

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T-088/2001

BETWEEN            ANCEL THOMAS                            PLAINTIFF  
AND                    RHONA MORGAN                            1<sup>ST</sup> DEFENDANT  
AND                    LEROY SMITH                                2<sup>ND</sup> DEFENDANT

Ms. Judith Clarke for the plaintiff.

Ms. Suzette Campbell instructed by Campbell and Campbell for the defendants.

**Heard: 17<sup>th</sup> December 2002, 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> March 2003 and 1<sup>st</sup> July 2003**

**Campbell, J.**

**ASSESSMENT OF DAMAGES**

On 23<sup>rd</sup> July 2001, the plaintiff commenced an action against the defendants for Negligence, claiming that the second defendant so carelessly and recklessly drove the first defendant's motorcar licensed 3756 PP, that it collided with the plaintiff's Nissan motorcar licensed 3687BD. On the 14<sup>th</sup> November 2001, the plaintiff entered an Interlocutory Judgment, the defendant having filed no defence. On the 28<sup>th</sup> January 2002, an Order was made on Summons to Proceed to Assessment of Damages. Notice of Assessment was filed on the 31<sup>st</sup> January and served on defendants' counsel on the 21<sup>st</sup> March 2002.

Dr. Dayamand Mitra Sawh, Consultant Orthopaedic Surgeon at the Bustamante Children Hospital, testified that he examined the plaintiff on October 26<sup>th</sup> 2002.

Sawh noted that the plaintiff's primary complaint was of pain in the right shoulder and stiffness and tenderness in the left knee. He said that no fractures were shown on the radiographs taken by the plaintiff. He noted a "mild wasting of the left thigh". He observed, however, that the "power and tone were normal". There was a 4 cm keloid scar around the left knee. The range of motion of the left knee was 0-110 degrees and 0-130 degrees. The normal range is 0-150 degrees. The ligaments were normal. Most of the tenderness was in the area overlying the keloid near to the patella tendon, which was partially damaged and incorporated in the scar. He opined that there was likely to be permanent partial disability. Sawh was of the view that because of the plaintiff's age and the fact that he was diabetic, there was an increase risk of infection. He said excision of the scar may lead to some relief, however there was a probability of complications arising from that procedure. He said that if the pain could not be controlled by standard painkillers, then he would recommend surgery, although he did not consider that operation would give him back the range of motion in his knee. Sawh opined that the nerves that are in that area would be susceptible to injury as "surgery is unpredictable". Further surgery may not alleviate his pain. He assessed the plaintiff disability of

lower extremity equal at 10% and 4% of the whole person. He explained the disparity between his report and that of Dr. Blake, by noting that Dr. Blake had seen the plaintiff one and a half years earlier than he had. Blake had not noted any ligamentum injury and had observed moderate effusion of the left knee. Blake's assessment of the lower extremity disability was 17%. There was a noted change in his range of motion. Since Blake's examination, the plaintiff had lost 10% of motion as against 20% of flexion of the left knee. The plaintiff claims to have difficulty standing on the left knee, and when climbing stairs 'it tends to give way' if he is without support. For the defendant, it is suggested that the plaintiff's evidence that there is always pain is not borne out by the medical reports, none of which prescribe medication or painkillers. In addition the giving away of the knee is not confirmed by either doctor.

The Defendants have argued that there is no support for the alleged inability to write and to do certain household chores as a result of the shoulder injury. In respect of the shoulder injury, the doctor opined that the range of motion had significantly decreased in all directions. Movement outside the range of motion resulted in severe pains. The MRI revealed that there was a complete tear of one of the tendon in the shoulder, i.e., the supra-spinatus tendon. This tendon is more prone to injury than the others and those injuries tended to be more disabling. The

injury that was observed was likely to be permanent, as is the pain that accompanies it.

The injury to the plaintiff's right eye is reported by Dr. Patrick Griffith as a subconjunctival hemorrhage. In his report dated 26<sup>th</sup> August, the plaintiff's visual acuity was given as "20/20" in his right eye" Dr. Griffith final opinion is that: the visual acuity in each eye is normal (20/20 or better). I find that the reduction in sensitivity cannot be said to be caused by the accident and should not affect the plaintiff's lifestyle significantly.

Sawh assessed the permanent impairment of the shoulder to be 23% of the upper extremity or 14% of the whole person. His total disability was assessed at 18% of the whole person. Dr. Blake's report did not particularise, the various range of motion. Dr. Blake's whole person assessment of the injuries was 8% whilst Sawh estimated it at 18%. The opinion of Sawh for the difference he observed was due to fact that the plaintiff was not in a "long term physiotherapy programme". Further, Dr. Blake did not have the benefit of seeing the MRI, if he had, he would have observed the torn tendon. The x-rays would not reveal the soft tissue damage.

The Consultant opined that physiotherapy might have improved his pain. The plaintiff's evidence is that he attended for physiotherapy for a period of between four to five months and received therapy from Dr. Blake and Mrs.

Mrs. Rattray. Counsel for the defendants has argued that there is no evidentiary support for the plaintiff's contention that he attended for four to five months and in fact is contradicted by the report from Insight that the plaintiff only attended three sessions of therapy and that he was never discharged. The defendant contended that the failure of the plaintiff to mitigate his losses by pursuing the prescribed course of physiotherapy has contributed to the pain and the inability the plaintiff is experiencing. It was further submitted on behalf of the Defendant that the Court should not be overly concerned with the physical injury and the percentage disability assigned to it, but with the impact the injury has on the quality of the plaintiff's life.

In respect of General Damages, the plaintiff relied on two cases (1) Cecil Henry vs The Attorney General & Keith Scott (Khans Personal Injury Awards, Vol. 4, Pg. 34-assessed March, 1996 and unreported judgement No. C.L. H 128 of 1992). In that case the plaintiff had one laceration to his face, thin subconjunctival hemorrhage in the right eye, injury to the right elbow and right thigh, blunt trauma to the chest and numbness to the right upper extremity. There was a limited range of motion in the right elbow, mild tingling in the digits, some limited movement at the knee and limited hip movement. His problems have been exacerbated by minor falls. Permanent partial disability in the upper limb amounted to 10% and 6% in the lower extremity. Overall whole person disability amounted to 16%. The

award to Mr. Cecil Henry for pain and suffering and loss of amenities in 1996 (\$1,250,000.00) updated is \$2,072,252.30. It was submitted that the present plaintiff injuries were more extensive and more severe (2) Wellington Williams vs Black River Upper Morass Dev. Co. Ltd. Khans Vol. 4 pg. 203 - assessed on April, 1997. Mr. Williams suffered a prolapsed intervertebral disc when he fell. There was permanent impotence, decreased sensation in the right leg, permanent damage to the 14 and 15 vertebrae and left thigh 1cm shorter than right thigh. Permanent whole person disability was assessed at 10%. An award of \$1,980,000.00 was made in 1997; this is updated to \$2,978,058.00. Based on the authorities, it was submitted that an award of \$2.8M would be appropriate, for pain and suffering.

The defendant relied on the authority of Monica Williams v Kingsley Bhoorsing & Ors. Suit No. C.L. 1985/W-023, where the fifty-one (51) year old plaintiff had suffered an injury to the right hand and arm in a motor vehicle accident. The Judge found on the facts that the plaintiff had lost between 60% to 75% of the use of the hand. An award was made of \$60,000.00 for pain, suffering and loss of amenities which updated amounts to \$667,000.00. It was submitted that Monica Williams had had her entire life displaced. She is unable to work at all and cannot perform normal chores, whereas Thomas is able to perform his normal chores "except that he states that he was not as efficient as before". It was submitted that an award in the range of \$600,000 – \$650,000.00, would be

appropriate. I find that there was some displacement of Thomas' life. I find that there was a tear of the right supra spinatus tendon of the rotator cuff, which had not healed at the time of the MRI. There was left knee quadriceps wasting and a mild effusion.

The Wellington Williams case deals with much more severe injuries than the discounting by Defense Counsel would indicate. Williams was hospitalized for a period of six weeks as against four days for Thomas. He had a decompression laminectomy. Wellington, forty-two (42) years old, was irreversibly impotent and had no reflexes in both lower limbs, and had suffered permanent damage to L4/L5. The "loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition", is a statement much more relevant to Williams than to this plaintiff.

I find that this plaintiff has failed to mitigate his loss. I accept that the report from Insight indicates that the plaintiff attended for only three sessions of therapy and that he was never discharged. The principle was stated in Charlesworth on Negligence – Fourth Edition – paragraph 1258:

"A person is entitled to recover only those damages which he has incurred while acting reasonably, and, if acting reasonably he could have minimized or reduced the damage that he has sustained to a smaller amount, it is only that smaller amount that he can recover." Per Mackinn M J. in Att. Gen v Valle-Jones [1935] 2 K.B. 209 at 219.

I find that the plaintiff's action in failing to attend for the requisite period on the physiotherapist was unreasonable in all the circumstances of this case. In Ponnnampalam Selvanayagam vs. University of the West Indies (1983) 34 WIR 267, where it was held that a plaintiff was under a duty to mitigate his damage; where he decided not to accept medical advice to undergo surgery, the burden lay on him to satisfy the Court that in all circumstances, including particularly the medical advice, he had acted reasonably in referring surgery.

I accept the testimony of Dr. Sawh that the deterioration in the range of motion seen by him as compared to Dr. Blake's finding was caused by the fact that the plaintiff had not been attending physiotherapy and had not attended for some time. I make an award of \$1,200,000.00 for pain and suffering and loss of amenities. Interest on General Damages to be applied at 6% from the 23<sup>rd</sup> July 2001 to 1<sup>st</sup> July 2003.

The sum of \$130,0885.25 is awarded for Special Damages, with interest thereon at 6% from 17<sup>th</sup> April 2000 to 1<sup>st</sup> July 2003.

Cost to the Plaintiff to be agreed or taxed.