

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 03004/2006

BETWEEN EMILE STEWART CLAIMANT
AND CAMILLE ROBINSON DEFENDANT

Mr. Orane Nelson instructed by K. Churchill Neita & Company for the Claimant

Ms. A. Beckford for the Defendant

Reasons for Judgment

Heard: July 21 and 22, 2010

Straw J

The court makes the following findings:

1. Mr. Stewart was climbing uphill on his motorbike with a pillion rider. He said he was going at 10 km. He said Ms. Robinson was travelling at a fast speed.

Ms. Robinson was proceeding downhill in her Hiace van. She agreed that it was more difficult to go uphill than downhill, but that she travels faster going uphill than downhill. She denied travelling at a fast speed and stated that Mr. Stewart was going over 10 km.

The court finds that Mr. Stewart is the more credible witness on this point and accepts that Ms. Robinson was proceeding at a fast rate of the speed downhill.

2. The court also accepts Mr. Stewart's evidence that the Hiace van driven by Ms. Robinson was in motion just before impact.
3. The court accepts that the road surface was damp as Mr. Stewart said it was drizzling but there is no evidence from either side that land slippage had occurred on the road at that particular time. I accept that Ms. Robinson encroached on Mr. Stewart's side of the road as she negotiated the corner.

She stated in her witness statement that Mr. Stewart came over onto her side of the road and was struggling to control the bike and that the bike went down sideways and slid across the road.

Under cross-examination she stated that Mr. Stewart and the bike were on his correct side of the road after impact. It is interesting that it was suggested to Mr. Stewart that after the collision, he fell closer to the right the side and that Ms. Robinson moved his bike from right side to left. She has made inconsistent statements that have affected the court's view of her veracity and honesty.

Mr. Stewart said the bike fell on his leg on his left side after the collision. This court finds that it is more probably than not that Mr. Stewart was on his correct side of the road when he and his bike came into contact with Ms. Robinson's vehicle.

Even if I were to accept that the road was only nine feet wide in the middle of the bend, if both Mr. Stewart and Ms. Robinson were on their correct driving side and taking care, there ought to have been no collision.

4. Ms. Robinson stated that Mr. Stewart was on her side of the road because of the guinea grass that was on his side of the road. She never stated in her witness statement that this fact coupled with the narrowness of the road in the bend, cause the pick-up van and herself to stop in the road to allow both vehicles to manoeuvre past each other security.

She had merely stated that this was due to the narrowness of the road. Under cross-examination, however, she has advanced both reasons and stated that the driver of the pick-up also could not see where he was going because of the grass.

Certainly, if the grass was never a problem to the driver of the pick-up, it is incredible that it posed a problem to Mr. Stewart and caused him to encroach on her side of the road.

The court finds that Ms. Robinson is not a reliable and credible witness. I was not impressed with her demeanour. She appeared tentative and hesitant as she gave her evidence.

Mr. Stewart impressed me as the more truthful witness. He answered his questions firmly and with quiet conviction.

The court therefore finds that the claimant has proved his case against Ms. Robinson on a balance of probabilities. The evidence accepted by the court is that she failed to negotiate the corner without encroaching on the claimant's correct side of the road. She also drove too fast around the corner without due care and diligence and without regard to other users of the road and failed to properly negotiate the corner.

The court does not find that the claimant is guilty of contributory negligence in any respect. The court grants judgment for claimant on the claim and counter claim.

General Damages

1. **Cost of Future Medical Claim**

The medical report is cogent and compelling and speaks clearly to the need for this medical procedure to alleviate ongoing pain experience by Mr. Stewart.

The amount of \$118,000.00 is awarded.

2. **Pain and Suffering and Loss of Amenities**

Mr. Stewart sustained a comminute bicondylar fracture of the left knee which has brought serious disruption to his life style since September 17, 2005. He had three surgical interventions between the date and December 12, 2005. Two of these interventions were due to a wound infection associated with the injury. He spent three months in hospital.

Dr. Palmer describes it as a severe injury to the left knee further complicated by infection. That it is unlikely he will have a good functional left knee.

He was seen by Dr. Dundas on December 10, 2007. At that time he was complaining of stiffness and pain in the left knee. Between December 5 to November 6, he was on crutches.

His current status is listed in Dr. Dundas' report.

Counsel for defendant has asked me to consider that Mr. Stewart removed the plaster of Paris himself on or about September 23, 2005. It is clear he did this, however, as there was an onset of infection and he returned to the hospital for treatment.

On examination by Mr. Dundas, the following was noted:

- 1 cm shortening of left lower extremity
- There were scars related to the surgical intervention
- 3 cm defect in left thigh circumference
- 1 cm defect in left calf circumference

Investigation revealed that there was significant loss of the knee joint space which resulted in 71% permanent impairment of the lower extremity or 28% Whole Person Disability (WPD).

The future surgery recommended is to have knee arthrodesed. According to Dr. Dundas, this would eliminate the problem of pain he suffers and reduce the WPD by five percent (5%).

Ultimately, therefore, he would be left with 23% Whole Person Disability.

Mr. Stewart walks with a limp. He cannot bend. The injured foot affects his ability to go under a motor vehicle. He has difficulty going up and down the stairs. He states it is uncomfortable moving around with a stiff knee and his physical activities have been limited.

He also has ugly scars all over the leg.

Counsel for the claimant cited several cases in relation to an award for pain and suffering. These are as follows:

1. **Wilbert Honeywell v Janet Roach**, Khan 4, pg 54, 13% WPD updated award using June's Consumer Price Index (CPI) - \$2,145,845.70 (consent judgment).
2. **Noel Robinson v The Attorney General et al**, Khan 4, pg 50, 14% WPD updated using May's CPI - \$2,268,705.88.
3. **Ricardo Anderson** – (not helpful) predisposition to arthritis, Khan 6, pg 70, 10% Permanent Partial Disability (PPD) updated \$2,926,922.00.
4. **Carlton Brown** – (not helpful) Khan 5, 270.
5. **Kenneisha Harris** – (not helpful) Khan 4, 77.

He has asked for an award of \$3.8 million.

Counsel for the defendant has submitted that an award of \$2,130,354.00 is adequate.

The court also considered the following authorities:

1. **Winnifred Hunter et al**, Khan – octogenarian. Suffered fracture to lateral tibial plateau. Left knee had valgus angulations of 15 degrees. Required to use cane full time – osteoarthritis crepitus in the left knee. 24% WPD, updated award \$2,171,621.62 July 2002. This appears to be on the low side, but her age has to be taken into consideration.
2. **Beverley Francis**, Khan 4, pg 52, updated (June) - \$2,146,755.73, 10% Whole Person Disability.

The court starts with a base award of \$2.2 million, bearing in mind the above cases (**Robinson** 14%, **Honeywell** 13%, and **Francis** 10% Whole Person Disability).

Mr. Stewart will have 23% residual Whole Person Disability.

The court therefore makes an award of \$3,000,000.00 under this heading.

General Damages

1. Pain and suffering and loss of amenities \$3,000,000.00 with interest at 16% from September 17, 2005 to June 21, 2000 and thereafter at 3% from June 22, 2006 to July 23, 2010.
2. Costs of future medical care - \$118,000.00.

Special Damages are awarded under the following heads.

- a. Receipts from the following are totalled as outlined:

Manuchant Limited - two receipts - Exhibits 2a and 2b	-	\$18,980.00
Monnex Limited -Exhibit 3	-	2,000.00
Medical X-ray Institute Limited - Exhibit 4	-	1,600.00
Police Report - Exhibit 5	-	1,000.00
Deans Pharmacy - five receipts - Exhibit 6	-	8,616.89
University Hospital of the West Indies - 16 receipts - Exhibit 7	-	6,750.00 (pleaded)
University Hospital of the West Indies discharge Receipt – Exhibit 8	-	172,396.04
Medical Report – Exhibit 9	-	<u>30,000.00</u>
Total	-	\$ 241,342.9325

b. **Cost of Extra Help**

The claimant had been in hospital based on report from September 17-23 and then September 26 to December 22, 2005. There would have been no need for the services of his spouse to bathe him. After that period I would expect that her services were of value and it is quite clear, that he would be limited in his movements for a period of time.

I will award him the cost of extra help from December 22, 2005 to June 2006 since there was intermittent drainage from his wound till then.

December 22, 2005 to June 30, 2006 at the rate of \$2,400.00 per week:

$$25 \text{ weeks at } \$2,400.00 \quad = \quad \$60,000.00$$

c. Costs of transportation = 26,000.00

d. **Loss of Earnings**

Mr. Stewart is claiming loss of earnings from September 2005 to June 2006 at \$8,000.00 per week.

His evidence is that he is a self employed auto-mechanic. He does general repairs to motor vehicles but his earnings are not constant. After clearing expenses, he makes between \$8,000.00 to \$12,000.00 weekly. He also said that he did not work for about two years after the accident.

He states that he can do construction work and electrical work also. He can also repair small appliances which he did between 2005 and now and that he would earn about \$20,000.00 monthly from this. He said he was able to walk one-and-a-half-years after the accident. This was about the same time he stopped using crutches.

Under cross-examination, he said the lowest he earned from mechanic work is \$4,000.00 and he lost his income as a mechanic from September 2005 to 2010.

Although he did indicate some uncertainty in relation to his ability to recall figures, he states it is true to say he lost \$8,000.00 per week.

In considering an award under this head, the court considers:

1. No documentary proof was provided. He stated that certain records were burnt while he was in hospital.
2. He is known to the defendant and she speaks to him having a garage, although she has never seen it filled with cars. She sees a few.
3. Between September and December, he would have been in hospital. Between January and June 2006, due to an infection, he had intermittent drainage from the wound to his knee. This wound required dressings up to June 2006 by a registered nurse.

The claim for loss of earnings is justified under these circumstances and I would assess it at \$8,000.00 per week.

There is no evidence to indicate that he did not do electrical repairs before the accident so any income earned by this would be extra income. I will therefore not adjust the award to reflect the extra income earned.

I therefore award him 41 weeks at \$8,000.00 per week which is \$328,000.00. This is discounted by 25% and totals \$246,000.00.

e. **Nursing Care**

In relation to the claim for nursing care – 29 visits at \$500.00 per visit, again there are no receipts. The court finds that, bearing in mind the medical reports of both Dr. Palmer and Dr. Dundas, it is reasonable in all the circumstances. He was, however, in hospital up to December 22, 2005.

The claim should therefore reflect the period December 22, 2005 to June 2006. Twenty-nine (29) visits are therefore justified at \$500.00 per visit.

Total for nursing care is therefore \$14,500.00.

Special Damages are therefore awarded as follows:

Medical Expenses	-	\$241,342.93
Transportation	-	26,000.00
Cost of Extra Help	-	60,000.00
Nursing Care	-	14,500.00
Loss of Earnings	-	<u>246,000.00</u>
Total	-	\$587,842.93

Interest at 3% from September 7, 2006 to July 23, 2010.

Costs of \$88,000.00 to claimant.