

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION

CLAIM NO: HCV 1973/2005

BETWEEN	MARCIA McINTOSH	CLAIMANT
AND	ELITE WHOLESALE AND DISTRIBUTORS LIMITED	1 st DEFENDANT
AND	DEVON NELSON	2 nd DEFENDANT

Heard March 31, 2009

Brian Moodie, Esq. instructed by Samuda and Johnson for the Claimant; Mrs. Sharon Usim instructed by Usim, Williams and Co for the Defendants

Assessment of Damages; contested as to quantum only; compensation for additional domestic help and future domestic help; handicap on the labour market;

ANDERSON J.

The Claimant is a fifty-five (55) year old administrative assistant at the Supreme Court of Jamaica where she has worked first as a librarian and then in her current position for over twenty (20) years. Having secured a default judgment as to liability, she is here concerned only with establishing the quantum of damages to which she is entitled as against the first defendant, the owner of the vehicle which caused her injury and the second defendant, the driver of the vehicle and the servant or agent of the first defendant.

Special Damages

In respect of special damages, the parties have agreed that certain expenses incurred by the Claimant are to be agreed according to the receipts which have been submitted for medical expenses, transport costs, pharmaceuticals and other incidentals. I shall return to this agreed sum later in computing the total due for special damages.

In addition to the special damages agreed, it was submitted on behalf of the Claimant that, as a separate head of special damages, she is entitled to a claim in respect of

domestic assistance which she had to secure because of the limitations brought upon her by the negligent action of the defendants. It was her evidence that prior to the incident which caused her injury, she had been able to cope with her domestic duties by using a household helper one (1) day per week. However, after the incident, she needed to secure help for two (2) days per week. Over the period from March 2005 to the time of trial, this had given rise to additional expenses of \$230,800.00.

There is credible evidence to support the additional sum as an item of special damages and I accordingly award this sum together with the amounts for receipts previously agreed between the parties in the sum of \$212,306.39 for a total of special damages of \$443,106.39. This sum is awarded with interest at 6% from March 22, 2005 to June 21, 2006 and 3% from June 22, 2006 to March 31, 2009.

General Damages

It was in the area of the amounts to which the Claimant should be otherwise entitled that there was some difference between the attorneys-at-law for the respective parties. Mr. Moodie, for the Claimant, submitted that the Claimant should also be given an award for the fact that she will need domestic assistance in the future. He argued that a computation for this figure should be the present rate of wages for the help now employed, times the number of years until the Claimant reached the age of seventy (70) years. There is undoubtedly some validity in a claim such as this as the case of **Kiskimo Ltd. v Deborah Salmon SCCA 61/89** (per Carey J.A.) shows. There it was stated that a claimant does have a right to be compensated for future (nursing) care which is necessitated by the tort having been committed upon her. I would, however, respectfully adopt the dictum of his lordship in that case where he said:

It is to be borne in mind that the court in assessing compensation for the expense of nursing and attendance is not calculating what that expense will be. It is only giving compensation for the fact that in the future extra expense will be incurred. See the observations of Lord Denning M.R. in

Taylor v Bristol Omnibus Co. Ltd. [1975] 1 W.L.R. 1054. The probable life expectancy must be reduced to have regard to the fact that a lump sum payment is being made immediately and there are a number of imponderables to be considered.

In the instant case, I believe that a multiplier of six (6) years is adequate to compensate the claimant under this head, given the dictum of his lordship. The award for this head would therefore be $\$1,200 \times 52 \times 6 = \$374,400.00$.

The Claimant had testified that she continued to have physiotherapy sessions as well as occasionally receiving trigger point injections for pain. These injections relieved the severity of the pain sometimes for a day or a few days, but then the pain could return suddenly based upon a sudden shift or some other action. Mr. Moodie submitted that the Claimant should be given an award for the future cost of physiotherapy as well as the future cost of the continuing trigger point injections to relieve her pain. Regrettably, there was no evidence before me as to the cost or the regularity of the physio-therapy sessions, nor of the cost of the injections in question. Notwithstanding this fact however, it must be remembered that the court's function is to seek to ensure that the overall figure arrived for damages is proper compensation for the injury suffered by the claimant. I take this to mean that where the court is minded to allow a reasonable sum for foreseen but un-quantified eventualities, it may adjust the sum for general damages providing it does not thereby make the final award inordinately high so as to cause an appellate court to reduce that amount.

The Claimant in this case in February 2007, was found to be still having significant pains. She was assessed as having:

- ❖ Chronic cervical whiplash
- ❖ Chronic cervical spondylosis
- ❖ Chronic cervical myelopathy
- ❖ Right biceps tendonitis
- ❖ Right rotator cuff tendinopathy

❖ Right periscapular muscular spasms

There was evidence of degeneration of the disc at C5/C6 as well as osteophyte formation, mild disc space narrowing at C5/C7 levels and calcification of the anterior longitudinal ligament at C6/C7. Her PPD was assessed at 15% of the whole person.

In respect of pain and suffering and loss of amenities, Mr. Moodie put forward two (2) cases which he submitted could assist the court in determining the amount of damages to be awarded the claimant. The first case is Kathleen Earle v George Graham & others reported at Khan's Volume 4 page 173. In that case the plaintiff, a teacher, was injured in a motor vehicle accident. She suffered sudden onset of neck pains and headaches, muscle spasm and exquisite tenderness along certain muscles. She experienced a marked restriction in the range of motion of her cervical spine due to pain. She also developed lower back pains and had episodes of fainting without loss of consciousness. She required medication to relieve her neck pains and her permanent partial disability (PPD) was assessed at 6% of the whole person. In December 1996 she was awarded damages for pain and suffering and loss of amenities, the sum of eight hundred thousand dollars (\$800,000.00). This figure when updated to the CPI of 136.2 for February 2009 is equivalent to 2.6 million dollars. He felt that this could be at the lower end of the prospective award as the Claimant's assessment was much worse than the plaintiff in Kathleen Earle.

The second authority was the case of Olive Henry v Robert Evans & Greg Evans Khan's Vol: 5 p 156 decided by Wesley James J. in February 1999. The plaintiff in that action was found to have

- a) marked restriction of extension and lateral flexion of the cervical spine
- b) impaired rotation
- c) bilateral sacrospinalis spasm with tenderness and spasm in the rhomboids and trapezii
- d) restriction of thoracic rotation especially towards the right
- e) tenderness in the extensor compartments of both forearms
- f) diminished grip on the right

g) defused sensory blunting on the right

She was diagnosed with a whiplash injury and her PPD was assessed at 11% of the whole person. There was a finding of fact that there had been a preexisting condition which accounted for 50% of the PPD and the judge, in assessing damages attributed 50% of the PPD to the pre-existing condition therefore treating the PPD as 5.5% for the purposes of the case. The award for pain and suffering and loss of amenities was \$750,000.00. Counsel submitted that, for the purpose of the instant case the court should proceed on the basis that, but for the preexisting condition, the full award for pain and suffering and loss of amenities would have been 1.5 million dollars and that is the figure that ought to be used for comparison. That figure, when updated to the February 2009 CPI, would now amount to 4.2 million dollars. It was accordingly submitted that an award of 4.5 million dollars for the claimant in this case where the PPD was 15% would be appropriate.

Finally, Mr. Moodie submitted that an award should be made for handicap on the labour market. It was his submission that the claimant had indicated in her evidence that, because of the pain and difficulties she was experiencing in her job, she intended to seek early retirement in this year. Accordingly, she would be at a disadvantage if and when she sought to compete on the labour market, given the disabilities to which she had testified. (To the extent that it was implicit in the submission that it may be necessary for a claimant to be employed at the time of the trial for an award of handicap on the labour market to be made, see the view to the contrary in my judgment in **Morgan v Valley Fruit Company Ltd. HCV 0805 of 2003** delivered 15/2/06 and the reference therein to **Cook v Consolidated Fisheries Ltd, [1977] I.C.R 635**)

Mrs. Usim for the defendants in sensibly brief submissions argued that the court should not use a period of 15 years as the multiplier in relation to the Claimant's need for future assistance. This multiplier should be reduced to take account of the fact that, as Carey JA said in the dictum quoted above, the claimant is being paid the lump sum up front and there are other imponderables. One therefore ought to consider the present value of the sum to be awarded. She also submitted that there was no evidence to indicate that the

Claimant was in any danger of losing her present employment so as to necessitate her competing in the labour market. Accordingly, she resisted any suggestion that there should be an award for handicap on the labour market.

I have to say that the submission in support of an award for handicap on the labour market is undermined by two (2) facts. Firstly, the fact is that the Claimant gave no evidence of any threat of her being dismissed from her present job on account of dissatisfaction with her performance. Secondly, the fact that the Claimant is considering voluntary early retirement at age fifty five (55) rather than waiting until she is sixty (60), would appear to suggest that she is not contemplating further involvement in the labour market. If she is not in the labour market, it is difficult to see how she could suffer a "handicap on the labour market".

By way of a case to give guidance to the court on general damages, counsel cited the case of **Jackson v Charlton, Khan's Volume 5 page 167**. In that case the claimant, a customer service representative at an insurance company, suffered injuries in a motor vehicle accident. She was assessed as having:

- A. Pain in neck, back , left rib cage and left elbow
Severe pains persisting to neck and lower back
- B. The plaintiff was seen by a Dr. M. O'Reggio on 1/12/98 complaining of persistent pains in neck and back since the accident. Examination revealed
 - Tenderness of nape and left rib cage. Tender swelling to the lateral epicondyle of the left elbow
 - Tenderness of the lower back especially to the left sacro-iliac jointAnalgesics were prescribed and she was advised to wear a neck brace which she did for one month. She was seen again on the 15/12/98 with persistent pain in the neck and back. Xrays showed no bony joint injury. She continued non-steroidal anti-inflammatory medication and repeated injections and remained under doctor's care.
- C. In January 1999 she saw Dr. G.G. Dundas, Consultant Orthopaedic surgeon, complaining of:-
 - 1. Tiredness and tension in her back
 - 2. Stiffness in the neck for 6 weeks.

She was assessed as having a PPD of 8% of the whole person. In May 2001, she was awarded damages for pain and suffering of one million eight hundred thousand dollars

(\$1,800,000.00) by Dukharan J. That figure when updated for the February 2009 CPI now amounts to four million three hundred thousand dollars (\$4,300,000.00). Counsel for the defendants submitted that an award of \$4 million would be adequate.

It is interesting that notwithstanding their appeal to different authorities, counsel for the parties were not that far apart in the sum each thought would be appropriate, that is somewhere between four million and four million five hundred thousand dollars. (\$4,000,000.00 to \$4,500,000.00)

Based upon the totality of the facts outlined above as to the extended and continuing period of pain, and the authorities cited, I believe that an appropriate award for General Damages for pain and suffering and loss of amenities would be of the order of four million five hundred thousand dollars (\$4,500,000.00).

I award this sum with interest of 6% from September 2, 2005 to June 21, 2006 and 3% from June 22, 2006 to the present.

Special damages are awarded in the sum of \$443,106.39 with interest at 6% from March 22, 2005 to June 21, 2006 and 3% from June 22, 2006 to March 31, 2009.

I also award a sum of three hundred and seventy-four thousand four hundred dollars (\$374,400.00) for the cost of future domestic help.

Costs are for the Claimant, to be agreed or taxed.

**ROY K. ANDERSON
SUPREME COURT JUDGE
MARCH 31, 2009**