less than half the cost than that estimated by Dr. Jackson. As both counsel are at one in their submissions in accepting

Dr. Arscott's estimate and this being in the circumstances the more reasonable of the two, that will be the sum awarded for corrective surgery.

Pain and Suffering and Loss of Amenities

The injuries suffered by the plaintiff was in the light of the medical evidence of a serious nature. The plaintiff no doubt experienced immense pain when his hand went into the machine and the pain would have been no less intense when his hand was being released from it. He was hospitalised for some twenty-six (26) days and following his discharge he had to visit the out-patient's clinic at the Kingston Public Hospital on many occassions, although the medical evidence fixes the disability to the plaintiff at an approximate figure of 50% the plaintiff is quite capable of performing all personal functions for himself such as bathing and dressing himself. He can also write with his injured hand and ride a bycicle.

In considering an award for general damages under this head it must not be forgotten that the plaintiff is also being awarded special damages for loss of earnings up to the date of trial. In this regard it is now well settled that such an award has the effect of reducing the award for general damages.

Learned counsel for the plaintiff cited the following cases:-

1. Leroy Mills v. Rowland Lawson and Keith Skyers reported at volume 3 of Mrs. Khan's Recent Personal Injury Awards p. 124
2. Alvin Smith v. Lowell Prince volume 1 p. 100 of the same work (referred to supra).

This last case in my view is of no assistance in the light of my earlier observations as to this aspect of the claim. Based on the 20% permanent partial disability in the Mills case and the award of $50,000.00 on 25th January 1989 using a scale upwards of 3 and allowing for the effects of inflation learned counsel submitted that a reasonable award would in the circumstances be $465,000.00.

Learned counsel for the defendant on the other hand cited the following awards:-

1. Icilda Lammie v. George Leslie C.L. 098/84 reported at p. 128, volume 3 of Mrs. Khan's work
2. Stanley Campbell v. Linton Roger C.L. 240/80 reported at p. 126, volume 3 of Mrs. Khan's work

3. Leroy Mills v. Roland Lawson and Keith Skyers
C.L. M.497/87 reported at volume 3 p. 124 of
Mrs. Khan's work.

Using the awards made in these cases learned counsel submitted that a reasonable award in the instant case if made in 1990 would amount to $70,000.00. When the consumer price incides is resorted to and applied to this sum to convert it into the money of the day the result would be an award in July 1992 of $143,188.59.

I must confess that given the medical evidence in the instant case and the assessment of the plaintiff's condition which averages out at a 50% permanent partial disability of the right hand, the award suggested by learned counsel for the defendant is too low. I also regard that suggested by learned counsel for the plaintiff as being too high. A case which offers some guide is C.L. G104/89 Laurel Garrick v. Roland King an unreported judgment of this court delivered on July 12, 1990. In that case the plaintiff a graduate teacher suffered serious injuries to her spine and left hand when a mini-bus overturned with her. These injuries were assessed at 25% disability of the whole person which converts to the 50% permanent partial disability suffered by the plaintiff in the instant case. An award of $140,000.00 for pain and suffering and loss of amenities was accepted by the parties. I would in the circumstances regard a sum of $250,000.00 as being a reasonable award for pain and suffering.

Loss of Future Earnings

Although it is not being disputed that the plaintiff suffered a serious injury to his right hand in other respects he is in a physically fit condition. When one examines the submissions being advanced by learned counsel for the plaintiff one could easily have concluded that the plaintiff had been reduced to a state of paraplegia as a result of the injuries he suffered on 28th November 1984. Given the evidence, the plaintiff's entitlement under this head will be an award based on his reduced earning capacity and not a total loss situation as sought for in the submission of his attorneys. It has already been recognised that his net income over the period under review was $21,150.00 yearly and this will be the multiplicand. A reasonable multiplier given the plaintiff's age of 40 years would be 10 years purchase. When this multiplicand is applied to the years of purchase this yields a gross sum of $211,500.00. This sum, however, falls to be reduced by the amount that the plaintiff would be capable of earning over the period. In this regard the national minimum wage has been recognised

by our Court of Appeal as a satisfactory guide in determining the minimum amount that a worker who has no fixed income would be capable of earning for a 40 hour week. Given the fact that the plaintiff's salary for one year would be $15,600.00 after the usual statutory deductions of N.I.S. $377.00, Income Tax $290.33 and Education Tax $304.46 the result is a net award of $14,316.00. When the multiplier of 10 years purchase is applied this yields a sum of $143,162.10. This sum falls to be deducted from the gross of $211,500.00 leaving a balance of $68,337.90 which is the amount awarded for loss of future earnings.

Submission have been advanced by learned counsel for the plaintiff in respect of an award of interest at the commercial rate. This in my view has no merit and is refused. The fact that damages have been awarded computed in the money of the day as well as the possibility should an application be made for an award of interest to the date of this judgment, renders any claim for interest at the commercial rate as being speculative. In that regard Central Soya v. Junior Freeman and the principles and guidelines laid down by the Court of Appeal in that case remains authorative and binding on this Court. In conclusion therefore the damages for the plaintiff have been assessed as follows:-

1.	Special damages		$ 94,533.34
2.	General damages being:-		438,337.90
	a) Corrective Surgery $ 120,000.00	)	
	b) Pain and suffering and loss of amenities 250,000.00	)	
	c) Loss of future earnings 68,337.70	)	$ 532,871.24

With costs to be agreed or taxed

On 8th January, 1993

Mrs. Margaret MaCaulay holding brief for Mr. Terrence Ballentyne, asks for:-

1. Interest on judgment
2. Order for costs to include three additional days costs in lieu of oral submissions in the light of written submissions having been prepared by counsel. No objections by other side to costs in lieu of oral submissions, suggesting that such order be limited to one day's costs.

Ordered that costs to the plaintiff to be agreed or taxed and to include two additional days costs in lieu of oral submissions. Interest awarded on special damages at 3% from 28th November 1984 to 8th January, 1993 and on general damages at 3% from date of service of the writ of summons 5th April, 1988 to 8th January, 1993.

Certificate for two counsel granted.

Further ordered that principal and interest of sums paid into Court in the said matter be paid out to the plaintiff's attorneys-at-law.