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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004 HCV 00962

BETWEEN	KELLECIAH MYRIE	CLAIMANT
AND	BEVERLY MITCHELL	FIRST DEFENDANT
AND	CORDELL WILSON	SECOND DEFENDANT

Michele Champagnie instructed by Peter Champagnie for the claimant

Defendant absent and unrepresented

March 8 and May 22, 2007

ASSESSMENT OF DAMAGES, LOSS OF EARNINGS, LOSS OF EARNING CAPACITY, COST OF PAST ASSISTANCE, COST OF FUTURE ASSISTANCE AND A HUNT V SEVERS TRUST,

SYKES J.

1. This is an assessment of damages arising from an accident that occurred on May 27, 2000, when Miss Kelleciah Myrie, the claimant, was a passenger in a car, driven by Mr. Cordell Wilson, which smashed into a utility pole in the vicinity of Wee Tom Lane along the Newland Road in the parish of St. Catherine. It was alleged that at the time of the accident Mr. Wilson was the servant or agent of Miss Beverly Mitchell.

2. Judgment was entered against both defendants. Judgment was entered against Miss Mitchell on February 4, 2005, and against Mr. Wilson on January 20, 2006. Miss Mitchell has paid over the policy limit ($1,500,000.00) and the case against her was discontinued by a notice of discontinuance filed January 17, 2007. This assessment is for the total damages recoverable from which will be deducted the sums already recovered from Miss Mitchell.

The assessment

Nature and extent of the injuries sustained

3. There are two medical reports. One dated June 24, 2002, and signed by Dr. R.A. Hussain, Resident, Department of Neurosurgery at the Kingston Public Hospital ("KPH"). The other dated July 10, 2002, signed by Dr. Donald Burke, Resident, Facio-Maxillary Department of the KPH.

4. Taking the first report. Miss Myrie was transferred to the KPH from the Spanish Town Hospital. On admission at KPH she was unconscious and had sustained sever head injury. She responded to pain by localizing but did not open her eyes. She had a sutured wound over the left mandibular area of her face. Her airway was protected by endotracheal tube. A "CAT" scan of the brain revealed multiple contusions in the brain associated with cerebral oedema and traumatic subarachnoid haemorrhage.

5. Radiographs showed a fracture of the left mandible. Her progress was slow but there was consistent neurological recovery. She was discharged on July 10, 2000. At the time of discharge she was conscious, oriented and had difficulty speaking and there was weakness in her left hand and leg.

6. She returned to the Neurosurgery Clinic six more times until February 6, 2002. She continued to make neurological recovery but was confined to a wheel chair and needed help to take care of her daily activities of living. She is confined to wheel chair at home due to weakness of her limbs.

7. The second report tells us that she had a 6cm laceration on the left side of her face. On June 6, 2000, almost two weeks after the accident, she was still unconscious. Her fracture was conservatively treated using interdental wires to stabilise the fractured mandible. The wires were removed by Miss Myrie, which necessitated another treatment option. On July 5, 2000, she had an open reduction and internal fixation along with the placement of arch bars. This operation was done under general anaesthetic. There was satisfactory occlusion and Miss Myrie was discharged as an out patient. On subsequent follow ups it was found that Miss Myrie consistently removed the fixation device. Despite this, the doctor reports that she healed satisfactorily and was discharged from the care of the Facio-Maxillary Department on September 21, 2000. The doctor's opinion was that there would be no permanent disability or dysfunction of her left mandible but left facial scars remained.

8. There is no further medical report, a matter to be regretted when the court is asked to assess damages where the claimant in seeking in excess of $9,000,000.00. Mrs. Champagnie in her written submissions speaks of the claimant suffering from speech difficulty and mental confusion from time to time. There is no evidence supporting this alleged mental condition and it might very well be that her speech impediment was brought about by her when she consistently removed the fixation devices placed on her left mandible by the medical staff. In my view, there would need to be cogent evidence that her speech impediment would have resulted even if the fixation devises were not removed.

The nature and gravity of the resulting physical disability

9. She is now confined to a wheel chair. She lost teeth and has persistent weakness on the left side of the body. She moves with the assistance of a walker and cannot care for her physical needs on a daily basis.

The pain and suffering endured

10. Miss Myrie said that she suffered terrible pain and suffering and loss of amenities as a result of the injuries.

Loss of amenities suffered

11. Miss Myrie has undoubtedly lost a body free from scars. Although there is no medical report indicating her whole person disability it appeared to me that she had lost significant use of her left arm and the left leg appears to be impaired in some way. There is no medical evidence indicating that the left leg was injured but there is evidence that there was general weakness on the left side of her body. Much if not all her daily needs have to be attended to by another person.

12. She complains that she is deprived of the pleasure of participating in sporting activities and activities with her son. Because of her confinement to a wheel chair she is unable to attend events at her son's school. Miss Myrie's mother attends the school functions and this has led the son to call his grandmother, mother, because according to Miss Myrie, her son told her that he does this because the grandmother is playing the role she ought to be playing. This is part of the mental suffering she had undergone and will continue to undergo until, perhaps, her son matures and appreciates the nature and extent of his mother's disability. The son is now 11 years old.

13. Miss Myrie was also unconscious for three weeks. I shall deal with the compensation of an unconscious person in more detail later.

The Assessment

Pain, suffering and loss of amenity

14. In ***H. West & Son v Shephard*** [1964] A.C. 364, Lord Morris stated that when a person is unconscious and feels no pain that there cannot be an award for pain and suffering. Therefore those assessments that depend on consciousness are eliminated but that does not mean that an award must necessarily be low because of this. The person may be compensated for the deprivation of the ordinary enjoyment of life. I make this point because Miss Myrie said that she was unconscious for three weeks and so was not experiencing any discomfort but that is not an end of the matter. An unconscious person may recover substantial damages if the injuries are severe enough.

15. An excellent example of this is the House of Lords decision in ***Lim Poh Choo v Camden and Islington Area Health Authority*** [1980] A.C. 174, where the doctor was transformed from a lively active person to a barely sentient individual. One of the grounds of appeal before the House was that the assessment by the trial judge was excessive, given that the victim had not been aware of her injuries and so the suffering, mental and physical, would have been reduced considerably. It was accepted by the House that the award was high. The question was whether the trial judge acted on correct legal principles and correctly applied those principles to the case before him. Indeed, the specific submission was that in the case of a barely sentient person the award should be small. For her part, the claimant cross appealed on the ground that the award for pain, suffering and loss of amenities was too low.

16. Lord Scarman, who spoke for the House, said that loss of amenity is a substantial loss whether the claimant is aware of it or not. The award by the trial judge was upheld by the House of Lords. In the case before me the claimant was unconscious for three weeks and now that she is conscious, she is constantly reminded of her decreased quality of life by her inability to care for herself and her son. The House specifically approved its previous decision of ***H. West & Son***.

17. Mrs. Champagnie relied mainly on the cases of ***Kenneth Richmond v Caribbean Steel Co.*** Suit No. C. L. 1990/ R 159 (delivered January 26, 1998) and ***Jamaica Telephone Company v Barrymore Hill*** SCCA 126/96 (delivered July 31, 1998). Both cases are found in Khan's Vol.

5 at pp. 235 and 239 respectively. In ***Richmond*** there was no weakness in both limbs on the same side of the body. The injuries were confined to the head with bruising and swelling around the eye with dilation of the right pupil, abrasions on the right side of the face and right ear, weakness of the right facial musculature and distinct paresis of the left lateral rectus. There was also 10% recent memory loss, loss of vision in right eye to the extent that he could not read with right eye but could count fingers, paralysis of the left sixth cranial nerve resulting in a squint and paralysis of the right seventh cranial nerve resulting in facial assymmetry. He was awarded $1,500,000. Using the January 2007 CPI of 2432.9, the current value is $3,297,208.16. In ***Jamaica Telephone Company*** the claimant suffered multiple small lacerations over the right preauricular and lower cheek areas which healed with raise hyperthropic scars, laceration over dorsum of left hand which left four multiple small hyperthropic hyper pigment scars, fracture of the right superior ramus, lacerations over the outer aspect of the right thigh which left approximately 20 small scars raised, hyperthropic and hyper pigmented, partial avulsion of the inferior ends of the collateral ligaments of the right knee. The claimant was awarded $1,115,000.00 which is valued today at $2,333,691.93. Mrs. Champagnie seemed to have been proceeding on the proposition that although those cases were not on point in terms of injury, the injuries of Miss Myrie were much worse overall and therefore deserving of similar compensation. Mrs. Champagnie submitted that the claimant in this case should be awarded $3,000,000.00. She also cited the case of ***Butler v McDowell*** C.L. 1980/B 388 (delivered January 19, 1987). That case was not of much assistance and so I need not refer to it any further.

18. So far as Mrs. Champagnie's principal cases are concerned, I observe that there was extensive medical evidence which established a clear link between the injuries and the tort. I take into account that the doctor said that the claimant constantly removed the immobilisers placed on her to assist in the healing of the broken left mandible. Her alleged speech impediment may well have been caused by this act. The burden is on the claimant to prove that her speech impediment was caused by the tortious act of the second defendant. She needed to prove by reliable evidence that the removal of the wires used to stabilise her mouth had nothing to do with her current speech impediment.

19. Mrs. Champagnie's claim for $3,000,000.00 took into account the view that the speech impediment was a direct result of the accident. As I have indicated, the evidence showed that Miss Myrie

consistently interfered with the apparatus attached to her mouth. What would have been needed was evidence that the speech impediment would have occurred inspite of her interference with the equipment. In the circumstances of this case I am of the view that an award of $2,500,000.00 is appropriate for pain, suffering and loss of amenity.

Loss of Income - pre-trial and loss of future earnings

Pre-trial loss of income

20. This aspect of the assessment has two components. There is the pre-trial loss of income and the post-trial loss of income. I shall deal with the pre-trial loss of income first. There is a letter dated June 23, 2003, signed by an R. Boucher indicating that Miss Myrie was employed to him for the past two years as a bartender and cashier at Boucher's H.Q. located at 1351 West Windermere Place for the past 2 years at a weekly salary of $4,000.00 per week. This was her earning at the time of the accident.

21. The written submissions of Mrs. Champagnie refer to a claim for six years and ten months. This gives a total of $1,408,000.00. According to Mrs. Champagnie, I should deduct approximately 1/3 for taxes which leaves $938,666.67. This is the sum awarded for pre-trial loss of earnings. It attracts 6% interest.

Loss of future income

22. Miss Myrie has testified that she has tried to get jobs but no one wants to employ her because of her disability. In fact, one employer told her, quite frankly, that he would not employ her with her present disability. It is no use pretending that persons with disabilities in our society are much sought after workers. They do indeed have a difficult life which is exacerbated when they seek employment. It is unlikely that Miss Myrie is going to be employed by anyone. One leg is obviously shorter than the other. Her left arm is clearly severely injured. She worked as a barmaid and a cashier before her injuries, jobs that would tend to suggest that her educational attainments did not allow her entry into more well paying occupations.

23. The evidence is that she is 29 years old and assuming a normal working life she may have retired at age 60. Based on the cases provided by Mrs. Khan in vols. 4 and 5 on personal injury assessments an appropriate multiplier is 9. The multiplicand, using her earnings of $4,000.00 per week, is $208,000.00. The total sum awarded is $1,872,000.00. No interest is awarded on this figure.

Loss of earning capacity

24. There is no doubt that Miss Myrie is no longer able to compete with able bodied women in the labour market. The claimant is not working but this does not mean that she is not entitled to compensation for the loss of earning capacity. My position on this head of damage is set out in ***Ebanks v McClymont*** Claim No. 2004/2172 (unreported judgment delivered March 8, 2007). For the reasons given there I agree with Miss Champagnie that a lump sum award is appropriate particularly since I have used the multiplier/multiplicand approach to calculate the future loss of income. She has asked for the sum of $250,000.00. I do so and it does not attract any interest.

Recovery of cost of care - past and future

Past care

25. The claimant now has no source of income. When she was discharged from the hospital it was her mother who has been assisting her financially. The evidence from the claimant is that since the accident she has been supported financially by her mother. The mother has to be paying $4,000.00 per week to a caregiver. She said from August 2000 she began paying for the caregiver at the rate of $3,000.00 per week. The details of the payments actually occur in the witness statement of Miss Myrie.

26. Miss Myrie identified the handwriting of her mother on receipts evidencing the moneys paid on behalf of her daughter. From the receipts, Miss Hyman paid $3,000.00 per week from August 5, 2000 to December 9, 2000. At the end of 2000 Miss Hyman paid $57,000.00 for assistance for her daughter.

27. She paid $3,300.00 per week from January 6, 2001, to the end of March 2001. In December 2000, she paid a total of $17,000.00. On April 7, 2001, she paid $3,500.00. From April 14, 2001 to September 8, 2001, she paid $4,000.00 per week. However on September 15 and 22, 2001, she paid $6,000.00 for both weeks. She went back to paying $4,000.00 per week on October 6, 2001 to December 8, 2001. The receipts for December 15, 22 and 29, 2001, have an unexplained increase of $5,000.00, $10,000.00 and $8,000.00 respectively. The receipt for December 22, even refers to curtains and decorations. There is another December 29, 2001, for $14,000.00. There is no evidence explaining these increases. I shall only allow recovery of $4,000.00 per week for these weeks. Up to the end of 2001 the sum paid for assistance was $198,000.00.

28. From January 5, 2002 to June 22, 2002, Miss Hyman began paying $4,200.00 per week and not $4,000.00 as was in her witness statement. The figure in the witness statement seems to be an error since the receipts refer to $4,200.00. This gives a total of $105,000.00. The evidence is that Miss Hyman began paying $5,000.00 per week from June 29, 2002, until the date of trial. For 2002 the total payments were $240,000.00.

29. From 2002 to May 4, 2007, the total payments are $1,130,000.00. The total cost of assistance from the time of accident to the present is $1,625,000.00.

30. In the receipts I observe that the first receipts indicated that the payments were to take care of Miss Myrie at home. From March 2001, the receipts were said to be for taking care of Miss Myrie and her son at home. It seems that taking care of the son did not result in any additional cost and so I won't make any deductions for the sums paid for the care of Miss Myrie and her son.

31. Miss Myrie was not able to pay for the services that she needed. Her mother underwrote the cost of assistance. There is no evidence that her mother paid this money pursuant to any legal obligation. There is no evidence that Miss Hyman was lending money to her daughter to pay these sums of money. Reasoning by analogy with the gratuitous service cases, if the provider of gratuitous service to the victim, even though she has no cause of action against the tortfeasor is regarded as being able to recover the value of her services, then all the more reason that someone who has paid for the service on behalf of the victim ought to be able to recover. The true principle of recovery seems to be that where a person provides service gratuitously or pays for services needed by the victim without being under a legal obligation to so such persons are entitled to recover the value of the service or the moneys actually paid on the basis that justice demands that such recovery is possible. As Lord Denning M.R. in ***Cunningham v Harrison*** [1973] Q.B. 942 said at page 952:

> *On recovering such an amount, the husband should hold it on trust for her and pay it over to her.*

32. This principle was approved by the House of Lords, speaking through Lord Bridge in ***Hunt v Severs*** [1994] 2 A.C. 350, 358:

> *The law with respect to the services of a third party who provides voluntary care for a tortiously*

injured plaintiff has developed somewhat erratically in England. The voluntary carer has no cause of action of his own against the tortfeasor. The justice of allowing the injured plaintiff to recover the value of the services so that he may recompense the voluntary carer has been generally recognised, but there has been difficulty in articulating a consistent juridical principle to justify this result.

33. The passages are clear enough. If a caregiver who provides gratuitous services can recover the market value of those services, then all the more reason that a person who has actually paid for the services on behalf of the claimant can also recover. The trustee of this sum of money is the claimant. In ***H v S*** [2003] Q.B. 965 reinforced the point that the **Hunt v Severs** trust is indeed a real trust. Lord Justice Kennedy in ***H v S*** at paragraph 30 said:

However, such damages can only be awarded on the basis that they are used to reimburse the voluntary carer for services already rendered, and are available to pay for such services in the future. In the words used by Lord Bridge in Hunt v Severs [1994] 2 AC 350, 363, damages are held on trust and if the terms of the trust seem unlikely to be fulfilled then the court awarding damages must take steps to avoid that outcome. Contrary to what was said by Crane J in Bordin's case [2000] Lloyd's Rep Med 287, 294, I believe that the trust is one which the court can, and in an appropriate case should, enforce. It is not sufficient to leave the matter for further litigation in another division. I will return to that matter at the end of this judgment.

34. In making good on his word Kennedy L.J. made orders that isolated that sum of money awarded for the caregiver in the case before him. That money was to be placed in a special investment account. This approach has not gone unchallenged (see ***Kars v Kars*** 187 C.L.R. 354 where the High Court of Australia did not follow ***Hunt v Severs***).

35. This **Hunt v Severs** trust, it is said, applies to past as well as future services. It follows that the money under this trust does not form part of the personal property of the claimant. In the case before me, the cost of past care is to be held by the claimant on

trust for her mother Miss Hyman. This money is to be paid to Miss Hyman as soon as it comes to hand.

36. Neither Lord Justice Kennedy, Lord Denning M.R. nor Lord Bridge indicated what type of trust they had in mind. At the very least, it would be a purpose trust established for the specific purpose of paying the caregiver. The caregiver's only interest is to be paid out of this fund. The caregiver cannot, for example, demand that the trust property be handed over to her before the services are provided. The logic would suggest that if the claimant dies before the trust fund is exhausted then the purpose having come to an end the property should return to the tortfeasor. It would seem to me that the trust in these circumstances should be a bare trust with no duty other than to hold the legal title and pay the caregiver as and when the sums become due.

37. Although it might be prudent to invest the money in this kind of trust, there is no duty on the claimant to do so. It also appears that if the claimant pays for past services and squanders the money before other services are rendered, there is no beneficiary who can claim a breach of trust to whom the claimant would be liable. It is clear from this that the **Hunt v Severs** trust is quite unique in the law of trusts and is of limited application. I shall make orders in respect of this trust at the end of this judgment.

Future care

38. The cost of future care is calculated on a multiplier/multiplicand basis. The claim here is made on the basis of $5,000.00 per week. The claimant was born on September 19, 1977. She is now 29 years old. The latest medical report is nearly five years old. It is desirable in cases such as this that every effort should be made to secure very recent medical reports. I have seen the claimant in court moving with the aid of a walker. I do not know that despite her injuries she may not be making out that her condition is worse than it really is. The June 2002 report said that she was confined to a wheel chair because of weakness of her limbs. Is that still the case? Is she worse or better than June 2002? She testified that she has gone out to seek employment as a cashier but she has not been successful. She added that she cannot use her left hond.

39. She also testified that she needs assistance to bathe and look after herself generally. This evidence establishes that she will need assistance in the future. It would have been helpful if the medical

evidence, for example, had assisted with care in the later years when Miss Myrie's need for greater care would perhaps be greater.

40. The cost of future care at $5,000.00 per week amounts to $260,000.00 per year. This is the multiplicand. In selecting the multiplier I take into account that this care will be life long. I shall use the expected life expectancy of women in Jamaica because there is nothing to indicate that her life expectancy has been shortened by the injuries she received. The multiplier takes account of the uncertainties of the future and the fact that the claimant is receiving the award now. An appropriate multiplier is 15. I have chosen this figure from the Khan's volumes 4 and 5. The cases collected by Mrs. Khan suggest that in this jurisdiction a multiplier of 14 or 15 is not unusual where the claimant's age is in the twenties. This gives a total of $3,090,000.00 without interest.

Conclusion

41. Special damages

a. Pre-trial loss of earnings of - $938,666.67 at 6% interest from date of accident to date of judgment.
b. Loss of future income of $1,872,000.00 without interest.
c. Cost of assistance - $1,625,000.00 at 6% interest from date of accident to date of judgment.

General damages

d. Pain, suffering and loss of amenities - $2,500,000.00 with interest at 6% from date of service of the claim to date of judgment.
e. loss of earning capacity - $250,000.00 without interest.
f. cost of future assistance - $3,090,000.00 without interest.

42. In respect of the **Hunt v Severs** trust I make these orders. The cost of past assistance ($1,625,000.00) when recovered is to be paid to Miss Hyman immediately or to her estate if, unfortunately, she dies before payment. The cost of future assistance ($3,090,000.00) is to be held on trust. The claimant is one of the trustees. Another trustee is to be appointed on application to the court. Upon the appointment of the second trustee both trustees are to apply to the court for investment directions. This is to ensure that the trust is properly constituted and that the trust funds are used for the purpose for which the damages were awarded. The trust is a purpose trust which comes to an end when either (a) the fund is exhausted or (b) the claimant dies before the fund is exhausted. There is no need, at this point, to make any provision for disposition of the trust

property if the latter event should occur. The final disposition of the trust property may well depend on who provided the fund and under what conditions. It is therefore not prudent to go beyond what I have said. This order also minimises the risk of future litigation.