

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV2007/001001

BETWEEN EVANGELIA DEYANNIS CLAIMANT
AND HALF MOON BAY LIMITED DEFENDANT

Ms. Catherine Minto and Mr. Maurice Manning instructed by Nunes Scholefield & Company for the Claimant

Mr. David Henry and Ms. Ana Harry for the Defendant

Assessment of Damages

Heard: June 8, 9 and 12, 2009

Straw J

The claimant, Evangelia Deyannis, a Canadian citizen, suffered injuries after being hit by a defective service cart while she was a guest at the Half Moon Bay Resort in Montego Bay on February 25, 2004. The injuries have caused a dramatic impact on her life, and a marked demise in her quality of life. She has suffered with persistent and ongoing pains.

Eleven (11) medical reports were tendered into evidence. There are three (3) reports from Dr. Peter Lombardi, the claimant's family physician; three (3) from Dr. Barry Malcolm an orthopaedic surgeon; two (2) from Dr. Samuel Wong, a psychiatrist; one (1) from Dr. Sara Aharon, a psychologist and three (3) from Dr. Christopher Rose, an orthopaedic surgeon who saw Ms. Deyannis at the request of the defendant's attorney.

The Evidence in Relation to the Injuries Sustained by the Claimant

The medical reports cover the years 2004 to 2009. The medical experts agree that the claimant suffered the following injuries as a result of the accident:

- Bulging and broad based disc herniation at the L4 and L5 level.
- Tearing of the right gluteus medius muscle at the insertion of the greater trochanter on the right side

Both these injuries were associated with discogenic back dominant pain pattern, although the doctors disagree as to the actual injury that has caused persistent (discogenic) pain.

Dr. Lombardi states the pain pattern is emanating from her L4 - L5 motion segment. He does not believe that the gluteus tear is a significant source of her symptoms. He has also stated that she is also suffering from a post incident pain disorder or syndrome.

It is Dr. Malcolm's opinion that the primary source of her pain is from the gluteal tear but that the injury at the L4 - L5 level may be a contributory factor.

Dr. Wong states that over the period of time of his treatment with Ms. Deyannis, her main complaints have always been pain in the right gluteal region. He opined that this may be secondary to the L4 - L5 disc herniation or the partial tear to the gluteus medius muscle.

Dr. Wong states as follows (see report dated March 26, 2009):

"Despite the soft-tissue healing, Ms. Deyannis remains symptomatic ---- this is not that unusual for soft-tissue injuries to remain symptomatic despite radiological evidence of healing. This is not to state the person is malingering or making up the symptoms, but this clinical situation has no explanation."

It is the opinion of Dr. Rose that her persistent pain symptoms could not be attributed to the bulging disc at the L4 - L5. He stated that the pains in her right gluteus muscle could be attributed to the partial tear in that muscle.

When Dr. Rose saw her on March 5, 2008, she complained of an inability to sleep on her right side due to severe pain. She also spoke of persistent pains along the right side of her lower back, right hip region and along the lateral aspect of her right thigh.

Apart from the physical injuries noted, Dr. Rose diagnosed her as having significant functional overlay or chronic pain disorder.

Dr. Rose states as follows at page 5 of his medical report dated May 26, 2009:

“---as a result of her injuries, she has developed a chronic pain disorder or---physiological distress due to her symptoms. It is also clear that even though the chronic pain disorder --- was caused by the discogenic pain and the tear to the right gluteus medius muscle, her ongoing present symptoms are not due to the discogenic pain and the healed right gluteal medius muscle but rather to the psychological distress or chronic pain disorder.”

Dr. Sara Aharon states in her report that decades of research into the nature and etiology of chronic pain have resulted in a shift towards a bio-psychosocial conceptualization of pain. This is essentially a movement away from seeing pain as either organic in etiology or rooted in psychological issues (psychogenic).

According to Dr. Aharon, pain is now viewed as a complex phenomenon. She quotes from an article in **Psychosocial Factors in Pain, Critical Perspective**, edited by Gatchel and Turk (1999, pg 7):

“In the past there was a tendency to view organic pain as a different type of pain from psychogenic pain. The term ‘psychogenic’ was used to suggest that the pain was due to psychological causes only, that it was ‘all in the patient’s head’ and that it was not ‘real’ pain because a specific organic basis for it could not be found.”

Dr. Aharon concludes that, “the fact that the claimant suffers from psychological distress due to her symptoms is to be expected and --- it is rare to find someone in her condition who

would not experience distress about their pain, a sense of loss, sadness, frustration, as well as, anxiety about their future. Being upset because one has an incurable injury resulting in unrelenting constant pain, insomnia and cognitive deficit (due to necessary medication) is not a psychiatric disorder.”

The claimant’s medical history before and after the accident is succinctly described by Dr. Rose at pg 12 of his last report (May 26, 2009):

“From all reports, Ms. Deyannis was pain-free prior to the incident. The injuries which resulted from the accident were diagnosed as a partial tear of the right gluteus medius muscle, as well as discogenic pain from the L4 – L5 level. Despite intensive and prolonged chiropractic treatment, her symptoms remain severe and persistent.”

Both Dr. Samuel Wong and Dr. Barry Malcolm have agreed that Ms. Deyannis has developed chronic pain and they both recommended assessment by a psychologist. In other words, neither Dr. Wong nor Dr. Malcolm could give good explanations for the severity and persistence of Ms. Deyannis’ pain based on the partial tear of the right gluteus medius muscle and the discogenic lower back pain.

Dr. Rose has concurred that the chronic pain disorder was caused by the discogenic pain and that Ms. Deyannis is not ‘malingering.’

He spoke to the difficulties involved in determining the extent to which patients are affected by their pain. He stated that no research has been done on the issue of determining the reliability and validity of pain related impairment assessments.

As an orthopaedic surgeon, his expertise does not extend to the evaluation and management of a chronic pain disorder.

In relation to the physical injuries sustained by the claimant, he assessed her total partial percentage disability as 8% of the whole person.

Dr. Aharon also evaluated Ms. Deyannis as suffering from mild depression and mild anxiety as a result of the impact of the injuries on her life style. She states that physical deficiencies and the associated disruptions in psychosocial functioning are well recognised as sources for both anxiety and depression.

Evidence of Ms. Deyannis

The claimant speaks of feeling pain after the incident which continued after she returned to Canada. She stated she was experiencing continuous pain along the right side, from the hip to waist and lower back and to the spine. She further stated that it has not improved over the years.

The following are some of the ways the pain has affected her:

- i. During the day, there is pain when she is seated. The pain gets worse as the day goes by.
- ii. Difficult to drive long distances as she has to bend her leg at an angle to avoid pain.
- iii. She requires medication during the day so that she can move around on her job.
- iv. There is difficulty in concentrating on the job and the drugs make her less alert and focused.
- v. She has noticed a very small limp when walking. She no longer bikes or jogs with her husband. She experiences difficulty sleeping because of the constant pain. She hardly sleeps for three to four hours before the pain sets in. She takes cesamat at night sometimes and tylenol during the day time.

She has undergone varying kinds of medical treatments to reduce the pain – physiotherapy, acupuncture, pain clinics, but the pain will not go away.

She fears the pain will be permanent and that her husband will leave her as there have been certain strains on the relationship since the accident. The pain has had a negative effect on

her love making. It hurts when they make love. She fears she will not be able to manage later on in life.

At paragraph 21 of her witness statement she states as follows:

“I have not had the ability to fully function physically, mentally or socially since the accident.”

All the doctors confirm Doctor’s Lombardi’s report and support the numerous forms of therapy, treatment and consultations to improve her pain with no beneficial results. He describes her pain from the injury as severe, daily and unrelenting.

In his report of December 2008, he states that she is taking cesamat, codeine, contin and wellbuttin. He further states that she will continue to need long term treatment for her symptoms which will consist of medications for pain management, as well as forms of physical therapy to assist in her treatment. He does not expect the treatment to be curative but to help to suppress the pain as best as possible to allow her to function day to day.

Dr. Malcolm has recommended a multi-disciplinary approach which involves assessing and treating psychological comorbidities as they may exist, dovetailed with an appropriate physical respiratory programme.

Doctor Wong assesses her as an individual who desperately wants to get better and that she has always been receptive to advice in attempting to get better. These include taking medication, seeing various therapists and maintaining a good outlook on life.

His conclusion is that the progress for the claimant for spontaneous and complete resolution of her symptoms is extremely poor.

Doctor Aharon also states that the claimant suffers from significant cognitive difficulties due to the pain and powerful pain medications.

Doctor Wong's report of March 15, 2006, speaks to the fact that the medication she requires is causing cognitive side effects, difficulty with memory as well as personality changes.

Award for Pain and Suffering and Loss of Amenities

The claimant cited the following case for the court's consideration: **Ann Marie Dietrich v Chin** 21 JLR, 323. In this case, the claimant was involved in a motor vehicle accident and sustained serious physical injuries. She sustained laceration to her face, in the region of the nose. She experienced pain in her face, neck and breast bone and right hand.

Some weeks later she lost function on the left side of her body. She had severe headaches and her back and entire body were in extreme pain. Her nose and face were badly swollen and she was having difficulty breathing. She was treated for acute, cervical and lumbar sprain.

After one year all the physical effects of the injury had disappeared. However, her illness led to psychological depression. Her psychological and severe persistent depression did not improve within two years of the accident and the court accepted the evidence of the medical expert that she might never recover enough to be able to hold regular employment.

The expert further stated that she would become more withdrawn, confused and mentally disturbed if she did not continue her treatment and there was a likelihood of psychiatric hospitalization in the future if she was not given care. The treatment caused subjective improvements but no significant objective care.

The updated award for pain and suffering is \$2,062,407.13.

The distinction between the present case and the above-mentioned lies in the fact that the psychological impairment of the claimant in the above case was more severe than the present

case. However, Ms. Deyannis is still affected by some amount of discogenic pain whereas the claimant in **Ann Marie Dietrich** completely recovered from the physical injuries.

In the case of **Marie Jackson v Glenroy Charlton**, volume 5 Khan 167, the claimant suffered pain in the neck, left rib cage and left elbow with severe pains persisting to neck and lower back. She was diagnosed with a lumbar disc prolapse and suffered severed whiplash injury. There was low back pain which progressed with time. There was tenderness in the vicinity of the left sacra iliac joint. The pain was aggravated by normal ambulation. The pain worsened with sitting up for long periods.

She subsequently developed dysaesthesia in the left lower extremity causing her to limp. She underwent surgical intervention in relation to the lumbar disc prolapse. She developed a phobia for travelling in motor vehicles and was referred to a psychiatrist. She was assessed as having eight (8) percent whole person disability.

Some months later, she developed tenderness in the area of the left rectus abdominus which restricted her ability to function normally in her day to day routine and analgesic were required. However, there was no anticipation that this development would create a significant permanent partial disability.

The updated award for pain and suffering and loss of amenities is \$4,352,613.24.

The Court of Appeal in **Stephen Clarke v Olga James Reid** SCCA No. 119/2007 (per Harrison JA) commented that this award was on the high side.

Cases cited by the Defence are:

1. **Angella Brown v Petroleum Corporation of Jamaica**, Claim No. 2004/HCV1061: The claimant suffered burns assessed at 20 - 24% of her body when a cylinder exploded at the workplace.

She also was diagnosed with post traumatic stress disorder. There was a degree of disfigurement to her nostrils and upper and lower limbs. The injuries had clearly affected her enjoyment of life.

Awards made in April 2007:

- \$2,450,000.00 for Pain and Suffering and Loss of Amenities
- \$340,000.00 for Post Traumatic Stress Disorder

Updated awards of \$2.5 million and \$450,000.00 respectively.

2. **Grant v Dalwood et al**, Khan Volume 6 pg 200, 10% Whole Person Disability (WPD).

Updated award for pain and suffering and loss of amenities is \$3,195,932.00.

3. **Candy Naggie v The Ritz Carlton Hotel** – 10% Whole Person Disability

Updated award for pain and suffering and loss of amenities is \$2,567,653.00.

In the present case, the court has to make an award to compensate the claimant not only for the continuing discogenic pain which has led to a rating of 8% WPD, but also for the chronic pain disorder which cannot be measured.

There has been a serious disruption in the lifestyle of Mrs. Deyannis. The court is of the view that, taking into consideration the discogenic pain, a base sum should be \$3,000,000.00, which would be in line with the **Candy Naggie** award and taking into account the **Marie Jackson** award. The issue of the phobia does not appear to be a significant factor in the total award.

The court would then increase that amount by \$2,000,000.00 to compensate the claimant for the ongoing psychogenic pain. The total award therefore would be \$5,000,000.00.

Loss of Earning Capacity

Ms. Deyannis has suffered tremendous pain and has been on various medications since the accident. This has been ongoing for the past five (5) years. Her job description is basically one of a sales representative. Since 2004, she has worked with six (6) different companies.

The changes in earnings before the accident were explained in terms of her high standards of reproductivity. She stated that in 2006, she changed jobs because she could not handle all the pressure at work being on so many medications. She then went to Drechel Business Interiors but was dismissed after 10 months in January 2007. She attributes this to memory lapses and cognitive challenges as a result of the pain and medication.

She has been working with Phoenix Flooring and Wall Products since March 2007. Her duties at Phoenix include making telephone calls, meeting with clients and showing catalogues. Her job also entails travelling.

At Phoenix, she earns a net salary with a prospect for bonus at the end of the year subject to her sales. At the various places she works, there is usually a set salary with bonus and commission.

At Drechel, she earned a high salary, but less commission and bonus. She states that she has become a low producer in sales now. She describes her company, Phoenix as doing very well and that the last two months are the best that the company has had.

Based on the evidence before this court, it is clear that this claimant is highly motivated to earn a living and this continues even though the injuries have severely impacted her life. She is 49 years old. Her earnings before and after the accident, fluctuated depending on a variety of circumstances.

In order to decide whether to award the claimant any damages under this head, the court relies on the principles as set out in **Moelicker v A. Reynolds & Company Limited** 1977 1 AER , pg 10:

a. Real Risk

Does a real risk exist that the claimant will lose her present job at some time before the estimated end of her working life?

She has given evidence as to the effect her disability has had on her working life. Her evidence has been supported by the medical experts, in particular Dr. Lombardi and Dr. Wong.

It is clear that because of the effects of pain and medication, she would be less competitive on the labour market and due to possible decreasing levels of productivity, her capacity to be given a bonus may be decreased.

The court therefore finds that there is a substantial or real risk that she may lose her present employment or be forced to resign her position and be thrown on the labour market at sometime before the estimated end of her working life.

b. The Assessment of Award

The court is guided by the factors recommended by Lord Brown in the **Moelicker** case (supra, pg 17 para b) which are stated as follows:

“The quantification of the present value of the financial damage that will be suffered, having regard to the degree of the risk, the time when it may materialize and the factors both favourable and unfavourable which may affect her chances of getting a job or an equally paid job if the risk stated should materialize.”

The court assesses the degree of the risk to be one that is periodic. She, as stated earlier, is highly motivated to earn a living and based on her evidence as to her track record, would be

given favourable recommendations. The disability suffered may prevent her obtaining job security and she may be forced to change jobs or to take lesser paying jobs as time goes by.

I am of the view that, as the risk is periodic, an award of a global figure without any reference to the multiplier/multiplicand will be the most just in the circumstances. A discounted figure of \$20,000.00 (Canadian dollars) is therefore awarded under this head.

Cost of Future Medical Care

Counsel for the claimant, Mr. Manning, has asked that she be awarded the discounted figure of \$3,162.60 (Canadian dollars) for future medication and \$5,400.00 (Canadian dollars) for physical therapy.

Mr. Henry has submitted that nothing should be awarded under this head as the claimant has not put any evidence before the court in order for quantification. He has stated also that is clear from the medical reports that physical therapy did not assist in any way.

It is clear that she will need future medication. Mr. Manning has asked me to adopt the approach of using her claim for medication over the past five (5) years as a base, the average of which is Canadian \$263.55 per year.

She is presently on three (3) medications. The claimant ought to have assisted the court with the cost of these medications. I will therefore use a base figure of Canadian \$100.00.

The claimant is closer to 50 years old. In Khan's, the average life expectancy of a 50 year old woman is 31.6.

I will therefore use a multiplier of 10. The discount is already built into the multiplier - $\$100 \times 10 = \$1,000.00$ (Canadian dollars).

In relation to the physical therapist, there is no evidence that she is presently keeping any such appointments or intends to do so. I will therefore decline to grant any such award.

Special Damages

Both parties have agreed to the cost of the medical expenses of Canadian \$10,962.39.

Loss of Earnings/Income

The claimant has claimed for loss of income between 2004 and 2008. At paragraphs 22 and 23 of her witness statements, she states as follows:

- 22. "My mobility was seriously affected by the accident. This is of particular importance as I am in Sales and my income is directly dependent upon my ability to meet with existing, and attract new clients and my ability to drive long distances. The lack of sleep also affects my performance at work----

- 23. In light of those difficulties, I was unable to work at my full potential after the accident and my income gradually decreased on my return to work, compared to my previous years."

The claimant gave evidence as to her earnings between 2001 and 2008. She gave evidence of the post accident loss by averaging her earnings for the years 2002 and 2003 (\$67,222.00) and subtracting her annual income for each year from this average sum.

Between the years 2001 - 2003, there were fluctuations as follows:

2001	-	\$53,638.56
2002	-	75,362.33
2003	-	58,908.95

She accounts for the fluctuations between 2001 and 2002 by stating that she moved to Ontario from Quebec in 2002. In 2003, she said it was significantly lower because she went to a new company and that it was a new job and a new structure.

In 2005, her earnings at the new company were \$70,572.73. It was a new area and she worked very hard.

Since 2005, her earnings have been as follows:

2006	-	\$59,440.00
2007	-	51,066.17
2008	-	51,066.17

It is difficult for the court to award loss of income for these years, as her earnings have been consistently in the \$50,000.00 range, except for 2002 and 2005. There are variables involved, some of which may include the impact of her injuries.

It is abundantly clear, however, that her earnings in 2004, the year of the incident, reduced dramatically. It was \$31,480.00. The court will therefore award her loss of income for that year by averaging the earnings for the three years preceding the accident and subtracting the amount of \$31,480.00.

The amount is \$31,150.51 which is to be discounted by 30% (reflecting income tax). The amount awarded is therefore (Canadian) \$21,809.62.

General Damages

1	Pain and Suffering and Loss of Amenities	-	\$5,000,000.00
	With interest at 3% from March 16, 2007 to June 12, 2009		
2.	Loss of Earning Capacity	- (Can. \$)	20,000.00
3.	Cost of Future Medical Care	- (Can. \$)	1,000.00

Special Damages

Medical Expenses	- (Can. \$)	10,962.39
Loss of Income	- (Can. \$)	21,809.62
With interest at 3% from February 25, 2004 to June 12, 2009		

The Canadian currency is to be converted into Jamaican currency at the Bank of Jamaica's rate as of June 12, 2009 in relation to the General Damages.

Costs to be agreed or taxed.

Costs limited to two Counsel for claimant.



Handwritten signature of a Judge, with the word "Judge" written below it.