



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 2006 HCV 02643

BETWEEN MOBREY LEWIS CLAIMANT
AND EVEROD LEWIS DEFENDANT

Mr. C. D. Cochrane for the Claimant

Mrs. Pauline Brown-Rose for the Defendant.

***Held: 8th & 9th May, 2007 &
19th November, 2007.***

MARSH, J.

Liability in this matter not being an issue, on September 14, 2006, it was ordered that the Claimant recovers against the Defendant damages to be assessed and costs to be agreed or taxed.

The Defendant has however sought to defend the matter contending that the claims made by the Claimant for losses sustained are excessive. He contested the claim for personal injury and put the Claimant "to strictest proof of the same."

The Claimant Mobrey Lewis was at the material time a Minister of Religion and the owner and the driver of a motor vehicle registered 3891 BV; the Defendant Everod Lewis was the owner and driver of a motor vehicle registered 3891 BV, the Defendant Everod Lewis was the owner and driver of a motor vehicle registered 0122 DM.

On the 27th January, 2002 at the intersection of the Winston Jones Highway and Kendal Road in the parish of Manchester there was an accident between the two vehicles driven by their respective owners.

The Claimant sought to recover damages from the Defendant, who it is averred, drove his vehicle so negligently that the Claimant suffered damage to his car and injury to his person, causing him to suffer loss and incur expense.

The particulars of injuries pleaded are as follows:

- (a) contusion on the front of the chest.
- (b) contusion on the right of the chest.
- (c) severe strain of the lower thoracic and lumbar area
- (d) Sequelal of whiplash injury
- (e) 7% of the whole body impairment
- (f) Chronic post traumatic cervical sprain with radiculitis
- (g) Chronic post traumatic - lumbar sprain/strain with radiculitis
- (h) Cephalgia
- (i) Malignant Hypertension.

The Claimant also indicated that it was his intention to recover additional medical expenses incurred subsequent to the filing of this claim.

Consequent medical treatment of the Claimant produced a collection of reports from the medical personnel who attended to him, both here in Jamaica and the United States of America.

The claim for special damages was supported by receipts for doctors' fees, for medications purchased, physiotherapy, for wrecking service, motor vehicle repair, estimate and other documents.

The Nature of the Injuries Sustained

Dr. Noel Black's medical report of the 6th day of May, 2003 reveals that on January 29, 2002 he examined the Claimant and found him to be suffering from the following injuries:

1. Contusion on the front of the chest
2. Contusion on the right side of the chest
3. Severe spasm of the Thoracic and Lumbar areas.

On the 14th of February, 2002, the Claimant was a patient in the Andrews Memorial Hospital until the 18th February, 2002. During this time, he had x-rays done on his cervical spine, Lumbosacral spine and chest. He had been admitted with diagnosis of muscular Ligamentous Strain of Spine and trunk and Hypertension.

On the 15th of February, 2002, he was seen by Dr. M. Douglas who referred him to a doctor in the United States of America Dr. Kirk J. Whitter - Dr. Whitter saw the Claimant on the 28th March, 2002 and on subsequent dates. He was treated for his injuries sustained in the accident of the 27th of January, 2002.

Mobrey Lewis was also seen and treated by Dr. Garth Officer; whose findings on his examination of the Claimant were as follows:-

His cervical spine revealed a restricted range of motion in flexion in extension, in right and left rotation and in right and left lateral bending.

Mild pain was experienced in the chest when pressure is applied to sternum at midpoint.

There was moderate pain in thoraco - lumbar spine at extension, rotation and flexion and at lateral bending. After radiography, it was concluded that Anterior spondylolisthesis, at L5-S1 minimal degenerating changes were to be found elsewhere in the lumbar spine.

There was a reevaluation of the Claimant over a period of four to six months. Although there was overall improvement shown, there was still complaint of occasional pains mostly to the low back, mild leg pains, especially if he stood for more than 45 minutes or drove for long periods. Headache and neck pains also occurred but "on less occasions."

Dr. Officer's prognosis is that the Claimant was shown to have sustained muscular and neurological injuries with multiple spinal subluxation in the area of the cervical and lumbar spinal column. Vertebral disc involvement could not be ruled out.

Dr. Kirk Whitter saw the Claimant again on the 11th and 21st days of September, 2004. More than two years after receiving his injuries, the Claimant still complained of left side head pain, left side neck pain, pain at the cervico-thoracic junction, with radio to the upper extremities bilaterally, numbness to the

fifth digit of each hand, profuse sweating to the left side of his face, pain down his back and across his hips with burning pain to his left heel.

He was admitted for further follow up tests in the Florida Hospital of Orlando - these revealed no causative factors. He was subsequently released.

Dr. Whitter, in his evaluation of and recommendations to the Claimant, was of the following opinion,

“in an 8 hour day Mr. Lewis may sit, stand and walk for up to three hours. He may not drive, climb, push, pull or use his feet for repetitive movement such as operation of foot controls. These restrictions will remain in effect until Mr. Lewis condition warrants lifting the restrictions.’ (See exhibited Report of Dr. Whitter dated 21st September, 2004 and exhibited).

Dr . Grantel Dundas, Consultant Orthopaedic Surgeon saw and examined the Claimant on September 1, 2005. He continued to complain about pain to the left side of the neck and along the inferior aspect of the left scapula.

Dr. Dundas diagnosis was that the Claimant was suffering from the “Sequelae of whiplash injury.” He also estimated that the Claimant suffered residual impairment amounting to 7% of the whole body, using the Range of Motion parameters using the American Medical Association (AMA) Guides for the Evaluation of Permanent impairment 5th Edition.

The Nature and the Extent of the resulting Physical Disability

Mr. Lewis, in his witness statement, indicated that he started feeling aches and pains in the back and side a few minutes after the accident. His pains increased so much so that he had to visit Dr. Noel Black for treatment. These

continued aches and pains caused him to see Dr. M. Douglas who referred him to a doctor in the USA.

He was also a patient in Andrews Memorial Hospital from February 14-18, 2002. He is unable to perform his duties as a Minister of Religion of the North Jamaica Mission of Seventh Day Adventist owing to the physical difficulties "he was experiencing". He has applied for retirement from the position, as a result. Years after the accident, the Claimant was still being treated, for injuries received in the accident.

Loss of Amenity Suffered

At the time of the accident, the Claimant was a Minister of Religion active and overseeing five churches in the parish of St. Ann. His duties included preaching, counselling and visiting his church members. He was required to drive to visit the churches under his oversight.

It became impossible to do this due to the pains which he was experiencing to the left side of his body "daily and consistently." His driving was curtailed. (see also Dr. Whitter's recommendation to the Claimant as to what he could do in an 8 hour day).

Pecuniary Loss Incurred as a result of Claimant's Injuries

Most of the items mentioned in the Particulars of Special Damages were agreed. This totalled an amount of Seven Hundred and Sixty Five Thousand Nine Hundred and Sixty Two dollars and 99 cents (\$765,962.99). Both parties

agreed that the value of the U.S. dollar for these purposes was one U.S. dollar equal to Sixty five Jamaican dollars (1US = 65 Jamaican).

The items contested by the Defendant are these at -

25	Airfare for medical purposes	\$21,620.00
26	Verification letter from Air Jamaica	\$3,606.06

It was Mrs. Brown - Rose for the Defendant who submitted that the items listed at 25 and 26 under the pleaded Particulars of Special Damages were not to be allowed. She based her position on the fact that the Claimant had a duty to take all reasonable steps to minimize his loss. For the Claimant to seek medical treatment in the U.S.A. was unreasonable. She continued, that the Claimant was not referred abroad for medical treatment, but heard about Dr. Kirk J. Whitter from his sister, a nurse. Nothing on the medical evidence tendered suggested that the injuries required treatment abroad. There was no evidence, she argued, that suggested that the Claimant required a type of treatment unavailable in Jamaica.

I am unable to agree with Mrs. Brown-Rose on this submission. It is undisputed that the Claimant had sought medical assistance regarding his injuries at a number of places in Jamaica, the Mandeville Hospital, Andrews Memorial Hospital at Dr. Noel Black and Dr. Garth Officer and at Dr. M. Douglas who referred him to a doctor in the U.S.A. (See Dr. Douglas report tendered). Despite this, the Claimant's painful crisis persisted. I therefore do not find it unreasonable that he should try to find relief outside of Jamaica in the

circumstances. I am therefore making awards in the sums for the items 25 and 26 of the Particulars of Special Damages. These amounts were reasonable expenditure. The amount of (\$25,226.06) Twenty Five Thousand Two Hundred and Twenty Six dollars and six cents should therefore be added to the amount already agreed as Special Damages. The total amount for Special Damages is therefore - Seven Hundred and Ninety One Thousand One Hundred and Eighty Nine dollars and five cents. (\$791,189.05).

Pretrial Loss of Earnings

Nowhere in the pleadings was there any claim for pretrial loss of earnings, nor was an attempt made to seek an amendment to include it. Mrs. Brown Rose stoutly objected to the Claimant's Attorney's submissions seeking an award to be made under this head. I am in complete agreement with the Attorney at Law for the Defendant. There shall be no award under this head.

Dr. Whitter's report dated February 20, 2007, has indicated that "the Claimant will undergo a course of cervical decompression designed to increase his cervical ROM and reduce the intensity of his cervical radiculopathy." He has itemized the schedule of the treatment over a six weeks period. There is however no evidence of likely costs for these recommended medical interventions. There was no mention made of a claim under this head nor was any effort made to apply for the necessary amendment. I am not disposed therefore to make any award under this head.

Pain, Suffering and Loss of Amenities

Mr. Cochrane for the Claimant cited some authorities in the form of decided cases which the Court could use to guide it in making an award under this particular head. He referred to Dr. Grantel Dundas' diagnosis of the Claimant's injury - sequelal of whiplash injury - the residual impairment suffered by the Claimant assessed at 7% of the whole body.

The first case cited is *Marie Jackson v. Glenroy Charlton et al Suit no. CL. 1999 J113 Khan's Vol. 5 Personal Injury Awards P. 162* assessed on the 8th January and 4th May, 2001. Here the Claimant suffered

- (a) Pains in the neck, back, left rib cage and left elbow
- (b) Severe pains persisting to neck and lower back

Claimant's Permanent Partial Disability was 8% of the whole person.

The award in this case was \$1,800,000 for Pain, Suffering and Loss of Amenities, which, in today's money would amount to \$3,193,943.00.

The next case relied on was *HCV 2005 HCV 294 Icilda Osbourne v. Barned et al* decided on the 17th February, 2002. Sykes J. made an award of \$2.5 million for Pain, Suffering and Loss of Amenities. The claimant's Permanent Partial Disability was 10% of the whole person. *Claim 2005 HCV 00023 Juliet Wignal v. Howard Gudge et al.* On the 6th day of June, 2006, the Claimant received an award of \$1,850,000 for Pain, Suffering and Loss of Amenities. Hers was a whiplash injury with mechanical lower back pains. Her total Permanent Partial

disability was estimated at 8% of the whole person. This would amount today to \$1,918,210.00.

Mr. Cochrane suggested that a reasonable award to his client in the instant case would be between \$2.00 million dollars and \$2.6 million dollars. The Claimant has been suffering since the year 2002, and in the circumstances, that would be a reasonable award.

Mrs. Rose-Brown responding to Mr. Cochrane's submission and the authorities relied on by him reasonable guides to this Court stated that the amount sought by the Claimant for pain, suffering and lack of amenity was high and outside the band of awards usually made for whiplash injuries and a permanent partial disability of 7% of the whole person. Dr. Dundas report diagnosed the Claimant's injury as less serious than those mentioned in the cases on which Claimant's Counsel Mr. Cocharane relied. She identified the injury according to Dr. Grantel Dundas certificate to be whiplash injury.

The Marie Jackson case (supra) shows the Claimant there to have an 8% Permanent Partial Disability of the whole person. Dr. Dundas, on his certificate had opined that the Claimant Marie Jackson was restricted from functioning in her day to day routines. Defendant's Attorney asked the Court to reject the Marie Jackson case as a guide in awarding the amount sought by Mr. Cochrane, the claimant's attorney.

Further Mrs. Rose Brown contends that the Icilda Osbourne case (supra) on which the Claimant relies is a more serious case. She is 60 years old and is

10% disabled – this award turned on the facts of this case. This case therefore is not a reasonable guide.

The doctor in the Juliet Wignal case was of the view that Juliet Wignal would suffer later from her injuries. There was no evidence in the instant case that the Claimant would be unable to function in his day to day living. His impairment is 7% Permanent Partial Disability of the whole person. This is not a suitable case to guide the court in the making of the award sought by the Claimant.

I am guided by Lord Birkett's off cited statement in ***Bird v. Cocking and Sons Ltd. (1951) 2 JLR 1260***, referred to again by Denning M.R. in ***Ward v. James 1 AER 563***.

"There should be some increase of uniformity in awards so that similar decisions are given in similar cases, otherwise there will be great dissatisfaction in the community and much criticism of the administration of justice."

With this admonition in mind, I consider the decisions cited by Mrs. Rose Brown as being better guides for the Court than those cited by Mr. Cochrane. The cases are these:-

- 1) ***Suit C.L. 1994 C115 Carolyn Cooper and Katherine Shields-Brodber Khan's Vol. 4 Personal Injury Awards and assessed on 20th April, 1997.***

The second Claimant suffered

- A. Whiplash
Severe neck pains with radiation of pains into both shoulders.
Marked restriction in all movements of the cervical spine.

- B. Significantly disabled up to 1992; moderately disabled after 1992.
- C. Permanent partial disability assessed at 6% (whole person). Award made in 1997 was \$275,000.00.

In today's money, this award would be equal to \$652,698.64. There should be an upgrade to \$750,000 to reflect the 1% difference in Permanent Partial disability assessment.

Suit No. C.L. 2000 G012 Wesley Glanville v. Delroy Campbell et al trial on 4th June, 2001. Injury was neck pain - whole person disability was 10%. Award for General Damages was \$975,000. Today this would equate to \$1,700,970.00.

Kathleen Earle v. George Graham Khan's Vol. 4 Personal Injury Awards - assessment made on 11th December, 1996. Claimant had severe whiplash injury. There was a permanent partial disability of 6% (whole person). The award made for Pain, Suffering and Loss of Amenities was \$800,000.00. Computed in today's money, this would be equal to a sum of \$1,469.96.

Jean McLennon v. Stanley Williams et al Khan's Vol. 4 Personal Injury Awards Assessment made on the 18th November, 1993. Claimant suffered from whiplash action - spasm and tenderness in the cervical vertebrae. Residual disability was assessed at 6% (whole person). The award in this case for Pain, Suffering and Loss of Amenities was whiplash action - spasm and tenderness in the cervical vertebrae. Residual disability was set at 6% (whole person). The award for Pain, Suffering and Loss of Amenities was \$170,000.00. Today's value of this award is \$8,787,881.77.

Relying only on those authorities which she herself had cited, this Court is asked to make the award in the instant case in the sum of \$1.2 million for Pain, Suffering and Loss of Amenities.

I have taken into account the medical evidence produced by the claimant herself, and using the case cited, *Marie Jackson v. Glenroy Charlton et al supra and Wignal v. Bridge et al* (supra) as preferred guides, I make an award in the instant case for Pain, Suffering and Loss of Amenities of \$2,000,000.00.

Loss of Future Earnings

Mr. Cochrane submitted that the Claimant can no longer function as Minister of Religion. This is because of the injuries he has received. There has been a reduction in his emoluments of some 25%. The Claimant Mobrey Lewis was born on the 25th July, 1955. (See Dr. Dundas report). He is now 52 years. From the evidence, Mr. Cochrane further submitted, the Claimant became unable to work from October, 2006. Up to the previous month he was earning a sum of \$91,000 per month. After statutory and other deductions, the amount he received was \$41,148.98. His December 2006 salary slip (exhibited) indicated that his take home pay was \$33,875 (net pay). The multiplier/multiplicand method should be used.

He relied on the case *Suit C.L. 1984 M544 Angie Moore v. Mervis L. Davis* Vol. 4 Khan's Personal Injury Awards. The Claimant here was a lady whose age was 53 years old. A multiplier was used in this case of 11, as was used in the

Angie Moore case. - she being 53 years old. The Claimant in this case was similar in age. The amount of the multiplicand should be \$33,875.

Mrs. Brown-Rose was not in agreement with Mr. Cochrane's submissions and she said that the Claimant has indicated that he is no longer able to function as a Minister of Religion. There is no evidence to state that the Claimant cannot function as a Minister of Religion. There is no evidence to say that Claimant's injuries would affect his daily living - there was no objective medical evidence. The Court should therefore not make any award under this head.

I cannot agree with Mrs. Brown Rose that there is no objective medical evidence that the Claimant's daily living would be affected by his injuries.

I have earlier referred to Dr. Whitter's unchallenged evidence that the Claimant was advised to refrain from doing a number of things which, as a Minister of Religion overseeing a group of five churches, he would be required to do. See Dr. Whitter's Medical Certificate dated September 21, 2006 Page 20 of the bundle. Dr. Phillip Henry's assessment is to be found in the Claimant's Permanent Disability Application Form (also exhibited) that the Claimant became unable to work in October 2008.

Dr. Whitter's Medical Report dated February 20, 2007 still refers to the Claimant's condition and refers also to a plan to ameliorate the Claimant's situation regarding his injuries.

I am of the view therefore that the Claimant should have an award made for loss of future earnings. The multiplier will be 10 and the multiplicand \$33,875.00. The resulting award for Loss of Future earnings is \$4,065,000.00.

Conclusion:

The award made is therefore as hereunder:

A. **Special Damages**

\$791,189.05 with interest thereon of 6% per annum from the 27th day of January, 2002 to 19th of November, 2007.

B. **General Damages**

(i) Pain, suffering and loss of amenities - \$2,000,000.00 with interest thereon of 6% per annum from the date of the service of the Claim Form the 28th day of July, 2006 to 19th day of November, 2007.

C. (ii) Costs agreed for the Claimant in the sum of \$ 85,000.00.
Loss of future earnings \$4,065,000.00.