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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2004/HCV0889

BETWEEN RAYMOND REID CLAIMANT
AND DALTON WILSON DEFENDANT

Mr. Richard Reitzin instructed by Reitzin and Hernandez for Claimant

Mr. Kevin Williams instructed by Grant, Stewart, Phillips and Company for Defendant

Heard: 3rd, 4th, 8th November and 10th and 20th December 2004

Sinclair-Haynes, J. (Ag.)

Raymond Reid was a passenger in a bus owned by Dalton Wilson which collided with another vehicle. As a result of the collision he was pinned between two seats for fifty (50) minutes and thereby suffered personal injuries and loss. The ill-fated day was September 17, 2002. Judgment in Default was entered against Mr. Dalton Wilson. It is now my task to assess the damages sustained by the claimant.

Claim for General Damages

Re: Pain and sufferings and loss of amenities

Mr. Reid was examined by Dr. Grantel Dundas. The following is an extract from his Medical Report dated March 3, 2004:

Examination

“There was a 1 cm superficial scar in the right lumbar area. The pelvis was unremarkable.

In the Lower extremities he walked with a short leg limp and a mild antalgic gait. The left lower limb was 2 cm longer than the right. He stood with the left knee slightly flexed. Trendelenburg sign was negative. There was a 1 cm deficit in the left calf circumference but the thighs were equal. There was a 14.5 cm oblique hypertrophic, hyperpigmented scar in the left gluteal area. He had a 30° flexion contracture of the left hip and could flex 80°. He could abduct to 20° and had a 15° external rotatory deformity. His external rotatory range extended to 35°. There was pain at all the extremes of motion. There was significant patello-femoral crepitus in the left knee but no fusion.

The Steinmann pin scars in the left leg were puckered and the skin adherent to the underlying tissues. The scars were 5 cm distal and 3 cm posterior to the tibial tuberosity. There was no deficit in power, sensation or reflex due to in the lower extremity. He could straight-leg-raise to 65° on the right and 45° on the left with tight hamstrings. Laségue test was negative. On the right lower extremity he had a 7+4 cm T-scar on the medial arch of the right foot. There was no tenderness or restriction in movement.

Diagnosis

The diagnosis entertained was osteoarthritis of right hip secondary to fractured acetabulum.

Investigation

Radiographs done at Medical X-ray Institute indicated that he had a sclerosis at the first tarsometatarsal joint of the right foot but there was no evidence of fracture currently.

On the left hemipelvis he had a superolaterally placed plate over the right acetabulum but significant diminution in the articular gap from normal 4 mm to 2 mm. There was evidence of lateral osteophytes formation at the acetabulum and heterotopic bone formation above the greater trochanter.

This man's residual impairment using the American Medical Association Guides for the Evaluation of Permanent Impairment amounts to 48 per cent of the lower extremity or 19 per cent of the whole person.

Prognosis

It is likely that his hip joint will go on to develop severe osteoarthritis probably necessitating Low Friction Arthroplasty in the future. Signs of this type of change are already evident."

Mr. Reid's evidence

The claimant testified that whilst he was pinned between the seats he experienced excruciating pain. His evidence is when he was finally removed he experienced "pain under his belly down." His feet could not touch the ground and he had no feelings when they touched the ground. The bone was protruding from his right side.

Whilst he was being transported to the hospital, the pain he felt in his chest, feet and all over his body was so severe that he felt he would die. Whilst at the hospital, he received an injection, which eased the pain a little. He was awake whilst the doctor used a bit to drill into his left foot. During this he said, "I felt out of the world with pain." He was given painkillers but the effect wore off before the procedure ended.

A hole was drilled in his left leg; an eight-pound weight was attached to it and a pin was placed into the hole. Two strings were attached to the outside in order to balance the weight. At the end of the procedure he was given painkillers in the form of an injection which allowed him to sleep briefly. He awoke to pain. He was very uncomfortably positioned in bed because of the injury and the traction that remained on his leg until he had surgery.

During surgery he was awake. The operation lasted 3 1/2 to 4 hours. About 1 1/2 hours through the operation the anaesthetic wore off. According to him the procedure was horrifying because he saw what they were doing to him.

After his discharge from the hospital he was unable to move without the assistance of someone. His feet could not touch the ground. He had to lie on his back. If he sat up he felt pain from the operation and around his waist.

By the middle of the week his entire left side lost sensation. Consequently, he was re-admitted to the hospital for three (3) weeks. A blood clot was discovered in his foot near the pin. He also developed an infection in the plate in his hip. The wound was reopened and cleaned. He told the court it was a painful experience. In his words, "It wasn't pleasant." He was unable to move around and take care of himself, for example, he could not use the bathroom unaided.

Upon his discharge, he was referred to the Chest Hospital for skin graft to his right foot. Skin was removed from his buttocks and used in the procedure, this was yet another operation. He was again wide-awake during the procedure. He spent the entire day at the hospital. After the operation his foot felt tight. He had to continue to lie on his back and suffered pain when he attempted to put his foot on the ground. He had no strength in his upper body. It wasn't until May 2003 that he was able to move around with the aid of someone and crutches. Eventually, he was able to ambulate by placing a piece of sponge under his foot. He needed assistance to get on and off the toilet.

Early June 2003 he was able to put weight on his left foot. He was, however, still in pain and was unable to sleep properly. He suffered nightmares of the accident. He was unable to turn in bed. His evidence is that the accident affected his ability to get an erection. Since the accident, he has had no sexual intercourse. Early 2004 he felt stiffness in his leg. Presently, he has a sticking pain in his right foot. Since April 2004 he suffers slight pain during the days but the pain worsens at nights. He now feels his condition is worsening. At nights, in order to get a good sleep he has to lift his leg by placing pillows under it.

His visits to the clinic to change his dressing were painful. His right leg is now 2 cms longer than his left. He walks with a limp. He experiences pain if he walks certain distances and has to stop to allow the pain to subside.

Prior to the accident he was able to walk distances, play football and cricket when he had the time. He jogged in the mornings. He is now unable to do these activities. He feels pain from his hip, right thigh down to his ankle and feet. He experiences pain on both sides. He is still a patient of the clinic and currently takes painkillers.

Submissions by Mr. Kevin Williams

Mr. Kevin Williams relied on the case of **Vinroy McDermott v Mohan Rigg and Michael Ramsaroop** CL2002/M199. He submitted that Mr. McDermott's Permanent Partial Disability (PPD) was greater. His leg was shorter by 3 cms whilst Mr. Reid's was 2cms. Consequently, an award, lower than Two Million Dollars (\$2,000,000.00) is appropriate. He submitted that Mr. Reid's testimony was contradictory in that Mr. Reid told the court he could not feel anything in his leg when he was taken from the vehicle and he was unconscious for 30 - 45 seconds. He told the court that he had pain from his waist down, but yet he told the court he had no feelings in his foot and from his waist down. Further, his claim of sexual dysfunction is not proven, as it is not mentioned in the medical certificate.

Submissions by Mr. Richard Reitzin

Mr. Reitzin cited the case of **Marcia Bradford v Melrose Martin and Delroy Macoe** Suit No. C.L. 1999 B 150 cited in Volume 5 of Mrs. Khan's work. He submitted that even though **Marcia Bradford's** PPD was 22% and Mr. Reid's 19%, she was hospitalized for three (3) days whilst Mr. Reid was hospitalized for a total of nine (9)

weeks. His accident was quite nasty and traumatic. He was pinned for a long time. Hip replacement surgery will cause him to be hospitalized for another week. The doctor's evidence is that his condition is deteriorating and with time it will worsen. Mr. Reid suffered additional pain by having traction with weight attached to his leg and he is still attending clinic. The PPD is only one factor to be taken into account. Mr. Reid was not cross-examined about his sexual dysfunction. The hideous scarring and hip problem would prevent him from engaging in that activity.

The Law

In **H. West and Son, Ltd. Law v Shepherd** (1964) Appeal Cases 326 at page 340 Lord Reid expressed:

'...the man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it, for that and for the mental strain and anxiety which results.'

At page 341 he continued:

'So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life.'

While it is true that PPD rating is the most significant consideration, it is not the only factor to be considered. In fact PPD rating takes into account the orthopaedic disability/deformity and not the medically related acute or chronic problems related to the injury. I cannot however, accept, Mr. Williams' submission that I ought to award a sum lower than that awarded to Mr. McDermott because Mr. Reid's PPD is lower.

In **H. West and Sons Ltd. v Shepherd** Lord Pearce enunciated:

'The practice of the courts hitherto has been to treat bodily injury as a deprivation which in itself entitles a plaintiff to substantial damages according to its gravity. In Phillips v London and South-Western Railway

Co. Cockburn C.J., in enumerating the heads of damage which the jury must take into account and in respect of which a plaintiff is entitled to compensation said:

"These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss." In Rose v. Ford Lord Roche said: "I regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself." If a plaintiff has lost a leg, the court approaches the matter on the basis that he has suffered a serious physical deprivation no matter what his condition or temperament or state of mind may be. That deprivation may also create future economic loss which is added to the assessment. Past and prospective pain and discomfort increase the assessment. If there is loss of amenity apart from the obvious and normal loss inherent in the deprivation of the limb – if, for instance, the plaintiff's main interest in life was some sport or hobby from which he will in future be debarred, that too increases the assessment. If there is a particular consequential injury to the nervous system, that also increases the assessment. So, too, with other personal and subjective matters that fall to be decided in the light of common sense in particular cases. These considerations are not dealt with as separate items but are taken into account by the court in fixing one inclusive sum for general damages.'

In Pogas Distributors Ltd. and others v Freda Mckitty S.C.C.A N.O 13/94 Wolfe

J. A. (as he then was) adumbrated as follow at page 36:

"[T]he judge, ... concluded that because the disability to the whole person was 15% the injuries sustained by the plaintiff were less severe than the injuries sustained in the instant case. This, with due respect to the learned judge, is a non sequitur. Primarily, what we are looking at in an award such as this, is pain and suffering and loss of amenities, not necessarily resultant disability. No doubt resultant disability is a factor to be considered in an award for pain and suffering and loss of amenities, but it does not necessarily speak to the extent of the pain and suffering an injured person endures."

1) **Mr. Reid's medical problems**

Deep vein thrombosis, which necessitated the prescribing of anti-coagulants

2) **Mr. Reid's surgical problems**

- a) De-gloving of foot with exposure of the bone
- b) Infected pin area

3) **Emotional injury**

- a) Pinned during accident
- b) Awake during surgical procedure

Surely, the fact that Mr. Reid was conscious, (except for a few seconds) while he was trapped until he was released must be taken into consideration. Further, he remained conscious while he was subjected to four (4) procedures. The evidence elicited in the case of Mr. McDermott was that at the time of the accident he was rendered unconscious. There is no evidence that he was conscious during any of his two surgeries. There was no evidence of non-orthopaedic complications. With regards to the submission that Mr. Reid's evidence was contradictory because he told the court he had no feelings in his foot at the time of the accident, it should be remembered that he also suffered injury to his pelvis, abdomen, buttocks, chest and thigh. The fact that he felt no sensation in his foot does not mean he had no pain elsewhere.

The evidence elicited in the case of **Otis Gordon v Carlton Brown SCCA48/98** cited in **Mrs Ursula Khan's Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica Volume 5** at page 45 revealed both the orthopaedic disability and neurological disability.

With regards to the orthopaedic disability, Mr. Reid has a higher PPD; however, **Otis Gordon** suffered neurological deficits which were computed by Dr. Cheeks at 22% the whole person. From the evidence adduced, Mr. Gordon's injuries are somewhat more

serious. In the circumstances an award less than that awarded Mr. Gordon is appropriate. Otis Gordon was awarded the sum of \$1,800,000.00 for General Damages. This award was on December 20, 1999. The C.P.I. was then 1265.9. Using the C.P.I. for October 2004, which is 1972.2 that figure now translates to \$2,804,297.34.

In **Marcia Bradford's** case her PPD was 1% higher as assessed by Dr. Dundas. However, she spent only three (3) days in hospital while Mr. Reid was admitted for nine (9) weeks. It is true that her labour and labour pains were prolonged as a consequence of the injury. However, she did not suffer medically and surgically related complications as a result of her accident. Mr. Reid, however, suffered deep vein thrombosis, infection to the pin area and extensive degloving of the sole of his right foot with exposure of the bone. He testified that his flesh was torn off from his ankle to the sole and he was able to see the bone. His foot was sutured and later he underwent a skin graft operation. The doctor's prognosis is that his osteoarthritis will become more severe. There is no guarantee that his condition can be improved by surgery. On January 21, 2000, **Marcia Bradford** was awarded the sum of \$2,000,000.00 for Pain and Suffering and Loss of Amenities. A C.P.I. of 1268.1 was used. Using the C.P.I. for October 2004, which is 1972.2, that figure translates to \$3,110,480.25. Mr. Rietzin submitted that I ought to award the sum of \$2,957,388.79 which sum is the average of the two awards. I, however, am of the view that the sum of \$2,790,000.00 is appropriate. Interest is awarded on that sum at the rate of 6% per annum from September 17, 2003 to December 20, 2004.

Cost of Future Operation

The sum of \$647,000.00, the cost of future operation is also awarded. This claim was supported by the necessary documentary evidence.

Special Damages

Mr. Reid worked as a Security Guard and he did part time electrical work.

Evidence regarding his job as a Security Guard

The evidence adduced was that he was paid fortnightly and his salary was deposited to his bank account. Upon commencing work with the company, a fortnight's pay was withheld. He worked three fortnights before he got his first fortnight's pay. His bank account was exhibited and sums were deposited on a fortnightly basis. His evidence is that a lone deposit of \$4,000.00 on the August 8 was a cash deposit that was made by him. He explained that the fluctuations in the income per fortnight were as a result of the fact that he sometimes worked more hours.

After the accident he resumed his job in September 2003 and was placed at a location which necessitated him patrolling the perimeters of the property; climbing stairs and checking the building. He was unable to perform his duties properly because he suffered pain when he climbed the stairs and moved around. He was then transferred to his employer's wife's place of business after one (1) week. There his job involved mainly sitting. However, he experienced constant pain in his back and had to get up and stretch occasionally. He remained at that job until August 1, 2004 when he was bitten on his right hand by a dog. He was unable to successfully evade the dog's attack because of the injury. As a result, he had to stay away from the job. He returned to work in October but was not accepted back. Since then he applied to two (2) security firms but was not hired because of his inability to run and climb stairs.

Submissions

Mr. Williams submitted that no award ought to be made under that head because the evidence adduced was insufficient to prove his exact income. He failed to prove how many hours he worked and to supply evidence as to the hourly rate. Further, the deposits in the passbook do not reflect the source of the entries, hence the court will be asked to draw inference where there is no evidential basis. The court cannot determine that the figures represent income from any particular source or whether it is income at all.

Entries vary from \$4,496.20 to a low of \$2,645.48. No evidence was led as to what the minimum wage was and so the court ought not to make an award for loss of income as a security guard.

Mr. Reitzin submitted that Mr. Reid's evidence that he was paid fortnightly was supported by the entries in the bank account, which were fourteen (14) days apart. His average income was \$10,495.00 per fortnight. The inescapable conclusion from the entries is that his salary was indeed paid into the account.

Assessment of the Evidence

Mr. Reid spent quite sometime in the witness box. I therefore had ample opportunity to assess his credibility. I found him to be a witness of truth. I find that the deposits in the bank account were in fact his salary as a security guard. The sum of \$5,000.00 per week is reasonable in light of the fluctuations in his earnings. I will not make any deduction for income tax because it would have been his net income that would have been deposited.

Evidence regarding Electrical Work

The evidence is that Mr. Reid did minor electrical residential part time work. He was trained as an electrician at various places including in the USA. He received certificates from St. Andrew Technical Vocational School and a diploma from the USA. He is qualified to do residential wiring. The unchallenged evidence is that the performance of his task as an electrician required him standing on ladders, drilling and going on roofs. Since the accident, he is unable to go on roofs or stand on ladders. His evidence is that he earned \$5,555.00 per fortnight from this occupation. He obtained jobs through his friends and he operated in the Portmore area. He kept no business records. Under cross-examination, he testified that he worked only when he was given an electrical job. He got three to four jobs per fortnight.

Special Damages must be proved exactly (see Ogus- The Law of Damages page 81). In **Bonham-Carter v Hyde Park Hotel, Ltd** (1948) 64 T.L.R Lord Goddard enunciated as follows:

“On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: ‘This is what I have lost; I ask you to give me these damages.’ They have to prove it.”

What amounts to strict proof

The learned authors in Mayne and McGregor on Damages Twelfth Edition at paragraph 994 stated:

“The evidence in proof of special damage must show the same particularity as is necessary for its pleading. It should therefore normally consist of evidence of particular losses such as the loss of specific contracts. Thus, had there been a sufficient allegation of special damage

in all the cases where its proof has been refused because of the plaintiff's failure to plead specific instances, the plaintiff would still have been required to give evidence of these specific instances to prove the special damage.

However, with proof as with pleading, the courts are realistic and accept that the particularity must be tailored to the facts. Bowen L.J. laid this down in the leading case on pleading and proof of damage, Ratcliffe v Evans. In relation to special damage he said:

'The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage ought to be ...proved. As much certainty and particularity must be insisted on... in...proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'

The Court of Appeal in the case of **Desmond Walters v Carlene Mitchell**

29 J.L.R. 173, refrained from laying down any general principle as to what is strict proof.

Wolfe J.A. (as he then was) expressed:

"...to expect a side walk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J., referred to as 'the vainest pedantry.'"

This Court observed in S.C.C.A. 18/84 Central Soya Jamaica Ltd. v. Junior

Freeman unreported per Rowe, P., that:

'In casual work cases it is always difficult for the legal advisors to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages, the Court has to use its own experience in these matters to arrive at what is proved on the evidence.'

'This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts. They buy, and replenish their stock from each

day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fare from the day's sales without regard to accounting.'

I accept Mr. Reid as a witness of truth. He has in fact provided proof that he is a trained electrician. I accept his evidence that he occasionally did electrical work. This was a very small operation. Employment in this nature can be regarded as casual work. He obtained jobs through his friends. It is unusual for such persons to keep records and issue receipts. Even electricians who work on a full time basis but on a small scale rarely keep proper records.

In the Court of Appeal case of **Hepburn Harris v Carlton Walker** S.C.C.A.NO.40/90, the court accepted that claimant was a welder. However, evidence of his earnings came entirely from his oral evidence and was inconsistent. It was, as Rowe P., observed:

'...unsupported by a title of documentary evidence.'

The claimant in that case kept no books and paid no income tax. He had no record, which 'a reliable earning pattern could be inferred.' Rowe P., expressed the view that plaintiffs ought not to be encouraged to throw up figures at the court without substantiating them. However, he said as follows:

'Courts have experience in measuring the immeasurable, to borrow a phrase of Carberry J. A. in C.A.65/81- United Dairy Farmers Ltd. Et al v Lloyd Goulbourne (27/1/94) but when they have so acted their determinations ought not to be unreasonably attacked.'

In that case despite the lack of documentary evidence the Court of Appeal endorsed the trial judge's assessment of the claimant's loss of earnings. In the absence of

documentary evidence I hold that his income from his electrical jobs was \$2,000.00 per week.

Handicap on the Labour Market

Submission by Mr. Kevin Williams

Mr. Reid is able to do sedentary work. He has not attempted to find employment outside of the security field. In the circumstances no award should be made for loss of earning for his security job.

Submissions by Mr. Rietzin

Mr. Reid is not academically qualified to do any other jobs. Attempts to obtain employment as a Security Guard were unsuccessful because he failed the running and climbing test.

Dr Grantel Dundas in his Medical Report dated April 16, 2004 stated as follows:

"I am of the opinion that Mr. Reid is unable to perform his normal duties as a Security Officer especially if it involves running, climbing stairs regularly or negotiating irregular terrain. He would also be impaired in terms of lifting weights. If however he is required to perform a sedentary job then this should not impede him significantly.

It is my opinion that the present disability is likely to worsen with time but unfortunately one cannot put accurate dates to this, as different people will progress differently depending on the degree of stress to which the joint is exposed. I think that if Mr. Reid is re-evaluated on an annual basis by his Practitioner or Orthopaedic Surgeon one could have a better idea of how to project the likely timing of the degeneration of his hip."

It is my finding that Mr. Reid is not a malingerer. He is a trained electrician but he can no longer work in that area. Nor can he perform the duties of a security guard. He has no academic qualifications, which would enable him to find employment as a

sedentary worker. Most of those jobs require academic qualification. I am of the view that an award under this head is justified.

Mr. Reid is 49 years old. In the case of **Victor Campbell**, a 48-year-old farmer cited in Volume 4 of Mrs. Khan's work, a multiplier of 7 was used. Also in the cases of **Othniel Ellis**, a 49-year-old linesman and **George Brown**, a 49-year-old farmer, mason and ice-cream vendor, in each case a multiplier of 7 was used. The cases are cited in Volumes 4 and 3 respectively, of Mrs. Khan's work.

Mr. Reid's total income from both jobs was \$7,000.00 per week. Using a multiplier of 7 his loss of future income is \$2,548,000.00.

I also make the following awards with respect to lost earnings between the date of the accident and the date of the award:

- (a) Lost earnings from the September 17, 2002 to the September 30, 2003 at \$7,000.00 per week;
- (b) Lost earnings from electrical work from October 1, 2003 to July 31, 2004 at \$2,750.00 per week;
- (c) Lost earnings from August 1, 2004 to December 20, 2004 at \$7,000.00 per week.

There was no contest with regards most items of special damages. The items challenged were costs incurred for physiotherapist, household helper and certain aspects of the travelling.

I find, however, that those items were proved.

I therefore award the sum of \$222,766.80 to compensate for expenses incurred for hospital, physiotherapist, transportation and household helper.

There shall be interest on the Special Damages at 6% per annum from September 17, 2002 to December 20, 2004.

Costs to be agreed or taxed.