9 pages.

ROYAL COURT
(Samedi Division) 97.

24th May, 1996.

Before: The Bailiff and Jurat the Hon. J.A.G. Coutanche
and Jurat C.L.Gruchy

Between	Michael Peter Le Gallou	Plaintiff
And	Kenneth Winston Malorey	Defendants

Advocate S. J. Willing for the Plaintiff
Advocate D. G. Le Sueur for the Defendant

JUDGEMENT

THE BAILIFF: We begin by recording that the decision embodied in this judgment is the decision of the Court as constituted at the time of the hearing, notwithstanding that Jurat Coutanche has now retired from the Bench.

On the 8th March, 1993, the Plaintiff was engaged in his work as a window cleaner when the ladder from which he was working slid sideways and he fell some 20 feet to the ground. As a result of the fall he suffered injuries and he alleges that he has suffered loss and damage. Liability has now been admitted by the Defendant and the only question for the Court is accordingly the quantum of damages which ought to be paid.

Mr. Willing, for the Plaintiff, puts the claim under three headings, viz:

(1) Special damages, principally for loss of earnings;

(2) Loss of amenity and pain and suffering;

(3) Potential handicap in the labour market at some future date.

We examine each of these elements of the claim in turn.

(1) Mr. Willing submits that the Plaintiff is entitled to lost earnings for the period 8th March, 1993, to 6th March, 1994, in the sum of £9,192, reimbursement of taxi fares to and from

the hospital in the sum of £30, and compensation for damaged clothing in the sum of £70. No point is taken by the Defendant in relation to the last two amounts. In relation to the first, Mr. Le Sueur accepts that the figure of £9,192 is a correct calculation of lost earnings if the Plaintiff is found to have been unfit to work during that period. Mr. Le Sueur argues however that the Plaintiff could have returned to work probably after a month but certainly long before 6th March, 1994.

The evidence of the Plaintiff was that he was born on the 22nd November, 1960, and was accordingly aged 32 at the date of the accident. He left school without any educational qualifications and had earned his living by manual work of different kinds. He had worked on fishing boats and in the fish and catering trades. He had worked as a window cleaner for eight or nine years. After falling from the ladder, he had been taken to the General Hospital in great pain. There he was given pain killing injections and was x-rayed. Having been told that his back was not broken, his other injuries were cleaned up and he was discharged from hospital and signed off work for two weeks. To the detail of his injuries we shall revert in due course. He continued to be in great pain and was referred to the physiotherapist. His evidence was that he was given infra-red treatment, pulsation by electric waves, manipulation, and treatment in the gymnasium. Although the frequency of the physiotherapy varied, it lasted for about a year. During all this time he was under the care of his general practitioner, Dr. Ellis, who examined him and signed him off work for periods of a month at a time. He was finally certified fit for work by Dr. Ellis on 7th March, 1994.

Dr. Ellis was not called as a witness. Mr. Le Sueur submitted that an unfavourable inference ought to be drawn from this omission on the part of the Plaintiff. We do not accept that submission. Documentary evidence was placed before us of payments made by the Social Security Department during the period in question on the basis of the sick notes provided by Dr. Ellis. We see no reason to doubt that the Plaintiff was certified unfit for work by Dr. Ellis during this period.

The Plaintiff gave evidence that he did not feel able to carry out manual work during this time. He would have been prepared to undertake office work but he was not qualified for any such occupation.

Some support for the Plaintiff's evidence was given by Dr. Carl Clinton who is a Consultant at the General Hospital. He has a diploma in sports' injuries. Dr. Clinton expressed the opinion that the Plaintiff should not have been working during the period for which his general practitioner had

signed him off work. His evidence was that persons suffering from back injury (as was the Plaintiff) were often signed off work for some time, particularly where manual work was involved. Dr. Clinton had examined the Plaintiff on the day of the accident and subsequently on the 15th March, 1993, 21st April, 1993, and 21st September, 1994.

Contrary evidence was given for the Defendant by Dr. S. Ravindran, an associated specialist in orthopaedic injuries. Dr. Ravindran examined the Plaintiff on the 17th October, 1994. On the basis of the history given by the Plaintiff and of his examination, Dr. Ravindran expressed the opinion that the Plaintiff could have been working one month after the accident. He could not however have lifted heavy objects. Dr. Ravindran nevertheless conceded that the Plaintiff's general practitioner was in a better position than he was to make such a judgment.

The Court is satisfied that the Plaintiff was not fit to work during the period 8th March, 1993, to 6th March, 1994. In our judgment the Plaintiff was an honest and convincing witness, and we have no hesitation in accepting his evidence. We accordingly award the Plaintiff under this limb special damages totalling £9,292. We also award interest on that sum from the 8th March, 1993, (the date of the accident) to the 16th February, 1996 (the closing date of the trial) at the rate of 6% per annum.

(2) Mr. Willing submitted that the appropriate award for loss of amenity and for pain and suffering was £10,000. Mr. Le Sueur argued that a figure of £4,500 would be right.

In support of his submission Mr. Willing argued that the Plaintiff had suffered a significant trauma. He had not lost consciousness after the fall and had been in severe pain. He was unable to move and believed that he had broken his back. He had suffered grazes and bruising to various parts of his body which were evident for about a month. He had sustained a direct blow to his right knee which had caused a neuro-praxia (that is bruising to the nerve supplying sensation). The Plaintiff gave evidence that intermittently he still felt no sensation in that knee. The Plaintiff was incontinent for some three weeks which had clearly been a distressing experience. Finally he had suffered injury to his lower back which, on the evidence of Dr. Clinton, was muscular and ligamentous in nature rather than a prolapsed disc. Dr. Clinton's prognosis was that the Plaintiff should eventually recover from the neuro-praxia. The symptoms affecting the lower back were more difficult to interpret but, given that the Plaintiff was still complaining of intermittent back pain after three years, he thought that it was likely to continue. The Plaintiff might well become a chronic back sufferer with permanent lower back pain.

Mr. Willing also drew attention to the other consequences for the Plaintiff of the accident. He had been unable to have sexual intercourse with his wife for some three months. He could not pick up his children and swing them around in play as he had once been able to do. His sporting activities had been curtailed. He was no longer able to play pool or darts. He had recommenced playing golf although at the date of the hearing he was able to manage only nine holes. His golfing prowess had been impaired and his handicap had risen from seven to eighteen.

Mr. Le Sueur relied upon the evidence of Dr. Ravindran. In essence this evidence was that the Plaintiff had made a complete recovery from all his injuries except the lower back pain. Dr. Ravindran's opinion was that this should settle with analgesics and would not cause the Plaintiff any permanent disability. He expressed the view (with which Dr. Clinton concurred) that if the Plaintiff reduced his weight this would help to alleviate his back pain.

Both Dr. Clinton and Dr. Ravindran agreed that back pain was a difficult area for medical men to assess because it relied to an extent upon the patient's own history of the pain or discomfort. Insofar as there is a difference of opinion between the expert witnesses as to their prognosis of the likelihood or otherwise of continuing back pain, we prefer the evidence of Dr. Clinton. We think that, having regard to his closer involvement with Plaintiff's medical problems, his prognosis is more likely to be correct.

Both Counsel helpfully drew our attention to a number of English cases in which particular awards had been made. None of those cases is completely in point but we derived some assistance from Wakefield v. Basildon and Thurrock Health Authority (16th May, 1989) Unreported. The short report in Butterworth Section IX reads:

> ***"Catering assistant injured her back while trying to turn over a patient who had fallen in a fit. She sustained an acute prolapsed disc. She continues to work but takes pain killers daily and finds that she is not as mobile as she was. Her back becomes more painful after a heavy day's work or in wet weather."***

An award of £6,000 was made which we were told would equate today to a figure of about £8,500.

Balancing all the relevant factors as best we can, we consider that the appropriate award on this limb of the claim is £8,000. To that figure must be added interest at 2% per annum from 15th March, 1994 when proceedings were instituted.

(3) We turn finally to what is sometimes called a Smith v. Manchester head of damage, i.e. the assessment of whether the plaintiff will suffer a potential handicap in the labour market at some future date.

Tomes D.B. in Brown v. Collas and Le Sueur (Electrical Contractors) Limited and Hibbs & Hill Limited (1992) JLR 145 at 158, stated that there were two questions to be answered:

> ***"First, is there a real possibility that the plaintiff will be on the labour market before retirement? ... Second, is there a real likelihood that he will suffer loss if were to return to the labour market?"***

So far as the first question is concerned, Mr. Le Sueur conceded that there was a real possibility that the Plaintiff will be on the job market before retirement. The first question must therefore be answered in the affirmative. So far as the second question is concerned, Mr. Le Sueur submitted that there was evidence of the Plaintiff's ability to compete successfully. The Plaintiff's 1992 Income Tax Return showed that his employment by Fishport Limited came to an end on 21st August, 1992. He was in receipt of welfare payments until 12th November, but then secured his job with the defendant. He had been unemployed for only some two months before finding alternative employment. After being pronounced fit for work following the accident, the Plaintiff had quickly obtained part-time work in the fish market. That had become full-time employment which he still held. On the other hand, the evidence of Mr. Campbelton, the Plaintiff's current employer, was that he had seen the Plaintiff in pain at work. Being a fellow back sufferer, he was sympathetic towards the Plaintiff. He had, however, been obliged to terminate the employment of another employee with similar problems and if the Plaintiff's back played up in the future, he could not guarantee continued employment. The Plaintiff is fortunate to have a sympathetic employer. If that employment were to come to an end, and the Defendant has conceded that possibility, it appears to us absolutely clear that the Plaintiff would suffer a considerable handicap in the labour market; that is to say, there is a real likelihood that he would suffer loss in those circumstances. We accordingly answer the second question in the affirmative.

In Smith v. Manchester, Scarman L.J. described this head of damage and the desirable approach to it in the following terms:-

> ***"The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market?.... It is clearly inappropriate, when assessing this element of loss, to attempt to calculate any annual sum or to apply to any sum so many years'***

> ***purchase. The Court has to look at the weakness so to speak 'in the round' take a note of the various contingencies, and do its best to reach an assessment which will do justice to the plaintiff".***

Adopting that approach, and having regard to the Plaintiff's age and skills, we consider that the fair figure under this head is one of £6,000.

The total award in favour of the Plaintiff, exclusive of interest which will have to be calculated, is one of £23,292.

Authorities

Wakefield -v- Basildon & Thurrock Health Authority (16th May, 1989) Unreported Judgment of English High Court.

Smith -v- Manchester Corporation (1974) 17 KIR 1; 118 Sol. Jo. 597.

Brown -v- Collas & Le Sueur & Anor (1992) JLR 145.

Kemp & Kemp R.55: June 1995: p.55006 - 55008: E1-004-007: Back Injuries.

Kemp & Kemp R.51: June 1994:

Norrington -v- Struth: E3-029/3.

Cairney -v- Alexander (1990) SLT568: E3-029/4.

Jacobsen -v- Hughes: E3-030.

Dale -v- Radcliffe Paper Mill: E3-031.

Wolfenden -v- James: E3-031/1.

re Gilchrist: E3-031/2.

Rothwell -v- Plymouth City Council: E3-032.

Prokop -v- DHSS & Anor: E3-033.

Kemp & Kemp: Release 37: 25-1-91:

Fletcher -v- Hattersley Newman Hender: E3-034.

Brettoner -v- N.C.B: E3-035.

Bennett -v- Kyle Stewart (Properties) Limited: E3-036.

Kemp & Kemp: R.49: January 1994:

Leach -v- Standard Telephones & Cables E3-037.

Maddison -v- Gandy: E3-037/1.

Deeley -v- Western National: E3-037/2.

Mattison -v- Ullah: E3-037/3.

McMillan -v- Marshall (D.B.) (Newbridge) Limited: E3-037/4.

Gordon -v- Portsmore: E3-038.

Hurran -v- Sir Robert McAlpine & Sons: E3-039.

Kemp & Kemp: R.53: January, 1995:

Carstairs: E3-039/1.

Jones -v- Liverpool City Council: E3-039/2.

Norman -v- Taylor: E3-039/3.

Bentley -v- Pushman: E3-039/4.

Mills -v- Greater London Council: E3-039/5.

Bell -v- Wash: E3-039/6.

Williams -v- Parry: E3-039/7.

Kemp & Kemp: R.56: August, 1995.

Kirk -v- Laine Theatre Arts: K2-012.

Studwell -v- White: K2-013.

West -v- Campagnie: K2-013/1.

Matthew- -v- Oldfield & Hawkins: K2-013/2.

Th- -er -v- Anders: K2-013/3.

Witton -v- Thompson: K2-013/4.

Pavell -v- Thompson: K2-013/5.

Hanwell -v- Bell & Anor: K2-013/6.

Bedford -v- Ackworth Working Men's Club: K2-013/7.

re Hirst: K2-013/8.

Johnson -v- Edwards: K2-014.

Pollard -v- Blackman: K2-014/1.

Speechley -v- Spencer: K2-014/2.

Goy -v- Dalgety: K2-014/3.

Old -v- Sampson: K2-014/4.

Butterworths: BPILS Issue 23: IX/1349-1364; 1381-1388; 1397-1404.
: BPILS Issue 25: IX/1365-1372; 1405-1412.
: BPILS Issue 27: IX/1373-1380; 1389-1396.

Kemp & Kemp : R.50: March, 1994: pp.5059-5060/1.

: R47: July, 1993: 5061-2.
: R56: August, 1995: 5063-5064.
: R55: June, 1995: 5075-76.
: R48: October, 1993: 5077-5078 (Smith -v- Manchester Corporation (1974) 17 KIR 1.
: R.47: July 1993: 5079-5116.
: R.48: October, 1993: 5117-5118.
: R.50: March, 1994: 5118/1-2.

Louis -v- Bellée (1970) JJ 1707.

Louis -v- Bellée (1970) JJ 2049 CofA.

Kemp & Kemp: Vol 2: Personal Injury Reports:

Page -v- Enfield & Harringay Area Health Authority: E3-107.

Lal (Harbans) -v- Alycast Limited: E3-010.

Saunders -v- South Eastern Electricity Board: E3-011.

Pedley -v- Timmins: E3-011/1.

Duxbury -v- Warwick & Bailey" E3-015.

Kemp & Kemp: Quantum of Damages: Vol.1: 5-009/7-5/012.