

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

Date: 19971211

Docket: T-79-91

BETWEEN.

PATRICK McGUIRE,

Plaintiff,

-and-

HER MAJESTY THE QUEEN IN RIGHT OF CANADA,

Defendant.

REASONS FOR JUDGMENT

DUBÉ J.

[1] On November 2, 1988, while entering a barn at the Pittsburgh Institution where he was incarcerated, the plaintiff was struck on the head by a round bale of hay weighing approximately one thousand pounds. The bale was pushed by an employee of Correctional Services Canada from a loft situated some twenty feet above the barn floor. The plaintiff who suffered injuries launched an action against the defendant

who admitted liability and filed a confession of judgment on August 24, 1993. The purpose of this hearing is to establish the quantum of damage.

1- Employment history

[2] The plaintiff was born on March 14, 1939, went to Grade 11 at the local high school at Gananoque, Ontario, but did not complete his grade. He began his employment with the Ontario Department of Highways in construction surveying at the rate of \$1.15 per hour in 1955. By 1959, he was working on the weigh scales at a \$1.35 per hour. Subsequently, he worked at odd jobs and became a rivet machine operator in Hamilton, Ontario. Between 1964 and 1966 he was employed by Fairbanks Motors as a grinder, initially earning \$2.50 per hour and then \$3.75 per hour. Later on, he worked on steel rigging earning \$4.00 per hour. Then, he worked for a period of almost seven years at the Stelco Plant in the forge shop and between 1966 and 1972 his pay rate rose from \$5.25 to \$8.25 per hour. Later on, he worked at Port Colbourne Drop Forging Ltd. from 1973 to 1980. His salary there rose from \$4.50 to \$10.00 per hour working in the forge shop and maintenance.

[3] In the course of his work at the forge shop he hurt his low back on April 28, 1980, by lifting a 45 gallon drum and has suffered chronic lower back pain ever since. On March 4, 1987, the Workers Compensation Board of Ontario confirmed his entitlement to a ten percent pension as a result of that accident and the plaintiff is currently in receipt of a life-time partial disability pension¹. The plaintiff has not been able to work for the three years preceding his incarceration.

[4] From December 18, 1982 to May 1993, he was in custody and released for a brief period of time until July 11, 1983, when he was convicted on the second degree murder of his wife with no possibility of parole for ten years.

2. Activities while incarcerated

[5] The plaintiff was incarcerated at Collin's Bay for two and a half years during which time he earned his certification as a welder and took some courses in English, mathematics, drafting and blueprint. While

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The amounts annexed to his August 1997 monthly cheque appear as follows:

PERM PARTIAL DISABILITY	\$500.53
O.A.S. BENEFIT/PENSION	\$405.12
BILL 165 AWARD - REGULAR/ARREARS	\$208.28
TOTAL AMOUNT PAYABLE	\$1,113.93

at the Joyceville Institution, he worked at building maintenance and attended physiotherapy, but his back would still flare up from time to time. On June 16, 1988, he began working on a farm at Pittsburgh Institution in the stock yard looking after cattle. He drove a tractor to feed the cattle until November 2, 1988, when the bale of hay fell on his head. The impact drove him backwards. He landed in a pile of cow manure and subsequently was transported to the Hotel Dieu Hospital.

[6] On the next day, he returned to work. He testified that he did return to work so quickly so as not to be returned to Joyceville Institution as he preferred to work on the farm.

3. The nature of the injury

[7] The plaintiff's medical expert, Dr. Charles Johnson, a specialist in rehabilitative medicine first saw the plaintiff on March 28, 1990, and examined him on several other occasions. He testified that the plaintiff suffered pain in the neck and intermittent tingling in the arms. There was also some pain in his upper thoracic spine. The plaintiff complained of difficulties turning his head and a grinding in his neck which was present a good deal of the time. He had difficulty turning his neck,

particularly toward the left. He felt tenderness in the muscles of the neck and shoulder area. The x-rays demonstrated a very mild degree of flattening of his sixth vertebra in the neck. There was not much degenerative arthritis. He did not expect the condition of the plaintiff to improve over the years. In his view, the plaintiff might not be competitively employable. He concluded as follows: "he can't do it on a maintained basis, he can't do it on a predictable basis and a reliable basis".

[8] The defendant called as a medical expert, Dr. Gavin Laughlan Shanks, Professor of Rehabilitation Medicine at Queen's University who only saw the plaintiff on one occasion, four and a half years after the accident but reviewed at the time the plaintiff's medical file, including x-rays taken immediately after the accident. In his view, the x-rays were inconclusive and open to a variety of interpretations. Whereas Dr. Johnson felt that the plaintiff had suffered a compression fracture, Dr. Shanks did not feel this was the case as such a condition would have resulted in the exhibition of immediate physical symptoms which were not clinically documented the day of his admission at the emergency after the accident. He noted that the radiology reports indicated no bruising and no soft tissue but a tender cervical spine. He stated that someone with a serious neck injury does not return to regular work duties the next day. In his view, the plaintiff's lower back injury was more debilitating to the

plaintiff's employability than the neck injury for the type of manual labour in which the plaintiff would want to engage.

[9] In summary, Dr. Shanks felt that the plaintiff expressed simple and straightforward complaints about a substantial injury to his neck which were in keeping with the mechanism of the injury which he sustained. Dr. Shanks thought that the plaintiff's discomfort had not materially changed. He reported that the discomfort was at a mild to moderate level. However, Dr. Shanks said that he was unable to set a percentage as between the back and neck injuries with reference to his ability to work.

4. Actuarial evidence

[10] Mr. Douglas Townsend was called by the plaintiff as an expert witness to give actuarial evidence. Using four different approaches, he came to the conclusion that the plaintiff's gross income based on \$16.00 per hour would be of \$33,280 per annum. He indicated that the plaintiff would not have been able to afford to retire at the age of 65 and thus that he would have to work until the age of 70. He calculated that the plaintiff's past income loss from September 1994 to August 1997, the

month of the instant hearing, to amount to \$101,879. At the trial, he realized that he had short changed the plaintiff by almost a year as the latter was released in December 1993 and not September 1994. As to future income loss, he calculated the amount to be \$203,156 at age 65 and \$323,600 at age 70. He calculated the plaintiff's loss under the Canadian Pension Plan benefits to be of \$9,628.

[11] In his summary, the plaintiff claims the following damages: general damages \$55,000 to \$60,000; future income loss \$323,600, less 10 to 15 percent for contingencies; past income loss \$101,879 and CPP pension loss \$9,628.

[12] However, as pointed out by counsel for the defendant, Mr. Townsend made several assumptions which were not established in fact. First, that he was qualified to be employed in any of the specific trades which he used as barometers for his hourly rates; second, that he would be immediately hired and paid a salary at the top of the pay scale; third, that he would work full time for twelve months; fourth, that his neck injury was the sole cause of his unemployment, disregarding the back disability for which the plaintiff was already receiving compensation; fifth, that the plaintiff had a valid driver's licence which he had lost before his

incarceration; and, sixth, that he would have been able to work or find work full time until the age of 65 or 70.

5. Conclusions

[13] It is clear that the plaintiff has suffered a substantial injury to his neck and the defendant has admitted responsibility for it. Thus, the defendant is liable for damages and the purpose of such damages is to place the plaintiff in a position that he would have been, but for the neck accident.

[14] The basic principle of compensation is *restitutio in integrum*. In assessing loss of future earnings, the Court ought to consider the following factors: level of income, period of loss, contingencies, discount rate, possibility of duplication and miscellaneous matters². However, the assessment of future losses can seldom be approached on purely mathematical criteria. It must often rest on a judgmental basis. In other words, actuarial and economic loss evidence may be used as a guide, but the Court must also take into account all the relevant evidence³. The

² Kim Kreutzer Work, *Remedies and Tort*, 1996. vol. 4, rel. 6.

³ *Reid v. Longridge*, [1994], May 16, 1994 (B.C.S.C.), unreported.

Court must consider the individual's field of work, his temperament, his education and ability, the general economic conditions and the possibilities of employment⁴.

[15] The plaintiff has provided this Court with eight decisions from Canadian Superior Courts between 1987 and 1996 (seven from the Province of Ontario and one from British Columbia). Based on these cases, general damages range from \$36,000 to \$75,000. These cases were for neck injuries described as small compression fractures or neck strain.

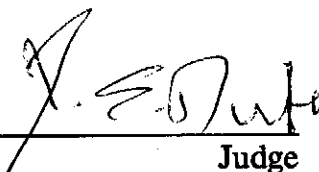
[16] However, each case stands on its own specific facts and, above all, the Court must be fair to both sides in fixing the appropriate measure of damages⁵. In the instant case, the Court is not dealing with a healthy young individual working steadily at a regular job whose loss of future income can be readily calculated. The situation is much more complex and extremely speculative. The actuarial report of Mr. Townsend is purely mathematical and does not take into consideration several vital factors, as mentioned earlier.

⁴ *supra*, note 1.

⁵ *Tomsic v. Sharma*, [1994], April 7, 1994, (B.C.S.C.), unreported.

[17] The plaintiff has been out of the work market for several years. He has been incarcerated for ten years. He is already handicapped by a back injury for which he receives compensation. He has no special trade nor profession. Undoubtedly, he wants to work but there is no evidence to the effect that any potential employer would have hired him, even without his neck injury. He is already 58 years old. Even if he were perfectly healthy, there is no evidence that in the present labour market he could be employed full time until the age of 65 or 70. No former employer came forward to testify that he would have re-employed him, but for his neck injury. His criminal record would possibly be a negative factor. Thus, there is no quick actuarial response to the problem and, again, the difficulty is compounded by the fact that the plaintiff is already handicapped by a back injury for which he receives compensation.

[18] Thus, a lump sum award for general damages is appropriate in the circumstances. I will therefore assess the general damages, including pain and suffering, at \$25,000 and loss of earning capacity, including loss of past and future income, at \$50,000, for a total judgment of \$75,000, plus the costs of this action.


Judge

OTTAWA, ONTARIO
December 11, 1997