IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DVISION

CLAIM NO. 2005 HCV01009

| BETWEEN | ARLINGTON BLOOMFIELD | CLAIMANT |
|---|---|---|
| AND | FABIAN MORRIS | 1ST DEFENDANT |
| AND | AMBUCARE LIMITED | 2ND DEFENDANT |
| AND | NAYENE LEIBA | 3RD DEFENDANT |

Mr. Gayle Nelson instructed by Gayle Nelson & Co. for the Claimant
Miss Tasha Madourie instructed by Nunes, Scholefield, DeLeon for the 1st and 2nd Defendants

***Assessment of Damages***

**Heard on 27th March 2008, 6th September 2010 and 17th February, 2011**

**Coram: Morrison, J**

[1] Should the matter at hand reflect an unsettling discontinuity between the above hearing dates then there are grounds for the found disquiet.

[2] From the records, the Claimant must bear a preponderance of the burden of the blame as he was either ill or he found that the adjourned dates to which the matter was set, after the initial date of hearing, to be incommensurable with his condition. Nothwithstanding, on the latter date a further application was made, on three bases, for an adjournment: the Claimant was not able to procure a further medical report because of his illness and attendant impecuniosity.

[3] Secondly, counsel Mr. Nelson sought to withdraw from the matter to allow the Claimant to seek out other counsel.

[4] Thirdly, to interpose the testimony of a doctor ostensibly to offset the lack of a medical report as to the Claimant's future medical care. Thereby hangs a tale. I am persuaded, in the end, that the applications, as they are, all ran afoul of the overriding objectives of the Civil Procedure Rules Part 1.1(4) and 1.1.(2). Also, I find that Part 1.3, which imposes a duty on the parties to help the court to further the overriding objectives, was honoured more in the breach than in the observance of that duty.

[5] The matter is of uncomplicated simplicity. The Claimant was injured in a motor vehicle accident on October 29, 2000. The first and second Defendants admitted liability.

[6] On March 7, 2000 the Court was advised by both counsel that general damages was agreed in the sum of $800,000.00 and that a further sum of $85,200.00 was agreed in respect of special damages.

[7] The only remaining issues are in respect of loss of earnings and the cost of future medical care.

[8] As a result of the latter I begin with its adjunct, the submitted medical report. The logical exorability of future medical care must be not only that it is medically required but that it is supported by medical evidence. Otherwise, a court so advised runs the risk of assessment by speculation because of the paucity of adjucative material. This I unhesitatingly recoil from doing.

[9] Mr. Nelson submits, using **Clarke v. Dawkins and Palmer**, Suit No. 2002/C-047 and Khan's compendium, Volume 5, that not only should this item be treated as separate but that it should be treated as, "a broad estimate ... taking into account all the proved facts and the probabilities of the particular case."

[10] Mrs. Madourie was content to say that the cost for future medical care was not pleaded and that there was no medical evidence which spoke of the type of care and the duration of care which is being claimed.

[11] I go back to first principles in resolving this issue. In the seminal authority of **Jefford v. Gee** (1970) 2 Q.B. 130 it is stated therein that awards must be itemized into non-pecuniary loss, pre-trial pecuniary loss and future pecuniary loss.

[12] It is trite law that medical, nursing, hospital and related expenses that the court considers will be reasonable incurred in the future are recoverable. In assessing the future cost of care the courts generally use the multiplier approach, multiplying the present annual cost by the number of years that care will be required. In **Lim Poh Choo v. Camden & Islington Area Health Authority** (1979) Q.B. 196, is authority for the proposition that rationality dictates that a particular item of damages should be challenged.

[13] There are two medical reports in respect of the Claimant. They are dated 21st October 2007 and 27th February 2008 and are from Dr. P. White. From the reports the Claimant was assessed with mechanical lower back pain and chronic non-verifiable bilateral lumbar radiculopathy. Further, Dr. White, in clear and cautionary tones opines that the Claimant will continue to have, "acute

exacerbations of the low back pain and the radicular pains" and that the Claimant, "will require future orthopaedic and physiotherapy services and possibly the services of a neurosurgeon if the radicular pains worsen"

[14] Applying the principles from the **Jefford** and the **Lim Poh** cases, *supra*, I cannot yield to the Claimant's proferred authority of **Clarke v. Dawkins and Palmer**, *supra*, as the claim for future medical care was not pleaded and importantly, as the invitation to treat with this head of damages is rife with speculation or, irrationality. There is no link between Dr. White's reports and any other as to the type of care which was sought, if any, and the duration of such care.

On now to the claim for loss of income.

[15] It is apposite that I retrace the pleadings in view of the adversative posture adopted by the Defendant.

[16] From the amended Particulars of Claim dated 31st July 2005 the Claimant asks for $1,500,000.00. In support of this claim the witness statement of the Claimant was received in evidence as his evidence-in-chief.

[17] At paragraph 30 of the said witness statement there is this stark bare statement: "Before my injuries I was a baker and operated a bakery. However, since my injuries my business has closed down because baking involves too much physical exertions such as long standing, bending and lifting and I can no longer do these tasks." Further at paragraph 30, he continues, "after my injuries I began to accept odd jobs as a gardener to cut lawns. I used a bush wacker." He dictated at paragraph 32 that he had to discontinue the cutting of lawns owing to

the fact that standing for long in tandem with the rotation of his upper body caused him to experience severe pain.

[18] Absolutely, no documentary proof was forthcoming to buttress the claim for $1,500,000.00. In fact, no evidence was given as to the duration of his operation of the bakery and at what rate of payment he paid himself.

[19] In fine, the aggregate figure of $1,500,000.00 was conclusively inconclusive.

In this the law is so clear that "he that runs may read."

[20] The Claimant pressed in aid the oft-cited authority of **Walters v. Mitchell**, 29 JLR 173. In that case, the Respondent being a push cart vendor claimed loss of earnings of $950.00 weekly from a joint partnership of sidewalk vending involving her husband. At first instance the judge, *inter alia,* awarded her the sum of $375.00 per week for 47 weeks. The Appellant took umbrage contending that the figure was "too high".

[21] The Court of Appeal held that in the sidewalk vending trade it is always difficult to obtain and present exact figures for loss of earnings. The Court of Appeal continued, "has to use its own experience in these matters to arrive at what is proved in evidence. The Respondent stated categorically the weekly profit, the partnership earned. The trial judge accepted this evidence. It was open to him to properly make the award that he made."

[22] It is not totally necessary that I travel beyond the judgment of the Court of Appeal. However, for present purposes, it is illuminating to look at the reasoning

process that was brought to bear on the kind of proof of income loss for a matter that is in a sense, because of its peculiar operation,*sui generis.*

[23] The Appellant relied on this quoted extract from McGregor on Damages, 12th edition: "The evidence in proof of special damage must show the same particularity, as is necessary for its pleadings. It should therefore normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. Thus, had there been a sufficient allegation of special damage in all cases where its proof has been refused because of the plaintiff's failure to plead specific instance, the Plaintiff would still have been required to give evidence of these instances to prove the special damage." Further along:

"However, with proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, LJ., laid down in the leading case on pleading and proof of damage, **Radcliffe v. Evans** [1892] 2 Q.B. 524(A). In relation to special damages he said: "The character of the acts themselves which produce the damage and the circumstances under which these acts were done, must regulate the degree of certainty and particularity with which the damage done 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 damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[24] Wolfe, JA (Ag.), as he then was, declined "to lay down any general principle as to what is strict proof." However, he interposed this reverbrant

qualification: "… to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical procession of a well organized corporation may well be what Bowen LJ., referred to as 'the vainest pendantry'". He then catenated, quoting Rowe, P. from **Central Soya Jamaica Ltd. v. Junior Freeman** SCCA 18/84, "that in casual work cases it is always difficult for the legal advisers 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."

[25] In the instant case the Claimant does not fall into that unique category of earners called 'casual workers' or 'informal vendors' whose business *modus operandi* does not consort with that of established book keeping-practices. On the contrary the Claimant, being a baker with accounting skills who ran a bakery stands at a distinct organizational remove from that of an informal vendor. As such, one would expect the Claimant to descend to statistical specifics in proof of his earnings: "…as much certainty and particularity must be insisted on in proof of damages, as is reasonable … to insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." More to the point is the authority of **Harris v. Walker** SCCA 40/90 (10.12.90): "Plaintiffs ought not to be encouraged to throw up figures at trial judges and to rely on logical arguments…"

[26] In particular circumstances of this special claim, that is, for loss of earnings from the bakery, the Clamant has failed on a balance of probabilities, to

prove this claim. The Defendants submission on this point is validly made. The case of **Walters v Mitchell**, *supra*, is distinguishable from the case at bar.

[27] However, the **Walter's** principle, distilled as such, resonates as to the Claimant's post injury occupation as a gardener. I accept his evidence on this score. That occupation is virtually akin to that of a casual worker. That kind of menial task does not lend itself to book keeping practices. It is, I think, too pedantic to demand from such an occupation.

[28] Having regard to the Claimant's testimony that he was able to do gardening work for 2½ months (ten weeks) at $3,000.00 per cut lawn, for three times per week, I do not find that the grant of a compensatory sum for this endeavour, in this context, is unreasonable. I say so being fully aware that had the Claimant continued to take his medication, as he says, he would have been able to continue to do so. Since no explanation was proferred, I am inclined to think that the act of discontinuance was not medically sanctioned; impecuiosity, cannot be inferred. Thus, I am of the view that the Claimant's failure to continue to take his medication was unilaterally done. It follows that the claim for this aspect of loss of earnings has to be circumscribed by the well recognized duty imposed on the Claimant to mitigate his loss.

[29] Has he done so? Clearly, he had made an attempt Even so, I am mindful that the burden of proof in establishing a failure to mitigate loss is on the Defendants: See **Garnac Grain Co. Inc. v. H.M.F. Faure and Fairclough Ltd; And Barge Corp'n** [1967] 2 All. E.R. 353; **Geestaple v. Lonsiquot** [2003] 1 All.E.R. 383.

[30] Still, I think that a sum representing three months gardening would be reasonable in all the circumstances. In deference to the Defendants' counsel the case of **Devon Fenton v. Leonard Blair And the Attorney General**, Claim CL 1995/F-181 (unreported judgment of Jones,J) is distinguishable on the facts: the Claimant in the instant case made some effort at mitigation whereas the Claimant in the **Fenton** case did not.

[31] In the result I award general damages, as agreed, in the sum of $800,000.00 with interest thereon at 6% from the 19th May 2005 to June 21, 2006 and thereafter at 3% to the date of judgment.

[32] Special damages comprising $86,200.00 as agreed, for out of pocket medical expenses plus a further sum of $108,000.00 being the Claimant's loss of earnings as a gardener for 12 weeks at $9,000.00 per week, yielding a total of $193,200.00 with interest thereon at 6% from October 29, 2000 to June 21, 2006 and thereafter at 3% to the date of judgment. The Claimant is to have his costs taxed, if it cannot be agreed.