IN THE SUPREME COURT OF NAURU
AT YAREN

Civil Suit No. 1 of 2016

BETWEEN

Joseph Adam

Plaintiff

And:

Nauru Rehabilitation Corporation

First Defendant

And:

Derio Namaduk of Ewa District, Leading Hand

Second Defendant

Before: Khan, J
Date of Hearing: 8 June 2017 and 25 April 2019
Date of Final Submissions: 26 June 2019
Date of Judgement: 4 October 2019

Case may be cited as: *Adam v Nauru Rehabilitation Corporation and Others*

CATCHWORDS:

Personal injuries claim - liability admitted - assessment of damages.

APPEARANCES:

Counsel for the Plaintiff: V Clodumar
Counsel for the Defendants: D Aingimea

JUDGEMENT

INTRODUCTION

1. The plaintiff was born on 22 February 1968. He is 51 years old now. He is married with two adult daughters. The plaintiff's spouse is unemployed.

2. The plaintiff was employed by the first defendant since 8 July 2013 as a general labourer. He was paid wages of $5,930.86 per annum at the rate of $228.11 per fortnight.

3. In the letter of appointment dated 8 July 2013 the plaintiff was advised that his employment was on a probationary period of 3 months when his performance will be reviewed.

INJURIES ON 22 APRIL 2015

4. After his appointment on 8 July 2013 the plaintiff continued in his employment with the first defendant until 22 April 2015 when he suffered injuries at around 10.20am. The plaintiff was working with another tradesman. Both got into a bucket of an excavator driven by the second defendant to replace a roller on a conveyor belt. They were raised to a height of approximately 20 feet. After the roller was replaced the second defendant driving the excavator swung the bucket to the left and to the right and up and down and swung over rock stockpiles tipping the plaintiff onto the rock stockpiles. As a result, the plaintiff suffered injuries to his right middle finger.

5. The plaintiff was taken to RON Hospital and he was attended by Dr Oten who noted that the plaintiff sustained a crushed injury of the right middle finger (distal phalange). He had surgery the next morning with the wound debridement and the doctor noted that he had extensive soft tissue injury, a damaged nail and a broken distal phalange. He was given antibiotics for 10 days and his wound became infected and a repeat surgical debridement was carried out on 7 May 2015 and the nail on the middle finger was removed.

6. The plaintiff attended the RON Hospital for daily dressing before his second surgical debridement.

7. The plaintiff saw Dr Oten on 13 May 2015 and the doctor stated in his medical report dated 14 May 2015 that the plaintiff may resume duties on 25 May 2015.

FURTHER MEDICAL REVIEW

8. Dr Oten saw the plaintiff on 11 October 2015 and provided a medical report dated 12 October 2015 where he stated:

> "I reviewed him in the clinic yesterday and both clinical radiological assessments revealed a consolidated union of the finger fracture with mal-alignment of the nail and mild deformity of the right middle distal phalange. The range of movement of the finger is full but the pulp is hypersensitive to light touch. This is also aggravated with exposure to cold water and vibration especially when riding his motor bike.
>
> Diagnosis: Neuroma – caused by damaged small nerve in the right middle finger.
>
> This is a permanent problem which will require regular medication and loss of production. The other treatment options are available – this would mean

complete denervation of the affected finger which will result in lost of sensorium and secondly a digital amputation."

9. On 19 August 2015 the plaintiff wrote to the administration officer, Jacinta Agir, and informed her that he was unable to return to the work because of the injuries and that the doctor had suggested that he may be required to have the middle finger amputated. He also complained that his colleagues were making fun of him as to how he sustained the injuries.

10. Because of his medical condition the plaintiff was unable to return to work.

CLAIM AGAINST THE DEFENDANTS

11. On 12 January 2016 the plaintiff filed his claim against the defendants and the defendants filed a statement of defence on behalf of both defendants.

LIABILITY ADMITTED

12. The matter was set down for hearing on 8 June 2017 when the defendants counsel, Miss Lekenua, informed the Court that liability was being admitted on behalf of both the defendants and the only issue for determination was assessment of damages. Mr Clodumar called the plaintiff to give evidence to substantiate his claim for damages.

TERMINATION OF EMPLOYMENT

13. On 2 June 2016 the plaintiff's employment was terminated by the first defendant. In their letter of termination dated 2 June 2016 the first defendant stated inter alia the following:

"The probationary period will be at the discretion of the Chief Executive Officer, at the end of a probationary period a review will be undertaken on the performance of the appointee and the Chief Executive Officer shall, in writing –

a) Confirm the appointment; or

b) Extend the probationary period if the original period was less than six (6) months up to six (6) months, or

c) Terminate the appointment.

However, upon reviewing your performance during your employment at NRC, your performance has not reached a satisfactory standard during your probationary period. During your probationary period it has been observed that you have absented yourself from work from 5 January 2016 to current date, 2 June 2016, you were aware of the stance that exceeding three (3) days absence without official leave is against the company's policy. ....

Due to your prolonged absences from work without any leave applied or explanation during your probationary period until current, I regret to advise you that effective today, Friday 3 June 2016, your casual employment with Nauru

Rehabilitation Corporation as a labourer within waste management section is hereby terminated."

14. During the course of the plaintiff's evidence it transpired that the plaintiff had consulted Dr Richard Leona, chief surgeon of RON Hospital who provided a medical report dated 6 June 2017 where he inter alia stated:

> " ... He is not able to do his normal job due to the non-use of the right hand. He is a right-handed person. ....
>
> The assessment is that the abovenamed a non-usable right middle finger from the injury sustained at workplace with ongoing pain. He will need an amputation of the affected finger at the middle interphalangeal joint.
>
> This will amount to 90% permanent functional loss of the affected finger."

15. On 9 June 2017 during the trial the plaintiff decided to have the middle finger amputated and the trial was therefore adjourned.

PROCEDURE FOR AMPUTATION

16. The procedure for amputation of the injured finger was performed by Dr Leona on 6 July 2017.

17. The hearing was rescheduled for 5 April 2019 when Dr Leona's medical report dated 7 February 2018 was tendered by consent in which he stated inter alia the following:

> "The procedure was performed on 6 July 2017. According to the patient, he does not experience pain. He is able to do normal activities at home.
>
> The examination shows that on supination there was a loss of distal phalange of the right middle finger with a well healing stump wound. The proximal and the middle phalanges are present.
>
> On flexion of the right fingers, the right middle stump flex to only 60 degrees. There is no less sensation to the stump.
>
> The following assessments are made:
>
> 1) There is a permanent physical loss of the distal phalange of the right middle finger;
>
> 2) There is no more pain that was experienced prior to the amputation;
>
> 3) There is a 40 degree loss flexion of the right middle finger stump;
>
> 4) There is a decreased right-hand grip strength;
>
> 5) There is no less sensation to the stump.

Based on the findings, the following recommendations are made:

1) The permanent physical loss of the distal phalange to be based on the personal injury act;

2) The loss of right-hand grip strength be compensated for a proportion of 20%;

3) The patient to commence right hand grip exercises."

18. Dr Leona's report amongst other things states that the plaintiff is able to do normal work at home and most importantly there is no more pain that was experienced prior to the amputation.

19. Mr Clodumar in his written submissions cited the case of *Katopau v Samoa Breweries Limited*[1] where Chief Justice Sapolu stated as follows at pages 6 and 7:

"**Some guiding principles on assessment of damages in personal injury claims**

> At common law, damages for personal injury claims are awarded in a lump sum on a 'once and for all' basis for past and future losses. Damages are not awarded on the basis of periodic payments of provisional damages. They are awarded 'once and for all' in a lump sum which must necessarily involve estimates, for a high component of such awards normally relates to future losses. Thus, a plaintiff cannot come back in future and say that the award was too low or the defendant to say that the award was too high as the future unfolds. In other jurisdictions, for example, Western Australia, South Australia and the United Kingdom, statutory provisions have been enacted giving the Court discretionary powers to award damages by way of periodic payments of provisional damages in appropriate cases. In *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1QB 196 at p.220, Lord Denning MR expressed the view that the trial Court had the power to make a lump sum award on an interim basis so that the plaintiff can come back to the Court in the future if the interim award turns out to be too low. However, on appeal the House of Lords disagreed with Lord Denning MR's view. As I understand these proceedings, they were conducted on the basis that the award of damages in an action for personal injuries is to be by way of lump sum on a 'once and for all' basis. At least that was position taken by Dillon J in the case of *Retzlaff v Western Samoa Airport Authority* [1980-1993] WSLR 464 cited by counsel for the plaintiff. For the purpose of this case, I am content to follow that approach.
>
> The traditional position at common law as expressed by Lord Scarman in the House of Lords in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC174 at pp.183-184 in this way:
>
> "Sooner or later- and too often later rather than sooner – if the parties do not settle, a Court (once liability is admitted or proved) has to make an award of damages. The award, which covers past, present, and future injury and loss, must under our law be a lump sum assessed at the end of the legal process.

[1] [2000] WSSC 36 (13 October 2000)

The award is final: it is not susceptible to the view as the future unfolds, substituting fact for estimate".

The above position seems to be one adopted in most jurisdictions, at least in England and Australia.

There is, however, a division of judicial opinion with a lump sum award of general damages in personal injury claims simply be given as a global sum without allocating a separate sum for each component of damages that make up the award, or whether a separate sum shall be allocated to each component head of damages, even on a tentative and preliminary basis, then the total of those individual sums to arrive at the lump sum award. Our Court of Appeal in *Western Samoa Shipping Corporation Limited v Iosefa Feagai* (1994) CA 6/93; unreported judgement delivered on 22 March 1994 has preferred not breaking down an award of special damages by allocating a separate of each component head of damages and then total them up. The Court of Appeal said:

"We think it better when making assessment for general damages that three additional subdivisions be used, even if in the final award separate amounts are not attributed to those subdivisions … We are inclined to the view that it is not desirable to break down awards as precisely as the judge did. That strategy could give an impression of exactitude which is not warranted."

The opposite view was expressed in Australia by Gibbs J in *Gamser v Nominal Defendant* [1977] HCA 7; (1977) 136 CLR 145 at 147-148 Gibbs and Stephen JJ in *Sharman v Evans* [1977] HCA 8; (1977) 138 CLR 563 at 572, which was cited for the plaintiff, is not the view favoured by our Court of Appeal.

The next matter I wish to refer to is the classification between special and general damages in personal injuries claim and how it applies to the assessment of damages. Special damages relate to pre-judgement and pecuniary losses and expenses incurred by a plaintiff as a consequence of his injuries. This would include such matters as hospital and medical expenses, transport costs to see a doctor, loss of earning before judgement. Because there are special damages, such matters must be strictly pleaded and proved. As for general damages, these relate primarily to post-judgement or prospective non-pecuniary losses such as pain and suffering, loss of amenities or enjoyment of life and loss of earning capacity. General damages also relate to such matters as pre-judgment or pain and sufferings which are non-pecuniary losses and post-judgement or prospective pecuniary expenses which at the time of the judgement had not crystallized. For the purposes of pleading, general damages need not be specifically pleaded, but there must be averred in the Statement of Claim.

As special damages are damages which crystallize in concrete form before trial, they are capable of precise mathematical calculation or approximation, and there should be little difficulties in reaching agreement on the amount to be awarded for special damages. It is the assessment of special damages which relate to prospective losses that presents the real difficulties. Because these are losses in the future, the Court in assessing damages for such losses must necessarily be involved in making only estimates for no one can foretell the

future with exactitude. The task of making assessment for general damages is commonly carried out under the conventional of heads of pain and suffering, loss of amenities and loss of earning capacity: see the judgement of the Court of Appeal in *Western Samoa Shipping Corporation Limited v Iosefa Feagai* (1994) (C.A. 6/93; unreported judgement delivered on 22 March 1994).

20. I shall now make an assessment of damages. Firstly, I shall make an assessment of special damages.

SPECIAL DAMAGES

21. The pain in the plaintiff's middle finger disappeared after the amputation on 6 July 2017 and the loss of earning in this period which I calculate to be 2 years 3 months (22 April 2015 to 6 July 2017). After the operation I shall make an allowance for a further period of 2 months for healing. So, his loss of earnings would be 2 years 5 months. At the time of the injury, he was paid an annual salary of $5,930.86 ($5,930.86 ÷ 12 = $494.23) and $494.23 x 29 months = $14,332.00.

22. The plaintiff's loss of earnings would have crystallized if he was able to return to work by September 2017 but it continued as the first defendant terminated his employment in June 2016 and the reason for the termination was being absent from work when it was well known to the first defendant that the plaintiff could not return to work because of the injuries sustained on 22 April 2015. This is supported by medical evidence so the plaintiff's loss of earnings from September 2017 continued until 31 December 2018 when he found employment as a security officer on a casual basis.

23. The plaintiff was able to find this employment as a relieving security officer only for a period of 3 months. His attempts to find full time employment as a security officer was not successful. He made application at Canstract after seeing advertisements and attended interviews but without any success. In any event the plaintiff is entitled to be compensated for loss of earnings up to the date of the judgement- see *Katapou v Samoa Breweries Limited*[2] where it was stated at page 8 as follows:

"*The next item that comes under special damages is pre-judgement loss earnings. This relates to the period from the time of the accident to the date of judgement.*"

Also see *Yanuca Island Ltd v Elsworth*[3]. The Fiji Court of Appeal stated at the last page of the judgment as follows:

"*Loss of earnings from the issue of Writ to the date of judgement ...*"

I calculate that to be (date of accident 22 April 2015 – date of judgement 4 October 2019 which is approximately 4½ years which is fifty-four (54) months x $494.23) is the sum of $26,688.00. From this amount I deduct a sum of 20 days for which the plaintiff was paid sick leave by the first defendant ($494.23 ÷ 14 = $35 x 20 days = $706) and I further deduct a sum of $1,200 which the plaintiff earned as a reliever security officer. So, the total amount of loss of earning is $24,782.00 ($26,688.00 - $1,906.00).

[2] [2000] WSSC 36 (13 October 2000)

[3] [2002] FJCA 65; ABU0085U.2000S (16 August 2002)

GENERAL DAMAGES

24. I now make an assessment of general damages which includes pain and suffering, loss of amenities and loss of earning capacity.

PAIN AND SUFFERING

25. The plaintiff went through multiple medical procedures at the RON Hospital for the injuries he sustained. Dr Oten was of the opinion that the injuries should settle down within 5 weeks but it did not and in his report on 12 October 2015 he stated that 'the pulps hypersensitive' and 'with exposure to cold water and vibration especially when riding his motor cycle'.

26. The plaintiff had to suffer the pain and suffering until his finger was amputated on 6 July 2017.

27. The plaintiff had to suffer the pain for a period in excess of 2 years and Mr Clodumar submits that an award should be made in the sum of $20,000 whilst Mr Aingimea submits that there should be no award for pain and suffering. He relies on the Workers' Compensation Act 1956 which provides that the maximum amount that can be awarded under the Act is $4,700 and the plaintiff's injuries will be classified at 11% and under the Act he submits that an award in the sum of $517 shall be made in total. I shall discuss the relevance of Workers' Compensation Act 1956 later.

28. The plaintiff had to put up with pain and suffering in excess of 2 years and I make an award in the sum of $ 15,000 under this head.

LOSS OF AMENITIES AND FUTURE LOSS OF EARNING CAPACITY

Loss of Amenities

29. Under this head the plaintiff claims that before the injury he would go fishing on a regular basis as well as catching black Noddy birds. The plaintiff said that he is unable to do fishing as he cannot hold a fishing line with a portion of the middle finger missing nor can he tie his bait and hold the pole to catch Noddy birds. His evidence is that he used to sell the Noddy birds and earn approximately $400 per month which I find to be exaggerated but I accept that is at a disadvantage now with the decreased strength and grip of the right hand (see Dr Leona's report 7 February 2018). Instead of making separate awards under this head, I will include it in the assessment for future loss of earnings.

Future Loss of Earnings

30. The plaintiff is a right-handed man. All his life was engaged in doing physical work including at the time of the injuries. Dr Leona in his report[4] states that:

[4] Dated 7 February 2018

"The loss of the right-hand grip strength be compensated for a proportion of 20%".

31. The plaintiff has had no formal education and can barely speak or write in English so he will not be suitable for any sedentary employment.

32. The plaintiff was able to get employment after the injuries as a reliever security officer for a period of 3 months but at a reduced pay. I am of the opinion that given the situation in Nauru his options are very limited. With his injuries he can still work as a security officer as that does not involve any lifting. But the pay will be in the region of approximately $200 per fortnight.

33. The plaintiff as I stated earlier is 51 years old and could work for another 10 years. I make an assessment for future loss of earnings in the sum of $50,000. The total award is as follows:

1) Special Damages	$ 24782
2) Pain and Suffering	$15,000
3) Future Loss of Income	$50,000
Total	$89,782

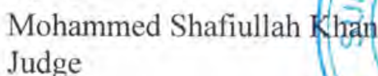
34. I stated earlier that I shall discuss the Workers' Compensation Act. Mr Aingimea in his submissions stated that this Act was reviewed in 2011 and unfortunately that is not correct. It was only revised in 2011.

35. In the title to the Act it is stated that it may be cited as Workers' Compensation Act 1956 and the maximum award of $4,700[5] was fixed in 1956 which in my view is completely out of date. With the developments taking place in Nauru the Act ought to be reviewed in terms of the amount of compensation payable.

36. When a workman suffers personal injuries, he can claim under the Act as well as independently of the Act[6]. Having been compensated under the Act he may file a claim for personal injuries under the common law and any amount received in excess of what he was paid under the Act has to be refunded.

37. I shall hear further submissions on the issue of costs to these proceedings.

DATED this 4 day of October 2019



Mohammed Shafiullah Khan
Judge

[5] S.12 of the Workers' Compensation Act 1956
[6] S.19 of the Workers' Compensation Act 1956