



[2020] JMSC Civ 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013/HCV06818

BETWEEN	JANE WILLIAMS THOMPSON	CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	1 ST DEFENDANT
AND	SHELDON HARRIS	2 ND DEFENDANT

IN OPEN COURT

Ms. D'Andra Grant-Wright instructed by K. Churchill Neita and Company for the Claimant.

Mr Dale Austin instructed by the Director of State Proceedings for the Defendants.

Assessment of Damages, Special Damages - General Damages - Claim for Reduced Pension - Whether the Claim should be for Loss of Earning Capacity.

Heard 30th of January 2020 and the 20th of May 2020

THOMAS, J.

Introduction

[1] This Claim is for damages in relation to a motor vehicle accident which occurred on the 28th of January 2013. Judgment was entered on admission in terms of liability. The Claimant Jane Williams-Thompson is a medical doctor. She testifies that as a result of the accident she sustained the following injuries:

She felt pain all over her body especially her right hip and leg. She could not move her hip because the least amount of movement cause pain. She had cuts to her right arm, left leg, right side of her forehead and right eye.

[2] She states that:

She was first treated at the St Ann's Bay hospital, then she was transferred to the University Hospital of the West Indies the next day. X-ray confirmed that she had a fractured femur. She was in pain the whole time though she got medication. She had a close reduction screw fixation surgery. She was discharged on the 2nd of February, 2013. to do follow up physiotherapy. She was having dreams about the accident and dying. She was not sleeping well at nights, irritable in the days, and had issues with being driven by people. If she had to go anywhere she had to sit right behind the driver and keep her eyes closed for the entire trip. Dr. Lewin psychologist diagnosed her with posttraumatic stress disorder

[3] She further testifies that:

After she got discharged from the hospital she had crutches to help her around. She developed constant pain in her left hand. X-ray revealed a fractured thumb. She had to use a wheel chair. The injuries affected her marriage in a bad way. She was unable to engage in sexual intercourse for months due to pain and stiffness in her hip. She had limited therapy in the hospital and had to pay for private therapy. She also did acupuncture in England for pain relief. Up to September 2013 she was still feeling pain. X-ray showed that she had a small collapse in the implant. She was not able to resume work until 6 months after the accident. Up until March 2014 she was still feeling the side effects of the accident. When she walked for more than 20 minutes she would feel pain in her right buttocks. She had difficulty coming downstairs as her right leg was weaker than the other which made her feel unbalanced and had a big issue sleeping on her right side because she felt pain so bad. Nothing seemed to be helping with the pain.

[4] Her evidence continued as follows:

In England she was referred by Dr. Cunningham because of the constant pain to Orthopaedic Surgeon Doctor Census. She was seen by Doctor Census in June 2016. Doctor Census found that the metal screw in her hip was displaced. She did surgery to remove the metal work from the hip with a view to do the hip replacement as recommended by Dr. Census. She did acupuncture before and after the surgery. She was never able to achieve full pain relief with acupuncture but it reduced the pain so that she could function in her everyday life. She had to have more therapy and exercise to regain her muscle strength. She also saw Orthopaedic Surgeon Doctor Mcloughlin in November 2016 as she was still feeling pain and discomfort in her thumb and right thigh. It was recommended that she did heel raise to address 1.5cm shortening of her right leg. The heel raise will last for 5 to 10 years.

[5] She further states that:

After the 2nd surgery she was out of work for another 6 months period. She came back to Jamaica and was attended to by Orthopaedic Surgeon Doctor Grantel Dundas in May 2017. She was still experiencing pain and stiffness in her hip, pain in her right knee and intermittent pain in her right thumb. She was diagnosed with avascular necrosis. That is bone tissue damage, due to interruptions in blood supply. She returned to England and was attended to by Doctor Mc Gregory Riley who referred her to consultant Orthopaedic Surgeon Doctor Kerry who specializes in hip replacement. He performed a hip replacement surgery in November 2017. She had 6 months, rehabilitation after that. During the time she was unable to walk like she used to. She had to use crutches. She did another course of acupuncture to ease the pain and physiotherapy. This helped but she is not back to her pre accident status but better than right after the accident.

[6] She says that:

Now, six years after the accident she still feel pain in the hip whenever she sits for too long, bend down switch between sitting and standing and when she walks for too long. She can't go through regular physical activity, exercise, running and jumping, which limits her previous lifestyle. She missed out on job opportunities. There was concern about her mobility following her second hip replacement. She had to take out an NHS pension after the accident as she had no source of income. This involved a 40% reduction in pay out as she was only 50 years old. It is not sufficient to live on in the UK and has long term financial implications. She was doing farming and fishing. She is no longer able to do so now. She is now having problems in her right knee which has some osteoarthritis and swells on the medial side. She was a Locum Physician in England. That is, she filled in for regular physicians when they are out. She was normally employed on a six months contractual basis. She was unable to perform her duties as a Locum Physician. She cannot undertake any high impact activities like sport which she used to do a lot of. She used to farm and fish in Jamaica. She cannot do that now. She gets stiffness and pain if she does too much activity. She will need another hip replacement in the next 10 to 15 years

[7] She has tendered in evidence:

Letters relating to a lost contact and reduced pension benefits, medical reports, medical receipts and receipts for acupuncture.

[8] On cross examination she states that:

In her witness statement she did say she gave evidence that she undertook acupuncture on the advice of her orthopaedic doctors. None of these doctors wrote this down in their medical reports. She was directed to undergo physical therapy. She was advised that this would improve the prospects of her recovery. She agrees that she began her physiotherapy sometime after the accident occurred. She had 3 operations. She had to

have physiotherapy after each one. She was on crutches after every operation for at least 3 months. The muscles in her leg wasted and the physiotherapy was to rebuild the muscles. The first time she started physiotherapy she was in Jamaica.

- [9] She explains her decision for choosing acupuncture over strong medication for her pain relief. She states that the acupuncture helped by providing pain relief. She did take some pain medication in the earlier stages. They helped the pain but gave her side effects like indigestion and constipation. She found the acupuncture better. The acupuncture lasted longer in terms of the relief from the pain, and it reduces the severity of the pain and she had no side effects.

Discussion

Special Damages

- [10] In relation to the special damages I find that the Claimant has provided reasonable justification and evidence for the expenses in relation to her medical expenses and transportation. I accept her explanations that she has given for choosing acupuncture over strong medication for her pain relief.
- [11] Despite the absence of receipts, I find that the travelling expenses are reasonable and have been justified. There is unchallenged evidence that the Claimant had to travel to various treatment centres, doctors, and hospital in relation to her injuries.
- [12] Mr. Austin submits that the Claim for Special Damage appears to be reasonable except in relation to the loss of use of motor vehicle. I am constrained to share this view. I find myself unable to make any award in relation to the damages to motor vehicle and loss of use. Essentially, I find that it reasonably expected, in the circumstances that supporting documents would have been produced from the wrecker company and assessors, in light of the fact that these entities cannot be considered to belong to the informal sector. No such supporting documents have

been furnished. Therefore, I find that the special damages that the Claimant has proven are as follows:

Special Damages

Medical related expenses	JD\$265, 2333.59
	<u>£761.74*180.3= 137,341.722</u>

Transportation expenses as follows:	\$ JA 60,000
	<u>£ 48,0000</u>

General Damages

[13] The initial medical examination of the Claimant on the 28th of January, 2013 reveals that the Claimant suffered from:

- (i) Hematoma and laceration to the right forehead.
- (ii) Small laceration ½ inch cornea of the right eye brow
- (iii) Multiple abrasion and excoriation to the mid third of right arm
- (iv) Multiple abrasions and excoriation to medial aspect distal third of left leg.
- (v) Right hip tender, lateral rotation of right foot
- (vi) Fracture to the head of the right femur.
- (vii) She was treated with screw fixation (See the report of Doctor Sloley)

[14] On the 7th of March 2013 she was examined by Dr. Maxim Christmas. He found that Radiograph revealed a displaced fracture of the right neck of the femur. She was diagnosed with right displaced trans cervical neck femur fracture. She was assigned 7% PPD of the lower extremity with 3% PPD of the whole person. His prognosis was that she recovered from the injury to the right hip joint but there was increased risk of her developing degenerative disease of the right hip in the future

[15] On the 22nd of June 2016 the Claimant was examined by Doctor Sandor Csernus. The doctor found that she had healed femoral neck fracture but radiography also showed signs of secondary osteoarthritis in the hip, and early anteromedial osteoarthritis. Removal of metal work and hip replacement surgery was done. She was reviewed on the 7th of September 2016. In the report dated September 15th 2016 the doctor indicates that she showed no signs of surgical complication. The hip was less painful but she complained of pain in the knee. No feature in the hip was found and the knee was preserved.

[16] Doctor S. J Mcloughlin attended to her on the 25th of November 2016. His examination revealed:

- (i) 25kgs grip strength to the dominant hand compared to 20kgs force in the non- dominant left hand.
- (ii) 1.5cm shortening in the right femur compared to the left.
- (iii) 45-degree AB abduction in the left hip 20% on the right side; External rotation 45 degree to the left compared to 20 to the right; internal rotation 25 degree to the left compared to 10 to the right.

[17] The doctor further indicates that:

She will always suffer from moderate discomfort in her right hip for the remainder of her life. There is 30-50% likelihood of her requiring hip replacement surgery. This is not likely before the next 15 years. In relation to knee, the likelihood of replacement was 10-15 %. He noted fracture to left thumb. The likelihood of requirement for surgery was less than 10%. He recommended carbon fibre heel raise on her right side of $\frac{3}{4}$ inches. Each insole would last 5-10 years.

[18] She was examined by Doctor Grantel Dundas on the 24th of May 2017. Doctor Dundas diagnosed her with status post fracture right hip with surgical fixation. Impairment at 2017 revealed avascular necrosis of hip and a range of 16% lower

extremity whole person impairment - 6%. Total hip replacement surgery was performed in November 2017.

[19] She was again examined by Doctor Dundas in 2020. In his report dated, January 22, 2020 Dr. Dundas revealed his finding as follows:

- i. Limited internal rotation of the right hip to 15°;
- ii. Flex to 120°, externally rotate 43°, abduct 25° and adduct 20°;
- iii. 19cm posterior lateral upper thigh and gluteal scar reflective of the low friction arthroplasty procedure;
- iv. 8cm sub-trochanteric scar of the previous surgery which had been done for fixing her hip fracture;
- v. Right thigh 1 cm larger than the left;
- vi. She walked with a mild limp;
- vii. Asymmetry of her gait was noted mainly in the swing phase.

[20] Dr. Dundas' diagnosis is as follows:

- i. Status post low friction hip arthroplasty with good result
- ii. Based on the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is as follows:

[21] The Claimant relies on the authority of **Eric Buchanan v Elias Blake** SCCA 2 of 1993. The injuries suffered in that case were:

1. Fracture of right Sacro-iliac joint with dislocation [Acetabulum (cup) was fractured and his allowed for dislocation of the joint].
2. Rupture of Ligaments – not practical to repair the torn ligament in the joint.

3. Weakening and flexion deformity 5 degrees.
4. Internal rotation restricted by 15 degrees.
5. 1 cm loss of muscle bulk.
6. Permanent Partial Disability of right lower extremity assessed at 12%.
7. A high probability of the development of osteoarthritis in the joint and lower back which the Doctor expected to show up around the age 45.

[22] Physiotherapy was recommended to mobilised the joints. Dr. G.G. Dundas F.R.C.S. who gave evidence at the trial suggested an alternative method of treatment either total hip replacement or fusion of the joint with preference for the former as this would remove the hip pain completely. However, the artificial hip would place limitations not then existing. For example, the Claimant could not jump, run, stoop, or squat or take part in active sports other than golf or swimming. The cost of the surgery was estimated at \$100,000.00. The general damages awarded in October 1992 were \$400,000 which revalues to \$6,311, 627.23 cents.

[23] Counsel for the Claimant submits that the Claimant at bar has more extensive injuries and that the treatment received was also more extensive. She points to the fact that three (3) major surgeries were done as compared to two (2) in the *Eric Buchanan* case.

[24] She further submits that:

Both Claimants had a high probability of recovery of osteoporosis. The pain of the Claimant in the case at bar expanded to 40%. She gave evidence of loss of enjoyment of amenities: sports, limitation exercising, ability to carry weights and complaints still ongoing. Considering surgery and period of rehabilitation, the Claimant in the case of at bar is deserving of an increasing award.

[25] She suggests, that an award of \$9,500,000 to \$10,000,000 is appropriate for general damages.

- [26] Mr. Austin on behalf of the Defendants relies on the cases of **Lewis Brown v Mendez** L1995 B120- Khans Vol 5- and **Carlton Parkins v Tennison Taylor CL 1989 Page 49 Khans Vol 4 page 45**. In the case of **Lewis Brown v Mendez (Supra)** The Claimant had lacerations to eye and face as well as fracture to the femur and left-leg. The Claimant did only one surgery on the 4th of October 1989 in which Steinman pins were inserted. These were removed by December 1989. The Claimant also had a 1 cm shortening disparity between the two legs. The doctor's prognosis was that maximum recovery would occur within 1 and ½ year from the date of injury.
- [27] The PPD impairment rating to Brown was 10% whole person. The award on the 10th of July, 1998 for General Damages was \$800,000.00 which updates to \$4,475,501.34.
- [28] In the second authority of **Carlton Parkins v Tennison** the injuries to the Claimant: included, fracture of the right femur, laceration to forehead, to the ear, to the thigh and other injuries including scars. He was assessed with a 10% PPD rating for the right lower limb. In 1991 General Damages was awarded in the sum of \$180,000.00 which updates to \$3,909,146.27.
- [29] Mr. Dale Austin by way of his submission concedes that:
The case of **Buchanan** relied on by Counsel for Claimant is a reasonable authority also. The Claimant's contention that her injury is more severe than Buchanan's seems valid as in the case of **Buchanan** there were 2 surgeries whereas in the present case there were three major surgeries.
- [30] I also examine the more recent authority of **Hyckroy Gordon v Howard Green and Ruby Pantan** [2012] JMSC CIV. 1
- [31] In that case the Claimant was diagnosed with a dislocated right hip. The Claimant was last seen at the University Hospital on the 4th of December, 2000, four months after the accident. Total Hip Replacement was deemed necessary on the 25th May, 2001. He was discharged on the 3rd May, 2001. When examined in July 2001

the hip was found to be unstable and there had been loosening of the femoral component. Examination revealed a heavy growth of pseudomonious. Revision hip replacement was done on the 2nd January 2002.

[32] In the final examination, the Claimant was diagnosed with an obvious short gait limp as his right leg was shorter by 2.5 cm than the left. He had a total whole person disability of 17% due to limb discrepancy and the hip replacement. It was also stated that he would require hip replacement surgery in 15 years. On the 3rd of October 2012 he was awarded damages for pain and suffering in the sum of \$5,000,000. This sum revalue to \$7,061,774.

[33] Despite the fact that the PPD in the aforementioned cases is higher than that in the case at bar I take into consideration that, despite the fact of the primary injuries being the same, the Claimant in the instant case also suffered other injuries such fractured thumb and pain in the knees. Similar to the Claimant in the of ***Hycksroy Gordon v Howard Green and Ruby Panton***, she had three surgeries done, two of which were major hip replacement surgeries and the other which was prior to these was a screw fixation surgery. Like Mr. Gordon she will require hip replacement in 15 years.

[34] Therefore whereas the injury in relation to the hip in the ***Hycksroy Gordon case*** appears to be more serious than that of the Claimant in the instant case in light of the higher PPD I find for the reasons outline her pain and suffering are comparable and most likely longer than that of the Claimant in the ***Hycksroy Gordon*** case. Therefore, it is my view that in spite of the higher PPD she should be awarded a sum in the same range as ***Hycksroy Gordon***. I also bear in mind my responsibility to aim as best as possible for uniformity in the awards. Therefore, I make an award of \$6,500,000 for pain and suffering and loss of amenities

Loss of Contract/ Loss of Earnings

[35] The Claimant also claims damages for loss of earnings/loss of contract.

She has submitted supporting documents from:

- (i) Sheffield Teaching Hospital indicating that she regularly worked with GP Collaborative over the summer months for the past three years (immediately prior to the accident) and that her average earnings was €28,813.55 for the year.
- (ii) Partnership in Care in which the writer of the letter confirms that an offer to enter into an employment contract was made to Ms. Thompson on the 26th of May 2016. The contract price was, €26,000. The contract was provisional on Ms Thompson passing all pre-employment checks.

[36] The evidence of Ms. Williams is that after she was discharged from the hospital in February 2103 she had to do follow physiotherapy. She developed constant pain in her left hand. X-ray revealed fractured thumb. She had to use a wheel chair for months due to pain and stiffness in her hip. Up to September 2013 she was still feeling pain. X-ray showed she had small collapse in the implant. Up until March 2014 she was still feeling the side effects of the accident. This evidence has not been challenged.

[37] Additionally, it is also her unchallenged evidence that she was seen by Doctor Census in June 2016, who found that the metal screw in her hip was displaced. She did surgery to remove the metal work from the hip with a view to do the hip replacement as recommended by Dr. Census. She could not have taken the job offer with Partnership Care as they were concerned about her mobility following her second hip replacement.

[38] Her evidence is also supported by the evidence of Doctor Sandor Csernus who reports that on the 22nd of June 2016 he examined her and that radiography showed signs of secondary osteoarthritis in the hip, and early anteromedial osteoarthritis. Further, removal of metal work and hip replacement surgery was done.

[39] Therefore, in light of the evidence I accept the evidence of the Claimant that she was not able to work with GP Collaboratives for the summer of 2013 nor accept the job offer from Partnership Care in 2016.

[40] Consequently, I find that her Claim for € 28,813.55 for the year 2013 and € 26,000 for the loss of the contract with Partnership Care are reasonable. Therefore, I find that the Claimant has sufficiently established that she is entitled to the sum of €54,813.00.

Reduced Pension

[41] The Claimant is seeking to recover sums for reduced pension. The sum she is claiming is equivalent to the reduction in her lump sum payment in addition to the total reduction in her yearly payment from the 4th of June 2013 to the date of her normal retirement age which would be age 60.

[42] The Claimant testifies that having worked with the National Health Services (NHS) for 25 years she is entitled to a pension on retirement. The normal retirement age is 60 years. However due to the injuries from the accident she was forced to take early retirement on the 4th of June 2013 at age 50. She has produced documentary evidence from NHS Pensions Center to indicate the following;

- i. As at the 14th of June 2013 she is in receipt of reduced pension consisting of a lump sum of 30,847.20 pounds yearly sum of 8,921.70 pounds
- ii. Before reduction the lump sum would have been €42,083.49 and the yearly sum would have been €14,027.83.

[43] Mr Austin submits that The Claimant is not entitled to damages for reduction in pension as there is no medical evidence supporting the Claimant's decision to take early retirement. He however admits that her injuries until corrected, "surgically and therapeutically are likely to pose challenges in her daily living, but the evidence does not go so far as to indicate that early retirement was necessary." He

suggests, that the Claim should be for loss of” future earning capacity/handicap on the labour market ought to have been pleaded and pursued instead”

[44] However, as it has been correctly pointed out by Counsel for the Claimant. in relation to the assessment of damages, the courts have placed loss of pension in a totally different category from lost wages. In the case of **Parry v Cleveland** 1970 AC 1 the court had to address this issue.

[45] The court found that the relevant questions to be considered are:

“First, what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident he can no longer get? And secondly, what are the sums which he did in fact receive as a result of the accident but which he would not have received if there had been no accident? And then the question arises whether the latter sums must be deducted from the former in assessing the damage.” (See the Judgment of Lord Reid on Page 1).

[46] The court further stated that:

“A pension is intrinsically of a different kind from wages. If one confines one’s attention to the period immediately after the disablement it is easy to say that but for the accident he would have got pounds X, now he gets pounds Y, so his loss is pounds X-Y. But the true situation is that wages are a reward for contemporaneous work, but that a pension is the fruit, through insurance of all the money which was set aside in the past in respect of his past work. They are different in kind” (See the Judgment of Lord Reid on page 4).

[47] Therefore, in light of the afore-mentioned authority the question for me to determine is this, but for the accident what is the value of the pension that the Claimant would have received. Essentially the damage the Claimant would be entitled to is the difference between the sum she would have received were it not for the accident and the sum she receives as a result of the accident. The

Claimant's evidence is that she was forced to go into early retirement in 2013 at age 50 as a result of her injuries from the accident.

[48] Ms. Thompson has produced evidence of loss job opportunity in 2013 and 2016 as a result of her injuries that is in the form of the letter from "Partnership in Care" and Sheffield Teaching Hospital. On the contrary, there is no evidence that other job opportunities became available to her which she did not accept. In the circumstances the Claimant was entitled to mitigate her losses and to seek sustenance for herself prior to and even during the pursuit of her legal remedy.

[49] In light of the fact that there is no evidence of the Claimant turning down any opportunity to work, the option of early retirement being available to her as a recourse in terms of mitigation and sustenance, I find that the submission of Mr. Austin that she should be claiming for loss of earning capacity is seriously flawed. I note that the total hip replacement, the third surgery was done in 2017. There is no indication or evidence that having by necessity exercised the option to go into early retirement in 2013, which is clearly provided for by the pension scheme, and for which she would have duly satisfied the requirements that after 4 years, there is provision for her to come out of retirement. That is also in light of the fact that, she would now be 4 years closer to the retirement age.

[50] I note that the evidence of the Claimant is that, now six years after the accident she still feels pain in the hip whenever she sits for too long, bend down, switch between sitting and standing, and walks too long. In May 2107 she was still experiencing pain and stiffness in her hip, pain in her right knee and intermitted pain in her right thumb. Her last hip replacement surgery was in November 2017. During the months of rehabilitation and after that she was unable to walk like she used to. She is not back to her pre accident status but better than right after the accident.

[51] I also note that when she lost the employment contract in 2016 that was subsequent to her first surgery. Her evidence that the concern related to her

mobility was not challenged. It is therefore clear that up to 2016 there was a concern in relation to the Claimant with regards to her injuries and her ability to function in her vocation. At the time that she opted for early retirement her condition would have been less manageable, as by then, the first hip replacement surgery had not yet been performed. Therefore, I find that the Claimant has established that but for the accident she would not have gone into early retirement and that it is, as a result of her injuries that she was forced into early retirement.

[52] Additionally, she has established, that her pension has been reduced, which, but for the accident would not have been reduced. Therefore, I find that the Claimant has established that she is entitled to damages for reduced pension as follows:

Loss (Reduction) in Lump sum	€11,362.41
Loss in annual payment from 4/6/13 to present to June 2019	€ 36,330.00
Future Loss up to the normal retirement	
Age. That is age 60 (€5190x4)	<u>€20,760.00</u>
Total	€ 68,452.41

In light of my assessment of all the evidence I make the following orders.

Damages are awarded as follows:

Special Damages

Medical related expenses	<u>JD\$265, 233.33</u>
	<u>£761.74</u>
Transportation expenses as follows:	JD\$60,000
	<u>£ 48,0000</u>

Interest at the rate of 3% from the 28th of January 2013 to the 20th of March, 2020.

Loss of Contact /Earnings €54,813.00.

Interest at the rate of 3% from the 26th of May 2016 to the 20th of March, 2020

REDUCED PENSION

Loss (Reduction) in Lump sum £1,362.41

Loss in annual payment - 4/6/13 to date €36,330.00

Total £47,692.41

Interest at 3 % from the 4th of June 2013 to the 20th of March 2020

Future Loss of Pension £20,760 (no interest)

General Damages **\$ 6,500,000**

Interest at the rate of 3 % from date of service to the 20th of March, 2020.

Cost to the Claimant to be agreed or Taxed.