

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT No. C.L 1997/G025

Between St. Helen Gordon and Ors. Plaintiffs
 Andianne Gordon (bnf St. Helen
 Gordon)
 Nina Francis (bnf St. Helen Gordon)

And Royland McKenzie Defendant

ASSESSMENT OF DAMAGES

Mrs. M. Macaulay and Mrs. Mulendwe for Plaintiffs.
Miss D. Newland for Defendant.

Heard : June 17, 18, July 10, 1998

HARRISON J

This matter came up before me for Assessment of Damages on the 17th and 18th June respectively, and I had reserved judgment. There was a slight delay in handing down judgment but this is due to the fact that I had been engaged in Chambers and the Criminal Courts for some time since judgment was reserved.

Three plaintiffs are joined in this action and damages in respect of both Andianne Gordon and Nina Francis have been settled. I am only concerned therefore, with assessing damages in respect of

St. Helen Gordon. I have reviewed the evidence presented on her behalf and have also considered the submissions made by both Counsel in the matter.

The medical evidence of Dr. Kenneth Vaughan establishes that the plaintiff St. Helen Gordon was diagnosed with a whiplash injury and X-Rays revealed that there were no fractures in the cervical spine and shoulder. This accident occurred in 1995 and he saw her on four occasions. He had recommended physical therapy and prescribed pain killers. Pain seemed to have been centred around the neck region as well as the shoulder. There was decrease range of movement of her neck and right shoulder and on her last visit on the 18th May, 1998 she still complained of pain and stiffness in the neck. On her final examination, Dr. Vaughan discovered that she had a mild tenderness over the base of the neck and across the right shoulder. Initially when he saw her, the range of movement in respect of the neck had been decreased by about 50% but on the 18th May, 1998, it had improved to 80% movement. He expressed the view that she still had a whiplash injury that was taking a long time to resolve. In his opinion, she had a 3% disability of the whole person which was likely to improve with time, but slowly.

Dr. Vaughan had opined that physiotherapy had "something to do" with the improvement which he noticed on her last visit. He was also of the view that generally some patients responded quicker to therapy but others did take a longer time. It was further his view that some patients became worse on therapy.

The Plaintiff gave evidence as to the difficulties she experienced after the accident. At the time of her injuries she was a Bank Officer but she has since then changed her job. She complained to Dr. Vaughan that she could not lift the children in her care and had to resort to using the left hand to do a number of chores. She could not drive a motor car. She had difficulty reversing as she could not turn her neck. It took her a while before she resumed driving. She was unable to do her normal homework; she could not sweep her yard, clean her house nor wash her car for some time. She had to wear a cervical collar even at nights when she went to bed because she had difficulty sleeping on her right side. The pains persisted for some time and when she was giving evidence she mentioned

that she was still feeling pain. She had to seek the Court's permission to be seated whilst she gave evidence because of discomfort. She said that there were some days when it was worse than others but it depended on what she had to do.

General Damages

I come now to the difficult job to assess damages under the head of General Damages. What should be a reasonable award in damages for this plaintiff? I consider the words used by Campbell J. A in *Beverley Dryden v Winston Layne SCCA 44/87* delivered June 12th 1989, quite helpful and instructive. He said:

“personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards.”

No two cases are exactly alike and this is why it is always difficult to assess damages in respect of pain and suffering and loss of amenities.

Mrs. Macaulay urged the Court to make an award of \$1,200,000.00. The following cases were relied upon by her:

1. *Earle v Graham* p. 173 of Khan's Vol. 4
2. *Lundie v McNaught* p. 171 of Khan's Vol. 4
3. *Johnson v HoShue and Anor*
4. *Joy Mae Hall v Morgan* p. 201 of Khan's Vol. 3

Miss Newland expressed the view that these cases were far more serious than the instant case. She submitted that the undermentioned cases were more relevant:

1. *Cooper & Anor v Smith* p. 159 of Khan's Vol. 4

2. McLennon v Williams And Anor p.161 of Khan's Vol. 4

3. Moore v Hamilton p. 189 of Khan's Vol. 3

She urged upon the Court to make an award of \$350,000.00.

I have given due consideration to the cases cited by both Counsel. I do believe that the cases of Cooper and McLennon (supra) cited by Miss Newland, are useful guides and they could assist the Court tremendously.

I bear in mind that the plaintiff in the instant case has a 3% disability of the whole person which was likely to improve with time. I also take into consideration that Dr. Vaughan said that the healing process could be slow.

In McLennon's case the plaintiff had sustained a whiplash injury with spasm and tenderness in the cervical vertebrae and she had a residual disability which was assessed at 6% of the whole person. She was awarded a sum of \$170,000 for pain and suffering and loss of amenities. When one uses the current consumer price index of 1119, this award is now updated to \$358,113.07.

In Cooper's case (supra) her injuries included a whiplash, severe neck pains with radiation of pain into both shoulders, marked restriction in all movements of the cervical spine and headaches. She was injured in 1989 and up to 1992 she was significantly disabled. After 1992 she was moderately disabled. She was assessed with a 6% permanent partial disability of the whole person. I do believe that the injuries sustained by the Plaintiff in the instant case are comparable with those sustained by Miss Cooper. The resulting disability however, was far more serious in Cooper's case than it is in the present case. On the 29th April 1997, Miss Cooper was awarded \$275,000 in respect of pain and suffering and loss of amenities. When that award is converted today by using the consumer price index of 1119, it is now valued \$298,183.13. It is noted in the Report where an appeal was contemplated. Up to the time of delivering this judgment it could not be ascertained whether an appeal was in fact lodged.

When all the circumstances regarding the plaintiff's injuries are taken into consideration together with the chances for full recovery, it is my considered view that an award of \$400,000.00 would be reasonable in all the circumstances.

Special Damages

A sum of \$32,210.31 has been agreed in respect of a number of items under this head of damages. I will have to decide now, whether the claims in respect of transportation and physiotherapy have been proved.

The plaintiff was quite aware of her responsibility in specifically proving these claims. During the period that she was unable to drive she had to take Taxis and there was an arrangement made with BOW'S Car Rental to transport both herself and her daughter from home to school, work and back home. She took Taxis to the Supermarket and to Church. She has produced a number of receipts that were issued to her in respect of payment and at her request, from those persons who provided transportation. This is not the type of case therefore, where a Plaintiff comes only to say she has paid without more. I have examined each receipt and bill with due care, and I have concluded that the plaintiff has been quite reasonable in minimizing her expenses. I also hold, that the time within which she had to rely upon this mode of transportation is reasonable. The sum of \$110,000.00 might appear to be large, but it is my considered view that this claim has been satisfactorily proved.

In relation to the claim for physiotherapy, I do agree with Miss Newland that it should be rejected. Mrs. Macaulay sought to amend the Statement of Claim and was granted leave to include this claim having regard to the evidence given by the Plaintiff that she had attended physiotherapy sessions. The amendment sought was to include a sum of \$37,500.00 at a rate of \$2500 per visit for the period November 1995 to January, 1996 inclusive. The plaintiff was asked to leave the Court room when the application was made, and upon her return she testified that she had paid \$250.00 per visit. She was unable to produce any receipts which she claimed were issued to her and were handed over to her Attorney's Secretary, before this Assessment was set down for hearing. No effort was made to produce copies of these receipts and in light of the serious discrepancy between the plaintiff's

evidence and what was pleaded, I am not satisfied that the plaintiff has discharged her burden.

Conclusion

Damages are therefore assessed as follows:

General Damages

Andianne Gordon - A sum of \$30,000.00 with interest thereon at the rate of 6% p.a. from the date of service of the Writ of Summons up to today.

Nina Francis - A sum of \$50,000.00 with interest thereon at the rate of 6% p.a. for the date of service of the Writ of Summons up to today.

St. Helen Gordon

Pain and suffering and loss of amenities

A sum of \$400,000.00 with interest thereon at the rate of 6% p.a from the date of service of the Writ of Summons up to today.

Special Damages

Andianne Gordon - A sum of \$1920.00 with interest thereon at the rate of 6% p.a from the 11th November 1995, up to today.

Nina Francis - A sum of \$1920.00 with interest thereon at the rate of 6% p.a. from the 11th November 1995, up to today.

St. Helen Gordon - A sum of \$142,210.31 with interest thereon at the rate of 6% p.a from the 11th November 1995, up to today.

There shall be costs to the plaintiffs to be taxed if not agreed.