Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1987/R-133

BETWEEN	LLOYD ROBINSON		PLAINTIFF
A N D	DENHAM DODD	FIRST	DEFENDANT
A N D	AUDREY WILSON	SECOND	DEFENDANT

Miss T. Small instructed by Kelly and McLean for Plaintiff.

Miss N. Anderson instructed by Crafton S. Miller and Company for Defendants.

ASSESSMENT OF DAMAGES

Heard: March 6, 1997 and April 16, 1997

KARL HARRISON, J.

Liability is not an issue in this matter so all that is left to be done, is to assess damages.

The plaintiff, a duco man by occupation, was a passenger in a mini bus which collided violently with a motor truck on the 24th day of January, 1986 along the Allan Byfield Highway in the Parish of St. Ann. As a result of this impact he was apparently thrown from the vehicle unto the roadway. He sustained several injuries and was taken to St. Ann's Bay Hospital for treatment. After spending some 4-5 days in that institution he was transferred to Cornwall Regional Hospital where he remained until early March.

The medical doctors who had attended to the plaintiff were not called to testify at the assessment hearing but medical reports were tendered and admitted in evidence without objection, pursuant to the provisions of the Evidence Amendment Act.

Exhibit 1 is a Medical report dated 1st August, 1986 from Dr. P. Herard. It speaks of the plaintiff being admitted into the Cornwall Regional Hospital on the 30th January, 1986 after being referred from St. Ann's Bay Hospital. The report continues and states inter alia:

> "...The diagnosis on admission were clinically and radiologically:
>
> 1. Comminuted fracture of left acetabulum.

2. Posterior dislocation of left hip.

The treatment has been:

1. Skeletal traction for 5 weeks after close reduction of the dislocation performed at St. Ann's Bay Hospital.

2. Analgesics.

On the 1/3/86 the fractures healed and patient was discharged for mobilization on crutches with partial to full weight bearing. He was seen on the 31/7/86 and was still using crutches with limping. The mobility of his hip was restricted with mild pain on motion. X-ray showed osteoarthritic changes of the acetabulum and the hip. It is too soon to give a percentage of disability of this problem. He will be re-assessed in 6 months time for that purpose."

Sgd. Dr. P. Herard
Orthopaedic Surgeon

Exhibit 3 is report dated October 27, 1987 from Dr. D. Harvey, Resident in Surgery. It refers to a query from the plaintiff's Attorneys and it states as follows:

"...patient was revaluated (sic) on the 21st October, 1987 and found to have limited flexion of the left hip (90°) and limited abduction (moving outwards - 5°). He walks with a limp as a result of his restricted movements. The hip is stiff and is likely to be permanent. He is able to fully weight bear."

Sgd. Dr. D. Harvey
Resident in Surgery

Exhibit 4 is a further medical report by Dr. Harvey. It is dated February 10, 1988 and states inter alia:

"...Mr. Robinson...had to be called in for revaluation (sic) on the 27/1/88. However on revaluation (sic) he has previously mentioned symptoms of pains (not severe) a limp, stiffness and cramps in the thigh with tiredness on long standing, estimated as 10% disability.

> On examination restriction of the left hip movements estimated as 10% and on radiological examination 10% disability estimated. Hence considering his occupation a total of 30% permanent disability."

Finally, Exhibit 2 is medical report dated January 16, 1990 from Dr. Herard. It speaks of the earlier observations made by the doctor and continues as follows:

> "...I re-examined him on December 19, 1989 and obtained the following findings:
>
> His complaintis were:
>
> 1. Cramps involving his left hip.
> 2. Limping gait.
> 3. Inability to stand for long hours.
> 4. Inability to lift heavy material.
> 5. Inability to run.
>
> My Examination revealed heavy built (sic) gentleman with a moderate limping gait. In comparison to the right hip his left his (sic) was weaker (grade 4 strength of flexor muscles). External rotation of that hip was restricted at 25°, flexion at 90° resulting in considerable stiffness of the hip. X-ray check showed advance osteoarthritis of the hip and acetabulum as well as minor subluxation of the femoral head. At present, his hip can be considerd disabled in a 20%. This percentage of disability can increase according to any arthritic changes which may occur.
>
> I have recommended that he works on a part time basis int he case of a physically demanding job. He could go to full time occupation in a more sedentary position...."

There was no medical evidence concerning the plaintiff's condition on his admission to St. Ann's Bay Hospital. He gave a very detailed description however, of these injuries. He said that after the accident he had felt dizzy. He received a blow to his head; a

severe chop on his left hand, his lip was "chopped" away and was split into about ten pieces and he had lost his dentures. He further testified that he received about 38 stitches over the right eye, 37 stitches in the lip and 19 stitches on the left hand.

He seemed to have experienced a great deal of pain and discomfort whilst he was in hospital. His evidence revealed that he was kept in traction until he was released. He had to remain on his back and could not sit up. He was attended to in bed and the bed pan was a regular feature during his stay in hospital.

He was unable to walk when he left hospital and had to use two crutches for about one year. He resorted to the use of a walking stick thereafter. According to him, his left leg is still affecting him and he suffers from cramps and minor pain "on and off." Most of the pain he experiences is from the hip region. He has pain in the back at times but this is not severe. Whenever he walks he has to stop and rest and at nights he has to "balm" down the hip and leg. He admits under cross-examination however, that he no longer takes tablets for the pain and according to him, "it is a long time now that I have not been back to the hospital."

He could not successfully continue with his normal occupation as a duco-man. He tried once, but due to pain in the hip he was unable to continue. He is not able to lift weighty things and so he now does a "little light" work for one Mr. Young.

In addressing me on general damages, Miss Small referred to and relied upon the following cases:

1. McLean v. Walters - page 28 of Khan's Vol. 3.
2. Vassell v. Jackson & Anor. - page 19 of Khan's Vol. 3.

She submitted that an appropriate award under this head of damages should be $1,000,000.00. It was her view also,that the court should make a "nominal" award of $100,000.00 under the head "handicap on the labour market." So far as special damages were concerned, she conceded that loss of earnings and the cost of replacing the dentures had not been proved. Travelling expenses, cost of X-ray, and cost of walking cane were agreed at $145.00. She further submitted that

the court should accept the evidence as to the cost of a missing watch and to allow $40.00 being the cost of a damages shirt.

Miss Anderson on the other hand, was of the view that an award of $500,000.00 would be appropriate in the circumstances. She sought reliance on the case of **Murray v, Harvey** at page 47 of Khan's Vol. 2. In respect of handicap on the labour market, she submitted that an award of $20,000.00 would meet the justice of the case.

In Vassell's case, damages were assessed before Walker J. on the 8th December, 1988. The plaintiff had suffered unconsciousness, received a laceration above and below the eye and had sustained a posterior fracture of the right hip. Under general anaesthesia the hip was manipulated and traction set up. Subsequent X-ray showed that reduction was inadequate due to a bone blocking the reduction. He underwent open reduction operation and the fragment of bone removed. Additional X-rays revealed that there was fixed flexion contracture of the right hip due to myositis ossificans in the muscle surrounding the hip. Abduction and adduction of the hip were zero degree. Further surgery was done to remove heterotropic bones. By the 8th October, 1987 the hip had 90 degrees flexion but there was no internal or external rotation or abduction. His disabilities included a strong possibility of recurring myositis ossificans, restricted movement of the hip, permanent stiffness in the hip, a permanent limp, lower back pains and a permanent partial disability assessed at 20% of the whole person. He was awarded $100,000.00 for pain and suffering and loss of amenities. When upgraded, that sum would now value in the region of $927,000.00.

The plaintiff McLean was also unconscious at the time of the accident. His injuries included a severe fracture dislocation of the left hip, fracture of the right shaft of the left humerus and small cuts in the face and head. He was placed in traction and confined to bed and could only move if assisted. Traction lasted for 3½-4 months and after his discharge from hospital he used crutches. Later he resumed work. He had restricted movement of the left hip and this was caused by considerable new bone formation around the hip. A total hip replacement was recommended. His whole person permanent partial

disability was assessed at 20%. Dr. Rose did opine that the total hip replacement would relieve pain and the function of the hip but would be complicated by bone formation which had a 50% chance of recurrence. With no recurrence of bone formation his whole person disability would probably be reduced to 6%.

In the instant case, Dr. Harvey did state in his medical report that Mr. Robinson's limp, stiffness and cramps in the thigh with tiredness on long standing, was estimated as a 10% disability. He further stated:

> "....on examination restriction of the left hip movements estimated as 10% and on radiological examination 10% disability estimated. Hence considering his occupation a total of 30% permanent disability."

Dr. Herard had estimated the disability of the hip as 20% and was of the view that the percentage of disability could increase depending on the arthritic changes which may occur. Dr. Herard is an Orthopaedic Surgeon whereas, Dr. Harvey is a Resident in Surgery. I am somewhat puzzled as to the method used by Dr. Harvey in arriving at the 30% permanent disability. I would prefer to accept the percentage of disability arrived at by Dr. Herard, he being a specialist in orthopaedic surgery. Unfortunately, Dr. Herard has not stated the percentage disability of the whole person.

Miss Small has referred me to the book "Guides to the Evaluation of Permanent Impairment" issued by the American Medical Association. Table 20 sets out the relationship of impairment of the upper extremity to impairment of the whole person and it shows that a 20% impairment would be equivalent to a 12% whole person disability. I am most grateful for the assistance and would accept the whole person partial permanent disability at 12% with the possibility that this percentage may increase as the plaintiff gets older.

I bear in mind the medical reports which have been admitted in evidence. The final report which is dated January 16, 1990 reveals where the plaintiff was last examined in December, 1989. His complaints then were:

1. Cramps involving his left hip.
2. Limping gait.
3. Inability to stand for long hours.

4. Inability to lift heavy material.

5. Inability torun.

His evidence here today, indicates that he is still experiencing similar problems. His limping is suggestive of some shortening of the lower limb but the Court is not assisted in this regard from the medical reports. This limp was quite noticeable as the plaintiff made his way to and from the witness box. The right hip was weaker (grade 4 strength of flexor muscles). External rotation of that hip was restricted at 25°, flexion at 90° resulting in considerable stiffness of the hip. X-rays showed advances osteoarthritis of the hip and acetabulum as well as minor subluxation of the femoral head. Dr. Herard was of the view that the percentage of disability in the hip could increase according to any arthritic changes which may occur.

Both cases cited by Miss Small are useful guides indeed. But for the state of unconsciousness and percentage of whole person permanent partial disability, one could say that the injuries in Vassell's case are very close to those suffered by the plaintiff here. What then is a reasonable sum to compensate this plaintiff in respect of pain and suffering and loss of amenities? I would think that an award $650,000.00 would be reasonable in all the circumstances when one considers the distinction pointed out above and that the award made in Vassell's case would now be upgraded to at least $927,000.00.

I will now deal with the head, loss of earning capacity. There is always some amount of speculation invloved when it comes to make an award under this head. What the court is asked to assess is the "plaintiff's reduced eligibility for employment or the risk of future financial loss" - **Gravesandy v. Moore** (unreported) SCCA 44/85 delivered 14th February, 1986.

The principle which will guide the court of trial in an assessment of this loss of earning capacity are clearly stated in **Moeliker v. A. Reyrolle and Company Limited** (1977) 1 All E.R. page 9 at page 176 by Browne L.J. thus:

> "...The consideration of this head of damages should be made in two stages...Is there a substantial or real risk that a plaintiff will lose his present job at some time

> before the estimated end of his working life? ...If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk, the time when it may materialize, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a hob at all, or an equally well paid job."

It is my considered view that this is an appropriate case for this type of award. Dr. Herard had recommended that the plaintiff work on a part time basis in the case of a physically demanding job and that he could go to full time occupation in a more "sedentary position..." Miss Small had suggested a "nominal" sum of $100,000.00 but I would not agree with her that that sum could be regarded as nominal. I would go along with the figure suggested by Miss Anderson and make an award of $20,000.00 under this head of damage.

So far as special damages are concerned, all the plaintiff will be entitled to, is the sum of $185.00 representing the costs of travel, X-rays, walking cane and shirt. I find it most unacceptable that a Rolex watch would have cost $500.00 in 1986. I do not believe that he lost such a watch hence, I disallow the sum claimed in respect of it. He has failed to prove the loss of earnings pleaded. He has also failed to prove the cost of the denture. The words of Rowe P. in the case of **Hepburn Harris** (un-reported) SCCA 40/90 delivered December 10, 1990 are quite apt when he said:

> "Plaintiffs ought not to be encouraged to throw up figures at trial judges, make no effort to substantiate them and to rely on logical argument to say that specific sums of money must have been earned."

AWARD

In fine damages are assessed accordingly:

1. General damages

   (a) Pain and suffering and loss of amenities $650,000.00

   (b) Handicap on the labour market $ 20,000.00

   with interest thereon at the rate of 3% per annum

from the date of service of the writ of Summons up to today.

2. Special damages

In the sum of $185.00 with interest thereon at the rate of 3% from the 24th day of January up to today.

The plaintiff shall have his costs taxed if they are not agreed.

Miss Anderson had expressed the view that the plaintiff should not be awarded interest in excess of six (6) years because of the inordinate delay in prosecuting the claim. I am not convinced that the delay was caused by the plaintiff as there is no evidence to support this contention. The period for interest is not restricted therefore in the circumstances.