IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C. L NO. 1994/W236

BETWEEN	CORDELLA WATSON	PLAINTIFF
AND	KEITH JAMES	1ST DEFENDANT
AND	ERROL RAGBEEN	2ND DEFENDANT

Mr. Ainsworth Campbell for Plaintiff.
Mr. Christopher Dunkley for the Defendants instructed by Wright and Dunkley.

Heard - September 26, November 28, 1997

ASSESSMENT OF DAMAGES

HARRISON J

Liability is not in issue in this matter so all that is left to be done is to assess damages. The evidence revealed that the plaintiff was injured in a motor vehicle accident on the 10th day of September 1992, whilst she was a passenger in a mini- bus owned by the first defendant and driven by the second defendant. She is now 54 years of age. At the time of the accident she was a vendor of oranges and cashew nuts but she has testified that she has been un - employed since 1992 because of the accident.

It was the plaintiff's evidence that she received medical treatment from Dr. K. Kotiah at Linstead Hospital. He had recommended bed rest for four weeks. She claimed that she did not "feel so bad" at the end of the four weeks but when she started to move around she began feeling pain again. According to her, pain came on when she tried to work. She took her medication and when she got no ease she relaxed at home. She was finally referred

to Dr. Rose, Consultant Orthopaedic Surgeon.

Medical Reports

The medical reports were agreed and admitted in evidence. Dr. K. Kotiah's medical report is dated November 18, 1992. It reveals the following:

> Re Cordella Watson
>
> " This is to certify that I have attended to her on the 12 (sic) of September 1992 after allegedly being involved in a motor vehicle accident. She complained of severe back ache. The X-Ray showed a chip fracture of the lower third vertebra and she was treated with bed rest. She still complains of pain in the back, but much better. The injury is of a serious nature but not likeable to leave any permanent disability to the patient."

Dr. R. C Rose, Consultant Orthopaedic Surgeon also saw and examined the plaintiff. His report is dated November 30, 1995 and it states as follows:

> " I saw this 52 year old female on November i, 1995, for the purpose of examination and the writing of a medical report.
>
> Ms. Watson states that she was a passenger in a mini-bus which was involved in a head on collision with an on coming vehicle in September of 1992. She states that she was sitting behind the driver. She sustained no loss of consciousness but developed lower back pains approximately half an hour after the accident. She was able to move her lower limbs. Her lower back pains were aggravated by physical activity. She sought medical attention on the third day following the accident.

X-rays of the lumbosacral spine were taken and she was placed on total bed rest. No physical therapy was requested.

The following were her complaints when she was seen by me on November 1, 1995:-

1. Inability to perform her occupation which involves buying and selling of goods as well as lifting heavy objects.

2. Lower back pains which are confined to the lower back.

She gives no history of any paraesthesia or pains in the lower limbs and no urinary problems. The lower back pains are intermittent and have restricted her activity at home.

On examination, she is a healthy looking female in no apparent distress. The significant findings were confined to the lumbar spine and the lower limbs. She experienced discomfort on the left lateral rotation and flexion of the lumbar spine. She was able, however, to touch her toes. Straight leg raising was to 900 bilaterally and the neurovascular status was intact in both limbs. There was, however, some blunting of the sensation along the left thigh and left leg.

Examination of the abdomen revealed no abnormalities. There was mild tenderness on palpation of the mid line of the lumbar spine.

X-rays of the lumbo sacral spine revealed no evidence of any fracture. These x-rays were taken in 1992.

A diagnosis of chronic mechanical back pain was made.

Ms. Watson's lower back pains will be aggravated by prolonged sitting, bending and lifting. The above aggravating factors are part of her daily existence. Although she will be left with some permanent partial disability, I feel certain that with a proper back care programme her symptoms can be reduced.

I have assessed her permanent partial percentage disability as it relates to the lumbosacral spine to be five (5) per cent of the spine which is equivalent to three (3) per cent of the whole person."

General Damages

On the issue of pain and suffering and loss of amenities, Mr. Campbell referred me to the case of Phillips v Palmer reported in Volume 2 at page 164 of Khan's Personal Injury Awards. Damages were assessed in this case by Orr J on the 3rd day of October 1995. The plaintiff who was involved in a motor vehicle accident in 1980 sustained a blow to the back and neck resulting in pain in the right hip. loin and waist. He was treated by a Doctor and had physiotherapy until 1985. The accident precipitated pain due to a degenerative disc disease. He was unable to straighten his leg to 90 degrees when suffering pain in the back. For pain and suffering and loss of amenities he was awarded $30,000.00. Mr. Campbell contended that that award would be valued $442,000.00 today by using the present consumer price index of 1050. He submitted that the Court ought to make an award of $600,000.00 for pain and suffering and loss of amenities having regard to the plaintiff's injuries.

Mr. Dunkley referred to two cases and submitted that the Court should make an award based on the difference between the two awards. The first case was Gayle v Whitman Associates Ltd and Anor reported at page 92 of Assessment of Damages for Personal

Injuries by Harrison & Harrison. The plaintiff a 39 year old welder was injured in a motor vehicle accident. She sustained a lumbar disc prolapse with right sided sciatica and had persistent excrutiating back pain radiating to the right buttock and right leg and pain whenever bending took place. Damages were assessed by consent in the sum of $69,151.36. That award would now be valued at $210,491.

The second case cited by Mr. Dunkley was Atkinson v Caribbean Cement Co. Ltd at page 92 of the same work referred to above. Damages were assessed in that case on March 5, 1992. He sustained a fracture between the lumbar vertebra and the first sacral vertebra with grade 1 traumatic spondylosis. He experienced persistent backaches and cramps. He suffered from insomnia and was unable to hold his urine. Straight leg raising on the left side was restricted to 70 degrees. He had muscle spasms and consequent restriction of flexion of the spine. He was unable to engage in heavy manual work or other physical exertion for the rest of his life. He was awarded $29,340 in respect of general damages. That award would now value $86,609.

Mr. Dunkley submitted that the Court should accept the medical opinion of Dr. Rose who said he had not seen any evidence of fracture. He also submitted that if the plaintiff had pursued a proper back care programme since the accident, there could possibly be no permanent disability as seen by Dr. Rose. Finally he submitted that the plaintiff gave no evidence of loss of her amenities. It was his considered view therefore, that an award between $120,000 and $130,000 would be appropriate.

Let me begin by examining the medical evidence. The medical report of Dr. Rose indicates that at the time of examination the plaintiff was a healthy looking female in no apparent distress. Significant findings were confined to the lumbar spine and the lower limbs and she experienced discomfort on the left lateral rotation and flexion of the lumbar spine. She was able however to touch her toes. There were no abnormalities in the abdomen but there was mild tenderness on palpation of the mid line of the lumbar spine. Having

examined the X-rays taken in 1992 he found no evidence of any fracture. His diagnosis was one of chronic mechanical back pain. He opined however that her lower back pains would be aggravated by prolonged sitting, bending and lifting. He was also of the view that although she would be left with some permanent partial disability, he felt certain that with a proper back care programme her symptoms could be reduced.

I have considered the cases cited by both Attorneys. I accept the opinion expressed by Dr. Rose that no fracture was involved. He is an Orthopaedic surgeon and it is my considered view that his expertise in the area of bone fractures ought to be accepted over the views expressed by a general medical practitioner. What is obvious from the findings of Dr. Rose is that this plaintiff is suffering from chronic mechanical back pain which will be aggravated by prolonged sitting, bending and lifting. Of course, one has to bear in mind the plaintiff's previous occupation. Her evidence that she would go to the orange farm and pick oranges for sale has remained unchallenged. Likewise her roasting of cashews remain unchallenged at the end of the day. These activities no doubt, would involve bending and lifting. Her own evidence revealed that she was unable to sell her oranges and cashews because lifting weight caused pain in her back. Her evidence indicate that she has been at home since 1992 and has not been engaged in any form of work. There is no medical evidence however, to support her contention that she has been unable to work because of the accident.

I do agree with Mr. Dunkley that if the plaintiff had undergone a proper back care programme as suggested by Dr. Rose her symptoms might have been reduced to a major extent when she visited him in 1995. 1 bear in mind her permanent partial percentage disability which is equivalent to three (3) per cent of the whole person. It is my considered view therefore, that an award of Two Hundred Thousand Dollars ($200,000.00) would be appropriate in the circumstances.

Special damages

The special damages claimed are as follows:

1. Loss of earnings @ $2000 per week from 10/9/92 to 28/2/96 - $254,000.00 (A notice dated 22/9/97 was filed seeking leave to further amend the loss of earnings at $3,508 per week for 262 weeks. This application was refused.)

2. Medication	$460.00
3. Medical Bills	$3,448.00
4. Travel costs	$500.00
5. X-ray cost	$100.00

The plaintiff testified that her earnings came from the sale of oranges and cashews. She would buy cashews by the bushel and oranges by the boxes. The cashews would be roasted and sold to a number of customers at $380 per quart for roughly 40 weeks per year. She buys 16 boxes of oranges per week and sells them at $40 per dozen over a 12 weeks period during the year. She said her profit per week on the oranges was about $5000 after all expenses were taken into consideration. Her weekly profit on the cashews was $5240.00

She paid Dr. Kotiah a total of $800 and Dr. Rose $3000. For medication she paid $4,800 and $100 for the X-ray.

Under cross-examination the plaintiff said, " I was making $20,000 profit off each thing I sold. I made no note of my sales...I know take home pay. I never paid tax on any of the money I earned. I have no record of the amount of money I had earned. I was making over $250,000.00 per year selling cashews. I have no documentary proof of my earnings."

Mr. Campbell submitted that the Court should allow the loss of earnings at $2000 per week and make an award up to and inclusive of the 1st November 1995 when Dr. Rose saw her. He argued that another 15 weeks should be added making it a total of 127 weeks totalling

$254,000.00. It was his view that the plaintiff had proved travel and X - ray costs. He finally submitted that in the circumstances of this case there was nothing for the plaintiff to have mitigated her losses.

Mr. Dunkley submitted on the other hand, that there had been lack of proof as to the plaintiff's loss of earnings. He submitted that six months would be a reasonable period for the plaintiff not being able to work and that the minimum wage of $500 per week should be applied.

Let me deal firstly with the claim for loss of earnings. One should bear in mind the guidance given by Rowe P in the case of Hepburn Harris v Carlton Walker (un-reported) SCCA 40/90 delivered 10th December, 1990 when he said:

> "Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned...."

I do agree with Mr. Dunkley that there is indeed a sparsity of evidence given in proof of the plaintiff's loss of earnings. One would have thought that with such a "thriving business" some documentary evidence would have been tendered to substantiate these losses. I hold therefore, that the plaintiff has failed to prove the loss of earnings pleaded. This leaves the Court to consider whether it should make an award based upon the minimum wage at the time when she experienced the loss. The national minimum wage has been recognized by our Court of Appeal as a satisfactory guide in determining the minimum weekly amount she would be entitled to by virtue of law. I bear in mind that she has chosen of her own volition to take no steps to mitigate her loss and to seek some meaningful employment. In the circumstances, I will make this award for a period of six months at the rate of $500 per week totalling $12,000.00.

I would allow the sums claimed in respect of medication, medical bills, travel costs and cost of X-ray.

Damages are therefore assessed as follows:

General damages

Pain and suffering and loss of amenities in the sum of $200,000.00 with interest thereon at the rate of 3% per annum from the date of service of the writ of summons up to today.

Special Damages

In the sum of $16,508.00 with interest thereon at the rate of 3% per annum from 10/9/92 up to today.

There shall be costs to the plaintiff to be taxed if not agreed.