

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. G104 OF 1989

BETWEEN

BETWEEN

LAUREL GARRICK

PLAINTIFF

AND

RONALD KING

DEFENDANT

Assessment of Damages

for Personal Injuries

N.O. Edwards Q.C. and Miss Phyllis Dyer for the Plaintiff.

D. Henry instructed by Nunes, Scholefield, DeLeon and Company for the Defendant.

Hearing on May 22, 25 and July 12, 1990

JUDGMENT

BINGHAM J.

In this matter the question of liability was not in issue. What falls for my determination has to do entirely with the quantum of damages to be awarded to the Plaintiff.

The Claim arose out of injuries received by the plaintiff a graduate Teacher who was a passenger in a Mini Bus registered P.P. 1474 owned by driven by the defendant which due to his negligence overturned while being driven along the Spanish Town By-Pass Road in Saint Catherine on June 20, 1986 injuring the Plaintiff in the process.

As a result of this incident the plaintiff suffered the following injuries:-

1. Cuts and bruises to the left hand, the shoulder, both knees and both feet.
2. Her left hand was without sensation and useless.

3. There were extreme pains along the left shoulder and whenever the plaintiff attempted to use her left hand.

4. There was also extreme pains in the area of her neck.

The plaintiff was first taken to Spanish Town Hospital where after observation she was then transferred to the Medical Associates Hospital and after examination there she was removed to the University Hospital of the West Indies where after further examination she was admitted to Ward 17 which is the Orthopaedic Ward.

Following her admission to this Hospital on 20th June 1986 the plaintiff was seen by Dr. Christopher Rose an Orthopaedic Surgeon attached to that Institution who also has a private practice at Orthopaedic Associates, Tangarine Place and at the Eureka Medical Complex, in St. Andrew.

Following his examination of the plaintiff he observed that she was a healthy woman in obvious distress. His examination was confined to her neck and lower limbs. He then noted the following injuries.

1. There was marked tenderness along the cervical spine as well as along both trapezius muscles which connected the shoulder to the neck.
2. There was marked restriction with a range of motion in the area of the Cervical Spine due to pain.
3. She had grade 4 power. Grade 5 being regarded as normal power. This was in the left biceps, triceps and the Supinator muscles. In the left upper limbs there was also Grade 4 power.
4. Her left hand was weak ~~This~~ also had grade 4 power.
5. The reflexes were absent in the left biceps and the left supinator muscles were diminished and reduced the triceps in the left muscles - all in the left side.
6. There was decreased sensation along the C5, C6 and C7 dermatomes of the left upper limbs. These being sections along the deltoid muscles, then along the forearm and the fingers areas respectively of the left hand.
7. The X-Rays of the Cervical Spine showed an anterior displacement of the C5 upon C6. This meant that the area was pressed forward (out of alignment).

8. She was in considerable pain as a result of her condition brought about by one ^{bone}/shifting forward upon the other.

Treatment

She was after her admission to ward 17, a patient in this ward from June 21, 1986 until August 4, 1986. During her stay there she was treated at first with Cervical traction which was done by putting her in traction in an attempt to correct the displacement of the two bones and following this she was placed in a Cervical Collar (Philadelphia Collar) in order to maintain the alignment and also to maintain the reduction. She was also started on a programme of physical therapy.

She continued to experience neck pains with radiation of the pains going down from the left arm to the fingers of the left hand. She was then readmitted into hospital and surgery was then performed in an attempt to fuse the C5 and C6, the two displaced Vertebrae. This surgery was done on May 18, 1987. She was then placed back in the Cervical Collar following surgery.

She was discharged from hospital on May 26, 1987. The fusion was done to prevent any further movement of the two vertebrae affected. It is the ligaments at the back of the neck that are responsible for stabilizing the spine. In this particular case it became apparent that these ligaments were torn. The surgery was done to ensure stability in this area as where there is movement due to instability then this results in more pain being experienced by the patient.

Following surgery Dr. Rose continued to see her at his private surgery at Orthopaedic Associates, and at Eureka Medical Complex. She still continued to experience pain in the affected areas.

Surgery has brought about a minimal reduction in the pains which she has been experiencing since the incident on 20th May 1986. These pains continued to persist and necessitated Dr. Rose carrying out a Myeogram in order to ascertain whether there was compression on any of the nerves leading up to her neck. The results was normal and there was accordingly in his opinion no need for any further surgery.

The plaintiff was then referred to Dr. Randolph Cheeks, a Neuro-Surgeon for a second opinion. He also was of the opinion that there was no need for further surgery but recommended that she continue to wear the Cervical Collar. This she will have to continue to wear indefinitely, although not constantly as she has now reached her maximum state of recovery. She will still continue to suffer neck pains along with restricted movement in her left upper limbs.

Travelling on a bus will affect her because of the jerking movements which would cause considerable discomfort because of her present condition.

As a teacher, her condition will be affected by the movement of her neck in the course of attempting to teach a class. This movement would tend to exacerbate the pains which she has been experiencing in the neck and along the shoulder area. This has also affected her ability to concentrate on the subject matter that she is teaching and on many occasions it has interfered with her attempts at her ability to teach.

The persistence of these pains will definitely affect her future. It will also interfere with her bodily function completely and the intense pains which would have to cause her to have to resort to pain killers to relieve her condition, a situation which corroborated the plaintiff's testimony in this regard.

Participation in Sports, dancing and other such activities would not be advisable as the plaintiff could only take part in these activities at great risk of aggravating her condition.

The plaintiff was last seen by Dr. Rose on 14th October 1989. On that occasion his subjective findings were:-

1. Neck pains aggravated by prolonged sitting.
2. An inability to carry any heavy weights in her upper limbs.
3. An inability to perform her occupation satisfactorily.

The objective findings were:-

1. On examination there was slight restriction in the range of motion of the Cervical Spine, however, this movement was accompanied

by pain at the extremes of motion.

2. There was decreased sensation along the left forearm.
3. X-Rays of the Cervical Spine revealed a solid fusion at the C5, C6 level with marked narrowing at the C5, C6, disc space. This narrowing indicate that there was damage to the intra-Vertebral disc at the time of the injury. This damage is permanent.
4. There will be a permanent disability of the whole person which Dr. Rose assessed at 25%.

Under cross examination by learned Counsel for the Defendant Dr. Rose ruled out any possibility of the plaintiff's injury being described as of the nature of a severe wiplash injury as in such cases no bones would have been affected. He was further asked:-

Q: Would you consider a fracture of 5th and 6th Cervical Vertebrae as being a more serious fracture?

His response was:-

A: This injury was more serious because of its proximity to the Spinal Cord. This is why it was necessary to reduce the fracture and to fuse the two bones as the torn ligaments dont heal very well.

He was then asked:-

Q: If there were fractures of the 5th and 6th Cervical Vertebrae coupled with a displacement of these two Vertebrae would that be more serious?

Dr. Rose agreed that such a condition would be more serious as this would in all probability leave the plaintiff paralysed.

He also stated that in his opinion there was no significant wasting of the muscles of the left hand seen at the time of this examination in October 1989.

Dr. John Hall, a Consultant Neurologist saw and examined the plaintiff on 15th May 1990. Having outlined the history which she gave him as to her condition, he examined her and found:-

1. That the plaintiff was a well nourished young woman who gave a clear history of her condition.

2. He observed a large 4½ inches healed surgical scar in the Nape of the neck extending to the Cervical area at the top of the Column which related to the surgical procedure that the plaintiff had undergone at the University Hospital in May 1987.

His findings:

1. There was a wasting of the first interdorscious muscles between the left thumb and left forefinger. The nerve supplying that muscle was damaged further up stream and suggested further to damage to the nerve roots that supplied that area.

2. There was also demonstrable weakness of the muscles of the left hand. These muscles are not visible to the naked eye but is best tested by placing a bit of note paper between the fingers. Failure to properly grip the note paper is evidence of weakness in that area. Such evidence of weakness would also be indicative of damage to the Ulna nerve between the 5th and 6th Cervical Vertebrae in the region of the neck.

3. There was weakness of the muscles of the left thumb and the digital muscle of the left finger. This was best demonstrated by causing the patient to touch these fingers together. In a normal case there would be difficulty confirming the weakness in that area. This weakness will persist and is a permanent disability.

4. There was hypersensitivity to a pin pick of the left upper arm, forearm and hand to the territory supplied by 5th and 6th Cervical nerve roots. This meant that the nerves in that area are damaged and are not conducting messages to the area concerned in a normal manner.

His Conclusions

The significance of injuries in 1-3 above is that there has been damage to the fibres of the Ulna Nerve consisting of damage at their point of origin between the 7th Cervical Vertebra and the **Thoracic** Vertebra, this being from the area of the neck down to the chest area. The prognosis is that the damage here is a degenerative condition of those bones which leads later on to Spinal Cord damage. There is also a risk of spondinosis developing which means a premature aging of the bones, a premature loss of

loss of shape and function and damage to the Constituent parts of the Spinal Cord and the nerves emanating therefrom and lying nearby. The damage to the sensory and motor areas are decidedly permanent and most likely progressive developments. There will be a permanent disability and lack of dexterity of the left hand which will affect the patient (plaintiff) in her profession as a teacher quite adversely. It will also affect her further participation in sports as well as any of the other activities that she used to engage in. Her sense of balance will also be affected. It is not possible to form or forecast an opinion as to the rate of progression. It is not inevitable.

The history given by the patient indicated a loss of awareness initially of the accident taking place which indicates that there must have been a concussive head injury at the time of the crash.

For the future closed head injuries of this type are precursors of post traumatic epilepsy in 5% - 10% of cases of this type.

The pains that now persist will continue to be an intermittent and persistent source of nuisance to the patient because of the nerve root damage which she suffered.

In so far as the patient's present condition is concerned this will also affect her in so far as carrying out her day to day activities, her normal routine in the household and at the work place would also be embarrassing to the patient as she would not be able to lift objects or weights or to carry out those finger movements as she would experience difficulty in performing these tasks. The injury to the neck is of particular significance as being the most mobile of the patients joints it will be under constant stress at all times. There is nothing from the examination to suggest any further improvement having regard to the examination and findings being arrived at almost three years after surgery was performed.

The pains now being experienced will mean that there will be bouts of continuous pain as distinct from pain occurring periodically.

Having regard to the nature and extent of the plaintiff's condition which was not only borne out by her evidence and her general demeanour in Court, factors which were fully corroborated by the testimony given by both Dr. Rose and Dr. Hall, one could not fail to be impressed by the manner in which the plaintiff gave her testimony. Seeing and observing her in the witness box as she sought to relive her experiences of that tragic incident and the circumstances attendant upon it which had now brought her to this present state one could not but be drawn to the realisation that there was a very gifted and exceptional person who despite the harrowing nature of her experiences coming at a time when she was on the threshold of a bright future having just graduated from the University of the West Indies with a Bachelor's Degree in Education specialising in the teaching of English. She has not allowed misfortune to stand in her way in achieving the goals that she has set herself but still undaunted has continued to strive to achieve the optimum that she is capable of. The fact that she has now taken on the challenge which a Masters Degree Programme calls for which given her determination, in all probability will be met and overcome are all factors which ought to redound to her credit. Given her condition and the obvious suffering she has undergone over the past four years, she could so easily, like many others, have become despondent, depressed, given up hope and sought the easy way out of her dilemma. One cannot but commend her for her immense display of courage, selfwill and determination of an extraordinary nature which ought to be an example to others faced with a similar experience.

This, however, ought not a factor benefitting the defendant when the question of the determination of the measure of damages falls to be assessed. The fact that the plaintiff has by her courage continued to press on with her career and in so doing ruled out any claim in the nature of loss of future earnings does not necessarily mean that she is to be considered as to such compensation as may be awarded for general damages on the same footing as a plaintiff who is no longer able to work.

Damages

This falls to be assessed under two broad heads namely:-

1. Special Damages
2. General Damages

Special Damages

This area has not posed any real difficulty in this matter as although there were some items of this claim which were in dispute at the outset of the plaintiff case as the evidence emerged there was agreement reached in virtually all these areas. Only one item was left unresolved.

In so far as this area of the claim was concerned, by virtue of an amendment to the Particulars of Special Damage the total claimed under this head amounted to \$26,363.91c. There was a challenge made, however, to the sum claimed for loss of income totalling \$10,822.50c covering the period 20/11/86 - 26/6/87, being seven months salary at \$1,547 per month.

Learned Counsel for the defendant submitted, and in my view rightly so, that as the plaintiff's evidence was to the effect that she resumed working in March 1987, her claim should be limited to that date and not to June 1987. This being so the total sum claimed in respect of this particular item ought to be one for four months and not seven which when quantified would result in a total of \$16190, which sum would then have to be scaled down by a further one-third to allow for the income tax deductions which when this added factor is considered would reduce the total sum recoverable as loss of income to \$4190. The end result would be that the total sum proven as recoverable under this head would therefore be \$19,658.41c.

General Damages

± This falls to be assessed taking into consideration the following factors:-

1. An amount for pain and suffering and loss of Amenities. In this

area such an award as is made must of necessity take into consideration the past, present and the future condition of the plaintiff having regard to the fact that one is here considering the case of a young woman, who although she has continued to be employed in her chosen field, thus ruling out any question of an award for future prospective earnings or for loss of income on the labour market, she nevertheless now has a degenerative condition developing which could possibly bring a premature end to what up to now despite her handicaps, still holds out some hope of a prospectively bright future in her field of endeavour. Such damages will, therefore, have of necessity to take into consideration her condition as at the present date but also the likelihood that the future holds for her certain risks which may lead to a worsening of her condition and for which some provision will have to be made to cover such an eventuality.

Then added to this there is the need to make some reasonable provision for such incidental expenses to cover the cost of replacement of the Cervical Collars which she will have to wear for the remainder of her life, as well as the physical therapy which she will have to undergo from time to time to relieve her of the discomfort caused from the constant wearing of the Collar and the generalised pains which now affect her from time to time as well as the medical expenses and medication all of which she will need to make life as comfortable as possible despite her handicap. One cannot also fail to consider that as an active young woman 34 years of age at the time of the incident the plaintiff must have entertained prospects of marriage and raising a family which given her condition would now seem lessened, if not remote.

The Submission

Learned Counsel for the Defendant has submitted that given the nature and extent of the plaintiff's injuries as described by the two Doctors, the highest award that ought to be considered is a sum for General Damages in the region of \$80,000. He relies for support on:

Rufus Peru vs. Frome-Money Musk Land Company Limited reported at page 127, Volume I of Mrs Khan's book on Personal Injury Awards in the

He submitted that in that case the injuries suffered by the plaintiff a 54 years old Cane Cutter was more serious than that which the plaintiff experienced in the instant case when such adjustments are made to the award for General Damages of \$18,000 in April 1981 in that case having regard to:-

1. The younger age of this plaintiff and her increased life expectancy.
2. Her higher status as a graduate teacher and a skilled professional.
3. The inflationary effects upon the present decreased value of the Jamaican Dollar.

When all the above factors were taken into consideration and having regard to the dicta of the Court of Appeal of Jamaica in C.L. 1979/F094 Central Soya Ltd. vs. Junior Freeman, page 242, Volume 2 of Mrs Khans Personal Injury Awards then the sum suggested would properly meet the justice of the case.

In my view this case is clearly distinguishable from the Peru case as apart from the fact that in the opinion of Dr. Rose that the injury to the plaintiff was more serious because of the proximity of the injury to the spinal cord, there was the added factors of:-

1. The torn ligaments at the back of the neck necessitating the wearing of a Cervical Collar indefinitely.
2. The narrowing of the site of the fusion of the 5th and 5th Cervical Vertebrae indicating damage to the Intra-Vertebral disc.
3. The damage to the nerve roots which significantly affected the movement and the use of the plaintiff upper left hand these injuries all being of a permanent nature. Moreover the fact that the plaintiff is a Specialist teacher by profession it would be difficult to conceive at this stage of her career (she is now 38 years of age) having like the plaintiff in the Peru case (a Cane Cutter) to change her occupation.

Learned Counsel for the plaintiff, as is usual in these matters in opting for a higher award submitted that the award for General Damages ought to be in the region of \$180,000. She relied upon the following authorities in support:-

1. Mason vs. National Packaging Corporation page 129 of Volume I of Khans Book
2. Kemp ands. Kemp Volume 2, Release 13, Porter vs. Martin decision of the Court of Appeal in March 1979 where an award of £45,000 was made to an Hotel worker 22 years of age.
3. Powell vs. Clarke, reported at pg. 158, Volume 2 of Mrs Khans Book. An award of \$42,000 on 19.5.82. The last mentioned of these cases clearly having regard to the facts is of relevance and no useful purpose is served in considering it as the facts it bears no similarity with the instant case.

In seeking to arrive at a just award although I must acknowledge my indebtedness to both Counsel for their industry in citing the authorities referred to, I did not regard those referred to in Kemp and Kemp as being of assistance as it has ~~by now~~ been a matter of trite law that in so far as such authorities are concerned with plaintiff's who hail from developed countries with higher socio-economic living conditions and per-capital income levels which bears no comparison with Jamaica such awards are far out of line with the level of awards which can bear any comparison with what would be regard as reasonable in Common Law jurisdictions of developing countries such as Jamaica, not possessing the affluence of other caribbean ~~americ~~ countries with their attractive economic living conditions born out of the privilege that is the result of being tax shelters and therefore havens for the wealthy and the famous.

The first case mentioned Mason vs. National Packaging on the other hand is in some measure similar to the instant one and is relevant as:-

1. The extent of the injuries in this case to the neck area, the intra-vertebral disc, and the nerve roots supplying movement to the left hand which has now resulted in a wasting away of the tissues in the hand rendering the left hand almost useless meant that any assessment of the disability as Professor Golding found in the Mason case referred to which was put at 10% of the whole person is not comparable to the 25% permanent

disability of the whole person in the instant case. The agreed damages of \$24,000 in that case would therefore when the necessary adjustments are made result in an award in 1978 approximating between \$55,000 - \$60,000 depending upon what portion of the agreed damages amounted to Special Damages.

I would therefore, consider that Mason vs. National Packaging Corporation, although the injuries were not as serious as in this case, can be used as a guide in arriving at an appropriate award. The sum of \$55,000 being treated as a reasonable award for General Damages for Pain and Suffering and Loss of Amenities in the instant case in June 1978, would when the necessary adjustments are made amount to a sum in the region of \$140,000 at the present date having regard to a further upward adjustment for the falling value of the dollar due to the continuing inflationary trends. Such awards before 1984 being doubled on the basis of the guidelines set out in the Central Soya Case (referred to Supra).

One would now need to add such further sums to cover:-

1. The loss of marriage prospects
2. Future Medical Expenses

Taking these additional factors into account, I would be minded to award a Global sum of \$30,000 to cover these two areas which would result in a total award of \$170,000.

Damages will therefore be assessed at \$189,458.41¢ with costs to be agreed or taxed being:-

1. Special Damages \$19,458.41¢
2. General Damages for pain and suffering and loss of amenities and (including a sum to cover loss of marriage prospects and for future Medical Expenses)

\$170,000
\$189,458.41

Interest awarded on Special Damages at 3% as from 20.5.86 to 12.7.90 and at 3% on \$140,000 of the sum awarded for General Damages from the date of entry of Appearance 30.8.89 to 12.7.90.