

HOLDER v. TODD

HIGH COURT - CIVIL SUIT NO. 1383 OF 1984

(Chase, J.) February 28, 1994]

(1994) 30 Barb. L.R. 68

Damages - *Personal injury - Comminuted fracture of left femur - Quantum.*

Facts: On March 14, 1982, the plaintiff was injured as a result of a motor vehicular accident. He suffered from a comminuted fracture of the left femur. On the question of damages -

Held: The sum of \$26,000 would be awarded for pain and suffering and loss of amenities.

Cases referred to:

Boyce v. Forde (Barbados. Civil Suit No. 166 of 1987)

Hodgkinson v. Percy (1980) Kemp & Kemp 10/233.

Zara v. Owens (1980) Kemp & Kemp 10/506.

Mr. H. deB. Forde, Q.C. for the plaintiff.

Mr. B.L.V. Gale for the defendant.

CHASE, J.: This is an application for the assessment of damages resulting from a collision which occurred on March 12, along Salters Road, St. George between motor cycle M7508 owned and ridden by the plaintiff and the motor van M3741 owned and driven by the defendant.

The application results from a judgment given by the court on June 13, 1988 in favour of the plaintiff.

Following the accident on March 12, 1982, the plaintiff was admitted to the Queen Elizabeth Hospital where he remained a patient for 13 weeks.

On admission, he was diagnosed as suffering from a comminuted fracture of the left femur and for 8 weeks he was treated with skeletal traction to the limb. After 13 weeks, he was discharged on non-weight bearing on the limb with the use of crutches. He attended the Orthopaedic Clinic as an out-patient for a number of weeks (medical report ex al) and was then referred to Dr. Errol Bennett, an orthopaedic surgeon, for an assessment of his injuries. Dr. Bennett's report (Exhibit A2) on the consultations which he had with the plaintiff on September 30 and October 12, 1983, states as follows:

"On examination, this man is erect. There is some tilting of his pelvis indicating a shortening of his left leg. The muscles of the left thigh is smaller by about two and one half centimetres (2 1/2 cm.) in circumference than the right side. The range of movement of the knees and his joints was full. [68]

X-rays were obtained of his left femur which showed that there was comminuted fracture of the distal left femur which on September 5 demonstrated solid bony union with very slight mal-alignment and shortening at the fracture site.

PROGNOSIS AND COMMENT

This man has sustained a fracture which has left him with a one and one half centimetre (1 1/2 cm.) shortening of the left leg. There is in association, some thickening around the fracture site and disability as a result of this.

The pains and stiffness which he complains of should be resolved gradually with time but they will probably not disappear completely.

He underwent considerable amounts of pain during the initial period after his injury and then remained in hospital for approximately thirteen (13) weeks, lying in bed in skeletal traction.

He is permanently disabled by virtue of the fact of having had a fracture and also by the shortening which he has suffered. On the basis of this shortening, he has a permanent disability of about twenty-five (25%) percent.

This refers to the fact that he is unable to walk without a limp and this is permanent. It also refers to the fact that this left leg is likely to remain somewhat smaller than the right and also to have less stamina and to become tired and uncomfortable on strenuous activity. As he is an out-worker, as a surveyor's assistant, this would have some influence on his ability to work normally.

He will probably be able to return to playing games, etc. but his tolerance for exercise will be somewhat diminished.

I do not anticipate that he will have any greater likelihood of having arthritis in the knee or hip joint but the slight possibility of this is taken into account in the disability assessment."

On October 3, 1986 the plaintiff consulted Dr. Winston Seale as regards his disability and continuing pain. In this report (Exhibit A3) Dr. Seale commented as follows:

"Re:Anderson Holder, Hothersal, St. John

I reviewed this gentleman on October 3, 1986 in order to submit an updated medical report on him. [69]

You will recall that his injuries were sustained on March 12, 1982, resulting in a fracture of his left femur. When I reviewed him, he noted that his present problems include:

1. A feeling of weakness and tenderness in the left leg especially when walking long distances. He also occasionally noted pain in and around the left knee.
2. Occasional swelling over the sites through which the skeletal traction was applied.
3. Some shortness of the left leg.
4. He felt his work was hampered and he was less efficient. He especially noted that climbing was difficult and long periods of standing often led to discomfort. He works as a surveyor's assistant and this demands periods of long walking, standing and climbing.

CLINICAL ASSESSMENT

This gentleman walked with an 'up and down' gait suggesting leg length irregularity. Clinically his left leg was one point five centimetres (1.5 cm) shorter than his right leg.

His femur was fully healed and he had started to rebuild his quadricep muscles. His knee was not swollen and he only lacked ten 10 degrees of full flexion. His knee and ankle were normal.

SUMMARY

This gentleman's injury is now some four (4) years old. His present difficulties can now be considered as permanent. A shortening of one point five (1.5 cm) presents only a little difficulty if his left shoe is built up to accommodate this defect, then he will correct his gait making any back discomfort less likely.

His ten degrees lack of extension is of no clinical significance except in full squats.

Repeat x-rays of his leg have shown full bony healing. There is no osteoarthritis present in the knee.

Mr. Holder's present disability is assessed at fifteen (15%) and this is permanent."[70]

In his affidavit filed in support of his claim for damages, the plaintiff deposed in paragraphs 10 and 11 as follows:

"10. At the time of the accident I experienced excruciating pain and despite the provision of analgesics and treatment at hospital, I underwent considerable amounts of pain during the time I spent in hospital. I was also unable to look after myself properly and was also immobile.

11. Since the accident I have experienced considerable pain, tenderness and numbness in my left leg and around the left knee together with swelling over the sites through which skeletal traction was applied. The pain radiated from my left hip area to my calf muscles. This was so especially when I walked for long distances. Prior to the accident I did not suffer such pain."

The plaintiff also asserts that he is no longer able to play cricket, a game in which he was an active participant prior to the accident; he is also unable to participate fully in any other type of athletic activity since sustaining the injury to his leg.

In his evidence under cross-examination, the plaintiff indicated that he never played cricket at the representative level. The cricket which he played was soft ball cricket and the other athletic activity was volley ball. Since the accident he has not attempted to play either of these two sports because of the injury to his leg.

Before the accident, the plaintiff worked as a casual chainman with the Ministry of Transport and Works and was away from work from the time of the accident on March 12, 1982 until September 30, 1982. (Ex A4).

On the basis of the foregoing evidence, I am satisfied that the plaintiff experienced pain and suffering as a result of the accident, that he was hospitalized for 13 weeks and during an 8 week period, he was treated with skeletal traction to his left leg and he was not able to resume work until October 1, 1982.

The plaintiff's x-rays confirm that he suffered a comminuted fracture of the femur. There is solid bony union accompanied, however, with some thickening around the fracture site. The plaintiff is now left with a 1.5 cm shortening of the leg; his pelvis is tilted as a result, and he walks with an up and down gait which can only be corrected by the use of a built-up shoe. He suffers recurrent pain and tenderness when he walks a distance of about half a mile and he experiences swelling of the calf muscle which bears a scar resulting from the application of the skeletal traction.

The plaintiff's work as a casual chainman or surveyor's assistant entails walking at sites and is his main activity on the job. He describes the nature of his work in paragraph 13 of his affidavit in these terms:

"At the time of the accident, I was, and at present, still am, a surveyor's [71] assistant employed by the Crown at the Ministry of Transport and Works. This job involves long periods of walking, standing and climbing. This work also involves walking and climbing

over rough surfaces and up and down hills from time to time. My ability to do these have been affected by my injuries and consequently, my on the job performance has suffered since I still suffer pain, particularly if I have to extend myself. I have had to curtail rather than extend my activity at work since I am partially handicapped."

The plaintiff also deposes as to work undertaken as a surveyor's assistant outside of his normal working hours with the Ministry of Transport and Works. In paragraph 13.1 he states:

"I was formerly allowed to undertake work outside of my job hours and I would from time to time work with other surveyors as their assistant on weekends and bank holidays. I estimate that from this I was at the time of the accident earning approximately \$75.00 per day. On an average I worked extra about 20 days per year. Because of my injury I do not now undertake such work although several surveyors have approached me to assist them. Surveyors' assistants are now paid on an average of \$85.00 per day for such work. Had I not suffered my injury I would now be earning extra from this additional work. Had I been able to work overtime I estimate that I would have increased my extra work to about 30 days on weekends and bank holidays."

Under cross-examination with respect to the work which he claims he did outside of normal working hours, his evidence is as follows:

"Prior to the accident, I worked with Andrews Bannister. After the accident, I phoned and asked him for work and he said it won't be any sense to have me because I can't do what I used to do before. He knew that because he used to work at the Ministry of Transport. He left the Ministry either last year or the year before.

I have not approached other surveyors for work. Only Andrew bannister. No other surveyors have spoken to me for extra work. I would have worked 60 days a year. When I say weekends, I include bank holidays. Before the accident my extra earnings were at \$75.00 a day. There are no receipts or pay slips to prove this."

In his report of November 21, 1983, Dr. Bennett assessed the plaintiff's permanent disability at 25% on the basis of his 1.5 cm shortening of the leg; whereas Dr. Seale in his November 4, 1986 report assessed it at 15%. In my judgment, Dr. Seale's assessment as to the plaintiff's permanent disability is to be preferred, and I therefore accept his assessment of the plaintiff's permanent [72] disability.

With respect to the assessment of the award which would compensate the plaintiff for the pain and suffering and loss of amenities which he sustained as a result of the negligent driving of the defendant, counsel cited a number of cases for the consideration of the court. These cases reflect the lower and upper limbs of compensation awarded for injuries almost similar to those of the plaintiff and range from \$15,500 in the case of *Cameron Boyce v. Colin Forde* (No. 166/1987) to \$55,257, in the case of *Hodgkinson v. Percy* (1980) Kemp & Kemp 10/323.

In *Boyce v. Forde* the plaintiff suffered a compound fracture of the right tibia and fibula and was hospitalized for 18 days. After recovery from the accident, his overall instability was assessed at 5%. There was no likelihood of premature degenerative arthritis. Damages were assessed at \$15,500.

In *Zara v. Owen* (1980) Kemp & Kemp 10/506, the plaintiff's injury was a fracture of the femur which resulted in hospitalization for 2 weeks and in surgery for the insertion of an intra-medullary

pin in the femur. After resting at home for a few weeks he began walking with the aid of crutches. He experienced weakness in the leg and occasional pain at the site of the fracture and he walked with a limp. He next walked with the aid of a stick until 8 months after the accident.

At the date of trial, he had no significant limp, but his mobility and endurance were slightly impaired. There was also some permanent discomfort at the site of the fracture. The operation on the leg left a scar. General damages were assessed at £3,500 sterling converted at \$16,817.50.

In my view, the injuries and loss of amenities in the foregoing cases were less serious than in the instant case where the plaintiff was immobilized for 13 weeks and suffered a 15% permanent disability attributable to the shortening of his left leg. His back discomfort is considered to be less likely only if he wears built-up shoes to correct the deficiency in his gait. His participation in the playing of volley ball and of other sporting activities requiring the use of his legs is now restricted and the scar to his leg remains.

As fair compensation for the plaintiff's pain and suffering and loss of amenities, I would assess the award for general damages at \$26,000.

As regards the plaintiff's claim in respect of loss of earnings for extra work, I take the view that the evidence upon which it is sought to base the claim is somewhat tenuous.

In his affidavit (para 13.1) the plaintiff states that he would from time to time work with other surveyors as their assistant on weekends and bank holidays; and that on average he worked for about 20 days per year doing this extra work. His further evidence under cross-examination is to the effect that he worked with no other surveyor except Mr. Andrew Bannister and that after the accident, he only spoke to Mr. Bannister as regards the likelihood of resuming the extra work. He also stated that he would have worked 60 days a year. No documentary evidence whatsoever was tendered to support the plaintiff's claim that he was paid \$75.00 a day for the extra work with Dr. Bannister.

It is to be observed also that since the plaintiff resumed his duties with the [73] Ministry of Transport and Works in October, 1982, he appeared to have worked with the Ministry continuously up to the date of trial on a 5 day work week, i.e. for a period of some 7 years after the accident. I am therefore led to the conclusion that, despite his disability the plaintiff must have been performing his duties adequately so as to retain his employment with the Ministry as "a casual chainman". In these circumstances, I can find no basis upon which the plaintiff's claim under this head can reasonably be entertained for assessment.

It is clear from Ex. A4 that the plaintiff has suffered loss of earnings as a result of his incapacity. This loss is certified at \$4,102.00 and is allowed together with the other items of special damages that have been agreed between the parties.

Interest on the special damages will be at the rate of 4% from December 14, 1984 until today's date; thereafter at 8% until payment. Interest on the general damages will be at the rate of 8% from today until payment.

The plaintiff will have his costs to be agreed or taxed.[74]

