

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 1256

BETWEEN VIVOLYN TAYLOR CLAIMANT
AND RICHARD SINCLAIR DEFENDANT

Mr. John Graham for the Claimant

Mr. Ainsworth Campbell for the Defendant

Heard: January 1, March 7 and April 18, 2008

Assessment of Damages

Sinclair-Haynes J

On the 24th December 2002, a bus owned by Richard Sinclair (Defendant), collided with the right shoulder of Miss Vivolyn Taylor (Claimant) as she walked along the Old Stony Hill Road. As a result of the collision, she fell, injured her left hand and sprained her right knee. Liability was not contested. The Defendant, however, challenges the quantum of damages the Claimant is entitled to.

The Claim

It is the Claimant's evidence that her left hand is useless. It is stiff and sticks her. Her ability to sleep at nights is affected because a severe pain radiates from her hand up to her shoulder. She experiences pain, cramping and swelling to the hand whenever it is held down.

She lessens the pain by holding her arm up, straps it or uses pain killers. Since the accident, she has attended upon and has been examined by a number of doctors.

She was examined by Dr. Christopher Rose, on the 14th November 2006. His examination revealed the following ranges of motion:

“...dorsiflexion 40 degrees volar flexion 55 degrees. The following were the ranges of motion of the index finger: metacarpophalangeal joint 0 degree to 65 degrees, proximal interphalangeal joint 0 degree to 82 degrees, distal interphalangeal joint 0 degree to 47 degrees. The ranges of motion of the middle finger: metacarpophalangeal joint 80 degrees, proximal interphalangeal joint 65 degrees and distal interphalangeal joint 20 degrees. The ranges of motion of the ring finger: metacarpophalangeal joint 0 degree to 65 degrees, distal interphalangeal joint 0 degree to 5 degrees. The ranges of motion of the little finger: metacarpophalangeal joint 40 degree, proximal interphalangeal joint 60 degrees and distal interphalangeal joint 30 degrees. There was no swelling of the hand but there was marked tenderness on palpation between the third and fourth metacarpals. Sensation was intact.”

He formed the impression that there was permanent stiffness of the fingers of the left hand “secondary reflex sympathetic dystrophy (complex regional pain syndrome)” which occurred as a result of trauma to the left hand sustained on December 24, 2002. His prognosis was that Ms. Taylor would be ‘significantly impaired as a result of her inability to make a complete fist of the left hand due to marked restriction in ranges of motion of the joints and fingers of the left hand.’

Her disability was rated as follows:

“Permanent partial percentage disabilities as they relate to the index, middle, ring and little fingers are 30 degrees, 45 degrees, 59 degrees and 56 degrees respectively. The percentage disabilities of the hand with respect to the index, middle, ring and little finger are six, nine, six and six percent respectively. The total percentage disability of the hand is twenty-seven percent which is equivalent to fourteen percent of the whole person.”

She was receiving physiotherapy but was forced to discontinue because of the unbearable and excruciating pain she experienced as a result. It is her evidence that she is unable to work because she can no longer use her left hand and her job requires the use of both her hands. Prior to the accident, she was employed by the Hamiltons as a domestic helper. She received a salary of \$4,000.00 per week. Her duties included washing and cleaning. She now depends on relatives to cook, wash and clean for her. She has permanently lost the ability to attend to her personal matters such as combing her hair and she is now forced to employ the services of Tanya Ferguson to wash for her.

She claims loss of earnings, cost of extra help, cost of medical reports, travel expenses, medical and physiotherapy expenses.

Submissions by Mr. John Graham on behalf of the Defendant

Mr. Graham submits that the Claimant has failed to mitigate her losses and therefore should not recover for the losses that could have been avoided. He submits that she did not follow her doctor's instructions to keep her hand in a sling. Further, she discontinued physiotherapy treatment. As a result, she ought not to be compensated for the pain and suffering she continues to experience which are as a result of her unreasonable refusal to mitigate her loss.

He also submits that the reasons she has advanced for her failure to seek other employment are unreasonable. There is no evidence that she was dismissed from her job by her employer. He submits that she did not enquire of her employer whether there was any other job, besides domestic which she could offer. Nor has she considered doing any other type of work, for example, becoming a security guard or engaging in 'buying and selling.' He submits that she is unwilling to explore other options which would require less use of her left hand since her right hand is her dominant hand.

It is also his submission that her evidence that she is unable to 'buy and sell' because she has no help to lift the load, is improbable and not credible because her children and grand children reside with her. Also, a young woman attends her house and assists her with her household chores.

Assessment of the Claimant's Evidence

It is her evidence that she sometimes uses her right hand to hold up her injured hand and sometimes she wears a sling. There is no evidence that she holds her hand down for protracted periods. The evidence is that the pain is severe when it is held down. The fact that she chooses at times to use her hand to hold up the injured hand instead of slinging it should not be deemed unreasonable as both methods ease her pain. In fact, the doctor did not advise her to purchase a particular sling. He merely told her to place it in a sling. As a result, she uses a piece of calico as a sling. She, in my opinion, ought not to be penalized because embarrassment causes her to remove the sling occasionally.

The claimant discontinued the physiotherapy treatment because it caused her excruciating pain. There is therefore no evidence that her pain would have ameliorated if she had continued to subject herself to such tortuous pain. It was recommended that she should attend the pain clinic and she did attend.

Regarding her inability to Work

It is her evidence that she left school at sixteen years old. Upon leaving school she attended extra lessons. She testified that she is 'not bright and brilliant' and has been a domestic helper all her working life, that is, from age twenty years. In essence she is not qualified to work at most other jobs that require qualifications. Manual labour to which she is accustomed requires the use of both her hands.

According to her, she is unable to engage in buying and selling because the injury to her hand prevents her from lifting loads. It is also her evidence that her children are employed and they assist her financially and support their children. I cannot, in the circumstances, agree with Mr. Graham's submission that she is not a credible witness because she should be able to get assistance to lift the load from her children who reside with her and the young lady who washes for her. It is the view of the Court that it would be unreasonable to expect them to abandon their jobs at the times she would need their assistance to make themselves available at the places she would need their assistance to lift her load.

Submissions by Mr. Graham regarding General Damages

Mr. Graham submits that the cases of **Michael Jolly v Jones Paper Co.** and **Christopher Holness** Suit Number 1996/J014 reported at page 120 of **Khan's** Volume 5 and **Roseland Richards v K's Roofing Co. Ltd** C. L. 2003 HCV 1010 are useful guides. It is his submission that the sum of Seven Hundred and Fifty Thousand Dollars is adequate compensation for the Claimant's pain and suffering and loss of amenities. It is also his submission that a lump sum award for Handicap on the Labour Market should be given instead of an award for Loss of Future Earning. He submits that an award of \$187,200.00 is adequate.

Special Damages

There is no challenge to the following sums claimed for the following items of Special Damages:

Cost of medical report	-	\$1,750.00
Travel expenses	-	\$1,900.00
Medication	-	\$1,350.00
X-ray	-	\$1,449.00
Physiotherapy	-	\$1,000.00
Pain Clinic treatment	-	<u>\$1,050.00</u>
Total	-	\$8,499.00

Mr. Graham, however, resists vigorously the claim for Future Help. He submits that the Claimant's evidence is that Tanya Ferguson, the helper, always washed for her; therefore her employment is not a consequence of the injury she received, but was a pre-existing arrangement. He submits that the sum of \$2,000.00 per week spent on extra help is not for the Claimant's benefit, as the other six members of her household benefit from her services.

General Damages

Submission by Mr. Campbell on behalf of the Claimant

Mr. Ainsworth Campbell relies on the following cases: **Trevor Clark v Partner Foods Ltd and Marlon Scotland** Suit No CL 1989 C256 cited at Vol. 5 of Khan's work on Personal Injuries, **Michael Jolly v Jones Paper** cited also at Vol. 5 of Khan's work on Personal Injuries and **Thomas Crandall v Jamaica Folly Resorts Limited** SCCA 102/98, heard on the 25th June 1998. He submits that the latter case is most helpful. It is also his submission that the case of **Roseland Richards v. K'S Roofing Company Ltd.** 2003HCV 1010 is not a good guide as it is out of sync with the other authorities.

He submits further that the Claimant is entitled to an award for Loss of Future Earnings. Her inability to work at the job she is qualified for is supported by Dr. Rose. It is his submission that although there is no evidence before the Court regarding the Claimant receiving a salary increase in the future, she would in all probability receive an increase. An equitable figure, he submits, would be \$7,389.16 per week. Applying a multiplier of 8, she is entitled to, he submits, an award of \$3,073,890.56.

Examination of the Authorities

Trevor Clarke was a twenty-six year old policeman who sustained the following injuries in a motor vehicle accident:

1. compound fracture to his right index finger;
2. bruises to his ankle, right knee and right shoulder, pain and swelling of right index finger; and
3. open injury to his right index finger.

He was subjected to two surgical procedures to fix the fracture because the first did not heal. Mr. Clarke's index finger which was his trigger finger was affected. It was markedly swollen and stuck out when he made a fist. He was unable to grip. He reported that his ability to use a firearm was affected. He further suffered the following:

- a. diminished sensation over the distal half of the finger;
- b. the pip joint was absolutely stiff with only five (5) percent flexion;
- c. a healed 2½ S lazy scar 1 over the dorsum;
- d. diminished sensation over the distal ½ of the finger; and
- e. zero grip.

He was found to have suffered Permanent Partial Disability (PPD) of 25 percent of the function of the right hand or 4 percent of the whole body.

He was awarded General Damages in the sum of \$565,000.00 on June 12, 2000. That award now values \$1,225,556.00.

The Claimant in the instant case was not subjected to two medical procedures but she still complains of pain. Her PPD is also higher.

In **Michael Jolly v Jones Paper Co. Ltd. and Christopher Holness**, the Claimant sustained the following injuries in a motor vehicle accident:

- a. laceration along dorsal ulna aspect of forearm;
- b. laceration of right forearm and hand
- c. Severed extensor tendons of right middle, ring and little fingers at their musculotendinous junction.

He was treated at hospital but upon being examined by Dr. Rose, surgery was recommended. His extensor tendons were repaired. He received physical therapy to improve the extensions of his finger but there was marked stiffness of the metacarpophalangeal (MCP) joints of the middle ring and little fingers. Dorsal Capsulotomies were performed on those fingers. He started a programme of intensive physiotherapy. He discontinued the programme because of financial constraints.

The Claimant in that case, complained of difficulty using a knife and writing with his right hand. He complained of pains at night after a days work. Examination by the doctor revealed the following:

- a. Surgical scars measuring 9.5cm on right forearm and 12.5 cm from wrist to dorsum of hand;
- b. 15cm deficit in the circumference of the right forearm;
- c. Slight in that case, t radial elevation of the wrist;
- d. Only 50-60 degree flexion of the MCP joints;
- e. Grade 5 power in the right hand; and
- f. Decreased sensation along right forearm.

His PPD as it related to residual stiffness in MCP joints of the three (3) fingers was 12 percent impairment of the hand which is equal to 11 percent of the upper extremity which represents seven (7) percent of the whole person.

An award of \$800,000.00 was made which is today valued at \$1,957,143.00.

The Claimant in that case, retained some use in his hand. His PPD was significantly lower than Miss Taylor's. The Claimant in the instant case is unable to use her hand.

In the case of **Thomas Crandall v Jamaica Folly Resorts**, the Claimant was a fifty-six year old obese tourist. At the date of the trial, he was sixty-nine years old. He weighed two

hundred and fifty pounds. He had a history of hypertension, gout, and radiation exposure for thyroid.

On the 13th December 1988, he was injured when a chair on which he sat collapsed and he was thrown violently to the floor. He suffered acute bicep tendon avulsion from the left radius and severe pain.

On examination, the doctor found swelling and discolouration from bleeding and tenderness along the front of his elbow where the bicep tendon would normally run. There was distinct weakness with resisted supination and forearm flexion. The bicep was entirely torn from the radius bone. He underwent surgery and was hospitalized for five days. He was unable to normally supinate his left arm after surgery. 'Heterotrophic ossification developed, limiting supination.' The claimant had further surgery. An hour after surgery he suffered myocardial infraction. With improvement of the pain, his condition was "more unstable angina rather than true infraction." He remained in hospital for eight days as a result of the cardiac event. Surgery was a substantial contributory factor to the cardiac event.

He was treated with radiation to prevent recurrence of ossifications and physical therapy to increase mobility. He also had out patient treatment. Up to 1991 he still had restriction of the rotation of the arm.

His doctor was of the opinion that the restriction of rotation of the arm would probably be permanent. His activities would be limited and he would suffer the associated discomfort. It was also his opinion that some mild progression of degeneration was likely although the x-rays suggested that his problem was persistent restriction of rotation and persistent limitation based on rotation. His Permanent Partial Disability was assessed at 20 percent of the function of the left upper limb. The trial judge awarded the sum of \$1,750,000.00 on 1st December 1997.

The Court of Appeal affirmed the decision of the trial judge. That award now values \$4,391,468.00.

The Court of Appeal noted the fact that the injury was painful and the consequential limitation of the enjoyment of the Claimant's life. The period over which the effects of the injury lasted and continued, was considered. The court also took into consideration the heart attack suffered by the Claimant.

Miss Taylor has suffered excruciating pain and still suffers pain.

In the case of **Roseland Richards's v K's Roofing Co. Ltd. and Abe Kawass** 2003HCV1010 which was heard on the 12th May 2006, the Claimant was injured whilst working on the Defendant's property. As a result, his second, third and fourth fingers were partially amputated. His whole person disability was 19 percent. An award of \$750,000.00 was made for pain and suffering. That figure now values \$909,185.00.

I hold that an award of \$4,400,000.00 for Pain and Suffering and Loss of Amenities in the instant case is reasonable in light of the awards made to the Claimants in the cases of **Trevor Clark, Thomas Crandall and Michael Jolly** whose PPD were lower than Miss Taylor's. **Michael Jolly and Thomas Crandall** did not continue to experience pain. Although **Thomas Crandall** suffered a cardiac event, the fact that Miss Taylor still experiences pain is a weighty factor. I have taken into consideration the fact that she unilaterally discontinued physiotherapy which might have diminished her disability. Lord Pearce in the case of **West and Sons Ltd v Shepherd** (1964) AC 326 cited with approval the following statement of Cockburn CJ in **Phillips v London and Western Railway Company**:

"Past and prospective pain and discomfort increase the assessment."

The Court of Appeal in the case of **Dalton Wilson v Raymond Reid**, Smith JA said:

‘In my view there can be no doubt that this was an exceptionally painful experience for the respondent. The immediate post accident period was one of extreme pain, frustration and immobility. The learned judge correctly took into consideration these features. The learned judge was entitled to take account of the consequential difficulties and disabilities in making her award.’

Loss of Future Earnings

Mr Graham submits that a multiplier of 2 should be applied. Mr. Campbell, however, urges the use of a multiplier of 8. In the case of **Oswald Hyde** CL H055 /1996 a multiplier of 5 was used for a 61 year old retired spray man. The Court of Appeal in the case of **Raymond Reid v Dalton Wilson** did not disturb the use of a multiplier of 7 for a 49 year old security guard/electrician.

Miss Taylor is fifty-six years old. She earned at the time of the accident \$4,000.00 per week. Applying a multiplier of six (6), her future loss of income amounts to \$1,248,000.00.

Future Help

Tanya Ferguson’s evidence is that she assisted Miss Taylor after the accident but it was after she was discharged from the hospital that she began receiving \$1,000.00 per day. She received \$2,000.00 - \$3,000.00 per day. The sum pleaded was \$2,000.00. The Claimant is therefore confined to her pleadings. Assuming that Tanya indeed has always worked for the household, it is indisputable, that the Claimant is now incapacitated and requires assistance. The sum of \$1,500.00 per week is, in the circumstances, a reasonable sum as her contribution towards the payment of Miss Ferguson. Applying a multiplier of 6, Damages for Future Help is assessed at \$468,000.00.

The Claimant is therefore entitled to recover the following:

1. General Damages in the sum of \$611,600.00 consisting of the following:

- a. Pain and Suffering and Loss of Amenities \$4,400,000.00 with interest at the rate of 6 percent per annum from the 30th June 2005 to the 21st June 2006 and thereafter at 3 percent per annum to the 18th April 2008.
 - b. Future Help - \$468,000.00.
 - c. Future Loss of Earnings - \$1,248,000.00.
2. Special Damages in the sum of \$1,512,999.00 consisting of the following:
- a. The sum of \$8,499.00 with interest at 6 percent per annum from the 24th December 2002 to the 21st June 2006 and thereafter at 3 percent per annum to the 18th April 2008.
 - b. Extra Help in the sum of \$412,500.00 with interest at 6 percent per annum from the 1st February 2003 to the 21st June 2006 and thereafter at 3 percent to the 18th April 2008.
 - c. Loss of Income of \$1,100,000.00 with interest at 6 percent per annum from the 31st January 2003 to 21st June 2006 and thereafter at 3 percent to the 18th April 2008.
3. Costs to be agreed or taxed.