IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 00687

BETWEEN	**NOEL DAVIS**	**CLAIMANT**
AND	**TANK-WELD LIMITED**	**DEFENDANT**

Miss Christine Hudson instructed by K.C. Neita & Co., for the Claimant
Mrs. T. Madourie instructed by Messrs. Nunes, DeLoen, Scholefield & Co., for the Defendant.

GENERAL DAMAGES - LOSS OF FUTURE EARNINGS - MULTIPLICAND/MULTIPLIER, HANDICAP ON THE LABOUR MARKET- COST OF FUTURE MEDICAL CARE - FUTURE COST OF HELP - OVERTIME PAYMENTS

Judgment delivered on 20.4.2010

Heard on: 10/3/2010; written submissions received

MORRISON, J

The Claimant, a mason, was 32 years old in 2009. In February of that year he filed a suit against the Defendant asserting that, while in the employment of the Defendant he was assigned to carry out certain duties on a roof. While he was so engaged in that dynamic he held on to the Jamaica Public Service Company Limited transmission power line which resulted in electric burns to his person. He suffered shock and fell to the ground from a height of 30 feet to his further hurt and detriment.

Some (9) medical reports were generated as a result of his attendance on several doctors. From the report of the University of the West Indies dated November 28, 2007 under the signature of Dr. Crichlow, MBBS, the Claimant was assessed as having 50% electrical partial thickness burns. He was co-managed with Plastic Surgery.

He then saw Dr. Guyan Arscott M.B., B.S., FRCS (Ed), Cosmetic and Reconstruction Surgeon, whose report is dated April 28, 2008. On examination the Claimant was found to have obvious residual scars and blemishes, as a result of burns to his face, burns to the anterior chest, burns over his anterior abdominal wall, burns over his upper and lower back, on the upper and lower limbs, over the upper third anterior aspect of his right leg and over the left lower limb.

From his findings and prognosis Dr. Arscott says that the burnt areas suffered partial and superficial thickness deep enough "to involve the cutaneous nerves to the skin." This he opines "can result in an indefinite period of itching and even pain."

The Claimant next saw Dr. Garth Rattray, M.B.B.S. (UWI) MCCFP. His report is dated October 20, 2009. On his examination of the Claimant he found him to have healed burn scars. Significantly, says Dr. Rattray, this Claimant was unable to stand fully erect because of his back pain. He could not forward bend without complaining of significant pain and stiffness.

Over several visits by the Claimant to Dr. Rattray the pain unabated in the result that he was referred to Dr. Walton Douglas, Orthopaedic Surgeon. It is more than noteworthy that Dr. Douglas gave the Claimant a rating impairment of 8% of the whole person due to the fractures of the lumbar spine. ***(Emphasis mine)***

Further, says Dr. Douglas, "he will require a very prolonged and intense period of physiotherapy to his back. An estimated (40) sessions over a 4 month period is considered a trial period. ***(My emphasis).*** Dr. Douglas was optimistic as to the pain reduction probabilities and he opined that the Claimant "will not be able to do strenuous activities."

The medical trauma of the Claimant did not culminate and the panoply of experts increased. As such he was seen by Dr. Grantel Dundas, FRCS, Consultant Orthopaedic Surgeon. Four reports were produced. They are dated December 20, 2009; January 10, 2010; February 10, 2010 and March 8, 2010.

Of note Dr. Dundas found that in respect of the cervical spine and the thoracolumnbar spine that the Claimant's movements were slow and deliberated. Dr. Dundas diagnosis entertained depression and query lumbar disc disease. Radiographs were done and a MRI scan of the lumbar spine was recommended. The latter revealed that the Claimant had a 19% impairment of the whole person. Thus the impairment ratings of Dr. Douglas and of Dr. Dundas were less than congruent. It is the deliberative and unchallenged opinion of Dr. Dundas that "Dr. Douglas" assessment is based solely on a compression fracture without taking into consideration the intervertebral disc pathologies that exists ...."

Finally, from the March 8, 2010 report, Dr. Dundas advises that the Claimant had reached maximum medical improvement. He opined that although the pathologies in his spine do not carry a surgical mandate yet the "non-operative intervention to same will not alter the structural pathologies."

The Submissions

From the ensuing contest the pose of the questions in argumentation concerns the appropriate sum that should be awarded to the Claimant for his injuries.

The Claimant asks for $8,000,000 for general damages, $4,351,990 for loss of future earnings capacity, $500,000,000 for handicap on the labour market, $250,000 for costs for future medical care and $250,000 for future extra help. This marks the point of departure between the disputants they having only agreed the special damages claim of $560,294.93.

From the agenda of contentions the Claimant asks this Court to embrace the authorities of **Merdella Grant v. Wyndham Hotel Company,** reported at Khan, Volume 4 page 194; **Alfred Thomas v. Pastry Specialist T/A Allans Pastry**.

The Defendant has sought to disturb the ground of reason of the Claimant by challenging the Claimant's cited authority of **Grant**, *supra*. They say that the Claimant's repose in that authority attempts to balance on the peak of contradiction. However, they say, that the damages claim is unrealistic and unreasonable. Having rejected **Grant's** case, *supra*, the Defendant proffers **Rudolph Bailey v. Insp. Preddie and Ag. Cpl. Errol Simms and The Attorney General** reported at Khan, Volume 5, page 260**; Robert Thompson v. Cedar Construction Co. Ltd**., reported at Khan, Volume 4, page 113; **Lincoln Nembhard v. Wayne Sinclair and Linton Harriott,** reported at Khan, Volume 6, page 177.

As to the issue of the multiplier the Defendant cited the authority of **Campbell v. Whylie** (1999) 59 WIR 327. Thus, they propose a multiplier of 7, whereas the Claimant asks for a multiplier of 12 based on **Godfrey Dyer v. Stone,** SCCA 7 of 1988. From the

Claimants written submissions and list of authorities reliance was also placed on the following cases including the **Grant case** and the **Thomas case,** *supra.* **Pogas Distributors Ltd. et al v. McKitty** reported at Khan, Volume 4, page 227; **Marie Jackson v. Glenroy Charlton and another**, reported at Khan, Volume 5 at page 167; **Stephen Clarke v. Olga James Reid**, SCCA 119 of 2007; **Richard Rubin v. St. Ann's Bay Hospital and The Attorney General** contained in Harrison and Harrison on Assessment of Damages for Personal Injuries, Revised Edition, page 227; **Walter Dunn v. Glencare Alumina Ja. Ltd. T/As West Indies Alumina Company (WINDALCO),** reported at Khan, Volume 5 at page 179; **Campbell & Others v. Whylie (1959) WIR 327; Icilda Osbourne v. George Barned & Others**, unreported first instant ..., by Sykes, J heard on February 2 and 17, 2005; and finally, **Geest Plc v. Monica Lansiquot**, Privy Council Appeal No. 27 of 2001 delivered on 7th October 2002.

I feel unconstrained to say that I do not propose to deal with all the cited authorities, as I think they are but instances of the applicability of general principles of assessment. As of such it is to the general principles that I turn for a resolution of the issues as raised through the submissions.

The Law

To begin with, it is the aim of compensatory damages in general to restore the Claimant to the position he would have been in if the tort had not been committed. Thus expressed, the Claimant is entitled to compensation for the past, present and future loss that are consequent on his actionable personal injury.

Allied to that principle is another that damages must be full and adequate: **Fair v. London and North Western Rl., Co.;** (1869) 18 WR 66.

Another concomitant principle is that damages are assessed once and for all: **British Transport Commission v. Gourley** (1956) AC 185. In the words of Lord Reid damages must be assessed as a lump sum once and for all, not only in terms of loss accrued before the trial but also in respect of prospective loss.

It is a principle of assessment of damages, according to John Munkman's work in Damages for Personal Injuries and Death, 16th Edition, that "The Court does not look for precedents, but for a general guide to the current range of damages." Also, it does not look at particular cases, but at the general level of recent assessments in cases which are fairly close to the case under consideration.

Thus, in **Pogas Distributors Ltd; et al v. McKitty, SCCA 13/94, Forte Ja.** warned against looking at percentages in assessing whole person disability but instead directed that the assessment should be canalised to reflect on the period of total incapacity and the permanent partial incapacity.

In the instant case the Claimant was referred to and seen by a number of experts. There is a difference, as between Dr. Douglas' and Dr. Dundas' reports as they relate to the whole person disability assigned percentages. Dr. Douglas puts it at 8% whereas Dr. Dundas ascribes to it 19%. Of the two, Dr. Dundas' report is to be preferred. He opined that Dr. Douglas's report had failed to assess the presence of the spasms in the sacrospinalis muscle with central tenderness, restricted straight leg raising, depressed deep tendon reflexes and loss of thigh circumference which all support the diagnosis of lumbar spinal, lumbar vertebrae and disc derangement which is confirmed in the MRI report. The referenced report was elicited by the Defendant's attorney and is dated February 10, 2010. Later, Dr. Dundas issued a final report in

which he indicated that the Claimant had reached maximum medical improvement; that although the pathologies in his spine do not carry a surgical mandate that the Claimant may benefit from physical therapy or the installation of Epidural Steroids injection for relief of his pain yet the prognosticated benefits "will not alter the structural pathologies which exists."

It is against that backdrop that I now turn to the report of Physical Therapist Mrs. Joan Lorne-Rattray. It is dated October 27, 2008. Among her observations are impairment to the Claimant's left shoulder, trunk, poor balancing and burning sensations in the chest area. She remarked that the Claimant was independent of all activities of daily living.

After (12) therapy sessions her prognosis was that the Claimant had achieved 80% recovery. She projected that the Claimant could return to work and do less strenuous activities. Her considered view is that through work-hardening coupled with core strengthening activities that the Complainant will be able to resume his previous level of work.

I only need to re-state the vastly superior and reliable report of Dr. Dundas, on whom I rely, in deflecting the physiotherapist's expectation of the Claimant's being able to resume his previous level of work. Dr. Dundas says that in spite of the benefits of physical therapy and steroidal injections that the structural pathologies will not be altered.

Of the two injuries suffered by the Claimant it is obvious that the back pain injury is more serious than the burns to his person. I am therefore cognizant that in assessing

the damages I am to assess the more significant injury and then to incorporate into such an assessment an amount for pain and suffering as a result of the other injury.

In **Merdella Grant v. Wyndham Hotel Company,** *supra,* a Registered Nurse, 54 years old at the time of the incident, fell backwards as a result of the chair on which she was sitting collapsed beneath her. She suffered pain and immobility as a result of lumbar strain in association with fracture of the traverse process of the 5th lumbar vertebra. She was assessed as having permanent partial disability rating of 25% of the whole person. It was the expert's considered view that her condition would worsen and that she would need physiotherapy for the rest of her life.

The assessment was done in 1996 and a sum of $1,400,000.00 was awarded. At today's value that award translates into $5,287,000.00.

Comparatively, and mindful of the stricture admonished upon by Forte, JA in the **Pogas** case, I refrain from matching up the percentage whole person disability ratings. I remind myself that the structural pathologies of the Claimant in the instant case will remain unaltered. There is no denotational difference between saying, as in the **Grant** case, supra, that the Claimant would need therapy for the rest of her life, that she would have to retire early and choose a sedentary job for the future and that of the current Claimant whose structural pathologies are life affirmed. He not only has a longer period of pain and suffering to negotiate being a much younger person than **Grant** but his physical impairment has imparced his virility and his aesthetic desirability. It seems to me that the upgraded award in **Grant** will need a further upgrade to take into account the Claimant's stark, staring reality.

In **Marie Jackson v. Glenroy Charlton and George Harriot,** *supra,* the Claimant being 24 years old in 1998 suffered from pains in the neck, back, left rib cage and left elbow, and severe pains persisted to the neck and lower back. Her permanent partial disability was assessed at 8% whole person she having done surgery. She was awarded $2,560,000.00. This case appears to be an anomaly and is such I shall not pay undue regard to it especially in light of the criticism levelled at it by the Court of Appeal in **Stephen Clarke v. Olga James Reid,** *supra.* In this latter case the hapless 60 year old Claimant was involved in a motor vehicle accident which left her with an impairment of 10% - 12% of the whole person. She suffered right buttock pain and weakness in the right lower limb that extended down to the right foot. She was awarded, at first instance, a sum of $4,000,000.00 for pain and suffering and loss of amenities. The Court of Appeal, through Harris JA was called upon to review the award. Interestingly, counsel for the Respondent argued that the Court had to look at the injuries sustained in context with the loss of the quality of life which the victim had suffered.

Against that background Harris JA remarked that, "it is always difficult to find comparable cases when it comes to making an appropriate award but this Court must strive to achieve a level of uniformity when awards for personal injuries are made."

In the up shot the award made at first instance was reduced it being on the high side as noted by the Court of Appeal.

The case of **Richard Rubin v. St. Ann's Bay Hospital and the Attorney General** is I find unhelpful being incomparable to the case at hand.

The cases of **Alfred Thomas v. Pastry Specialist; Walter Dunn v. Glencore Alumina Ja. Ltd.;** all concern incidents of the Claimant being awarded damages in respect of burns only.

In **Rudolph Bailey v. Insp. Preddie and Ag. Cpl. Errol Simms and the Attorney General,** *supra,* the Claimant required surgical intervention due to damage to the 11th thoracic vertebra upon the twelfth. He was diagnosed as having suffered a significant injury to the spine and to the knee as well. His spinal injury was assessed at 37%; his knee injury was assessed at 8% for a combined whole person impairment of 45%. He was awarded $2,000,000.00 for pain and suffering which in the money of today realizes the sum of $5,921,200.00.

Bearing in mind the dicta of Forte JA in the **Pogas** case, of not looking at percentages but at the total incapacity and the permanent partial disability, it is clear that the injuries to **Rudolph Bailey** were severe. Nevertheless, in the instant case the Claimant suffered from electrical burns that, according Dr. Arscott, "has no significant functional limitations to his limbs." In spite of what Dr. Arscott says I have to pay regard to the effects of the scarring, a point to which I have already alluded, surely beyond the extent of the itching and heat intolerance being experienced by the Claimant. A monetary value has to be placed upon that reality.

I am persuaded that the age of this Claimant, the scarring to his person, the lasting structural pathologies and the itching and heat tolerance all have to be factored in the assessment. Whereas I do not accept that a sum of $8,000,000.00 is, or can be, justified as being reasonable still I find that the sum of $5,500,000.00 as proposed by the Defendant low.

I place reliance on the **Grant** case it being more akin to the one at bar. As the updated award in **Grant** case is $5,300,000.00 without any other injury of note, I think that a further sum should be added on to reflect the loss of amenities occasioned by the scarring, itching and heat tolerance. In the end I take a sum of $6,500,000.00 as being reasonable as, with prudence, an investment of that lump sum will likely compensate for the Claimant's future projected discomforts. I only need remind myself of the trenchant words of Lord Reid in **Baker v. Willoughey, (1969) 3 All ER 1528 at p. 1532**: "A man Is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is his inability to lead a full life; his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned..."

Should this sum be discounted for want of mitigation of loss?

The thrust of the Defendant's submission is that any award of damages should be made to suffer diminution as the Claimant has failed to mitigate his loss. Bearing in mind that the burden of proof in establishing a failure to mitigate loss is on the Defendant **(Garnal Grain Co., Inc. v. HMF Faure and Fairclough Ltd and Barge Corp'n** [1967] 2A11 ER 353) the question is whether or not the Defendant has discharged its burden. The irrepressible evidence is from the medical report of Dr. Dundas and the Claimant himself in contradistinction to the opinion of the physiotherapist Mrs. Joan Lorne-Rattray. If it is remembered that Dr. Dundas says that epidural injections notwithstanding, that physiotherapy notwithstanding that the structural pathologies would not evanesce, I ask, in those circumstances what ought the Claimant to have done?

I fear that there has not been presented to me any reasonable cogent evidence of what he should have pursued and why. The award, I should think, ought not to be adjusted downwards.

Multiplicand/Multiplier

The Claimant asks for a multiplier of 12 while the Defendant asks for a multiplier of 7.

In **Campbell & Others v. Wylie** (1959) WIR 327 the Court of Appeal held that , "... 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. Khan's compendium on **Damages in Personal Injury Cases, Volume 4,** contains a useful guide as to how the multiplier is arrived at. From the above referenced material a linesman, Winston Pusey, aged 35 years received a multiplier of 10 for loss of future earnings. Similarly, Glenville Bell, a Hotel Waiter/Curio Vendor aged 31 received a multiplier of 10 in respect of loss of future earnings.

The rationale suggested by the Defendant for a multiplier of 7 is that the Claimant will be receiving a lump sum payment and as such the Court would overcompensate were it to adopt a higher multiplier.

The Claimant is antipodal in this respect. He posits that it is the certainty of the continuing nature of the loss which affects the choice of multiplier bearing in mind that he is a mason who, more likely than not, all things being equal, would have transcended the statutory retirement age of 65 years.

In an attempt to shore up their multiplier of 12 reliance was placed on **Campbell v. Whylie,** 1959 WIR 327. It suffices to say, without going into the particular of that case, that the multiplier of 12 adopted by the first instant judgement was reduced by the Court of Appeal to 7 on the basis that, "the respondent would, in all probabilities, have to cease working before she would normally do and ... lose the capacity to earn at all during those latter years." Since she would not lose her ability to earn in those early years the multiplier of 12 was reduced.

The Defendant also placed reliance on the **Campbell** case, supra, as well as on **Robert Thompson v. Cedar Construction Co. Ltd**., Khan, Volume 7 and on **Lincoln Nembhard v. Wayne Sinclair & Linton Harriott** reported in Khan's, Volume 4, page 177, in vindicating a multiplier of 7.

I take it that the principle to be applied here is that the Claimant, so far as the injury results in pecuniary loss, should receive full compensation for that loss. However, the remaining years of the Claimant's life, the multiplier, must bear the realism of contingencies. This I understand to convey the principle that a court must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury but must take a reasonable view of the case and give under all the circumstances a fair compensation.

With that guidance in mind and rejecting the inappropriateness of the **Campbell** case as well as the case of **Godfrey Dyer v. Stone,** SCCA 7 of 1998, I am of the view that the multiplier mined from **Nembhard's** case as well as the **Thompson** case is the preferred measure. Having said so, however, this figure of (10) as a multiplier, has to be reduced on the contingency principle. Thus, I arrive at a multiplier of 9. In this

scenario then, the multiplicand having been agreed at $15,216.75 per for fortnight, translates into a sum of 15,216.75 x 9 = $3,560,719.50.

Cost of Future Medical Care

The Claimant asks for a sum of $190,000.00 and a further sum under the head of damages: "Cost of further medical care/physiotherapy." However, for future medical care, save for the Claimant's summary claim I have not had the benefit of its predication nor have I had the benefit of the input of the Defendant. However, this was pleaded by the Claimant in his amended Particulars of Claim filed on February 22, 2010 and as it was not traversed it must be taken as accepted by the Defendant. Accordingly, I award the sum of $190,000.00 as pleaded.

The claims for overtime payments and the Claimant's transportation expenses were not prosecuted by the Claimant and are therefore disallowed.

Re: Handicap on the Labour Market

The leading authority on this aspect of the claim is **Moeliker v. A. Reyrolle & Co. Ltd.,** [1977] 1All ER 9 and **Smith v. Manchester City Council** (1974) 118 Sol. Jo. 597. 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. Applying that principle and on the basis of the medical report of Dr. Dundas I can find no countervailing reason why the sum of $500,000.00 should be disallowed

Cost of Future Medical Care

It is plain that this claim for it to have a basis it must be supported by expert evaluation. As such this claim is buttressed by the report of Dr. Dundas. However, I am mindful that in the past the Claimant had curtailed his physiotherapy treatment. Therefore I award a nominal sum of $100,000.00

Re: Cost of Future Extra Help

This head of claim is assessed on the basis of whether, when, and for how long. This cost will in fact be incurred. In **Willbye v. Gibbons [2003] EWCA CIV 372** Lord Justice Kennedy observed that, "all that can realistically be done is to increase to some extent the fund available to the [Claimant] to satisfy her need for assistance in the future..."

It is therefore a principle of application that where there are potential future care needs these are taken into account in a general rather than a specific manner. Thus, I embrace the Claimant's submission of $2,500.00 for (2) years, all things considered, and especially as this head of damages was not traversed by the Defendant. I therefore award the sum of $250,000.00

In the upshot and on a balance of probabilities I award judgment to the Claimant as follows:

a) Special damages as agreed with interest thereon at 3% from 13th October, 2007 to 20th April 2010.

b) General damages in the sum of $6,500,000.00 with interest thereon at 3% per annum from 24th February 2009 to April 20, 2010.

c) Future medical care in the sum of $190,000.00.

d) Loss of future earnings of $3,560,719.50.

e) Handicap on the labour market of $500,000.00.

f) Cost of future physiotherapy of $100,000.00.

g) Cost of extra help $250,000.00.

h) Costs to the Claimant to be agreed or taxed.