IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.2002/B092

BETWEEN	ROGER BROWN	PLAINTIFF
AND	CECIL BASSARAGH	1ST DEFENDANT
AND	SHELDON BASSARAGH	2ND DEFENDANT
AND	MICHAEL TULLOCH	3RD DEFENDANT
AND	ERROL Mc KENZIE	4TH DEFENDANT

Miss Dorothy Gordon for the Plaintiff.

Mrs. Suzette Campbell for the 1st and 2nd Defendants instructed by Campbell & Campbell.

Assessment of Damages

Heard: 17th, 18th, 23rd & 28th July, 2003

BROOKS J.

The Plaintiff in this action claims damages for negligence against the 1st Defendant as the owner, and the 2nd Defendant as the driver, of a motor truck which struck the motor car then being driven by the Plaintiff. The collision occurred on the 19th September 2001 and as a result the Plaintiff suffered personal injuries. The damage to the motor car being driven by the Plaintiff is not a factor in the action.

A Writ of Summons was issued on behalf of the Plaintiff on 6th June 2002. An Interlocutory Judgment in Default of Appearance was entered against the 1st and 2nd Defendants on the 25th July 2002. These Defendants subsequently entered an appearance but have not contested liability. The action has since been discontinued as against the 3rd & 4th Defendants.

The injuries suffered by the Plaintiff as a result of the collision were outlined in a report from Dr. Mark Minott, who treated the Plaintiff on his being admitted to the Spanish Town Hospital. Dr. Minott's report has outlined that the Plaintiff had suffered:

(a) injuries to the face and right side of the body

(b) a painful right hip which had significant restriction of movement

(c) swelling and tenderness in the right foot

Radiographs done, confirmed that there were fractures of the right acetabulum and of a metatarsal of the right foot. Treatment was initially by way of traction. Dr. Minott's report, after outlining these aspects, concluded with the following:

> "He was treated in this manner for two weeks, and discharged on October 3, 2001. He was advised to ambulate with the aid of crutches for six weeks, non weight bearing on the right lower limb.
> Mr. Brown was last seen on November 15, 2001 in the Orthopaedic Out Patient Clinic. At that time he was able

> to ambulate without crutches, comfortable (sic). He was discharged from the clinic on that visit.
>
> Summary
>
> Mr. Brown sustained injuries consistent with the stated history. He had a temporary disability of three months duration. He has healed with no permanent impairment."

Contrasted with this very positive report was the testimony of Dr. Grantel Dundas, who testified at the behest of the Plaintiff and whose written reports in respect of the Plaintiff's injuries were placed in evidence.

Dr. Dundas testified that he first examined the Plaintiff on 26th April 2002. The Plaintiff's complaints, to Dr. Dundas, then were:

(a) Pain in the right hip radiating to the right knee

(b) Pain in the scrotum with sexual intercourse

(c) Back stiffness

(d) Numbness in the instep of the right foot.

An examination by Dr. Dundas along with reference to the X-Rays done at the Spanish Town Hospital allowed Dr. Dundas to initially report as to the Plaintiff's condition in the following terms.

> "In the extremities, his gait was normal.
> He executed full range of motion of the hips. He had pain at the extremes of rotation and abduction as well as flexion. There was no measurable wasting and power was rated as IV + /V in the adductors and abductors of the hip. His knee was unremarkable. In the examination of his foot, he

> exhibited mild limitation in eversion but no other pathology."

Dr. Dundas confirmed the diagnoses by Dr. Minott, but was more detailed, in that he reported the results of the X-Rays as showing:

> "A minimally displaced fracture of the medial wall of the right acetabulum; the femoral head intact and no dislocation noted.
> Fracture of the base of the third metatarsal - undisplaced."

Significantly, Dr. Dundas opined in his first written report that:

> "Mr. Brown has not yet reached maximum medical improvement. I think that he will probably be at that point about a year from his injury. In the interim, he should continue a programme of physical theraphy for strengthening and mobilization of his right hip. No treatment is required for his foot."

In his oral testimony Dr. Dundas indicated that by the 26th April 2002 the Plaintiff's metatarsal fracture had already healed and the fracture to the acetabulum was healing.

The Plaintiff consulted with Dr. Dundas on two later occasions being 10th June and 29th September 2002, respectively.

In June the Plaintiff complained of a pain in the right knee and low back in the vicinity of the kidney. The doctor found tenderness in the right kidney area with spasm in the muscles overlying that area. "However", said the doctor, "there was no evidence of any pathology distally."

Further the doctor said that the Plaintiff had complained of passing blood in his urine the very morning of the examination, yet when the urine was evaluated it did not reveal any blood.

When the Plaintiff was again evaluated in September 2002 he complained of pain in the right knee, back-ache and blood in his stool. At that time the Plaintiff "walked with a painful limp and pointed to his right hip and groin area as the sources of pain."

The examination recorded one new feature namely "a questionably positive test for miniscus injury to his right knee".

Dr. Dundas in a written report dated October 4, 2002 said in respect of the complaint of blood in the stool that, "I do not think that this is traceable to the injury itself."

Dr. Dundas' latter report which was addressed to the Plaintiff's Attorney-at-Law concluded with the following:-

> "I suggested to Mr. Brown that he should have a CAT scan of his right hip performed. He also needs to have arthroscopy of the right knee to evaluate the internal status and, depending on the findings of these investigations, he could go on to have a program (sic) of physical therapy.
>
> "Mr. Brown currently suffers from some disability relating to the right lower extremity. It would not be appropriate however, to quantitate these, as the values could change with time and a more enlightened diagnostic status."

Dr. Dundas maintained this opinion in his oral testimony.

When the Plaintiff entered the court to give evidence, he was wearing slippers. He walked slowly and with a limp. He requested to be seated as he said that he was unable to stand for any period. He generally projected a picture of despair arising from his physical situation, and had to be frequently reminded of the reason why he was in court. He cried at one stage during his examination in chief. His demeanor as a witness was wholly unimpressive. Upon finally leaving the witness box his parting words to the court were to the effect that regardless of what the court decided, he would still be left with his injury.

In her closing submissions Mrs. Campbell has accused him of malingering. If in fact his performance in court were genuine it would seem that he ought to seek medical treatment to determine whether he is suffering from clinical depression. I have included that preamble to the treatment of the Plaintiff's evidence because it has affected the court in its task in assessing the damages to be awarded to the Plaintiff.

The Plaintiff who, in his evidence, said that he is forty one years old, testified that prior to his injury arising from the collision he operated a route taxi for a living. He had been a sideman on a truck after leaving school at grade eight. Upon securing a license to drive public passenger vehicles, he

started driving such vehicles for a living. He did not have his own vehicle but drove one owned by a Mr. Panton.

Apart from that activity the Plaintiff said that he also earned money as an assistant netball coach. He said that he would also play football as a leisure activity.

As a result of the injury he said he is unable to drive or to coach netball. He said he is unable to go to church, cook, clean, wash or do other household chores that he was accustomed to doing, before the injury. He says he is unable to walk freely and he cannot have sexual intercourse. In his words "I walk with a painful limp. Sometimes I just feel weak in my body. I can't bathe comfortably. I can't put on my clothes comfortably."

General Damages

The court feels constrained to express its concern that this matter has come on for assessment before the Plaintiff has achieved medically certified maximum medical improvement. The Plaintiff, as an explanation for not undergoing the procedures recommended by Dr. Dundas, has said that he was unable to afford them. There is however, legislation in place to assist Plaintiffs in such circumstances and it is not unknown for Defendants to voluntarily finance such procedures so as to assist in achieving certainty as to their liability.

The failure to adopt such a course has left the court with the invidious task of not only attempting assessment of compensation for pain and suffering in these circumstances but has also left it to decide whether the failure to undergo those tests is as a result of the Plaintiff being a malingerer as is alleged by counsel. The court has to do its best in the circumstances to determine a sum which will provide certainty to the parties and secure an end to litigation.

Dr. Dundas, despite being an experienced professional in the area, did not assist the court greatly in its task as he said very plainly that he is unable to give a definitive opinion on the Plaintiffs physical disability (or to its effects on the Plaintiff's daily life) without securing the information which would be provided by the results of the CAT Scan or the arthroscopy.

The court therefore finds that this Plaintiff has suffered:

(a) a minimally displaced fracture of the medial wall of the right acetabulum, and,

(b) an undisplaced fracture of the base of the third metatarsal.

It seems that both fractures have healed.

Hip injuries, based on the authorities, by themselves do not generally seem to leave the persons affected, with large degrees of permanent

disability. Almost two years have passed since this injury was first sustained and therefore I shall treat the Plaintiff as a person who, but for his own approach and attitude would have, by now, reached maximum medical improvement.

The cases cited to the court by counsel in their written submission were:-

1. Eric Buchanan vs Elias Blake 4 Khan page 45.
2. Lloyd Robinson vs Denham Dodd et al 4 Khan page 47.
3. Marcia Bradford vs Melrose Marlin et al 5 Khan page 32.
4. Errol Finn vs Herbert Nagimesi 4 Khan page 66.
5. Christopher Myers vs J. R. Transport Co Ltd. et. al. Harrison's Assessment of Damages in Personal Injury Cases page 102.
6. Collette Brown vs Dorothy Henry et. al. 5 Khan page 42

The court has also considered the case of Suzette Campbell vs Wilbert Dillon 5 Khan page 50.

Bearing in mind the difficulties prefaced, the court has concluded that this Plaintiff, perhaps from his physical activities prior to the injury, had a very good prognosis for recovery. He was not prescribed the extensive period of bed rest usually involved in the healing of hip injuries, and after

two weeks he had been sent home from hospital ambulating on crutches. The report of Dr. Minott was very positive in this regard.

I therefore find that physically, this plaintiff's injuries are closer to those of Collette Brown, Suzette Campbell and Eric Buchanan. Whereas Defendants must take their victims as they find them, including a disposition to depression, Plaintiffs have an obligation to mitigate their loss.

Though I have mentioned depression twice thus far in this judgment I wish to make it quite clear that though the Plaintiff said he felt like crying every time he remembered the collision, there is no medical evidence concerning any depression.

The court does have precedence for an award for damages for acute depression but there must be medical evidence supporting it. (Munkman's Damages for Personal Injuries and Death 10th Edition pp. 118 – 9.)

In balancing the two abovementioned well established principles in this case I shall award the Plaintiff somewhat more for his loss of amenities than the finding as to the injury would normally warrant. This is because I find that he has been affected for almost two years by this injury though to some extent by his own inactivity. I therefore award the sum of $850,000.00 for pain and suffering and loss of amenities.

The Plaintiff has claimed and has provided evidence concerning the cost of carrying out the recommended diagnostic procedures as follows:

Cost of Arthroscopy	$78,000.00
Hospital charges connected with the Arthroscopy	46,450.00
Cost of CT Scan	22,000.00
Total	$146,450.00

Miss Gordon on behalf of the Plaintiff has also submitted that damages should be awarded for the Plaintiff's "reduced eligibility for employment" and for loss of future earnings.

Mrs. Campbell has submitted that "there is no medical or any evidence whatsoever that the claimant faces a real and substantial (risk) of losing his job and that he would be at a disadvantage when competing on the job market." She cited, in support of her submission that no award should be made under this head, the case of Dawnette Walker vs Hemsley Pink SCCA 158/01 (delivered 12th June 2003).

I agree with Mrs. Campbell that no medical basis has been placed before the court to justify an award for either handicap on the labour market or loss of future earnings.

Dr. Dundas' evidence, as I understand it, is that he is unable to say whether the Plaintiff would be affected in driving and participating in sports

until he, the doctor, has identified the cause of Mr. Brown's complaints. This, he says, he cannot do until the diagnostic procedures are carried out.

I shall therefore make no award for handicap on the labour market or for loss of future earnings.

Special Damages

The Plaintiff suffered a setback in the proof of some of the items of his claim in that the witnesses upon whom he intended to rely for the evidence in support of the claims did not attend. The Plaintiff gave evidence of efforts, which he made concerning the witnesses but the court refused to admit in evidence the hearsay evidence. This was on the basis that it was not satisfied that all reasonable steps had been taken to procure the attendance of the witnesses.

Two items which presented difficulty, were the claims for loss of earnings and for expenditure on transportation for the Plaintiff's children.

The Plaintiff pleaded loss of earnings of $7,000.00 per week for the period up to trial.

He gave evidence that he would earn $3,500.00 - $4,000.00 per day. From that figure he would pay to the owner of the car, a Mr. Panton, the sum of $1,500.00 per day.

The arrangement with Mr. Panton was that the Plaintiff would stand the cost of purchasing gasoline for the car while Mr. Panton would pay all other maintenance costs.

Gasoline was said to cost the Plaintiff $5,000.00 per week. Based on a six-day work week the calculation would be as follows:-

Gross Income	$3,500 x 6 =	$21,000.00
Less:		
Payment to owner	$9,000.00	
Cost of gasoline	$5,000.00	
		$14,000.00
Net Earnings		$ 7,000.00

The Plaintiff had no documentary evidence to support these figures. He testified that he kept no record of his earnings and he paid no taxes. He seemed to be indicating that the owner of the motor car would make the necessary deductions and returns, but in light of the system which he has described as obtaining, I find that that is unlikely to have been so.

Mrs. Campbell has urged the court not to award any damages based on this evidence and has cited the well known case of Hepburn Harris v Carlton Walker SCCA 40/90 (delivered 10/12/90) in support of her submission.

Without seeking to "relax old and intelligible principles" (per Lord Bowen in Radcliffe vs Evans [1892] 2 QB 524 at p 532 –3) I shall however have to consider the circumstances of this particular Plaintiff. He has a grade eight education and is involved in a cash-only business, dealing with several persons a day, as such is the nature of a route taxi operation. His expense in respect of the vehicle is limited to the purchase of gasoline, which is another transaction typically devoid of documentation.

In the circumstances I am prepared to follow the guidance provided by the Court of Appeal in Desmond Walters vs Carlene Mitchell (1992) 29 JLR 173 and find, based on my acceptance of the evidence of the Plaintiff as being truthful in this regard, that the damages concerning the weekly loss in this area have been proved. A deduction has to be made for income tax however.

The pleadings indicated that the loss was continuing and the evidence is that the Plaintiff is still unable to drive. The period since the injury was first sustained is ninety-six weeks. At $7,000.00 per week this makes a total of $672,000.00. From this figure should be deducted the Plaintiff's earnings since December 2002 at $2,500.00 net per week. The total deduction (thirty weeks at $2,500.00 per week) should be $75,000.00. The difference of

$597,000.00 should be reduced by 25% for income tax leaving a net of $447,750.00.

In respect of his loss of earnings as an assistant netball coach, the Defendant called as a witness, the coach whom he assisted. This was a Mr. Christopher Smart. Mr. Smart gave evidence that the Plaintiff would be paid $1,000.00 per session for each training session, which he attended. Training was held twice per week. There was no season in respect of the training and so the training was year round. Mr. Smart said that the financing for the remuneration came from the members of the netball club and that Mr. Brown earned $8,000.00 per month. No taxes were deducted from those earnings.

The job of assistant coach involved demonstrating to players and assisting with umpiring matches.

I find that the Plaintiff has proved the loss of this income as a netball coach at $8,000 per month.

Again the award has to be adjusted for income tax.
At $8,000.00 per month for twenty-two months, the result is a figure of $176,000.00. Marked down for tax the net result is $132,000.00

Another item, which involved some controversy, was a claim by the Plaintiff for recovery of expenditure of $1,500.00 per week for the

transportation by taxi of his children to and from school. The Plaintiff testified that, of the three children, the eldest attended the Portmore HEART Academy which is some distance from the Plaintiff's John's Road Spanish Town address. The younger two attended school in Spanish Town. In justifying why his children would not be able to take "public" transportation the Plaintiff testified that such "transportation runs between my house and the school but for security reasons I make sure my children reach safely and back .... I don't like to know that they are out there stranded in any kind of crises and can't ..."

No documentation was forthcoming in support of the alleged expenditure though the children were being transported up to as recently as last month. The provider of the service, a Mr. Vernon, was not produced as a witness.

The court is not prepared to award special damages in these circumstances. The Defendant should not be required to pay more than what is reasonable for public transportation unless some special reason exists for it. I am not satisfied that the Plaintiff's reason is sufficient and even if it is, I am not satisfied that the expense has been proved.

The final item involving controversy was a claim by the Plaintiff for expenditure said to be incurred for extra home help arising from his injury.

The Plaintiff testified that as a result of his inability to assist with housework he had to employ a domestic helper who does day's work. He testified that she works three days per week for him. He said before the accident he would take care of the house four to five times per week, and he washed his own clothes. His wife goes out to work but his eldest child is fifteen years old and washes her own clothes. Again he produced no evidence apart from his testimony and since I am not satisfied that he has proved a need for the expenditure nothing is awarded in respect of this claim.

As a result the special damages awarded are as follows.

Damaged pants	$2,000.00
Lost underwear	800.00
Lost shoes	3,000.00
Damaged shirt	1,000.00
Lost watch	5,000.00
Lost stop clock	1,500.00
Lost hat	800.00
Medical Expenses & Hospital fee	250.00
X Ray costs	800.00
Registration fee	250.00

Cost of injection	800.00
Crutches	1,550.00
Medical reports and doctor's visit	15,000.00
Police report	1,000.00
Transportation to hospital	500.00
Transportation from hospital	500.00
Transportation to doctor's office three trips @ $3,000.00	9,000.00
Loss of earnings as a taxi driver	447,750.00
Loss of earnings as a netball coach	132,000.00
Total Special Damages	$623,500.00

In summary therefore damages are awarded as follows:-

General Damages	
Pain & Suffering & Loss of Amenities	$850,000.00
Cost of Future Medical Diagnostic Processes	146,450.00
Total	996,450.00

Interest is awarded on the sum of $850,000.00 at 6% per annum from 29/6/02 to 28/7/03.

Special Damages 623,500.00

with interest thereon at 6% per annum from 19/9/01 to 28/7/03.

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