



[2019] JMSC Civ. 15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV02485

BETWEEN	KILO WALTON	CLAIMANT
AND	CHINA HARBOUR ENGINEERING COMPANY LIMITED	DEFENDANT

IN OPEN COURT

Ms. Olivia Derrett instructed by Oswest Senior-Smith & Company for the Claimant
Ms. Sadeera Shaw instructed by Mr. Glenford Watson for the Defendant

Heard: 10th January 2019 & 5th February 2019

Assessment of Damages–Negligence –Personal Injury – Judgment in Default of Defence - General Damages – Special Damages

MCDONALD J

BACKGROUND

[1] The claimant, Kilo Walton, who was at all material times employed as a labourer to the defendant company, China Harbour Engineering Company Limited (CHEC), by way of Claim Form filed 16th June 2016, claimed against the defendant to recover damages for personal injuries, loss and damage he sustained during the course of his employment, arising from the alleged negligence of the defendant company.

- [2] In his Particulars of Claim filed on the said date, Mr. Walton alleged that, on or about the 27th August 2015, whilst carrying out his assigned duties as a labourer on the CHEC Americas Division Toll Road Building Project at Golden Grove in the parish of St. Ann, a brick from a pile of bricks the claimant was to relocate and stock, broke in two and fell on the claimant's right foot.
- [3] Although, the defendant acknowledged service on 5th May 2017, it failed to file a defence, and Judgment in Default of Defence was entered on 12th July 2017.

The Claimant's Evidence

- [4] The claimant averred that, on the day in question, he was wearing his safety gears that the company had provided him with and was packing bricks as he had been assigned to do. He usually stocked 10 -12 bricks, which were about the size of four normal size tiles and about five or six inches thick, in one pile. He was instructed to lift one brick at a time. At the material time, they were piling them up to about 13 bricks. He examined the bricks before lifting them as he always did. At the material time, he had lifted about 10 – 12 bricks. He was in the process of lifting one of the bricks to place on top of the pile he was making when it suddenly broke in two and one of the pieces fell on the instep of his right foot.
- [5] Immediately his right foot became swollen. Two minutes later a co-worker helped him into a wheelbarrow and pushed him to a shed where his supervisor and other co-workers were sitting. He waited for about five minutes and another co-worker placed the claimant on his motorbike and carried him to see the nurse at the main office. The nurse placed his leg on a stool and put an ice pack on it. He held the ice-pack on it and sometime thereafter the nurse sprayed something on his leg for the swelling. About twenty minutes after the incident, he was taken to the St. Ann's Bay Hospital for treatment.
- [6] At the hospital he received an injection to 'kill the pain' and to prevent lock jaw. He also did an x-ray which revealed he had broken bones in his leg. A cast was

applied to his foot, and he was released from the hospital on the same day and given seven days sick leave.

- [7] The cast was removed at the St. Ann's Bay Hospital after about three (3) months and he returned to work about three (3) months after the injury at a different company. At the new company his duties were as a lifeguard and navigational crew member on a sail boat. At this time, he could move around but was not fully healed.
- [8] It is noted that in his witness statement the claimant stated he would still feel pain in his foot, especially at night after a day of work and that he stopped feeling pain about three (3) months later. However, at the hearing, he stated that after he had started back work he did not revisit a doctor and he was not feeling any pain. I therefore accept his evidence to be that he three (3) months after the injury, the point at which he started back working, he was not feeling any pain.

The Medical Evidence

- [9] The report of Dr. Bersha Cole, dated 10th March 2018, reveals that the claimant, who was 27 years old at the time, was seen at the St. Ann Bay's Hospital on August 27th, 2015. He was not admitted. He was diagnosed with a closed fracture of the left second metatarsal bone and was treated with analgesics and immobilization. He was prescribed a follow-up of three visits at the orthopaedics clinic.

Discussion

- [10] The Claimant relies on the following cases in respect of general damages, the only head of damage being sought:
- 1) **Errol Finn v Herbert Nagimesi and Percival Powell** (suit No. C.L. 1991 F 117 – reported at Vol. 4, pg. 66 of Ursula Khan's **Recent Personal Injury Awards Made in the Supreme Court**), and

2) **Duzeth Griffiths v Brillyan Scarlett** [2017] JMSC Civ. 159

- [11] The Defendant also relies on **Errol Finn** and **Duzeth Griffiths**, and, additionally **Joy Hew v Sandals Ocho Rios Limited** [2013] JMSC Civ. 42.
- [12] In **Errol Finn**, the claimant, a 27-year-old welder and businessman, sustained a compound fracture of the 5th metatarsal of the left foot, and a wound at the fracture site requiring stitches, during a motor vehicle accident. He was treated at hospital with sutures to his wound and a plaster cast to immobilize his lower leg and foot. He attended out-patient clinic and was discharged from the clinic about 3 weeks later. He was totally disabled from the date of the accident (August 5th, 1990) to the end of August. He was assessed as having a disability of 30% of his extremity for 1 month, and of 10% for a further month with no significant final disability. General damages were assessed at \$64,365.00 on 5th May 1994. Using Consumer Price Index (CPI) for December 2018 of 254.7 (and 25.64 for May 1994), that figure updates to **\$639,382.43**.
- [13] In **Griffiths v Scarlett**, the 49-year-old claimant also suffered a fracture to the fifth metatarsal bone of his left foot and swelling as a result of a motor vehicle accident. He was treated with analgesics and discharged the same day. He did not follow-up his treatment at the Orthopaedic Out-patient department. He had had a pre-existing injury from a gunshot wound to the left leg, but the court found that it did not worsen or aggravate the injury from the accident. Upon examination about a year later the claimant was diagnosed with a fractured left ankle with pathological healing and chronic osteomyelitis stemming from the accident. Although, the claimant had complained of pain and discomfort thereafter, and had been assessed as having a 5% impairment of the extremity and 2% impairment of the whole person, these were attributed to the previous injury. The court relied on both the **Errol Finn** and **Joy Hew** matters, and awarded a sum of \$425,000.00 on 3rd November 2017. Using CPI for December 2018 of 254.7 (and 247.3 for November 2017), that updates to **\$437,717.35**.

[14] In *Joy Hew*, the claimant sustained injuries from a fall at the defendant hotel when her shoe became lodged between an uneven interlocking pavement. Upon medical examination she was found to have swelling of the dorsum of her right foot with tendon of 4th metatarsal and base of 5th metatarsal. A radiograph revealed she had a comminuted undisplaced intra-auricular fracture to the base of the right 5th metatarsal. She was treated with the application of a cast boot. Approximately a month later all pain had ceased and the fracture was assessed as being healed with fibrous union. She was referred to physiotherapy for muscle strengthening and range of motion exercises. About two months later, after presenting to the doctor with complaints of mild pain after excessive activity, the claimant was assessed as having no disability consequent on the injury, but that there may be occasional pain and discomfort. She was subsequently seen by another doctor, who determined that the discomfort felt by the claimant was due to tendonitis and not the result of bony injury, which could be easily treated with physical therapy or an injection of corticosteroid. She was assessed as having a 1% disability of the whole person. An award of \$650,000.00 was made on 5th April 2013 for pain and suffering and loss of amenities. Using Consumer Price Index (CPI) for December 2018 of 254.7 (and 198.5 for April 2013), that figure updates to **\$834,030.23**.

[15] Although, the claimant submitted that the claimant's injuries are similar to Errol Finn, in that Mr. Finn suffered a fracture of a metatarsal in the foot, it was submitted that the instant claimant's injuries are greater, as he was immobilized for three months, whilst Mr. Finn was immobilized for only two months. Also, the claimant's last visit to the doctor was three months after the accident, whilst Mr. Finn was released from hospital care after 25 days. The court is also asked to consider that the award is very old. In relation to **Griffiths v Scarlett**, the claimant submits that that case is also very similar to this one as that claimant also suffered a fracture of a metatarsal bone. However, it is noted that in this case there was an open wound whilst in Griffiths there was a closed fracture; Griffiths was discharged from the hospital on the same day and did not follow up

with his hospital treatments, whereas in this case Mr. Walton followed up on three different occasions for treatment; Mr. Walton received seven days sick leave whilst Mr. Griffiths got none. It is also noted that Mr. Griffiths was assessed as having a 2% disability rating whilst Mr. Walton received no such assessment. On those bases the claimant suggests a discounted award of \$780,000.00.

[16] On the other hand, the defendant suggested the amount of \$650,000.00 as reasonable in the circumstances. Counsel for the Defendant submitted that the claimant suffered injuries similar to that of all three (3) cases cited, but his injuries are most similar to **Errol Finn** where there was no disability rating. Further, the higher awards were granted in the Hew and Griffiths matters because of the disability ratings in those cases, and if not for the disability assessment, Griffiths would have been decided along the line of Errol Finn.

[17] In response, in relation to the **Hew** matter, the claimant submitted that the claimant wore her cast for less than a month, a much shorter period than the instant claimant. The only difference between the cases, it is submitted, is the 1% impairment rating, and thus, that this claimant suffered a longer period of immobilization than both Hew and Griffiths. Further, it is argued that a disability rating does not automatically impute that an award should be vastly higher since the court ought to consider not only the rating, but also the extent of the injury and the extent of the pain and suffering.

[18] It is clear that all three cases are very similar to the instant case in respect of the injuries sustained, given that all three sustained a fracture to a metatarsal bone in the foot. Both **Finn** and **Hew**, like the claimant, were given a cast for treatment. Finn's cast was removed after about 3 weeks and he was fully healed after 1 month; Hew's cast was removed after two months. There is no indication Griffiths received a cast, and he was released from hospital on the same day. He was noted as having no disability. However, Finn suffered an open wound that required stitches, unlike this claimant. That would compensate for the shorter period of time that Finn wore the cast. Given the injuries and the prognoses in

the cases, I don't believe that the disability rating in Griffiths and Hew make them substantially different.

[19] I would therefore award an average of the three awards, which amounts to \$637,043.34, and add an additional \$100,000.00 for the extra time it took the claimant in this case to heal and have his cast removed. I would thus award a sum of **\$737,043.34** for pain and suffering and loss of amenities.

ORDER

1. The claimant is awarded the sum of **\$737,043.34** for general damages.
2. Interest of 3% is awarded to the claimant on the above sum, from the date of service of the claim form, 5th May 2017, to the date of judgment.
3. Costs to the claimant to be agreed or taxed.