

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2004/0069

BETWEEN:

RASHID PIGOTT

Claimant

AND

GALEFORCE WINDOWS & DOORS INC.

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Ms Jose Laurent of Legal Aid and Advice Centre for the Claimant

Mr. Hugh Marshall and Mrs. Cherissa Roberts-Thomas for the Defendant

2006: March 18th, 30th
May 18th, June 30th, August 30th
January 11th 2007

ASSESSMENT OF DAMAGES

- [1] **MATHURIN, M:** On the 23rd July 2003 the Claimant (Mr. Piggott), who was 42 years old, was employed with the Defendant Company as a window fabricator. On that day he was struck on the head with a 20 foot metal reinforcement steel frame when he was assigned to assist with the off loading of materials from a container. On the 1st March 2004, Mr. Piggott filed an action for damages for the injuries sustained from the incident. Judgment was entered for Mr. Piggott on the 11th January 2005 and directions were given for the assessment of damages and after several false starts occasioned by the parties attempting to resolve the matter, the hearing of the matter for the purpose of assessment was set down on 18th and 30th March 2006. Submissions were completed on the 16th August 2006.

General Damages

- [2] On the question of general damages, the law is settled. The case of Cornilliac v St Louis (1965) 7 WIR 491 is the locus classicus on this point and Wooding CJ set out the considerations to be borne in mind in assessing general damages;
- (a) The nature and extent of the injuries sustained
 - (b) The nature and gravity of the resulting physical disability
 - (c) The pain and suffering experienced
 - (d) The loss of amenities if any
 - (e) The extent to which pecuniary prospects are affected
- [3] Further, applying the principles in Heeralall v Hack Bros. (1977) 15 WIR 117, the law expects an award of fair compensation, fair to Mr. Piggott for what has happened to him through the negligence of the defendant and fair for the defendant to pay for such negligence. Such damages cannot be perfect compensation, but it will be fair compensation for his injuries and for the social, economic and domestic consequences to him.
- [4] Mr. Piggott, in his witness statement of the 17th October 2005, states that he was temporarily knocked unconscious when he was hit with the steel frame, he was taken to the hospital and given pain killers and went home to rest. He states that he continued to feel excruciating pain in his neck and right side especially in the shoulder but the doctor merely kept refilling his pain killer prescription. The doctor eventually put him on sick leave in August 2003 but at the end of the week as he was still in pain, he decided to visit Dr. Fouad Naffouj MD. He visited Dr. Naffouj six times and received injections to help relieve the pain. Mr. Piggott exhibited details of his visits from the 6th August to the 8th December of 2003. See "RP1"
- [5] On the 3rd September 2003, the Defendant sent a letter to Mr. Piggott acknowledging receipt of bills for the treatment by Dr. Naffouj but stated that they had no medical report and requested that he attend the Company Dr. Ramsey for an examination. There is no medical report submitting the result of the examination. There is a bill however for the examination and treatment of Mr. Piggott.
- [6] Mr. Piggott states that he could obtain no financial assistance from the Company to do the MRI test recommended by both Dr Naffouj in September 2003 and Dr Bedaysie in October 2003. His family, he states eventually assisted financially him in getting it done in April of 2005 when the procedure became available in Antigua. The MRI dated the 7th April 2005 revealed posterior osteophytes at C4/5, C5/6 and C6/7 which contained diffuse disc herniations at those levels. Dr Bedaysie in his report of 11th August 2005 stated that these findings were consistent with the injury described and assessed him with a partial disability of 40%. Dr Bedaysie also stated on cross examination that if surgically treated, his disability would be lessened to about 15%.

- [7] Mr. Piggott states that he continues to have excruciating and constant pain in his head, neck chest and shoulder and states that he has been advised that he will have to live on pain killers for the rest of his life with a strong prospect of increased disability as he grows older. This is substantiated by the witness statement of Dr. Bedaysie filed on the 15th February 2006 in which he states that Mr. Piggott will *"have to use painkillers and various forms of treatment for the rest of his life to reduce the pain"*.
- [8] Dr Bedaysie examined Mr. Piggott and submitted medical reports on the 17th October 2003 and on the 11th August 2005. Counsel for the Defendant Company cross examined him at length on both of these reports but in my opinion did not derogate from the fact that Mr. Piggott did in fact sustain the injury complained of and that the resulting disability to Mr. Piggott was from that injury. Indeed, on cross-examination, Dr Bedaysie stated as follows;
- "In my opinion if he had received appropriate treatment in 2003, I don't know if he would recover or not, 75% recover and 25% need surgery, it depends on where he falls... Recovery is not full, only symptomatic depending on stress, cold, how one treats the neck, driving, sports, swimming, diving... if he was not in the 75% category, he could have been treated surgically to be brought within that 75%"*
- Additionally, Dr. Bedaysie states that inasmuch as 90% of men have degenerative changes or diseases, he also states that the injuries to Mr. Piggott would either precipitate the onset or accelerate its deterioration.
- [9] Dr. Bedaysie asserts that permanent partial disability is a disability that is likely to prevent a person for the remainder of their life from performing one or more of the tasks of their accustomed profession but does not impair the ability to perform less demanding or other types of employment. At the time of the accident, Mr. Piggott was a window fabricator. He states that he now has a retail vending operation since the accident selling clothing, cosmetics and gift items in a building at Perry Bay Drive in St John's. He also has a pick up that he rents out on occasion. He states that in the course of his business, he loads and offloads the vehicle but does not lift items that weigh over a couple of pounds.
- [10] I have taken into consideration all the cases submitted as well as the submissions of counsel in relation to the issue of quantum of damages, and in all the circumstances, I am of the opinion that an award under the head of pain and suffering and loss of amenities in the sum of EC\$50,000.00 would be reasonable.

Loss of earning capacity

- [11] Mr. Piggott states that his earnings at the time of the accident were \$400.00 per week and now his vending business earns him between \$70.00 and \$200.00 a week (Para 11 affidavit of 12th December 2005). Mr. Piggott states however that he is an engineer in applied sciences by qualification which he defines as using knowledge of physics and mathematics to solve problems. He states that although he has applied in several instances, he has been unable to find a job fitted to his qualifications. There is no indication or evidence that this is either because of the injury or that the injury has affected his skills as an engineer or I hazard that he would not have made the applications. The

evidence is that his ability to perform as a window fabricator or in a similar field has been impaired.

- [12] The method that the court employs to assist in determining prospective loss of earnings was addressed by Haynes C. in Heeralall v Hack Bros. (1977) 15 WIR 117 where he quoted from Mayne and McGregor on Damages (12th edn) p.767

"This amount is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last... The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given instead of the various sums over the years, and second that contingencies might have arisen to cut off the earnings before the period of disability would otherwise come to its end. The method adopted by the courts is to scale down the basic figure is to take the figure intact of present annual earnings and reduce only the multiplier."

- [13] Counsel for the Defendant has suggested that the sum of \$250.00 per week be used to represent an estimate of the difference between what he was earning at the time of the injury and what he earns now. Counsel for the Claimant has not adjusted the multiplicand to reflect the fact that Mr. Piggott has been able to earn a living as a vendor for what he stated in cross-examination as "*a few years now*". I find the sum of \$250.00 per week to be an acceptable adjustment given the fluctuation in the Claimant's revenue from week to week. This would amount to the sum of \$13,000.00 per annum.
- [14] Counsel for Mr. Piggott asserts that a multiplier within the range of 12 to 15 would be proper given that Mr. Piggott was 42 at the time of the accident and therefore would have enjoyed a working life of at least 15 more years. Counsel for the Defendant refutes that a multiplier of 9 would be more appropriate as "*the trend for persons such as the Claimant is to use a multiplier of 9*". Regrettably Counsel has neither elaborated on that position nor submitted any authority from which the Court can derive any assistance.
- [15] I am minded of the vicissitudes and contingencies of an indefinite future as well as the fact that Mr. Piggott would receive the award as a lump sum and think that 10 may be an equitable multiplier in the circumstances. To calculate it in this regard, the loss of earnings will amount to \$13,000.00 x 10 = \$130,000.00.

Unlawful retention of wages from September 2003

- [16] Mr. Piggott, at the time of the accident was a weekly paid worker receiving a salary of \$400.00 a week. In accordance with the Antigua and Barbuda Labour Code, the notice requirement for such a position would be one week. He was on continuous medical leave from the 30th July 2003 to the 4th September 2003. On the 3rd September 2003, the Chairman of the Defendant requested that Mr. Piggott attend the Company doctor within five days to be examined based on the alleged injuries that he says he sustained on the job. The letter indicated that "*until the said matter is investigated and resolved, you are hereby suspended from work without pay.*"

- [17] Curiously, no medical report pursuant to this examination has ever been produced. The only indication that Mr. Piggott visited Dr. Ramsey is a statement submitted by Mr. Piggott dated the 4th November 2003. That statement indicates that Dr. Ramsey not only saw Mr. Piggott but also administered 10 ultra heat and vibration treatments, at least, I conclude, between the visit in September 2003 to the date of the bill in November 2003.
- [18] Counsel for the Defendant submits that because the suspension was indefinite, the Company was in breach of its contract to Mr. Piggott entitling him to damages in the amount he would have been paid had the Company terminated him. Counsel however, does not address when the breach effectively took place. It is my opinion, that it could only have taken place after the Company's doctor finished his treatment of Mr. Piggott and therefore I would order that the Company pay Mr. Piggott's wages for every week from the 3rd September to the 4th November, which in my calculation is a period of nine weeks. I would also order that Mr. Piggott be paid one weeks notice as required by law, totaling the sum of \$4,000.00.

Special Damages

- [19] The Claimant has itemized it special damages in the amount of \$5,453.68 representing the costs of his visits to Dr. Naffouj and Dr Ramsey, the cost of his MRI, the costs of the medical reports prepared by Dr Naffouj and Dr Bedaysie and the cost of sending the MRI test to Dr Bedaysie in Trinidad. The Defendant objects to these expenses stating that Mr. Piggott has failed to link these expenses to the injury sustained on the job in July 2003. I have no such difficulty. The Doctors swore by affidavits to the treatment received by Mr. Piggott. Dr Naffouj spoke of the visits and the treatments issued following the injury of 29th July 2003 in his affidavit of the 19th October 2005. Counsel for the Defendant chose not to raise any questions in relation to this evidence on cross examination of Dr Naffouj on the 18th March 2006 and it remains unrefuted. Similarly, no such questions were raised in cross examination of Dr Bedaysie or Mr. Piggott.
- [20] The Claimant has submitted bills in support of all the expenses claimed and I am satisfied that they were all incurred pursuant to the injury claimed and as such I order that special damages in the sum of \$5,453.68 be awarded to Mr. Piggott.

Interest

- [21] Interest is awarded to a claimant in a personal injuries case on the sum awarded for general damages for pain and suffering and loss of amenities prior to Judgment. Interest on this sum is calculated from the date of the service of the claim form to the date of judgment at the rate of a short-term investment. After judgment, the claimant is entitled to the full amount awarded at the statutory rate of 5%.

Costs

- [22] Costs in this claim are to be assessed as prescribed under Part 65.5(1) of the Civil Procedure Rules 2000. The damages to be awarded are \$50,000.00 for pain and suffering

and loss of amenities, \$130,000.00 for prospective loss of earnings, \$4,000.00 for loss of wages and special damages of \$5,453.68, The total award is EC\$189,453.68

[23] In keeping with Appendix B, costs are calculated in the sum of EC\$37,418.05 which is to be reduced to 55% as the claim concluded prior to trial but up to the case management conference and including assessment of damages. This amounts to costs in the sum of \$20,579.93

Summary of Order

[24] In summary, the following is the order on the assessment of damages:-

1. The defendant will pay the sum of \$50,000.00 as the global award for general damages for pain and suffering and loss of amenities to the claimant.
2. The defendant will pay, in addition, the sum of \$130,000.00 for prospective loss of earnings
3. The defendant will also pay special damages in the sum of \$5,453.68
4. The defendant will pay \$4,000.00 as loss of wages for 10 weeks.
5. The defendant will pay interest at the rate of 3% on the sum of \$189,453.68 from the date of service of the claim (5th March 2004) to date of the hearing of the assessment (18th May 2006)
6. The defendant will pay interest on the total judgment sum of \$189,453.68 at the rate of 5% per annum from today's date until payment.
7. The defendant will pay 55% of Mr. Piggott's prescribed costs in these proceedings in the sum of \$20,579.93.

CHERYL MATHURIN
MASTER