REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry, San Fernando

CV 2013-02216

BETWEEN

DEVANAND RAMSAMOOJ
Claimant

AND

DAI-TECH LIMITED
Defendant

BEFORE THE HONOURABLE MADAM JUSTICE JONES

Appearances:

Mr. S. Roopnarine instructed by Ms. S. Sandy for the Claimant.

Mr. R. Jagai instructed by Ms. R. Jaggernauth for the Defendant.

JUDGMENT

1. On 7th February 2012, while in the employ of the Defendant as an air-condition technician, the Claimant, Devanand Ramsamooj, sustained injury on the jobsite. He sues the Defendant in negligence. By consent the parties have agreed to apportion liability as follows: 70% in favor of the Claimant 30% in favor of the Defendant. At issue here is the assessment of the Claimant's damages.

2. Before dealing with the sums to be awarded for both special and general damages two issues relevant to both types of damages arise on the evidence. It is appropriate to deal with these issues now. Evidence on behalf of the Defendant was given by its managing director Dev Debideen. According to Debideen in December 2013 he offered to have the

Claimant return to work at the same salary and, even though he could no longer perform his duties, merely sit in the office.

3. The first issue raised by this evidence is, if the offer was in fact made, ought the Claimant to have accepted it in mitigation of his damages. The second issue arises from the submissions of the Defendant. According to the submission this was an offer made during the course of mediation. This was mediation engaged by the parties pursuant to an order of the Court made in accordance with the existence at the time of court annexed mediation. The issue here is whether it is proper to refer in evidence at trial to an offer made during the course of mediation in circumstances where the mediation does not result in an agreement.

Mitigation

4. The basic principle is that a Claimant is required to take all reasonable steps to minimize her or his loss. In this case the issue of mitigation was not raised in the defence. Understandably so since if the submission made by attorneys for the Defendant is correct it would seem the offer was made after the defence was filed. Under normal circumstances therefore, if not raised in the defence, a defendant would be unable to lead evidence in this regard. The duty of a claimant to mitigate loss still however exists.

5. No objection was made to this evidence. Indeed the Claimant himself in his evidence in chief alludes to a job offer. He says that he did not accept the job offer because he was too scared to go back to work with the Defendant. Under cross-examination however the Claimant denies that he was offered a job at the same salary with no duties.

6. For the reasons hereinafter adduced it makes no difference whose evidence I accept. For what it is worth however I prefer the Defendant's evidence in this regard. It seems

to me to be the more credible in the light of the apparent contradiction between the Claimant's evidence in chief and his cross-examination. The simple question here therefore is whether it was reasonable for the Claimant to refuse the offer. The question of the reasonableness of the refusal is an issue of fact for my determination.

7. In the context of his evidence in chief the Claimant's stated reason for refusing the offer seems to relate only to an acceptance of his old job and the physical conditions under which he would be required to work. Under cross-examination he states that even if he was offered the same salary for doing nothing he would not accept it. He does not give any further reason for such refusal.

8. On the undisputed facts it seems to me to be reasonable for the Claimant to refuse an offer to be allowed to sit in the office and do nothing. In the first place it is clearly an offer only made during the course of the court proceedings and even then only made orally. Secondly the Claimant is 22 years old with a long working life ahead of him. Is it realistic to expect that for the rest of the Claimant's working life the Defendant would allow such an arrangement to continue. The Defendant runs a business, presumably to make a profit, in which other persons are employed. It is reasonable in these circumstances to expect that good business and good industrial relations practice would require the Defendant at some later stage to reconsider this position. In my opinion this was not an offer that was reasonable to accept in these circumstances.

Mediation

9. While this issue makes no difference to the outcome of these proceedings the principle raised is one which needs stating. One of the first and fundamental principles of mediation is confidentiality. Parties, including the mediator, are bound by the mediation

agreement to keep the information received and communications exchanged during the mediation process confidential. If the mediation results in a settlement of the dispute then the only information arising from that process that is published are the agreements arrived at during the mediation. It is therefore generally improper to refer to offers made during the mediation process in evidence at a subsequent trial.[1] The Mediation Act however by section 13(2)(c) provides an exception where the substance of the evidence has been disclosed with the express or implied consent of all the mediation parties. If the submission made by the Defendant's attorney is correct therefore such disclosure if not consensual was highly inappropriate and the evidence prima facie inadmissible. That said I am satisfied that the evidence was not allowed in by Counsel by virtue of any mala fides on Attorney's part. Court annexed mediation is still relatively new to this jurisdiction.

GENERAL DAMAGES

10. As is the norm in this jurisdiction[2] general damages are considered under five category headings:

(i) the nature and extent of the injury sustained;

(ii) the nature and gravity of the resulting physical disability;

(iii) the pain and suffering endured;

(iv) the loss of amenities suffered; and

(v) the extent to which the claimant's pecuniary prospects have been affected.

11. In support of his claim the Claimant produced medical reports from the North-Central and the South West Regional Health Authorities. These medical reports are dated 20th April 2012, 25th of September 2013 and 7th November 2013. These reports were produced

[1] Mediation Act Ch 5:32
[2] Cornilliac v St. Louis (1964) 7 WIR 491 @ 492

into evidence by virtue of hearsay notices. The Claimant was also medically examined by the Defendant's doctor, Dr. Derek Lousaing. Only Dr. Lousaing gave oral evidence.

The nature and extent of injuries sustained and the resulting physical disability

12. The nature and extent of the injuries sustained are not in dispute. The Claimant suffered comminuted high energy distil radial fractures of both wrists. The dispute between the parties, if any, lies in the area of the nature and gravity of the resulting physical disability sustained by the Claimant. It is not in dispute however that the Claimant is left with permanent residual damage. I accept the evidence of Dr. Lousaing with respect to the Claimant's resulting physical disability.

13. According to Dr. Lousaing in his medical report dated the 20th March 2014 the Claimant is assessed as having a permanent partial disability of 40%. While I recognise that an assessment of the permanent partial disability is primarily for the purpose of workman's compensation it forms a useful tool here as a means of comparison between the later assessment of Dr. Lousaing and the Claimant's earlier assessments and is of assistance to chart the Claimant's progress or lack thereof.

14. In this regard it is to be noted that the medical report of Dr. Vaalmiki Singh dated that 7th of November 2013 notes that the Claimant's permanent percentage disability was assessed at 40%. For what it is worth therefore both doctors seem to be in agreement with respect to the effect of the injury on the Claimant's percentage permanent partial disability. This to me suggests that there has been no real improvement in this regard despite the Claimant's undergoing two surgeries and physiotherapy sessions over the period of review.

15. According to the Claimant he cannot now do anything for too long because of his hands. Given the context in which this is stated in his witness statement I assume that this means with respect to doing practical work requiring the use of his hands. He says he cannot lift heavy things and can barely grip anything. According to him he can barely hold a pen, struggles to write his name and takes a long time to do so. His evidence is that his hands bend outwards and there are scars on his wrist.

16. The medical report and evidence of Dr. Lousaing confirms damage to both wrists and in particular:

a) numbness and tingling in the fingers;
b) mild radial drift of the right wrist;
c) significant radial drift of the left wrist;
d) shortening of the radius in both arms - with a significant shortening of 20 mm in the right arm;
e) reduced range of movement in both wrists; and
f) future deterioration of the joints of the wrist and future post-dramatic arthritis in the joints of the wrist.

17. The evidence of Dr. Lousaing is that deterioration as a result of distal post-traumatic arthritis is inevitable. He says that he would expect that surgical procedure may improve his long-term function with respect to decreasing the deterioration over time. He costs that procedure at $65,000.00. Under cross-examination Dr. Lousaing accepts however that the surgery will not prevent the Claimant from developing post-traumatic arthritis.

18. Much of the oral evidence centred on the Claimant's ability to grip: in particular to grip between the thumb and index finger and to make what Dr. Lousiang describes as 'a

power grip'. To this end the Defendant produced video evidence which it was submitted showed an exaggeration by the Claimant of his resulting disability. The contents of the videos do not convince me of this fact. One video shows the Claimant with his fingers around a wrought iron bar forming a part of a gate. In my opinion it provides no evidence of his gripping the bar or supporting his body weight with his hands as suggested by the Defendant. Nor does the second video show the Claimant holding or throwing a duck as submitted by the Defendant. At best this video merely shows the Claimant "shooing" a duck presumably back into its pen and picking up and throwing a stone to chase a dog.

19. In this regard therefore I accept the evidence of the Claimant given under cross-examination with respect to the video evidence. In its submissions the Defendant made much of the fact that under cross-examination the Claimant admitted signing his witness statement using a pen. While I am satisfied that the Claimant can sign his name this fact does not render his evidence that he can barely sign his name and takes a long time to do so untrue. Neither does the fact that during the course of his cross-examination the Claimant was able to turn pages of his witness statement. It was clear to me that the Claimant was able to do this with some difficulty. My observations of the Claimant also confirmed his evidence with respect to his hands being permanently turned outwards.

20. Evidence was also given from an investigator employed by the Defendant. Except with respect to the verification of the video evidence I am satisfied that the evidence given by this investigator does not advance the case of the Defendant. At the end of the day I accept the evidence of the Claimant and of the Defendant's doctor, Dr. Lousaing as to the Claimant's resulting physical disability.

Pain and suffering endured and loss of amenities

21. The award for pain and suffering is made to compensate a claimant for the physical pain and mental stress endured. An award for loss of amenities takes into consideration a claimant's non-pecuniary loss as a result of the accident. Both are subjective. The Claimant gives graphic evidence of the intense pain endured by him immediately after the accident and through hospitalization for 7 days; his two surgeries and 8 physiotherapy sessions. I accept this evidence. I also accept his evidence with respect to his embarrassment over the indignities experienced as a result of not being able to use his hands to care for himself.

22. According to the Claimant he still experiences pain everyday particularly if the weather is bad. He says his hands, and his fingers cramp if he does one task for too long. I understand this to refer to tasks that he is able to do given his disability. Under cross-examination he accepts that he is now able to bathe and feed himself and to take care of his personal hygiene. I accept the Claimant's evidence. With respect to pain I am satisfied that, although not as intense as it was initially and through his two surgeries, the Claimant still suffers pain sufficient for him to rely on the regular use of pain killers.

23. In his evidence Dr. Lousaing accepts that the Claimant will be restricted in some activities of daily living. According to him this can only be subjectively described by the Claimant. Although the Claimant's evidence to his loss of amenities is short in my view it says a lot to the effect of the injury on him and his lifestyle.

24. The Claimant says that he is no longer able to drive because he cannot hold the steering wheel. According to him before the accident he was saving to buy a vehicle. He says he cannot live a normal life for a 22 year old man. He does not go out regularly as he feels

very self-conscious about the scars on his wrists and the fact that his hands bend outwards. As a result of persons staring at him he says whenever he goes out he wears long sleeved jackets to hide his injuries. According to him the accident has truly changed his life.

25. I accept the Claimant's evidence in this regard. I am satisfied that as a result of the accident he is now unable to enjoy most of the activities available to a young man of his age. Indeed the mere fact that he is now unable to drive must be the source of much anguish to him. I am also satisfied that his physical appearance is no longer as appealing and that as a result of this he would attract the attention of members of the public and not in a good way. It would seem to me that this would be particularly mortifying for someone of his age. I am satisfied that as he says the accident has truly changed his life.

26. The Defendant suggests that the sum of $80,000-$100,000 is a reasonable sum to award under the head of pain and suffering and loss of amenities. The Claimant on the other hand suggests that a reasonable sum here is $450,000.00. In coming to my conclusions in this regard I bear in mind that this is a once and for all award and that the Claimant is entitled to compensation which is both fair and adequate. And while I am required to look at past cases they are just that, a guide, and no more. Each case must be assessed on its own unique facts.

27. That said it is clear that a comparison of awards made in earlier cases are not of much assistance. To my mind the important factors distinguishing this case from the cases dealing with hand injuries are: the age of the Claimant; the fact that both hands have been seriously damaged and the cosmetic effect of the injuries and its consequence on the Claimant's non-pecuniary future. In these circumstances while I have considered awards made in other cases I am satisfied that this case is unique with respect to the injuries suffered

by the Claimant. In the circumstances the sum of $250,000.00 is in my opinion a suitable sum to compensate the Claimant for his loss of amenities and pain and suffering endured.

Pecuniary prospects

28. It is not in dispute that the Claimant can no longer work as a air-condition technician. Evidence has been adduced of the Claimant attending classes leading to a diploma in electronics. The Claimant has not denied this but says that he was merely doing this to accompany his brother to the course and to occupy his time. He says that he has been unable to participate in the practical parts of the course. I accept this evidence. It is consistent with the medical evidence as to his resulting disability. I am satisfied that on the evidence before me the Claimant's attendance at the classes will make no difference to his pecuniary prospects.

29. Dr. Lousaing opines that in the future the Claimant's employment prospects will be limited to office type activity and clerical work. The difficulty here is that, although the Claimant is clearly able to read and write and had attended secondary school, he has only obtained one subject at the Caribbean Examinations Council ("CXC") level that subject being science. According to him he was never academically inclined and was better at practical work. He says that his work experience has only been in the field of air-condition installation. I accept this evidence. It would seem to me therefore that it is highly likely that at this stage the Claimant will get alternate employment. Further there seems to be no likelihood, given his aptitude, that even if he retakes his CXC examinations that he will be successful in the near future or at all. That said the Claimant is a young man and has his whole life ahead of him to retrain for limited clerical work.

30. I propose therefore to embark on the usual multiplier/multiplicand exercise based a total inability to work but then discount the total arrived at by 15% to take into consideration that given his young age it may be possible over time for the Claimant to re-educate himself in order to hold some sort of clerical job. At the same time I must bear in mind that the longer he is unemployed the more difficult it will be for him to compete with younger more physically able persons for employment.

31. Using a base figure of $4,000.00 a month I arrive at a multiplicand of $48,000.00 a year. The Claimant suggests a multiplier of 21 years. I think a multiplier of 20 years is more appropriate. That gives a figure of $960,000.00 which when discounted by 15% gives a total of $816,000.00. In the circumstances the sum of $816,000.00 represents the Claimant's future loss of earnings.

SPECIAL DAMAGES

Medical expenses

32. The Claimant seeks the sum of $850.00 and continuing for his medical expenses. The sum of $850.00 claimed in his statement of case has not been denied in accordance with the rules. The Claimant has also produced receipts amounting to the sum of $1,182.00 paid for medical expenses in 2014. Both of these sums are allowed. The Claimant's medical expenses as proved are therefore $2,032.00.

Travel expenses

33. The Claimant seeks the sum of $2,500.00 and continuing representing his travel expenses. The Claimant produces no receipts in support of this expense. Given the nature of the expense and the fact that taxi drivers do not usually provide receipts the failure to provide

receipts is not necessarily fatal to the claim. The Claimant however gives no oral evidence of any travelling expenses except that after the second surgery his aunt had to hire a vehicle to take him home. Even then the Claimant does not give the cost of hiring the vehicle. Nor does he give me any evidence from which I can arrive at a reasonable sum in this regard. No award is made under this head.

Loss of future earnings

34. The Claimant seeks the sum of $4,000.00 a month and continuing for his loss of future earnings. The Claimant would be entitled to loss of earnings as special damages for the period from the date of the accident to trial- a period of some 33 months. By its defence the Defendant admits that the Claimant was entitled to $4000.00 a month less the statutory deductions and states that the Claimant was paid his salary for the months of March, April and May 2012. The pay-slips annexed to the defence and tendered into evidence however state the Claimant’s net pay to be $4,000.00. I accept this.

35. I am satisfied that the Claimant received the sum of $4,000.00 a month for the months of March, April and May and thereafter the sum of $1,333.33 for 5 months. According to the defence these latter payments were in accordance with the provisions of the Workmen's Compensation Act and accordingly are to be treated as payments under the Act. In the circumstances therefore the sum of $120,000.00 represents the Claimant’s loss of earnings. From this however will be deducted the sum of $6,666.65 representing the sums paid to him under the Workman’s Compensation Act. The award under this head is therefore $113,333.35.

Domestic/nursing assistance

36. The Claimant seeks the sum of $2,500.00 a month representing domestic/nursing assistance from 7th February 2012. The Claimant's evidence is that during his period of incapacity his aunt looked after him. He does not purport to have paid his aunt and consequently provides no receipts for this expense. With respect to this claim on the evidence I am satisfied that the Claimant needed nursing assistance and that this assistance was provided to him by his aunt. I am also satisfied that the Defendant is liable to pay to the Claimant the value of these services. In this regard I accept the statement of Megaw LJ in Donnelly v Joyce[3]:

> " The Plaintiff's loss……….is not the expenditure to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or those nursing services, the value of which the purposes of damages-for the purpose of the ascertainment of the amount of his loss-is the proper and reasonable cost of supplying those needs."

In my opinion this sum of $2,500.00 a month is a reasonable cost of supplying the Claimant's need for nursing care and domestic assistance.

37. From his evidence his aunt attended to his needs everyday even while he was in hospital. It is clear from the evidence and I accept that at least up to March 2013 the Claimant's aunt was required to attend his needs on a full-time basis. The Claimant gives no evidence as to when thereafter he became able to see after his personal hygiene. He however only seeks to payment under this head for 14 months. This seems to me to be a reasonable period on the evidence before me. I am of the opinion that the sum of $35,000.00 is a reasonable sum to cover the value of domestic/nursing assistance rendered to him by his aunt.

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[3] [1973]3 All E.R. 475 @480.

Future surgery

38. As I understand the evidence of Dr. Lousaing the surgery recommended is to deal with that deterioration as a result of distal post-traumatic arthritis which, he says, is inevitable. Under cross-examination Dr. Lousaing accepts that the surgery will not prevent the Claimant from developing post-traumatic arthritis. Dr. Lousaing gives the costs of this surgery as $65,200.00.

39. With respect to undergoing further surgery in his evidence in chief the Claimant states that he was advised by Dr. Ramroop that he would need future surgery for his wrists. With respect to that surgery the Claimant says that he wishes he would not have to undergo any further surgery but if it is required he would have no choice. As a result of a decision taken by the Claimant's Attorney not to present Dr. Ramroop for cross-examination the medical report of Dr. Ramroop was not tendered into evidence. Under cross-examination however the Claimant says categorically that he does not want to do the surgery. In the context of the cross-examination this statement could only be with reference to the surgery recommended by Dr. Lousaing. In the circumstances of this categorical refusal I make no award for future surgery.

40. Insofar as the failure to undergo this surgery may impact on the Claimant's general damages I am of the view that it does not. It is clear to me that at best Dr. Lousaing can only surmise that the surgery may improve the Claimant's long-term function. He is certain however that even if the Claimant were to undergo the surgery it would not prevent him from developing post-traumatic arthritis. In the circumstances in so far as it is relevant to the question of mitigation, given his history with previous surgeries and the prognosis given by the doctor of the limited chances of success and then only with for the purpose of limiting the

extent of post-traumatic arthritis, I find that it was not unreasonable for the Claimant to refuse to undergo this surgery.

41. At the end of the day therefore if the Defendant was 100% liable for the Claimant's damages I would have awarded the Claimant the sum of $1,066,000.00 representing his general damages and special damages in the sum of $150,365.35. In accordance with the consent order on liability therefore these amounts must be discounted by 30%. That is, General Damages = $1,066,000.00 - $319,800.00 (30% reduction) =$746,200.00. Special Damages=$150,365.35 - $45,109.61 (30% reduction) = $105,255.75.

42. In any proceedings tried in any Court of record for recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment **s.25 Supreme Court Act Ch 4:01**.

43. The award of interest is to compensate the litigant in personal injuries cases for being kept out of the money which ought to have been paid to him **Jefford v Gee [1970] AC 130**. It is for this reason that future awards are not subject to interest payments.

44. Adopting a similar approach to that taken by this court in **Samantha Hosein v Central Equipment Rentals and Ors CV2009-00301**, I am of the view that giving the prevailing economic climate and in particular the low rates of interest being paid by financial institutions at present that with respect to the special damages the Claimant will be entitled to interest at the rate of 3% and with respect to the general damages interest at a rate of 6%.

45. My award is as follows. General damages excluding loss of future earnings is assessed in the sum of $175,000.00 together with interest at a rate of 6% from the date of filing the claim to the date of the trial. Loss of future earnings is awarded in the sum of $571,200.00, no interest is awarded on this sum. Special damages are assessed in the sum of $105,255.75 at a rate of interest of 3% from the date of the accident to the date of the trial.

Dated this 10th day of November, 2014.

Judith Jones
Judge