

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

SUIT NO. C.L.2000/M133

BETWEEN                      RAYMOND MOLLISON                      PLAINTIFF  
AND                              ALBERTHA ANDERSON                      1<sup>ST</sup> DEFENDANT  
AND                              O'NEIL ANDERSON                      2<sup>ND</sup> DEFENDANT

Mr. Manley Nicholson instructed by Nicholson Phillips for the Plaintiff.

Mr. Seymour Stewart for the Defendants

Assessment of Damages

Heard: 2<sup>nd</sup>, 3<sup>rd</sup>, 17<sup>th</sup> March & 29<sup>th</sup> May, 2006

BROOKS J.

On June 4 2000, a truck ran over Mr. Raymond Mollison's legs while it was being reversed by Mr. O'Neil Anderson. The vehicle was owned by Ms. Albertha Anderson. Mr. Mollison suffered serious injuries as a result of the mishap and now seeks to recover damages from the Andersons for those injuries, and the expense which he has had to incur as a result.

Immediately following the incident, Mr. Mollison was admitted to the Spanish Town Hospital where he spent 3 weeks. He was thereafter admitted to St. Joseph's Hospital where he remained for 3 months. He spent a further 3 months undergoing physical therapy following his discharge from St.

Joseph's. It is significant that despite the extensive recuperation time mentioned above, Mr. Mollison had had his claim against the Andersons filed on July 3, 2000. Despite that there was no application to have the pleadings amended prior to the claim coming on for assessment of damages.

Mr. Mollison was a roofing tradesman up to the time of his being struck by the truck. He testified that as a result of his injuries he now walks with a cane and has difficulty standing. He is no longer able to ply his trade.

There were a number of gaps in the evidence which one would normally expect in an exercise of this kind and I shall address them as I examine the General and then the Special damages.

### **General Damages**

The medical evidence concerning Mr. Mollison's injuries came from a number of reports from Dr. Mark Minott, a consultant Orthopaedic Surgeon who treated him. The originals of three of these reports were not produced. Mr. Mollison's evidence concerning the matter was that he had received a report from Dr. Minott and that he had given it to his lawyer. No account was given for the absence of the originals but Mr. Nicholson, on behalf of Mr. Mollison, submitted photocopies which were certified by Dr. Minott as true copies of the originals.

The photocopies of reports dated June 6, 14 and 27, 2000 respectively were admitted into evidence based on this certification and the fact that a later report (original exhibited) made reference to one of the earlier ones.

In the June 6 report Dr. Minott reported that Mr. Mollison had sustained "multiple fractures of the pelvis and lower limbs". He also went into shock. The fractures were particularized thus:

"Pelvis-

- Fractures of the right superior and inferior pubic rami
- Lateral rotation of the right sacro-iliac joint
- Fractured (sic) of the left superior and inferior pubic rami
- Displaced transverse fracture of the left acetabulum

Right femur - Displaced fracture of the medial femoral condyle

Left femur - Fracture of the right femoral condyle

Left tibia - Fracture of the left tibial plateau"

The doctor prescribed surgical fixation as treatment for the fractures. In his June 14, report however, Dr. Minott reported that due to a shortage in the supply of blood, surgery was delayed, during which time Mr. Mollison's abdomen became "quite distended". A laparotomy revealed that Mr. Mollison was suffering from "a perforated diverticular disease." It does not seem that this disease was a sequel to the injury sustained. I shall therefore consider the "subtotal colectomy" and "ileo-rectal anastomosis" performed on Mr. Mollison as treatment for this condition as being unrelated to his being struck by the vehicle.

I find that I am supported in this view by a report dated November 20, 2001 by Dr. Minott which is reproduced in full below.

“Mr. Mollison was involved in a motor vehicle accident on June 4, 2000. A report of his injuries was documented on June 6, 2000. After discharge, he was cared in a nursing home but lost to follow-up until October 3, 2001. At that time, he was ambulant without aids and comfortable. Physical examination revealed marked crepitus in the left knee, a valgus deformity of five degrees with a full range of motion. The right knee has a varus deformity with marked crepitus. The left hip was mildly tender over the greater trochanter.

Radiographs of the left hip confirmed satisfactory healing of the acetabular fracture with no loss of cartilage thickness. In the left knee, the lateral tibial plateau had collapsed approximately seven millimetres with a secondary valgus deformity. The fracture of the medial femoral condyle had united well. The right knee revealed collapse of the medial femoral condyle with secondary varus deformity of the left knee.

#### SUMMARY

Currently, Mr. Mollison is asymptomatic and his permanent impairment is related to his valgus and varus deformities in the knees. This translates to a permanent impairment of 10% of the whole person.

However, the crepitus in the knees, along with the altered biomechanics imply that he already has degenerative arthritis in the knee. This is likely to get worse and require a total knee replacement in both knees.

At the Rehab Plus, the cost of the implants for two knee replacements are (sic) \$210,000. The current professional fees (Surgeon, Assistant Surgeon and Anaesthetist) for both knees at one sitting are about \$320,000.00 Follow-up has been arranged for April 2002.”

It will be noted that Dr. Minott does not address the perforated diverticular disease mentioned earlier and specifically does not mention it as a continuing feature of Mr. Mollison's condition. This is in contrast to Mr. Mollison's evidence in which he says:

“I have problems with my rectum. (For) my right knee – I have to keep a bandage on it....I have problems with my stool. I cannot pass my stool freely now. This didn't happen before 2000. (I) had one operation at

Spanish Town and two at St. Joseph's. The operation in 2003 was the best one, after that I could eat."

It is true to say that Dr. Minott's last report is prior to that last operation mentioned by Mr. Mollison, but the fact remains that there is no medical evidence to support this connection to the motor vehicle incident as Mr. Mollison claims. It is for Mr. Mollison to provide the medical evidence to assist the court in the exercise.

It should also be noted from Dr. Minott's November 20 report that he purports to quote the cost of the knee implants which Mr. Mollison needs. This would be hearsay and inadmissible for that purpose, but I shall treat with that aspect more fully when dealing with the question of special damages.

Mr. Nicholson submitted that the court should treat the estimate of 10% whole person disability as having worsened since Dr. Minott made his assessment. Counsel pointed in support, to the need for the knee implants and to the fact that Mr. Mollison has not fully recovered. I find that the submission is without merit since it has not been supported by a medical report to that effect.

The cases cited to the court by Mr. Nicholson in respect of general damages were:-

1. *Douglas Wright v. Wayne and Clive Marsh* 5 Khan page 70.

2. *Douglas Fairweather v. Joyce Campbell* 5 Khan page 74
3. *Suzette Campbell v. Wilbert Dillon* 5 Khan page 50.

In *Wright v. Marsh* the claimant Mr. Wright was hit from his motorcycle. He suffered a comminuted displaced fracture of the left femur, a compound comminuted fracture of the left tibia and fibula with missing bone and a fracture of the left tarsal navicular bone. He also suffered from some other non-bony injuries, which were relatively minor. Like Mr. Mollison, Mr. Wright underwent an extended period of recovery and had not been able to return to his usual vocation. His resulting disability was permanent, though not quantified.

\$1,500,000.00 was the then (17/4/98) award for general damages. When converted to today's value using the Consumer Price Index (CPI) for January, 2006 of 2295.7, the result is approximately \$3,000,000.00.

In *Fairweather v. Campbell* Mr. Fairweather was also hit by a reversing vehicle. His major injuries were a compound fracture of the left tibia and fibula, a battered and painful shoulder and whiplash injuries resulting in tenderness and stiffness to the neck and upper spine. He was eventually assessed to have a permanent functional impairment of 7-10% of the lower left limb.

I am of the view that since the major injury which affected Mr. Fairweather was the whiplash injury, this case is not an appropriate guide for assessing Mr. Mollison's case, where the major injuries are the fractures.

In *Campbell v. Dillon*, Miss Campbell was injured in a motor vehicle crash. She suffered, in addition to abrasions, swelling and tenderness, multiple fractures to the right hemi pelvis, a fracture of the pubic bone and a fracture of the acetabulum. After an extended period of complete bed rest and thereafter physiotherapy, she was found to have fully recovered after four months. She did however have some occasional pain and a susceptibility to complications such as osteo-arthritis. Almost a year later, she was again assessed and found to be suffering from a 1½" shortening of the right lower limb, subluxation (partial dislocation) of the right sacro iliac joint and dislocation of the pelvic ring. She was then experiencing pain over the right side on walking. Her permanent partial disability was assessed as being 10% of the whole person.

The general damages assessed at \$1,300,000.00 on 5/6/2000 converts to approximately \$2,400,000.00 using the CPI for January 2006.

I find that the *Campbell v. Dillon* case is the best guide in assessing the instant case. Mr. Mollison's injuries, though resulting in the same level of permanent disability were more extensive in terms of the number of

fractures. Mr. Nicholson submitted that the sum of \$3,500,000.00 would have been an appropriate award, but in light of the similar levels of permanent disability I find that that sum would be exorbitant. An award of \$2,800,000.00 would be more in keeping with the situation, and I so find.

### **Special Damages**

The major difficulty with Mr. Mollison's claim for special damages is that he was generally unable to say what were his expenses, with whom they were incurred and whether the bills were paid or not. He testified that the majority of the transactions were handled by his son and his niece, but neither of those persons was called to give evidence. A number of receipts bearing his name were admitted into evidence, but they were not linked to his injuries by any testimony.

In his statement of claim, Mr. Mollison pleaded special damages as follows:

"Hospitalization	\$187,200.37
Ambulation Transport	6,000.00
Laboratory Procedures	62,872.00
Pharmaceutical Supplies	35,515.89

#### Professional Fees for Fixation

Dr. Paul Scott	50,000.00
Dr. Clive Thomas	145,000.00
Dr. Mark Minott	785,000.00
Dr. D. E. Brown – Physiotherapist	3,200.00
Pancreatitis Nutritional Meals	100,000.00



Post Operation Nursing Care	480,000.00
Post Discharge Physiotherapy	225,000.00

Other Related Expenses

Ripple Mattress	1,200.00
Wheelchair	21,000.00
Arm Crutches	2,650.00
Hinge Knee Brace	15,000.00
Commode	5,200.00
Urinal	120.00
Adult Briefs	15,000.00
Incontinence Pads	9,750.00
Police Report Fee	1,000.00
Pictures of Plaintiff's Injuries	376.47
Airline ticket for Plaintiff's Nephew	31,920.00
Taxis to and from Hospital	<u>18,400.00</u>
Total	\$2,201,404.73"

A Notice of Intention to Tender Evidence contained in a document was filed and served on 2<sup>nd</sup> February, 2006. In it a number of documents were listed. Copies of the documents were served on the attorneys representing the Andersons. These documents listed included:

- “13. Receipts from St. Joseph Hospital dated 8/6/00 – 9/8/01;
- 14. Receipt from Carimed dated 3/7/00;
- 15. Receipts from Dr. Mark Minott dated 30/6/00 – 20/11/01;
- 16. Receipts from Dr. Carolyn Donaldson dated 18/8/00 – 10/11/00;
- 17. Receipts from Dr. D. E. Brown dated 19-28/7/00;
- 18. Receipts from Biomedical Laboratory dated 6/6/00 – 20/7/00;
- 19. Receipts from Green Acres Nursing Centre dated 5/8/00 & 1/11/00
- 20. Receipts from Medical Essentials Limited dated 27/6/00, 28/7/00 & 2/8/00; and
- 21. Receipt from Dr. Anthony Davis dated 28/6/00.”

In his testimony Mr. Mollison spoke of his stay at St. Joseph's and at Green Acres. He also testified about operations being done by Dr. Minott and Dr. Thomas and at Spanish Town Hospital. He testified about having to wear Pampers and to get a police report and prescriptions, but without any particulars. He said that he had to take a taxi from his home at Horizon Park to Spanish Town to go to the doctor, and that the cost was \$500.00 each way. Apart from that figure, however, he was unable to specify any figure for any expense which he incurred as a result of these injuries.

The well known quote from the case of *Bonham-Carter v. Hyde Park Hotel Ltd.* (1948) 64 T.L.R. 177 (per Lord Goddard, C.J. is apposite in this situation and I repeat it here:

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying:  
“This is what I have lost; I ask you to give me these damages.’  
They have to prove it.”

It is therefore usual and expected that claimants such as is Mr. Mollison would provide the required proof by giving evidence of the sum expended and supporting it with the documentary evidence. At 65 years old Mr. Mollison is not an old man, yet he testified that his poor memory is; “coming from the accident. My memory was OK before the accident”. There is no medical evidence to support that statement, but the question is should the

court place any reliance on these various receipts tendered in evidence without the evidentiary link to Mr. Mollison's injury. In answering that question I rely on another well known principle, cited in *Desmond Walters v. Carlene Mitchell* (1992) 29 JLR 173. It is to the effect that the court should take into account the circumstances of each case in deciding what the reasonable approach in assessing the evidence was. In that case Wolfe J.A. (Ag.) (as he then was) said at p. 175 I – 176 C:

"At paragraph 1528 of McGregor on Damages 12th Edition the learned Author states:

"However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L.J., laid this down in the leading case on pleading and proof of damage, *Radcliffe v. Evans* [1892] 2 Q.B. 524 (C.A.). In relation to special damage he said:

"The character of the acts themselves which produce the damage and the circumstances under which these acts are 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.*" (Emphasis added)

Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of C a well organized corporation may well be what Bowen, L.J., referred to as "the vainest pedantry".

In *Walters v. Mitchell* the court was dealing with a case where there was an absence of documentation. In Mr. Mollison's case extensive documentation exists. I am of the view that given the extent of the documentation, the period of time for which he was incapacitated and the

fact it was a son and a niece who conducted the various transactions on his behalf, it would be unreasonable for the court expect Mr. Mollison to be able to remember the details of the expenses incurred. It is true that they should then have been called to testify, but he said that his son lives in Canada. No explanation was given for the absence of the niece who assisted him. I nonetheless find that the Anderson's Attorney-at-Law having been alerted of the intention to tender the documents, they should be allowed to be tendered in evidence and relied upon by the court in assessing the special damages, if they are otherwise credible.

Using this approach I find that the following expenses have been pleaded and proved:

Hospitalization (Exhibit 7)	\$187,200.37
Laboratory Procedures (Exhibit 12)	62,872.00
Pharmaceutical Supplies (Exhibit 8)	2,773.80
Dr. Paul Scott (Exhibit 4)	50,000.00
Dr. Clive Thomas (Exhibit 3)	55,000.00
Dr. Mark Minott (Exhibit 9)	126,200.00
D. E. Brown – Physiotherapist (Exhibit 11)	3,200.00
Post Operation Nursing Care (Exhibit 13)	155,800.00
Post Discharge Physiotherapy (Exhibit 10)	66,000.00
Ripple Mattress (Exhibit 14A)	1,200.00
Hinge Knee Brace (Exhibit 14A)	15,000.00
Urinal (Exhibit 14C)	120.00
Police Report Fee (Exhibit 7A)	<u>1,000.00</u>
Total	\$725,866.17

For some items, the actual expenses as set out in the exhibits were more than the amount pleaded, (especially bearing in mind the time of

pleading) but Mr. Mollison would be limited to the amount pleaded. Some items were not allowed. One such was the claim for taxi fares. The fares claimed were not for transporting Mr. Mollison but his son. Without there being evidence as to why this expense was incurred it cannot be allowed.

There is one further point which needs to be addressed. Dr. Minott, opined that Mr. Mollison would require total knee replacement for both knees. There was no pleading for the knee implants however and so Mr. Mollison would not be entitled to recover the sum. In any event there was no proof of the amount of the expense, as the figure quoted by Dr. Minott (mentioned above) could not be considered evidence on the point.

In summary therefore damages are awarded as follows:-

General Damages

Pain & Suffering & Loss of Amenities      \$2,800,000.00

with interest thereon at 6% per annum from 14/7/00 to 29/5/06.

Special Damages      \$725,866.17

with interest thereon at 6% per annum from 4/6/00 to 29/5/06.

Costs to the Plaintiff fixed in the sum of \$89,000.00.