Judgment Book

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L G.149 of 1993

BETWEEN	TREVOR GOODWIN	PLAINTIFF
AND	WEST INDIES GLASS COMPANY LIMITED	DEFENDANT

Mrs. Jacqueline Samuels-Brown for the plaintiff
Frank Williams and Miss Paula Blake instructed by
Dunn, Cox, Orrett and Ashenheim for the defendant

Heard: January 10, 11 and 24; February 9 and September 30, 1996

PANTON, J.

The plaintiff was employed to the defendant as a grade two mould repairer. On August 18, 1992, while he was performing his duties, an accident occurred which resulted in injury to him. The nature of the injury eventually caused the defendant to make the plaintiff redundant on medical grounds. The date on which the redundancy became effective was December 12, 1993.

The injury sustained by the plaintiff has been diagnosed as acute traumatic spondylolysis with chronic lumbar strain. There is no deformity, but straight leg raising on the right is slightly restricted. Surgical stabilization is advised in order to prevent indefinite recurrent incapacitating pain.

In his claim against the defendant, the plaintiff has alleged that the defendant breached its statutory duty to maintain a safe system of work in its factory operations. Alternatively, the plaintiff alleges negligence and or breach of contract by the defendant. Nine particulars are listed. They include exposure of the plaintiff to risk of injury, failing to provide efficient equipment, and requiring the plaintiff to carry out his work using unsafe and defective machinery.

The defendant has denied any statutory breach, negligence or breach of contract. So far as the plaintiff's injury is concerned, the defendant pleaded that it (the injury) was "occasioned wholly or in part by a pre-existing medical condition namely spondylolysis of the fourth lumbar vertebra with sacralisation of the fifth lumbar vertebra and facet arthritis between the third and fourth lumbar especially on the left side". Further, or in the

alternative, the defendant pleaded that the plaintiff was the author of his own misfortune as he failed to make proper use of the equipment, a mould vice.

THE CAUSE OF THE ACCIDENT

In this matter, the Court's primary task is to determine the cause of the accident.

The defendant's principal activity is the making of glass bottles. These bottles are formed from moulds. From time to time, the moulds are damaged and it becomes necessary for them to be repaired. This is where the plaintiff comes in.

Moulds come in varying shapes and sizes, and a single one may weigh between sixty and ninety pounds. In repairing a mould, a welding torch is used. The repair is done by grinding the damaged areas, welding with calmonoy spray and grinding back to the original size. That is the description of the process as told to the Court by Mr. Wayne Johnson, the production engineer at the defendant company.

During the grinding process, the practice is to place the mould on bench vices which are part of the mould repairer's equipment.

The vice is situated at the edge of the worktable. It is bolted down. It cannot be operated from anywhere else on the table, according to Mr. Johnson. The mould which is about twelve to fourteen inches in height is clamped on top of the vice which is itself approximately eight inches above the table. The system in operation also requires the use of a chain to hold the mould to the vice. The chain is wrapped around the mould while the chain itself is held by the vice.

The plaintiff testified that the part of the vice that holds the chain is in the form of two jaws. On the 18th August, 1992, the vice that he was using had jaws which had no grip. The condition of this vice was not unknown to the plaintiff. According to him, he had noticed it for years and had on several occasions brought it to the attention of his supervisor as well as the inspector. There were other vices in the factory, but their condition was worse so he had no better choice.

While the plaintiff was grinding the mould, it slipped out of the vice which he said he had tightened. By reflex, he said he tried to catch the mould but it was too heavy and it carried him down in the direction of his left side. While doing so, he heard as if something had burst in his back.

Mr. Noel Dawson, a foreman in the moulding department, who was standing beside the plaintiff at the time of the accident, confirms the fall of the mould and the attempt by the plaintiff to catch it. Mr. Dawson further confirmed that the grooves on the jaws of the vices were all worn and smooth. He said that the vices were "not efficient." He described their condition as "unsafe" and said that that situation had existed for a "long time, over a year."

It should be pointed out that Mr. Dawson is no longer employed to the defendant. He was made redundant in 1995. He said that he does not bear any resentment against the defendant as immediately before he was made redundant he had been planning to resign during 1996.

I accept the evidence of the plaintiff and Mr. Dawson on the manner in which the plaintiff received his injury. I also accept their evidence as to the prolonged state of disrepair of the vices.

The defence, through its very frank witness Mr. Wayne Johnson, production engineer, acknowledges receipt of complaints in relation to the vices. Most of the vices were indeed defective, he said. Unsuccessful efforts had been made to either replace them or the jaws. The defendant had recognized that the state of the equipment was so dangerous as to put the worker at risk. According to Mr. Johnson, the danger existed even in cases where the worker took care.

Learned attorney-at-law, Mr. Frank Williams, has urged on behalf of the defendant that the Court should find that the plaintiff contributed to the accident. According to him , the plaintiff did a most imprudent thing in trying to catch the mould as he ought to have foreseen that such an effort would have resulted in injury to himself.

Mr. Williams' submission overlooks, in my view, the fact that the action by the plaintiff was not one on which he had deliberated. He was concentrating on his work. His action was a reflex action. In that situation, I think it would be wholly unreasonable to attach any blame whatsoever to him. The defendant, it is, who should have foreseen that the plaintiff might have been injured in this way. Especially so when one considers the evidence of Mr. Johnson that it would have been considered a breach of the disciplinary code if a worker flatly refused to work the defective vice. Continued refusal over an extended period, he said, would expose the worker to the possibility of dismissal.

In the circumstances, it seems to me - and I so hold - that the plaintiff was not the author of his misfortune; nor did he contribute in any way to receipt of his injury. The pre-existing medical condition pleaded by the defence has also not been proven. Therefore, full liability has to be laid at the defendant's door.

SPECIAL DAMAGES

(a) Earnings as painter

The plaintiff is claiming damages for loss of earnings not only as a mould repairer but also as a house painter. In October, 1993, when the statement of claim was prepared, there was no mention in it of of his status as a painter. On January 10, 1996, I granted an amendment to the pleading in this respect. As it has turned out, the loss of earnings that the plaintiff is claiming as a painter is far greater than that suffered in respect of his regular job.

Two questions arise. Firstly, is the plaintiff a painter? Secondly, if he is, has he proven that he has lost the sums that have been particularized?

Mr. Noel Dawson, referred to earlier, told the Court that he knew that the plaintiff paints, and that he has purchased paint for him through a friend of his (Mr. Dawson's) at Berger, the well-known paint company. Mr. Dennis Salmon who has been a painter for thirty years also gave evidence that he and the plaintiff learnt the painting trade together. According to Mr. Salmon, the plaintiff continued to paint while he was employed at Brinks and with the defendant.

I accept this evidence and I find that the plaintiff is indeed a painter.

There now has to be an examination of the evidence to see whether he has proven the loss claimed.

The plaintiff has given evidence to the effect that his earnings as a painter ranged between $5,000.00 and $6,000.00 per week. Put another way, he was earning between $260,000.00 and $312,000.00 per year. As a result, his claim for the period September 1992 to December 1995 amounts to the grand total of $1.96 millions. The magnitude of the claim is recognized when it is considered that the claim for loss of earnings from his regular job for the period August, 1992 to January, 1996, including overtime is for less than half million dollars.

As a mould repairer, the plaintiff was required to work on shifts. One of these shifts was from 10.00 p.m. to 7.00 a.m. According to the plaintiff, whenever he worked on this shift, he "had the whole day to work", that is, to paint. Apparently, sleep was not part of the equation in his life. He would sometimes give up a shift so as to paint. He did no painting job in 1993. He took jobs in 1994 and 1995, but he gave them to others to do, collecting from them a portion of the money. He narrated many instances of jobs that he had received and done, albeit done through others whom he had to pay. The monies quoted by him are relatively staggering.

I find it difficult to accept that the plaintiff used to earn the sums of money that he has mentioned; nor do I accept that he has taken since his injury the jobs that he mentioned in his evidence. He attempted to secure confirmatory testimony in this respect from Mr. Dennis Salmon but I must say that I was totally unimpressed. In fact, Mr. Salmon's evidence was violently in conflict with the plaintiff's on quantum.

Assuming that the plaintiff has earned the monies that he mentioned or has taken painting jobs that carry those rewards mentioned. I would have expected tangible evidence thereof. He feigned ingnorance when learned attorney-at-law Mr. Williams inquired of him as to whether he had any records. He paid no taxes on what he earned, which I suppose is not strange for a significant portion of the nation's population. He would, he said, give his wife a portion and save a portion in the bank. He said that he had proof of the deposits

of these sums in the bank. Alas, he never entrusted the evidence to my eyes. In the end, I was presented with nothing other than the plaintiff's say-so. Not even a receipt from a paint store, or from a worker. "Neither a jot nor tittle of documentary proof in support of this claim", as Mr. Williams has submitted. Indeed, on this point, I am in no better position than **Lord Chief Justice Goddard was in when he was moved to say: "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying:"This is what I have lost; I ask you to give me these damages." They have to prove it." [Bonham-Carter v. Hyde Park Hotel Ltd. (The Times Law Reports Vol. 64 p. 177)].**

According to the plaintiff, he lost in 1995 alone approximately $279,500.00 as a result of having to pay persons to do work that he would normally have done. This sum is exclusive of the US$150,000.00 that he claimed he could have earned with Mr. Salmon on a job at an apartment building on Shortwood Road.

As said earlier, I am not prepared without more to accept as fact the loss of such huge sums. That is not to say that I do not accept that the plaintiff has suffered some loss. It is probable that he has suffered some loss. As a result I make an award of $200,000.00 to cover the period up to judgment.

(b) Earnings as a mould repairer

It seems reasonable to assume that had the plaintiff not received the injury, he would not have been made redundant. The medical evidence has been briefly referred to earlier. Implicit in the language of exhibits four and five (medical reports) is a situation in which the plaintiff will continue to experience recurrent incapacitating pain until surgery has been performed. After such surgery, he will need six to nine months to recuperate.

On the basis of this evidence, given the nature of the injury, I am of the opinion that the plaintiff is entitled to his wages up to August of next year by which time surgery and recuperation ought to

have taken place. From this amount is to be deducted the redundancy payments as the plaintiff ought not to benefit twice.

(c) Miscellaneous

The other items that are properly special damages are not in dispute and are awarded: that is, the cost of medication already had, and of doctor's visits.

GENERAL DAMAGES

Under this heading fall pain and suffering and loss of amenities, the cost of future medical treatment and loss of future earnings.

(a) Pain and suffering and loss of amenities

The plaintiff has undoubetedly suffered pain as a result of his injury. He will, it seems, intermittently experience pain until his operation. As said earlier, he should be fully recovered by August 1997.

The Court notes that the plaintiff said that he can no longer play "ball and bat". In my judgment, this amenity is not one that the plaintiff has lost. He is fifty years old. One would be hard put to find a Jamaican male of that age who is anything other than a mere spectator where cricket is concerned.

The plaintiff also said that his sexual performance and enjoyment have suffered as a result of his injury. I find that it is unlikely that the injury has affected him in this way, yet there has been no medical evidence to support such a claim. It is hardly likely that the distinguised doctors who attended to him would have missed this feature in relation to his case.

Learned attorney-at-law, Mrs. Samuels-Brown, relied on the case **Mason v. National Packaging Co. [C.L. M052 of 1978 - delivered on June 30, 1978]**, details of which are in Volume one of Mrs. Khan's work at page 129. In that case, the plaintiff who suffered a fracture between the fifth lumbar vertebra and the sacrum allowing the spine to slip forward was awarded the sum of twenty-four thousand dollars ($24,000). This, according to Mrs. Samuels-Brown, when converted using the consumer index for November 1995, would provide for an award of eight hundred and eighty thousand three hundred and nineteen dollars and ninety cents ($883,319.99).

In my view, there are several other cases in the said volume of Mrs. Khan's work which are probably nearer to the mark so far as the injuries are concerned. For example, **White v. J.O.S. [C.L. W053 of 1977 - delivered on November 9, 1979.]** In that case, a female, fifty-three years old suffering from fracture of spinous process of distal sacrum, and acceleration of degenerative disease of the lumbar spine was awarded nine thousand dollars [$9,000.00]. Further, in **Brown v. J.O.S. [C.L. B272 of 1975 - delivered on December 20, 1977,** a thirty-nine years old female with a lumbar disc problem, with spasm in the back, sprain of the lumbar sacral joint, and permanent recurring back pains was awarded six thousand dollars [$6,000.00] by Campbell, J. (as he then was). So far as consistency of awards is concerned, it would seem that these latter cases cannot be ignored. In the circumstances as I have found them, it seems to me that an award of four hundred thousand dollars [$400,000.00] is quite adequate and appropriate. I have taken into consideration the important fact that there is no permament disability noted by the doctors. In addition, there is the clear probability of full recovery after the operation.

(b) Future earnings

This calls for nothing more to be said beyond that which has already been said in dealing with the plaintiff's earnings under the heading "Special Damages". The earnings in the future are calculated to August, 1997. The figures supplied to the Court indicate a net payment of one hundred and seventy thousand, six hundred and forty-three dollars and thirteen cents [$170,643.13] to the plaintiff as earnings for the period in his capacity as a mould repairer. So far as his earnings as a painter are concerned, I award ninety thousand dollars [$90,000.00].

Finally, it was said that the plaintiff had a duty to mitigate. All plaintiffs do have that duty. However, it is difficult to envisage how the plaintiff could have mitigated his loss while he was in pain. Employers can hardly be expected to employ persons who are in pain. It is quite significant that the defendant itself did not offer the plaintiff another position.

Judgment is entered for the plaintiff as follows -

General Damages

1.	Pain and suffering and loss of amenities	:	$ 400,000.00
2.	Future medical treatment	:	414,300.00
3.	Loss of future earnings - to August, 1997	:	260,643.00
		Total	$1,074,943.13

Interest is awarded on $400,000 at the rate of 6% per annum from the date of the service of the writ to September 30, 1996.

Special Damages

1.	Cost of medication	:	$ 1,000.00
2.	Cost of visits to the doctor	:	1,500.00
3.	Loss of earnings to date	:	467,243.20
		Total	$ 469.743.20

Interest is awarded at the rate of 6% per annum from August 18, 1992 to September 30, 1996.