IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 00576

BETWEEN	**RADCLIFFE TAYLOR**	**CLAIMANT**
AND	**COMMISSIONER OF CUSTOMS**	**FIRST DEFENDANT**
AND	**KINGSTON WHARVES LIMITED**	**SECOND DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**THIRD DEFENDANT**

Mr. Jason A. Jones instructed by Nigel Jones & Co. for the claimant.

Mr. Harrington McDermott instructed by Director of State Proceedings for the first and third defendants

Heard: 9th January 2014 and 11th April 2014

Assessment of damages – Development of chronic myeloid leukaemia – Loss of earning capacity – Claimant previously employed as a Custom Tally Officer

Assessment of damages – Breach of statutory duty – Breach of contractual duty – Negligence

OPEN COURT

E. BROWN, J

[1] The life of Radcliffe Taylor (the claimant) changed drastically following his exposure to a dangerous chemical on Thursday, February 19th 2004. Mr. Taylor was then 26 years old and was employed at the Jamaica Customs Department as a customs tally officer. He sustained injuries during the course of his

employment when he inhaled a hazardous substance on the premises of Kingston Wharves Limited. This seemingly minor incident eventually caused him to develop Chronic Myeloid Leukaemia (CML).

[2] The matter involved a damaged container on board a ship. He was among the persons called to inspect the container and remove drums from it. The ship's cargo was said to contain chemicals known as Dimethoate Tech 98%. Foul odours were emanating from the unopened container and it was suspected that the chemicals in the cargo might be dangerous. The claimant along with other workers was asked to remove the seal from the container. They were then provided with dust respirators by the third defendant. However, no protective gear was provided by the claimant's employer, the first defendant, while the claimant worked on the cargo. The dust respirator was the only gear that the claimant wore throughout the entire operation.

[3] The operation lasted for about four hours after which the items were placed back into the cargo. Within hours of exposure to the substance, workers who were in the vicinity of the container while it was opened, started falling ill. In particular, the claimant started experiencing itching of his throat and running eyes within four hours of contact working on the cargo. He continued to experience sickness over the following months which included severe pains to his shoulder and lower back. As a result, he sought medical assistance.

[4] In October 2004 while he was on vacation with his family in Tortola, British Virgin Islands, the claimant became seriously ill and was admitted to the Peebles Hospital. It was then that he was diagnosed with CML which occurred as a result of his exposure to the dangerous chemical Dimethoate Tech 98%.

[5] The claimant was subsequently flown back to Jamaica as the Peebles Hospital did not have adequate facilities to properly treat his situation. Upon his return to Jamaica, he was treated at the Department of Pathology at the University Hospital of the West Indies by Doctors including Dr. M.E. Bromfield.

MEDICAL EVIDENCE

[6] While in Tortola, the claimant was seen by Dr. M. Yee Sing. The doctor in his medical report stated that the claimant was admitted to the Peebles Hospital approximately twenty hours after he had priaprism. He had been trying home remedies during this time and denied using any topical or oral medications to effect an erection. He alluded to having pain in his left abdomen and flu like symptoms with fever three weeks before arriving in Tortola. The claimant as part of a medical examination had blood test done in March 2004 after being exposed to chemicals while working at the Newport West Wharf in Jamaica. He had no history of Weight loss or weakness.

[7] The claimant was given Ativan, Largactil, iv fluids and Voltaren but with no positive effect. A diagnosis of CML with secondary priaprism was made. He was transfused two units of blood prior to having his penile shunt to alleviate his priaprism. The pain was localized at the tip of his penis and there was no recurrence of his priaprism.

[8] While at the University Hospital of the West Indies (UHWI), the claimant was seen by Dr. M.E. Bromfield, who in his medical report dated December 30th, 2004, stated that the claimant had been diagnosed with CML. This diagnosis came after he was transferred to the Urology Service, UHWI, in September 2004, from the British Virgin Islands. Dr. Bromfield noted that, in addition to his surgical complaint, the claimant was found to have an elevated white blood cell count and blood film suggestive of CML. The doctor also indicated that chromosomal studies confirmed the presence of the Philadelphia chromosome, which is diagnostic of the disease. He also indicated that the claimant will require life-long treatment and was being followed up as an outpatient at the Haematology Clinic.

[9] The claimant was also seen by Dr. Garfield Forbes at the Kingston Public Hospital. In his medical report dated February 21st, 2010, Dr. Forbes stated that the claimant was referred to his practice on October 1st, 2010 with a history of being previously diagnosed with CML in October 2004. Dr. Forbes noted that his

assessment was that the claimant had CML with complete haematological response to Imatinib. He noted that the claimant was reportedly exposed to two chemical agents, Ethephan which has no known carcinogenic potential and Dimethoate (an organophosphate insecticide) which has been extensively studied and is classified as a Group C carcinogen. It has strict guidelines for its use and handling as it may be absorbed via the skin, respiratory tract and gastrointestinal tract.

GENERAL DAMAGES FOR PAIN AND SUFFERING

[10] Special damages was agreed at J$265,000. The court is now called upon to assess general damages. To make this assessment the court's attention was drawn to the following cases, ***Linden Palmer v Neville Walker & Michael St. John*** 5 Khans 216; ***Joan Morgan and Cecil Lawrence v Ministry of Health*** 6 Khans 220; ***Nicholas v Ministry of Defence 2013 EWHC*** 2351 and ***Angie Moore v Mervis Rahman*** 4 Khans 4**.** The claim was discontinued against the defendant. Consequently, the assessment of damages concerns the first and third defendants only.

[11] Generally, the purpose of an award of damages is to give the claimant adequate compensation for the damage, loss or injury suffered. When the Court is asked to assess damages in any case of tort, the court is constrained to make an award of damages which, as far as money can do should put the injured party in the same position as he would have been had he not suffered the wrong for which he is now being compensated. This principle was enunciated by Lord Blackburn in ***Livingstone v Rawyards Coal Co*** [1880 Appeal CAS.25].

> *"I do not think there is any difference of opinion as to its being a general rule that, where any injuries to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."*

[12] Counsel for the claimant sought to highlight that, the award for pain and suffering in Jamaica is achieved by an award of a sum of money calculated on the basis of established principles and the use of comparable cases. This principle has been approved and applied by the Jamaican Court of Appeal, as seen in the case of ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12th June, 1989, where Campbell J.A. stated that,

> *"Personal injury awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards."*

Thus, applying the rule in this case, the court is minded to address two primary factors. Firstly, the basis on which a claimant is to receive compensation and secondly, what would constitute a reasonable sum to compensate the claimant.

[13] Counsel for the claimant maintained that, though in making the assessment, comparisons ought to be made with past awards that are made in Jamaica, there are instances in which there are no precedent awards made in this jurisdiction. It was submitted that this is one such case, where there is no literature on any similarly decided cases in Jamaica.

[14] In ***Linden Palmer v Neville Walker & Michael St. John*** Suit No. 1990 P 072, the court had a similar dilemma. In that case, the plaintiff a Deputy Commissioner of Police was injured in a motor vehicle collision on March 9th, 1990. He was admitted to the Kingston Public Hospital (KPH), and there remained until June 20, 1990. On discharge, he visited the Orthopaedic Clinic for further treatment of fractures until October 1990. He had physiotherapy from June to November of the said year. On discharge from the hospital he could not walk and was mobilized by a wheelchair or walker and crutches respectively.

[15] The medical reports of Dr. Warren Blake, Dr. D. Calder and Carolyn Donaldson, Physiotherapist, and G.M Burgess were admitted in evidence by consent. The claimant's injuries were of such that there were no reported cases of similar injuries in this jurisdiction. In seeking to justify the employment of the

figure used in that case, as a guide, the claimant relied on a quote from the learned Walker JA. There Walker, JA considered the English cases of ***Singh v Sherwood & Others*** *and* ***Winston Barr v Bryad Engineering Co. Ltd & Others*** **(SCCA Nos. 45 and 48/85)** and quoted from Wright JA saying that,

> *"Where justice demands...where the required guide cannot be found in awards in the same jurisdiction or in neighbouring locality then recourse should be made to such source as will aid the court in coming to a just and fair conclusion...."*

[16] Applying the principle enunciated by the learned judge, the Court converted the awards in the English cases to Jamaican dollars and reached a reasonable figure to adequately compensate the claimant and attempted to put him back in the position as he would have been in had he not been injured. For general damages, the plaintiff was awarded the sum of $8,000,000.00 with interest at 3% in 1990.

[17] A similar approach was employed by the court in ***Joan Morgan and Cecil Lawrence v Ministry of Health*** Claim No. 2005 HCV 00341. The first claimant Joan Morgan was a thirty-nine year old teacher and the second claimant Cecil Lawrence was a Police Officer. The first claimant in her evidence stated that she donated blood for a friend. In February of 2003 she was requested by letter to return to the University Hospital to have her blood re-checked as something was detected in it. She did not return but when she got pregnant, she returned to the hospital to have her blood re-checked. In April 2003, she was again asked to return to the hospital with her spouse where she was then told that she had tested positively for HIV. Blood was taken from the second claimant for testing as required in such situations.

[18] As a result of the findings she was sent for counselling, became nervous and fretful and entertained suicidal thoughts. Her blood pressure soared and she received medication for stress. She became withdrawn from her seven year old son and her sex life plummeted as she was "affected by every advance made by the second claimant". However, the second claimant's test was negative and

further tests of both of them came back negative.

[19] The first claimant visited psychiatrist, Dr. Irons, on several dates between May 2003 and January 2004. The second claimant stated that from the day he learnt that the first claimant had tested positive he felt like taking his life and his sex life was greatly affected. Marsh J found that there were few cases in the region addressing psychiatric injury simpliciter, sought guidance from the Guidelines for Assessment of Damages in Personal Injury Cases (Guidance Studies Board of England). Three Million Five Hundred Thousand Dollars ($3,500,000.00) general damages was awarded to the first claimant and Five Hundred Eighty-Four Thousand Dollars ($584,000.00) to the second claimant.

[20] Further, counsel for the claimant relied on the following English case as a guide. ***Nicholas v Ministry of Defence*** 2013 EWHC 2351 decided on July 31, 2013. In this case, the claimant developed oesophageal cancer as a result of asbestos at her factory workplace during World War Two. The claim was statute barred in 2007 but the court found that this did not prevent an equitable assessment and award of damages.

[21] The Defendant had admitted liability and causation and was not prejudiced by the delay. The claimant had worked in a factory assembling gas masks from 1941 to 1943 and had thereby been exposed to asbestos. A doctor advised her in August 2004 that she could make a claim in relation to asbestosis. She grew increasingly breathless, had to use an oxygen cylinder, and had very limited mobility. In her last years she was assisted by someone ‘N’ who shopped, cooked and cleaned for her and took her out. The claimant died in 2008.

[22] The award for pain and suffering was $40,000.00 pounds. In the present case counsel for the claimant sought to draw a distinction between **Nicholas (supra)** and the instant case. In the former case the claimant died months after her illness had developed into cancer whilst the claimant herein has suffered for 10 years already with his illness. On this basis, counsel proffered that the award for pain and suffering ought to be increased, owing to the extended period of

suffering endured by the claimant.

[23] Counsel maintained that the exchange rate as at December 2013 is $173.69 to 1 pound. Therefore, the award in Jamaican dollars would then be $7,000,000.00. However, it was submitted that the sum of $8,500,000.00 is reasonable for pain and suffering for the claimant in this case, to account for the longer period of suffering.

[24] When the authorities cited by counsel for the claimant are analysed, some points of departure are noted. First, an assessment of the present case makes it clear that **Linden Palmer (supra)** can be distinguished. In that case, the plaintiff had suffered *inter alia* 100% permanent disability in both eyes. However, he was only months away from retirement at that time. In the present case, the claimant is not close to the age of retirement and cancer though it can be treated is at the moment incurable. Therefore, the claimant is expected to experience pain and suffering for a considerable time yet. Therefore, a departure has to be made from **Linden Palmer** if justice is to be done in the case at bar.

[25] Turning to **Joan Morgan (supra)**, the injury suffered was less severe than in this case. The claimants are likely to improve with time based on the fact that the root cause of the injuries no longer exists. That is, they are no longer operating on the belief that they are HIV positive. In the case before me, not only has the claimant endured immense physical pain and suffering but this will likely continue for the rest of his natural life. Hence, like in **Linden Palmer (supra),** it would be superficial to make an award based solely on Joan Morgan, supra.

[26] The closest case to the one at hand is that of **Nicholas supra** in that the claimant had also developed cancer. However, yet another distinction can be drawn. While in Nicholas, supra, the claimant died a few months after her illness developed into cancer, the claimant herein is still living with the disease and the pain and suffering that comes with it.

[27] The inevitable question then is whether there are any factors in the instant

case to warrant either a similar award to one or several of these cases or one outside the scope of any of the cited cases? First, Radcliffe Taylor is 37 years old. Secondly, unlike the claimants in **Linden Palmer, supra** and **Nicholas, supra**, he continues to suffer from the disease. Thirdly, unlike the claimant in, **Linden Palmer, supra,** he is not close to retirement. Accordingly he is likely to face hardship in the labour market though he has not suffered external physical injuries.

[28] The collective effect of these factors means that Radcliffe Taylor is faced with an extended period of pain and suffering. Ten years have already passed and he is still suffering. Hence, it appears to the court that it would not be excessive to make an award at the upper end of the scale. The aim is to properly compensate the claimant for his pain and suffering and the court is of the view that this can only be done if a fair award is made to him. In all the circumstances of this case, the award which is Eight Million Five Hundred Thousand Dollars ($8,500,000.00) as submitted by counsel for the claimant.

FUTURE MEDICAL EXPENSES

[29] The court now diverts its attention to the claim for future medical expenses resulting from ongoing treatment for the claimant's illness. In the opinion of Dr. Garfield Forbes, the estimated cost of future medical care for the claimant is J$2,484,000.00 and US $759,000.00.

[30] The case of ***Kenroy Biggs v. Courts Jamaica and Peter Thompson*** 2004HCV00045 delivered on January 22, 2010 is instructive. In that case, Sykes J. accepted the submission of counsel for the defendants, based on Scottish and English jurisprudence that the multiplicand/multiplier approach should be used and that if the cost is expected to be life long, then the multiplier should be higher than that used for loss of future earnings.

[31] Relying on the case of ***Angie Moore v Mervis Rahman*** SUIT NO. C.L. 1984 M 544 as a guide, counsel for the claimant suggested a multiplier of 23. In **Angie Moore**, the claimant was 53 years old and a multiplier of 15 was used for

future medication. He was a wholesale higgler and pastor of the Redemption Church of God. He was injured in a motor vehicle accident on the 6th of November 1984.

[32] Mr. Moore was admitted to the Spanish Town Hospital on the day of the accident and transferred to the Kingston Public Hospital (KPH) later that day. There were several fractures to his ribs and he had a flail chest resulting from the trauma causing severe respiratory problems. A neurosurgeon and general surgeon were summoned to manage the plaintiff along with the orthopaedic team. Some brain damage was diagnosed. He had cerebral oedema (inflammation of the brain tissue). He was also suffering from hypovolemic shock. His legs were debrided under local anaesthetic but because of the plaintiff's precarious condition no more could be done at that time. He remained in hospital from November 06th, 1984 to April 06th, 1985 during which time he was totally disabled. General damages for future earnings was assessed at $1,756,096.00.

[33] In the present case, Dr. Forbes noted the estimated cost of standard therapies for chronic phase CML. He stated that the likely line of treatment will be based upon the stage of the claimant's disease which may evolve during the natural history. The line of treatment indicated by the doctor includes:

- **Daily Hydroxyurea**- this is primarily cytoreductive but does not confer cytogenetic or molecular response. The estimated cost = $6,000 - $9,000 per month. The annual sum of this medication is therefore approximately JA$108,000.00 (9,000 X 12). Using the multiplier of 23 the sum claimed for this medication is JA$2,484,000.00;

- The doctor state that the claimant will also need either **Imatinib** o**r Tasigna** daily. The estimated monthly cost of Imatinib is US$2,000.00 and the estimated monthly cost of Tasigna is

US$3,500.00. The average of these two costs is US$2,700.00. An estimated monthly cost of US$2,750.00 amounts to US$33,000.00 annually. Using the multiplier of 23, the sum claimed is US$759,000.00. Counsel therefore claims the sums of J$2,484,000.00 and US$759,000.00 under this head.

[34] Summary of awards:

- Special Damages: J$265,000.00
- General Damages: J$10,984,000.00 and US$759,000.00
- Pain and suffering: J$8,500,000.00
- Future medical expenses: J$2,484,000.00 and US$759,000.00
- Interest of 3% on special damages for the 19th February, 2004 to the 11th April 2014.
- Interest of 3% on the sum awarded for pain and suffered from the 12th February 2010 to the 11th April 2014.
- Costs of J$40,000.00 to the claimant.