

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.M. 503/95

BETWEEN

LESLIE MIGHTY

PLAINTIFF

A N D

ALCAN JAMAICA LTD.

DEFENDANT

Miss Carol Davis instructed by O.G. Harding and Co. for the Plaintiff.

Mr. D. Batts and Miss D. Gentles instructed by Messrs. Livingston, Alexander and Levy for the Defendant.

Heard: 7th, 8th, 9th, 10th, 14th
and 15th October, 1996.

Delivered: 4th July, 1997.

JUDGMENT

MARSH J. (Ag.)

By Writ of Summons dated 16th November 1995, the Plaintiff claim against the Defendant to receive damages for negligence.

On or about the 5th day of March, 1990, while employed to the Defendant, Plaintiff was replacing a recently repaired tyre on Defendant's truck when the said tyre exploded causing injury and damage to the Plaintiff. Further, Plaintiff claimed damages against defendant for Wrongful Dismissal from his employment.

In an amended statement of claim, Plaintiff claimed that as a result of Defendant's negligence, he suffered the following injuries.

- (a) lacerations to root of penis and left upper thigh.
- (b) one centimeter jagged puncture wound to to the anterior aspect of the middle third of the left leg.
- (c) deep oblique laceration of the left groin running from the dorsum of the base of the penis across the inguinal region transacting femoral nerves and artery

- (d) amputation of terminal phalanx of right ring finger.
- (e) Two centimeter longitudinal laceration to the dorsum of the terminal phalanx of the right middle finger.
- (f) undisplaced midshaft fracture of left tibia.
- (g) fracture of the terminal phalanges of the ring and middle fingers.
- (h) weakness, numbness and wasting of quadriceps in both legs
- (i) loss of bulk and sensation in left leg.
- (j) area of induration on left side of penis;
- (k) weak erections and left lateral deviation of penis;
- (l) 30% loss of penile function.

The Plaintiff further claimed that Defendant wrongfully terminated his contract of employment and/or wrongfully refused to employ the Plaintiff from and after May 24, 1992.

Appearance was entered on behalf of the Defence on 8th December, 1995.

Interlocutory Judgment in default of Defence was entered on the 2nd of February, 1996.

The Plaintiff now proceeds to have his damages assessed.

PLAINTIFF'S CASE

The Plaintiff was employed to Defendant Company, first as a casual worker, then by promotion as a Trades Helper. He was engaged in tyre repairs and was being trained to assume position of full tyreman when the accident, which gave rise to this case occurred. But for this accident, it is contended, Plaintiff would have become a tyreman.

On the 5th March, 1990, Plaintiff and another of Defendant's employees were replacing a tyre (1200 x 24) tyre onto one of Defendant's trucks when he heard an explosion

Wage Rates Schedule, Alcan declaration, Statement of Earning and deductions for period ending 23rd May 1992 for Plaintiff and a list of job rates were also part of this agreed bundle.

DEFENDANT'S CASE

Lloyd George Panton, Industrial and Community relations manager employed to Defendant and having personnel responsibilities at Defendant Company gave evidence for the defence.

In 1990, Plaintiff was employed to the Defendant as a Trades helper - one of the several categories of workers. Another category of worker was tyre repairman. Subsequent to describing Plaintiff as a Trades helper, witness corrected himself by reference to a document from Defendant Company which describes Plaintiff as a tyre repairman. This was the document - Employment History at Alcan - tendered in evidence.

Tyre repairman is higher category of employment than that of trades helper.

SUBMISSIONS

Mr. Batts submitted that there were many inconsistencies between pleadings and evidence produced by Plaintiff. Defendant had to prove that the injuries caused the loss of earnings as 'causation' was critical.

For wrongful dismissal, Plaintiff was only entitled to such notice pay as he would have been entitled to in law together with such other sums withheld as would have been due to him.

Plaintiff is therefore not entitled to any sum at all as he had been paid Vacation and end of service pay as indicated at p.7 of the Agreed bundle - (Exhibit 1) **Fuller v. Revere Jamaica Alumina Ltd. (1980) 31 W.I.R. 304**. Though Plaintiff was described in a company document as Tyre repairman, it was Plaintiff's own evidence that he was a tradeshelper and recieved

and accepted a trades helper's pay up to time of accident.

Court was open to find that there was a mutual error-error that Plaintiff was at time of accident a tyre repairman. Court also invited to use for purposes of computation the period March 1990 - April 1992 as period that Plaintiff was off work due to his injuries. The hourly rate to be used should be that relating to trades helper and not to tyre repairman. Several authorities were cited by Miss D. Gentles, appearing with Mr. Batts, as suggested guides in the computation of award of General Damages for the injuries Plaintiff received.

Miss Davis for Plaintiff, in response, agreed with submissions that damages for breach of Contract for Wrongful dismissal were limited to contract alone and that Plaintiff's entitlement would be for

- (i) notice pay
- (ii) end of service pay
- (iii) Vacation pay.

Plaintiff had been short paid - referred to page 7 of Exhibit 1 (agreed bundle). However this was not being pursued.

Re Claim for damages for Negligence

- (a) Pain, Suffering and loss of amenities
- (b) Loss of earnings

Cases were cited as bases for possible awards to be made by the Court as General damages. However since these were no reported cases in which damages were ever awarded for injuries similar to these received by Plaintiff to his penis, Court should make an award, bearing in mind the seriousness of injuries to penis, that should be a benchmark and a substantial award.

A. Plaintiff's job classification on time of accident:
There was some confusion of the job classification of plaintiff at the time of accident. Plaintiff stated that he was a trades helper who but for this accident,

| | | |
|--------|--|--------------|
| (iv) | January 1993 - December 1993 52 weeks at 40 hours per week at \$41.24 per hour = | \$85779.20 |
| (v) | January 1994 - March 1994 12 weeks at 40 hours per week at \$43.30 per hour = | \$20784.00 |
| (vi) | April 1994 - June 1994 12 weeks at 40 hours per week at 45.46 per hour = | \$21820.80 |
| (vii) | July 1994 - June 1995 52 weeks at 40 hours per week at \$92.17 per hour = | \$191,713.60 |
| (viii) | July 1995 - March 1996 36 weeks at 40 hours per week at \$112.05 per hour = | \$161,352.00 |
| (ix) | April 1996 - October 14, 1996 26 weeks at 40 hours per week at \$312.78 per hour = | \$138091.20 |
| | Total earned = | \$704,825.60 |

From this is deducted 30% for taxes and statutory dues. Also deductible are amounts previously paid to Plaintiff as disability benefits.

Plaintiff admits that \$378.90 were paid to him weekly from December 1990 to June 1992. It seems reasonable to conclude that disability benefits would have ceased before June 1992. Consequently the period for which disability benefits were paid would be December 18, 1990 - May 18, 1992 eighteen (18) months at \$378.90 per week - 72 weeks at \$378.90 = \$27280.80

| | |
|--|--------------|
| Amount earned during relevant period = | \$740,825.60 |
| Less 30% = | 222,235.20 |
| Less disability benefits = | 27,280.80 |
| | = 491,309.60 |

By way of mitigation, Plaintiff sold chicken and drinks, earning as profits during the relevant period \$243,580.00

Total loss of earnings therefore is

\$491,309.60 - \$243,580 = \$247,729.60

Cost of Medical reports was agreed at \$3750.00

Damage to clothing was agreed at \$1665.00

Plaintiff's claim for cost of lunch when he visited the Physiotherapist is denied as this would be an expense which he would most likely have incurred even if the accident had not happened.

I have not been satisfied on a balance of probabilities that there was need to have employed a helper, as a result of the accident.

Plaintiff will therefore not be reimbursed for amount paid to helper. Helper's only function was to wash clothes - no evidence as to why it was necessary to employ anyone to wash clothes, after the accident.

Special damages are therefore awarded as hereunder:-

| |
|--------------|
| \$247,729.60 |
| 3,750.00 |
| 1,665.00 |
| <hr/> |
| \$253,144.00 |

I found that the injuries claimed by the Plaintiff were in fact received by him during the accident. The medical reports and his own testimony support the effect of the injuries received.

- (a) The injury to the penis presents a particular difficulty as no similar injury has been the subject of an award, although there has been award for testicles damaged. The single case cited was **French v. Langford December 2, 1994**
Quantum Issue 1/95, 24th January, 1995

This is a case where the Plaintiff received a bite to his glans penis - was off work for a month - injury healed with small residual scar - pain when penis was erect and Plaintiff had to forgo sex with his "long standing partner" for three months. General damages was £4,500; Special damages £311.00

Injury to penis of plaintiff in instant case was of considerable severity. Penis was cut so that....." could see vein and tube inside of it."

Plaintiff contended that injury to penis affected his whole sex life as his penis had been cut in two up to the root.

He is unable to get an erection. This has "smashed" relationship with his "young lady" as that was now "on the rocks."

His claim that there was a resultant inability to have an erection, violently contradicts the finding of Dr. Robert wan, Consultant Urologist, who in his report of 12th July 1996, state inter alia,

"Overall his sexual performance has since his accident, although he complains this is not as good as it had been prior to the accident. His main complaint is of poor erections and deviation of the penis to the left during erections. I last examined him on 11/7/96 and this revealed some residual induration on the shaft of the penis which is most likely due to his injury.

As far as his urological problems are concerned I feel he has sustained an injury to his penis and that this has resulted in a 30% permanent loss of erectile function."

I accept Dr. Wan's professional opinion that Plaintiff has suffered a 30% permanent loss of erectile function, and not Plaintiff's statement as to his impotence.

- (b) Re fracture of left tibia - leg was in cast for an undisclosed period in excess of the 16 days during which Plaintiff was hospitalized.
- (c) amputation of oblique slice of terminal phalanx of right ring finger.
- (d) fracture of ring and middle finger.

Dr. Warren Blake's follow up medical report dated September 20, 1993 assessed total permanent disability as a result of the injuries to left leg as equating to 5% of the extremity and 2% of the whole person; **Rose v Rodger's Concrete**

Block Works Ltd. 23.7.92 - Harrison's Casenotes 2 page 15.

Amputation to ring finger, fracture at base of terminal phalanx of right hand, amputation to tip of middle finger of right hand. 45% disability of the function of the right middle finger - 25% disability award for pain and suffering. \$55,000.00

Francis v. Sayers - Harrison's Casenotes 2 p. 47 - 15.11.91

Fracture of left tibia - chance of osteoarthritis developing in left knee joint.

Damages were assessed by consent, in the sum of \$75,000 inclusive of costs.

Junior Freeman v. Central Soya et al p. 239 Khan's Volume 2

Personal injuries cited with resultant disability-impotence.

Award made then for Pain, Suffering and loss of amenities was \$40,000.00.

Currently that award would be approximately \$541,300.00

Eaton Edwards v. Tennyson Taylor et al - Harrison's Casenotes 2 page 31

Fracture was to right femur with multiple lacerations and abrasions to face and back of head, as also four broken teeth and glass splinter in the eyes.

Award made then for Pain and Suffering and loss of amenities was \$180,000.00. This award would currently be approximately \$973,532.00

Manning v. DeSouza C.L 1988/M97

Compound comminuted fracture of left femur fibula and tibia.

Injuries in this case are comprised of more serious fractures than in the instant case.

Award for Pain and Suffering and loss of amenities
was \$265,000.00

Current value of such an award would be approximately
\$124,592.02.

I have considered the cases cited and the injuries received
by Plaintiff. The injury to his penis was particularly significant.
He can no longer take part in cricket and football two games
he played before injury. Consequently award for pain and
suffering and loss of amenities is \$1,750,000.00.

LOSS OF FUTURE EARNINGS

Was Plaintiff entitled to any awards under
this head?

"If he is earning less than he was earning
before the accident, he has a claim for
loss of future earnings which is assessed
in the ordinary multiplier multiplicand
basis" per Browne L.J. in Moeliker v.
A. Reyrolle & Co. Ltd. (1977) 1 AER

On 5th March 1990, date of accident, Plaintiff was earning
\$548.40 per week (i.e regular 40 hour week at \$13.71 per hour).

On 15th October 1996, Plaintiff was earning in his new employment
selling chicken and drinks, an amount of \$1990.00 per week.

Plaintiff was therefore earning more than he was earning before
the accident and is therefore not entitled to loss of future
earnings.

Damages for Plaintiff are assessed as follows:

Special Damages:- \$253,144.60
with interest at 3% per annum from
5th March 1990.

General Damages:-

Pain, Suffering and loss of Amenities \$1,750,000.00
with interest at 3% per annum from
service of the Writ.

and found himself "going up in the air". He fell and could not get up as he could not move.

His pants was split in four; his left leg was immobile, part of ring finger of right hand was missing. There was a big wound to area of groin making it possible to see inside his testicles; his penis was cut so that he could see the tube inside it - left side of penis was cut. Middle finger of right hand was "burst." He was rushed to Defendant's facilities at Ewarton by Amulance attended to by nurses and company doctor, Dr. Excell. He was subsequently transported to Medical Associates Hospital where he was subsequently attended to by Doctors Warren Blake, G. Smith and Robert Wan. He became unconcious and an operation was performed on him. He was in great pain and helpless. He remained in hospital for about sixteen (16) days.

On his discharge from hospital he relied on the help of his girlfriend and also acquired services of a helper for three days weekly at a cost of Six hundred dollars (\$600) per week. Sometime later he was able to move around with the aid of crutches.

Visits to doctor and to physiotherapist continued long after his discharge from hospital.

In June 1992, while still recuperating from the effects of his injuries, Plaintiff said that he was told by Defendant's Personnel Manager that he had deserted his job.

Efforts made by Plaintiff to find other employment proved futile so he "started a little business selling chicken and drinks."

Medical reports from Drs. G. Dumas, Warren Blake, Granville Smith and Robert Wan respectively were tendered by Plaintiff as part of an agreed bundle of documents - Exhibit 1.

would have been promoted to tyre repair man, or so he was told.

Defendant's personnel manager, Mr. Lloyd George Panton agreed that Plaintiff¹ was at relevant time a trades helper. However he produced a work record, relevant to Plaintiff which categorizes him as tyre repair man. Plaintiff despite all this, was receiving and did accept the pay of a trades helper. It appears therefore that Plaintiff's categorization as tyre repairman on the document produced by the Personnel Officer was the result of an error. I therefore find that the Plaintiff, at the relevant time, 5th March, 1990, was employed to the Defendant as a trades helper.

WRONGFUL DISMISSAL

Plaintiff received and accepted on 18th May, 1992, payment of \$5,699.38 as vacation and end of service pay, without demurrer. He is therefore not entitled to any other sum for damages for wrongful dismissal. **Fuller v. Revere Jamaica Alumina Ltd 31 WIR 312 at para. j.**

LOSS OF EARNINGS

As a trades helper employed at a basic regular work week of 40 hours, and going by the work rate schedule, Plaintiff would be entitled as follows:

| | | |
|-------|--|------------|
| (i) | March 1990 - September 1990 | |
| | 28 weeks at 40 hours per week at \$13.71 per hour = | \$15355.20 |
| (ii) | October 1990 - December 1991 | |
| | 64 week at 40 hours per week at \$15.20 per hour = | \$38912.00 |
| (iii) | January 1992 - December 1992 | |
| | 52 weeks at 40 hours per week at \$41.24 per hour = | \$67017.60 |