IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L.B 241 OF 2000

BETWEEN	EZEKIEL BARCLAY	1ST PLAINTIFF
AND	CLIFFORD SEWELL	2ND PLAINTIFF
AND	KIRK MITCHELL	DEFENDANT

Ms. Christine Mae Hudson instructed by K Churchill Neita & Company for the 1st Plaintiff:

Mr. David Johnson and Ms. Althea Wilkins instructed by McGlashan, Robinson & Company for Defendant.

Heard 15th June 2001 and 13th July 2001

JUDGMENT

This action was commenced by a writ filed in the Supreme Court by the first plaintiff, Ezekiel Barclay, a 47 years old farmer and businessman, on the 28th day of September 2000. (The second plaintiff did not pursue any claim against the defendant.) The endorsement on the writ is a claim for damages against the defendant for negligence. The allegation of the plaintiff is that on the 4th October, 1999 he was injured and suffered loss as a result of a motor vehicle accident caused by the negligence of the defendant. The accident occurred along the Four Paths Main Road in Clarendon, and the only medical evidence before the Court was a report from Dr. N.N. Than, a resident in the Orthopedic Department at the Kingston Public Hospital. The report stated in relevant part that the plaintiff "had swelling and deformity of the left elbow with tenderness over the left thigh and ankle.

X-rays done showed:

1. Segmental facture of the left ulna with dislocation of the radial head (left).
2. Comminuted fracture of the upper left ankle
3. Tri-malleolar fracture of the upper left ankle.

He was eventually treated under anesthesia and above elbow plaster of paris back slab was put on. Above knee plaster of paris was put on for left ankle, he had surgery on December 6, 1999. Open reduction and internal fixation of the segmental fracture of the left ulna and excision of the head was done."
Dr. Than estimated based on the injuries that there was a 25% disability of the whole person.

Judgment having been entered for the plaintiff in default of defence on January 31, 2001, the matter came on for assessment of damages before this court, on the 15th day of June 2001.

The plaintiff gave evidence of considerable pain especially during orthopedic procedures involving drilling his left leg on three separate occasions to insert screws, procedures which he said were not done in operating theatres. He also gave further evidence of being put in traction for eight weeks, during which he suffered great pain and was uncomfortable; of his being discharged from hospital and having to pay for help and using a crutch to assist in ambulating, but only after his left arm was well enough to bear the weight. He continues to have pain and discomfort which limits his mobility and affects, in particular his ability to manage his farms of which there are three, one of which has now apparently fallen into ruin.

He stated that whereas before the accident he was very active and weighed around two hundred and twenty pounds (220 lbs) after the accident, he is not as active and he now weighs two hundred and seventy eight pounds (278 lbs). In cross examination, Mr. Johnson for the defence sought to impugn the witness's credit, but I regret that it does not appear that he had much by way of instructions to go on, particularly in relation to the plaintiff's claim for Special Damages.

It is trite law that where it comes to special damages the plaintiff is put to strict proof unless, of course, the parties agree. In the instant case, the following items of special damages were agreed:

Costs to Kingston Public Hospital		33,950.00
Costs to Kingston Public Hospital Out Patient Clinic		1,500.00
Cost of crutches		1,500.00
Travelling expenses from K.P.H. to St. Elizabeth, on being discharged		3,500.00
Goods destroyed/lost at accident scene		
5 bags Irish Potatoes @ &700.00 per bag		3,500.00
3 bags Onion @ $1,050.00 per bag		3,150.00
2 bags Carrot @ $2,500.00 per bag		5,000.00
Agreed Total	**$**	**52,100.00**

Other items of special damages claimed were:

Costs of five trips to Kingston Public Hospital's Out Patient Clinic @ $5,000.00 per trip		25,000.00
Cost of extra help from 17/12/99 to 31/5/00 @ $2,500.00 per week		60,000.00
	$	**85,000.00**

As to the items in this last group, the defendant strongly resisted this claim, and the plaintiff did not submit invoices in relation to these expenses.

Mr. Johnson, for the defendant, has urged the court not to countenance any claim under these heads of special damages in the absence of any evidence, other than the plaintiff's oral testimony as to the quality of help or the actual costs of the trips. Similarly, with respect to a claim for damages incurred in managing each of his three (3) farms, two (2) in St. Ann, and one (1) in Manchester, the plaintiff is claiming for

expenses of management, at the rate of $600.00 per day for each farm from October 4, 1999 to May 31, 2001, for a total sum of $774,000.00.

Mr. Johnson raises the same objection here as to the lack of any proper proof being advanced by the plaintiff save for his own oral evidence. With respect these claims, Mr. Johnson referred the Court to Murphy v Mills [1976] 14 JLR 119. In particular, he referred the dictum of Lord Goddard in the case of BONHAM-CARTER V HYDE PARK HOTEL LTD (3) [1948) 64 TLR at page 178, which dictum was quoted with approval by Hercules J.A. in the Murphy case.

> "On the question of damages, I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove these damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court saying: "This is what I have lost; I ask you to give me these damages; They have to prove it"

Hercules J.A. then went on to state in Murphy that he felt the same way and disallowed the plaintiff's claim for loss of earnings, which he did not feel, had been adequately proven. Mr. Johnson submits that this should also be the result here.

I believe it is open to the court to partially distinguish that decision and to take judicial notice of certain factors in this context. It would be most uncommon for a driver of hired transport to have provided receipts for the trips from the plaintiff's home to the Kingston Public Hospital. Even less likely is it that the plaintiff will have receipts from any helper he had engaged to help him during his period of convalescence upon his discharge from the hospital. In this regard, I take cognizance of the judgment of Smith J, in the case of Walter v Mitchell upheld by the Court of Appeal (Rowe, President, Forte J.A. and Wolfe J.A. acting) SCCA64/91. As indicated by the judgment of Wolfe J.A. acting (as he then was), "the learned trial judge was not unmindful of the nature of the evidence adduced in proof of income. In dealing with the question of loss of earnings, he took into consideration the following factors:

1. That the Respondent was self-employed on a small basis
2. That there was no proper accounting system employed in the business
3. That no basis was given as to how the profit of the Nine Hundred and Fifty Dollars ($950.00) per week was arrived at.
4. The level of intelligence of the Respondent."

Wolfe J.A. (ag.) continued:

"Having considered these factors, he observed that the Court must begin to impress upon litigants the need for proper evidence to be tendered in proof of special damages. He nevertheless concluded that the respondent was a witness of truth and expressed the view that the Court could not be unmindful of how persons at the level of the society from which the respondent originates operated the type of business in which the respondent was involved. He found that the respondent was engaged in a partnership with her common law husband and accepted the figure of Nine Hundred and Fifty Dollars ($950.00) as the weekly profit realized from the vending partnership. On the basis of a partnership he assessed her income at Three Hundred and Seventy Five Dollars ($375.00) weekly and allowed her loss of earnings for forty-seven (47) weeks.

There is support for the approach which the judge adopted. At paragraph 1528 of **McGregor on Damages** 12th Edition the learned Author states:

"However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L.J. laid this down in the leading case on pleading and proof of damage, Ratcliffe V. Evans [1892] 2 Q.B. 524 (C.A.). In relation to special damage he said:

The character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon

less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

I adopt the reasoning of Wolfe J.A. (ag) on page 5 of the said report where he says:

"Without attempting to lay down any general principles as to what is strict proof, to expect a sidewalk or push cart vendor to prove her lost of earnings with the mathematical precision of a well organized corporation may well be what Bowen L.J. referred to as the "vainest pedantry".

I find that the plaintiff as a simple self employed former and that the evidence led with respect to the claims for travel to and from Kingston, as well as the expenses for additional help are credible and sufficiently proven in all the circumstances of the case. I would accordingly allow those items to be included in the plaintiff's entitlement to special damages.

Having said that, I now turn my attention to the claim made by the plaintiff for expenses paid or payable to persons who assisted in the management of his three (3) farms. This is a claim for Six Hundred Dollars ($600.00) per day for each farm for the period October 4, 1999 to May 31, 2001. Despite the observations above in respect to the other claims, the principle that litigants must provide evidence to be tendered in proof of special damages remains sacrosanct. It is also not unreasonable to posit that the more substantial the claim the stricter the proof that is required. The claim by the plaintiff for a total of Seven Hundred and Seventy Four Thousand Dollars ($774,000.00) is devoid of any supporting evidence other than the plaintiff's say-so.

In a recent suit, Kean v Officer and Anor. C.L. K. 018 of 1999, I had awarded special damages in relation to expenses of managing a farm. However, in that case, the plaintiff gave detailed evidence of the specific agronomic practices employed, as well as evidence of the profitability of the enterprise and why it was not only able, but obliged to incur the expenditure claimed as special damages in that instance.

In the instant case the plaintiff has not provided any credible evidence to support the claim for such significant expenditure. Indeed, on his own evidence, before the accident he supervised all three of his farms himself, while his claim implies separate supervisors for each farm. Moreover, there was no evidence that he visited and supervised each farm every weekday, before the accident. Further, he also conceded that one of the farms at Cascade was now in ruins and that he had visited there since the accident. He also admitted that his brother had been looking after the farm situated at Frank Hall. It is difficult to see how, in those circumstances, a claim for supervisory expenses can be maintained, and in the absence of any evidence which could assist in making a rational reduction, the entire claim must be disallowed.

With respect to General Damages, counsel for the litigants have urged upon me several locally decided cases in support of their respective submissions on the amount which I should consider awarding the plaintiff.

The medical report of Dr. N.N. Than, a resident in the Orthopaedics Department at the Kingston Public Hospital, was received into evidence and has already been referred to in relevant part. The report concluded that on March 24, 2000, when the plaintiff was last seen at the clinic at the KPH, "the fracture sites were found to be solid and non-tender. X-Rays done showed that the fracture was healed. The Steinmann's pin in the ulna was removed in the operating theatre on March 27, 2000. The kind of injuries that he sustained are serious injuries. He will have problem (sic) with his ankle joint and elbow joint and they may develop into early ostheo-arthritis. Percentage of disability is twenty-five per cent (25%) of the whole body".

Ms. Hudson invited the court to distinguish between the clinical findings of "healing" as found in the report of Dr. Than and the "patient's reality". She referred the court to, *Peter Ankle v Florence Cox, Suit No C.L. A-157 of 1987* in which a plaintiff whose ankle had been seriously injured in an accident, but whose impairment was adjudged to be 8% of the whole body, had been awarded general damages of $360,000.00 for pain and suffering and loss of amenities in October 1994, a figure which would now be worth $722,634. We were also referred to *Tyrone Wilson v Henry Smith and*

Arnold Blackwood Suit No C.L. W. 177 of 1993. In this case, the plaintiff suffered a Permanent Partial disability of 8%. This plaintiff was awarded general damages of $500,000.00, in July 1997, a figure now purportedly worth $649,280. The Court was also referred to *Cecil Henry v The Attorney General and Keith Scott Suit No C.L H. 128 of 1992*. Here the consequence of the injuries sustained was a Permanent Partial Disability of 16% of the whole person "which is not expected to change" General damages of $1.25 million was awarded in March 1996, which would give rise to an award of $1.482,842 million. Finally, we were referred to the case of *Michael Watson v Alcan Jamaica Limited and George Grindley, Suit No C.L. W 134 of 1989*. In that case, the plaintiff, a thirty (30) year old driver was severely injured in a motor vehicle accident. His injuries included a ruptured liver and stomach, compound fractures of right tibia and fibula, and a fracture of the olecranon. He developed pneumonia and his fractures became infected, and he experienced a shortening of one leg. His Permanent Partial Disability was assessed at 24% of the whole person. The plaintiff was awarded general damages of two million ($2,000,000.00) dollars, which today would be worth $3.0114 million. However, the injuries in that case were so much more ... the instant one, that one can easily distinguish them and, accordingly, I do not believe that we are helped significantly by using as a guide, the award in that case. Having cited the above cases, Ms. Hudson asked that the plaintiff be awarded a sum of $1.8 million as general damages.

Mr. Johnson on the other hand submitted that the clinical findings of Dr. Than should be accepted by the court and should form the basis upon which its award was made. He further submitted that the Watson case above was not particularly helpful and I have already stated my view on the applicability of that case. He also referred to the other cases cited for the plaintiff and urged that the cases which were closest to the instant case were *Wilson v Smith*, and *Henry v The Attorney General*. It was defence counsel's position that the injuries particularly in the Wilson case were similar and that despite the difference in the assessed Permanent Partial Disability, (8% in Wilson as opposed to 25% in the instant case) in light of the nature of the injuries, any award should be in line with that case. I have formed the view that inherent in the

submissions of the attorneys for the two sides, is a difference in perception as to the approach the Court should take in relation to looking at the resultant disability or the injuries. My approach is to keep in the forefront of my mind the fact that the damages are for pain and suffering and loss of amenities. In this regard, I am guided by the approach of Wolfe J.A. as he then was in the case of Pogas Distributor Ltd, 1st Defendant, O.K. Francis, 2nd Defendant, Robinson's Car Rental Ltd., 3rd Defendant, Deneve Smith 4th Defendant, William Bernard 5th Defendant/Appellant, Clinton Grant 6th Defendant/Appellant, v Freda Claire McKitty Plaintiff/Respondent, SCCA 13/94, and SCCA 16/94, O.K Francis, 1st Defendant/Appellant, v Pogas Distributors, Ltd 2nd Defendant/Appellant, Freda Claire McKitty, Plaintiff/Respondent, William Bernard, 5th Defendant, Clinton Grant, 6th Defendant.. In reviewing the judgment of Langrin J. (as he then was) at first instance, Wolfe J.A. was critical of the conclusion seemingly arrived at, that a lower resultant level of disability was synonymous with less severe injuries.

At page 36 of the judgment, the learned Justice of Appeal said:

> "Secondly, the judge, in reference to Thompson v McCalla & Jamaica Omnibus Services (Volume 3 of Khan's Personal Injury Awards, at page 152), concluded that because the disability to the whole person was 15% the injuries sustained by the plaintiff were less severe than the injuries sustained in the instant case. This, with due respect to the learned judge, is a non sequitur. Primarily, what we are looking at in an award such as this is pain and suffering and loss of amenities, not necessarily resultant disability. No doubt resultant disability is a factor to be considered in an award for pain and suffering and loss of amenities, but it does not necessarily speak to the extent of the pain and suffering an injured person endures".

In the same case, Forte, J.A. (as he then was) in considering Langrin J's reasoning, stated the following:-

> " The learned judge misdirected himself by looking at percentages and did not properly assess the injuries and the period of total incapacity and the permanent partial incapacity"

In this regard, Ms. Hudson's submission concerning the distinction between the "clinical healing", and the "patient's reality" is a valid one. In other words, look at the plaintiff's injuries in assessing pain and suffering. At the same time, having asked the Court to focus on the nature of the injuries, that is, the "patient's reality", and having realized that these injuries are far less serious than Watson's, the plaintiff cannot then turn around and say, "Never mind the injuries, look at the percentages." I would wish to make a passing reference to the 25% PPD which was Dr. Than's assessment. Without in any way purporting to cast any doubt on the good doctor's evaluation, compared to other cases cited, it does appear a little high. I am mindful however, of the advice given by Consultant Orthopaedic Surgeon, Dr. Christopher Rose, F.R.C.S. (C), on the question of disability and how it should be viewed, as set out on page 227 of Khan's Volume 4. "Disability may be defined as an alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment. Disability refers to an activity or task the individual cannot accomplish". He further makes the important point in that advice that:- "It must be emphasized that impairment percentages derived according to the 'Guides to the Evaluation of Permanent Impairment', criteria <u>should be used only as a guide to make direct financial awards or direct estimates of disabilities".</u> (Emphasis mine)

The plaintiff in the instant case does continue to complain of pain when he walks or drives for any distance, but he does appear to walk in a normal manner and

without a limp. He states that the result of his injury is that it restricts his ability to continue his agricultural pursuits at all his farms, and these are factors which on any reading, must be taken account of in determining his entitlement to general damages. I am also mindful that the plaintiff was so seriously injured that he had to be moved from the May Pen Hospital to which he had been taken after the accident to the Kingston Public Hospital, where he remained for over two (2) months in traction. Further, that he had to have surgery for the insertion and removal of a Steinmann Pin and the excision of the head of the left ulna, and he experienced considerable pain and suffering as a result of the accident. Finally, he does have a deformity of the left elbow as well as the left thigh and ankle.

In the result, I believe that an award of Nine Hundred and Fifty Thousand Dollars ($950,000.00) is a reasonable sum for general damages. In the absence of an affidavit of service which would establish the date of service, this will bear interest of six per centum (6%) per annum from January 3, 2001, the date of the entry of the Notice of Appearance until June 15, 2001.

As noted above, total Special damages awarded amount to One Hundred and Thirty Seven Thousand One Hundred Dollars, ($137,100.00) with interest of six per cent (6%) per annum from October 4, 1999 to June 15, 2001.

The Plaintiff will have his costs, to be taxed, if not agreed.

ROY K. ANDERSON
Justice, Supreme Court

Dated.....