

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL GAGNE, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 92-162-P-H
)	
LO STAMPO, et al.,)	
)	
Defendants)	

RECOMMENDED DECISION ON DAMAGES

The plaintiffs initiated this products liability/personal injury suit against Lo Stampo, Kachina Tanning Company, Inc. and Abbas Fadel. Lo Stampo never appeared in the action and its default was entered on November 18, 1992. Kachina Tanning and Fadel originally appeared through counsel who later withdrew with leave of court. Subsequent defaults were entered against Kachina Tanning on May 14, 1993 and Fadel on October 14, 1993. A damages hearing was held before me on November 29, 1993. The only defendant to appear at the hearing was Fadel. The following are my recommended Findings of Fact and Conclusions of Law.

1. On May 13, 1991 plaintiff Michael Gagne ("Michael"), while working as a laborer at Prime Tanning Company, Inc. in Berwick, Maine, caught the lower or toes end of his right foot, encased in a steel-toe boot, in a so-called Lo Stampo leather processing machine and experienced immediate, extreme pain. Testimony of Michael Gagne; Deposition of Guy M. Esposito, M.D. ("Esposito Deposition") p. 4.

2. Three to five minutes passed before the machine was opened and Michael was able to extricate his foot. The boot was stretched and ripped apart. Michael continued to experience extreme pain. Testimony of Michael Gagne.

3. A medical transport was called to take Michael to the hospital. An additional 15 to 20 minutes passed before it arrived. Upon its arrival, Michael asked its personnel for pain relief but, because they were not trained paramedics, they were unable to administer any. The ride to the hospital took approximately 15 minutes. *Id.*

4. After Michael arrived at the hospital and was evaluated, approximately one and a half hours after the accident occurred, he was given morphine to relieve his pain. *Id.* Despite this, Michael continued to experience pain and was in some shock until he was given a general anaesthetic in preparation for his first surgery, which was performed by Guy M. Esposito, M.D., an orthopaedic surgeon, after x-rays were taken. *Id.*; Esposito Deposition p. 8.

5. Dr. Esposito determined that the toes of Michael's right foot had been stretched and pulled apart when the lower end of his foot became caught in a roller of the Lo Stampo machine, that his skin, muscles and tendons had been torn severely and that bone had been exposed at the end of the foot. Esposito Deposition pp. 4-5. He proceeded to surgically remove all of the toes on Michael's right foot, leaving the metatarsal bones in- tact. *Id.* pp. 6-7.

6. Michael awoke from his surgery between midnight and 1:00 a.m. and was then told he had lost part of his foot. Upon awakening, he felt pain and was given more pain medication. Testimony of Michael Gagne.

7. A second amputation procedure was performed three days later on May 16, 1991. In this procedure, the heads of the metatarsal bones were removed in order to close Michael's wound and shape the end of his foot in a way which would allow him to ambulate. Esposito Deposition pp. 8-9.

8. A few days after the second procedure, when the original dressing was removed, Michael was made to look at his foot and saw what he had lost. Testimony of Michael Gagne.

9. In total, approximately one-third of Michael's right foot, consisting of his toes, some of the bone from the metatarsal heads and tissue comprising all but approximately one-eighth inch

of the ball of his foot, was amputated. Esposito Deposition p. 11; Testimony of Michael Gagne.

10. Michael experienced pain throughout his stay in the hospital. His post-operative pain worsened whenever he was required to get out of bed and walk. Testimony of Michael Gagne.

11. Michael was discharged from the hospital on May 20, 1991. Esposito Deposition p. 11. As of June 3, 1991 he was complaining of a constant soreness, throbbing and aching. Plaintiff's Exh. 1 (Marsh Brook Rehabilitation Services evaluation).

12. On June 7, 1991 a third procedure, a skin graft, was performed by Peter A. Winkler, M.D. on a portion of the amputation wound that had become nonviable in the post-operative healing period. This was accomplished by removing a dead area of skin and covering it with a split-thickness skin graft taken from Michael's thigh. Esposito Deposition p. 10; Plaintiff's Exh. 1 (Winkler notes).

13. Michael experienced a post-trauma adjustment reaction, diagnosed as post-traumatic stress disorder. He was very angry, depressed and discouraged. *Id.* pp. 12-13. He was often abusive to those with whom he came in contact, especially his wife, plaintiff Kelly-Jean Gagne ("Kelly"), who was his primary caretaker once he returned home. He began to drink excessively. As a consequence of his behavior, Kelly moved out of the house in early June 1991. Testimony of Michael Gagne. She moved back in approximately three months later. Testimony of Kelly Gagne.

14. Dr. Esposito referred Michael to Dr. Eric Niler, a clinical psychologist, in September 1991 for help with his psychological problems. Esposito Deposition p. 12. Dr. Niler counseled Michael regularly from September 16, 1991 through November 17, 1992. He terminated his treatment of Michael on January 28, 1993. Plaintiff's Exh. 1 (Atlantic Behavioral Medicine/Niler notes).

15. Michael returned to work at Prime Tanning in April 1992. He was first assigned a file clerk position covering four hours a day, four days a week. It appears that little, if any, actual work was expected of him. He spent his time reading the newspaper and working on his GED.

Because he did not enjoy the inactivity, he tried to find other work outside the company but was unsuccessful. Testimony of Michael Gagne.

16. In time, Michael was assigned to other work at Prime Tanning. Two of these positions, "toggling" and "trimming", proved to be too demanding given his accident-related limitations. He is now performing "quick toggling" work, which is lighter than the other laborer work he was assigned, but which is nevertheless proving difficult for him to do because it requires him to bear weight on both feet and to pivot. He doubts his ability to continue this work and testified that the work will soon be taken over by a new machine in any event. *Id.*

17. Michael presently uses a toe-filler orthotic in a high-top shoe. He was scheduled for a fitting for a permanent prosthesis on December 1, 1993. *Id.*

18. Michael is now 25 years old. His activities have been significantly limited by his injuries. He is no longer able to play basketball, which he did almost every weekend before the accident. He played football in high school and thereafter but can no longer. He also played baseball in high school but doubts his ability to do so now. He and Kelly, who married in 1987 when he was 19 and she 18, used to hike, fish and camp together before the accident. He can no longer hike or ice fish. They also used to bowl in a league, but he can no longer bowl because he cannot wear low-top shoes. Whereas they used to go dancing almost every weekend, Michael can now do only a little slow dancing. They have been dancing only four or five times since the accident. They also regularly enjoyed beach walking in the summer, which Michael has been unwilling to do since the accident because of the appearance of his foot. Testimony of Michael and Kelly Gagne. Once he is fitted for a prosthesis he will not be able to wear it on the beach. Esposito Deposition p. 24.

19. In addition to the foregoing, the Gagnes' relationship has been otherwise affected by Michael's injuries. Their sex life has been significantly, negatively impacted. Despite considerable progress in addressing his emotional issues, Michael remains somewhat irritable and depressed.

Testimony of Michael and Kelly Gagne.

20. In addition to the limitations noted above, Michael's foot remains and will remain sensitive to heat and cold. The skin graft area is more susceptible to abrasion and bruising than the remainder of his skin. Esposito Deposition pp. 16-17.

21. Michael has a lower extremity permanent impairment of 21 percent and a whole body impairment of 16 percent. *Id.* p. 20. He has lost about one-half the shock-absorbing capacity of his right foot. *Id.* p. 23. As a consequence of the loss of his toes and the ball of his foot, he has lost the ability to push off when he walks, which affects his ability to walk and climb stairs, and to jump up and down. *Id.* pp. 23-24.

22. In terms of his physical condition, Michael is now at an end result. *Id.* p. 27. He cannot perform work which requires prolonged standing or pushing-type activities. Clerical or desk jobs are appropriate as are light factory work, bench work and occupations where he can do intermittent sitting and there is not a lot of physical activity. *Id.* His education (grade 11 and a GED) are limitations on the kinds of clerical or desk jobs available to him.

23. Michael has incurred medical expenses to date as a result of the accident totalling \$27,376.44. Plaintiff's Exhs. 2, 4.

24. Michael will need to be evaluated by an orthopedist once a year at a cost of approximately \$100 per visit. Esposito Deposition p. 26. This translates to \$4,900 over the course of Michael's life expectancy.

25. It is important that Michael be fitted with a prosthesis in order to assist his foot function, protect the end of his amputation site and avoid, to the extent possible, the aggravation of any arthritic condition he might develop. *Id.* pp. 18, 28. The cost of an appropriate state-of-the-art functional prosthesis is \$3,500. *Id.* p. 25. The prosthesis will have to be replaced approximately every four years. *Id.* p. 26. Based on Michael's life expectancy (49 years), the prosthesis will have to be replaced 16 times. The projected total cost of prostheses over Michael's remaining life time

equals \$42,875.

26. Just prior to the accident, Michael's gross wage at Prime Tanning was \$535.86 a week or \$27,864.72 annualized. Testimony of Michael Gagne; Plaintiff's Exh. 6. He also worked a second job at the Rochester, New Hampshire Fire Department earning \$819 a year. He is no longer able to perform such work. *Id.*

27. Michael's past lost wages, after taxes, total \$30,500. Plaintiff's Exh. 6.

28. In calculating Michael's future lost earnings resulting from the accident, I adopt the individualized analysis of economist Robert E. Doucette and conclude that they total \$903,091. *Id.*

29. I further conclude that Michael is entitled to \$200,000 for pain and suffering, disfigurement and loss of enjoyment of life and that Kelly is entitled to \$25,000 for loss of consortium.

30. Michael's total damages, therefore, are \$1,208,742.40 and Kelly's total damages are \$25,000.

On the basis of the foregoing, I recommend that judgment be entered for plaintiff Michael Gagne against defendants Lo Stampo, Kachina Tanning Company, Inc. and Abbas Fadel in the amount of One Million Two Hundred Eight Thousand Seven Hundred and Forty-Two Dollars and Forty Cents (\$1,208,742.40) and for plaintiff Kelly-Jean Gagne against said defendants in the amount of Twenty-Five Thousand Dollars (\$25,000).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district

court's order.

Dated at Portland, Maine this 13th day of December, 1993.

David M. Cohen
United States Magistrate Judge