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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1993/L157

BETWEEN	**VICTOR LOBBAN**	**PLAINTIFF**
A N D	**MICHAEL AMOS**	**1ST DEFENDANT**
A N D	**NEVILLE AMOS**	**2ND DEFENDANT**

Ainsworth Campbell for Plaintiff.

John Givans for the Defendants.

HEARD: 20th & 21st March, 2000, 4th May, 2000 26th February, 2001, 11th June, 2002 & 20th September, 2002

Dukharan, J.

In this action the Plaintiff claims to recover damages for negligence and/or breach of Employer's Liability against the defendants. The Plaintiff is alleging that on or about the 18th November, 1987 whilst in the employ of the defendants he was directed to work on a truck which fell off a jack thereby causing him to sustain bodily injuries.

The defence of the defendants is a denial that they breached any duty imposed on them by law. The defendants deny that the Plaintiff submitted himself to their direction and control. The defendants further contend and admit that there was a truck at the premises but that the Plaintiff was working on the said truck at the instance of the owner of the truck.

The Plaintiff in giving evidence said that he is a welder. On the 18th November, 1987 he was working as an apprentice welder for the first defendant Michael Amos, on a truck, with a next welder. This was on premises owned by the second defendant Neville Walker. He said the second defendant sent him to work on a truck and to build up a spring. While working under the truck it fell off the jack and fell on his foot causing a severe injury. He was taken to the Kingston Public Hospital where he was admitted and spent nine weeks. An x-ray revealed that he suffered a compound fracture dislocation of the right ankle joint resulting in a permanent impairment of 30% of the right lower limb, representing 15% of the whole person.

The plaintiff told the court that he was invited to the premises to work by the first defendant and owned by the second defendant. He said he was introduced to the second defendant by the first defendant who remarked that he liked hard working men. The plaintiff said he was working at the premises about two and half months before the incident happened.

He said that both defendants would direct him as to the work to be done. He was paid $80.00 per week by the first defendant.

In relation to the incident he said both defendants told him to do work on the truck and they were present when it fell off the jack and onto his foot. He said after the accident he got four weeks pay ($320.00) from Mr. Amos, the first defendant. He also said that the second defendant, Mr. Walker paid for his medical expenses after the accident and bought crutches for him. He also gave him $1000.00.

In cross-examination it was suggested to him that neither defendants were his employer. He denied that it was a Mr. Romily who had directed him to work on the truck. He said the jack was owned by Mr. Walker and he the plaintiff did not jack up the truck.

Dr. Adolph Mena, an Orthopaedic Surgeon gave evidence for the plaintiff. He told the court that the plaintiff suffered a compound fracture dislocation of the right ankle bone. This has resulted in a deformity of the ankle.

That was the case for the plaintiff.

Both defendants gave evidence. Mr. Neville Walker told the court that he is a businessman and a director of Triumph Car Specialists and Triumph Commercial Limited. These companies operated at 18 Elgin Road.

He said he has seen the plaintiff Victor Lobban but he was never employed to him or any of his company nor did he enter into any contract of employment with him. He denied that he gave him any instructions to work on the truck and install spring blades.

He admitted however that he took the plaintiff to the Doctor when the incident occurred and that he paid him $1,000.00 to buy medicine.

The defendant Michael Amos said that in November, 1987 he was employed to Triumph Commercial Company as a welder and fitter. He says that he took the plaintiff to paint truck bodies at Triumph Commercial Limited. He denied however that he gave the plaintiff instructions to work on a truck. He also denied that he paid the plaintiff weekly.

For the court to find that the defendants were negligent it must first determine whether the plaintiff was employed to the defendants and, or whether the defendants did so use the plaintiff's services which caused the plaintiff to do work and that one or both defendants exercised such power over him that he was obliged to obey either.

Was the plaintiff employed to the defendants?

The second defendant, Mr. Neville Walker was the director of the premises occupied by Triumph Car Specialist Limited, and was in charge.

The truck on which the plaintiff was working on, when he was injured was on the premises of Mr. Walker. It is agreed that the plaintiff was working on that premises for over ten weeks prior to receiving his injury.

It is not in dispute that work was being done on the truck at the relevant time. There is evidence from the plaintiff, if accepted, that the first defendant paid him a weekly sum. There is also evidence that the second defendant Mr. Walker took the plaintiff to the doctor when he received the injury, bought crutches for him and gave him $1,000.00.

The plaintiff said that it was Mr. Walker who told him to go and assist to put on the spring blades on the truck and that he wanted the truck off the premises by the next day.

It is quite clear from the evidence that the plaintiff was given directions to do work on the truck.

I find as a fact that there was a working relationship between the plaintiff and both defendants. The first defendant gave the plaintiff four weeks pay after the accident.

I find as a fact that the second defendant was the de facto employer of the plaintiff. I find also that the plaintiff was obliged to follows the instructions of the second defendant. It was his premises and he instructed the plaintiff to work on the truck.

Having established who his employers are the plaintiff has to show that it was the negligence of the defendants that caused his injury.

At Common Law a master is under an obligation to take reasonable care for his servant's safety. An employer is under a duty to provide competent staff and to provide his employee with proper plant appliances and premises. There is also a duty to provide a safe system of work.

Having been given instructions to work on the truck the plaintiff was entitled to assume that the jack which held up the truck was safe and in working order.

BY sending the plaintiff to work under the truck the second defendant was in fact vouching for the safety of the truck upon the jack.

The plaintiff is saying that when he went then the truck was already jacked up.

I therefore find that the second defendant did not have sufficient regard for the safety of the plaintiff and did not provide adequate equipment for use by the

plaintiff. The second defendant is therefore negligent and is liable for the injury to the plaintiff.

The question of damages naturally flow from this finding.

With regards to Special Damages the plaintiff is claiming Loss of Earnings from the 18th November,1987 and continuing up to the 17th January, 2001. This claim is at an increasing weekly rate. The plaintiff told the court that he does not know the range of pay currently in the welding trade and that these are different grade of welding. The total claim for loss of earnings is $1,523,820.00. The range is from $80.00 per week in 1987 to $4,400.00 per week in January, 2001 taking inflation into account. The plaintiff was an apprentice welder when he was injured in 1987. There is no certainty that the plaintiff would have been employed full-time during this period. Taking this into account a reasonable figure for the period that is being claimed would be $500,000. The other items under Special Damages amounts to $8,850.00 and is not challenged.

The award under special damages would be $508,850.00.

On the issue of General Damages, the medical evidence of Dr. Adolph Mena points to a compound fracture, dislocation of the right ankle joint. There is a deformity of the right foot with angulation. There is also the development of infection in the wound around the ankle. Dr. Mena is of the opinion that there is no guarantee that surgery would correct the deformity although it may help for cosmetic purposes.

However there will be permanent stiffness of the ankle. Dr. Mena says that this is a serious injury which can affect his job as a welder. He is of the

opinion that the plaintiff suffers a permanent impairment of 30% of the right lower limb representing 15% of the whole person.

On the question of quantum of damages for pain and suffering, Mr. Campbell for the plaintiff, cited the case of ***Harris v. Central Fire and General Insurance Co. Ltd.*** (Page 88 of Khan's Reports Vol. 2).

In this case the plaintiff who suffered a 10% permanent partial disability was awarded $85,000.00 on the 13th May, 1986 for Pain and Suffering and Loss of Amenities which when updated would be over $1,3000,000 today.

In this case of ***Rose v. Satchwell*** (Page 70 Vol. 4 of Khan's Report) the plaintiff suffered a severe crush injury involving soft tissue and bony components of the left leg and foot with the left heel being amputated. The plaintiff in this case suffered a 70% permanent disability of the left extremity which was equivalent to 28% whole person disability. The plaintiff was awarded $2,500,000 for Pain and Suffering and Loss of Amenities which when updated amounts to over $3,300,000. The plaintiff was also awarded $400,000 for Handicap on the Labour Market.

Mr. Campbell has asked the court to make an award of $3,500,000 for Pain and Suffering and Loss of Amenities.

Mr. Givans for the Defendant cited the case of ***Barnett v. McLeod*** (Page 33 Khan's Reports Vol. 3). In this case the plaintiff suffered a fracture of the neck of the right talus with loss of consciousness, permanent partial disability of the right lower limb was assessed at 21% which converts to 8% of the whole

person. The plaintiff was awarded $45,000 for Pain and Suffering and Loss of Amenities which when updated to December 2000 would be $542,830.

In ***Morrison v. Attorney General*** (Page 40 of Khan's Report Vol. 3). The Plaintiff suffered a fracture of the right tibia with a 15% disability of the whole person. He was awarded $60,000 for Pain and Suffering in November, 1988 which when updated to December 2000 would amount to $737,692.

In the instant case the plaintiff suffers a 15% impairment of the whole person. He says he can't run, can't climb or engage in sporting activities. Since July,2000 his leg has broken down and he is unable to work. What therefore is a fair award to the Plaintiff? In the ***Rose v. Satchwell*** case cited by Mr. Campbell the plaintiff in that case suffered a 28% disability of the whole person. In the instant case the plaintiff has suffered a 15% disability of the whole person. I am of the view that a fair award in all the circumstances would be $1,600,000 for Pain and Suffering and Loss of Amenities.

Dr. Mena testified that the cost of future surgery to correct the deformity and in which his gait would be improved would be approximately $150,000 if done privately. However he said if it was done at the Kingston Public Hospital it would cost about one third (⅓) of the above figure. Taking inflation into account the plaintiff is awarded $60,000 for the cost of future surgery.

With regards to Handicap on the Labour Market/Loss of Future Earnings the plaintiff was 20 years old when he got the injury in 19897. At that time he was earning $80.00 per week as an apprentice welder. Up to January, 2001 he was earning $4,400.00 per week doing welding on a limited scale. The evidence

of Dr. Mena is that the ankle bone is infected but both the infection of the bone and the deformity can be corrected by surgery in which case his gait would also be improved. However Dr. Mena did indicate that the stiffness in the leg would be permanent.

It does appear that even with surgery the plaintiff will have a handicap.

What therefore should the court award for Loss of Earnings/Handicap on the Labour Market? It is never an easy task for the court to arrive at a figure under this heading. One method is to employ the notions of the multiplicand and multiplier.

The plaintiff can derive some benefit from surgery. However although he can still do welding on a limited scale the court will use the multiplicand of $2000 per week or $104,000 per annum.

The multiplier can never represent the actual number of potential years of earning left to the plaintiff because it is intended to take into account the uncertainty of prediction. In all the circumstances the court will use a multiplier of four (4).

The plaintiff is therefore awarded a sum of $416,000 (i.e. $104,000 x 4).

In summary, there will be judgment for the Plaintiff against the second defendant as follows:

Special Damages - $508,850.00

with interest @ 6% per annum from the 18th November, 1987 to 20th September, 2002.

General Damages as follows:

$1,600,000 for Pain and Suffering and Loss of Amenities with interest @ 6% per annum from the 18th January, 1994 to 20th September, 2002.

Cost of future surgery - $60,000.00

Handicap on the Labour Market/Loss of Future Earnings - $416,000.00

Cost to the Plaintiff to be taxed if not agreed.