



NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 00638

BETWEEN	CECELIA BUCHANAN	CLAIMANT
AND	SEACOAST TRUCKING SERVICE LIMITED	1st DEFENDANT
AND	BRIAN THOMPSON	2nd DEFENDANT

Miss Mott for Claimant instructed by Marion Rose-Green & Company

Miss Racquel Dunbar for Defendants.

Heard: May 19 and 24, 2009

McDonald, J.

There is no issue of liability. The matter now falls for assessment of damages.

The Claimant now aged 38 years old, on the 19th December 2006 was a passenger in a coaster motor bus which was rear ended by a trailer in the vicinity of Excelsior Biscuit Company on Spanish Town Road.

As a result she sustained injuries particulars as pleaded are:-

1. Cervical mildly tender posteriorly. Pain on movement laterally.
2. Loss of cervical lordosis
3. Mild whiplash injury
4. Neck pains
5. Mechanical lower back pains
6. Mild contusion to left shoulder

7. Right shoulder – 90° of abduction, 90° of forward elevation and 20° of internal rotation.
8. Blurring of vision
9. Mild left parietal headaches
10. Mild intermittent pains along the medial aspect of the left knee.
11. Tenderness along both trapezius muscles especially the right
12. Tenderness on the palpation of the midline of the upper lumbar spine and mid dorsal spine
13. Ranges of motion of the lumbo-sacral spine: extension 30°, respectively.
14. Straight leg raising to 80° bilaterally with onset of hamstring pains.
15. Five percentage (5%) whole person disability.

The medical reports of Dr. Ameeraly and Dr. R.C. Rose exhibits 1 and 3 respectively are consistent with the injuries pleaded.

I will first give consideration to the matter of general damages.

The Claimant testified that after the accident she was in a lot of pain especially in her neck, back and left knee. She was taken by police car to the Kingston Public Hospital where she was given injections to relieve the pain in her back and throughout her body. She was sent to do X-rays on her neck and back.

The doctor gave her a neck brace and instructed her to wear it for about four (4) months. She was discharged from the hospital the same day and went home with a prescription to buy pain medication.

The doctor advised her to do physiotherapy as this would relieve the pains she was experiencing in her neck and back. She attended the physiotherapy clinic fourteen (14) times.

At the end of the fourteen (14) sessions she was still feeling pain in her back and neck, but not as much as before.

She returned to work three months after the accident and worked for about one (1) month and had to stop working again. The tasks she had to carry out caused her to have a lot of pain in her neck, back and shoulder. She is currently unemployed. The Claimant states that she is still suffering as a result of the accident because she still has pain in her back and knee from time to time and has to take pain killers. She is not able to sit low anymore because it is very hard to get up and she has to be assisted up. She complains of pain in her neck especially when she has it in a fixed position for a long time. From time to time she still has pain in her knee and shoulder but most of the pain is felt in her back and neck.

Miss Mott placed reliance on three cases in support of this head of damages. These cases are **Moses Green v CFC Construction (Engineers) Limited** 2007 HCV 000613 (unreported) **Yvonne Black v Oshnell Morgan & Renford Williams** unreported 2006 HCV 00938 and **Kathleen Earle v George Graham et al** 4 Khans Report 173.

In Moses Green's case (supra) the Claimant suffered lower back pains, whiplash injury, abrasions to the right elbow and leg, scrotal tenderness and lower abdominal pains. He complained of intermittent stiffness in the

right knee which was present mainly at nights. His neck pain was intermittent in nature and aggravated by holding the neck in a fixed position for long periods. In addition turning of his neck would also precipitate pains in the upper extremities.

Examination of the lumbo sacral spine revealed Inter alia:-

The following ranges of motion – forward flexion 50°, extension 25°, right and left lateral flexion 25° to 30° respectively – all ranges of motion were accompanied by pain. Straight leg raising was to 80° bilaterally.

Review of the radiographs of the cervical spine taken on November 2, 2006 revealed normal cervical lordosis with normal alignment and no destructive bony changes.

His permanent partial percentage disability as it relates to the lumbosacral spine was estimated as 5% of the whole.

On July 7, 2008 he was awarded \$2,500,000 for pain and suffering and loss of amenities – such an award updated would amount to \$2,578,358.21 (CPI – 138.2 March 2009).

Miss Mott submitted that although the PPD ratings in both cases are similar, the injuries sustained by the instant Claimant are more serious in nature.

She made reference to the present Claimant's lower back pain as being constant whereas Mr. Green's were intermittent.

She averted to the differences in the range of motion of the lumbo-sacral spine. She also made reference to the fact that radiographs of Mr.

Green's cervical spine revealed normal cervical lordosis with normal alignment, no destructive bony changes, and disc space narrowing at the C5 - C6 and C6-7 levels, whereas the Claimant's radiographs of the cervical spine revealed loss of the normal cervical lordosis; no mal-alignment, no destructive bony changes but there were degenerative changes extending from C4-C7 vertebrae. I do not find that the above is a sufficient basis to increase the award as contended by Counsel for the Claimant.

It is true that both Claimants Mr. Green and Miss Buchanan suffered mild whiplash injury and mechanical lower back pains and have a 5% PPD whole pain. However having examined all the cases cited in this matter I am now of the opinion that my award of \$2.5million in the uncontested Green case was too high.

Miss Mott urged the Court to make an award of \$2.7million under this head of damages.

Miss Dunbar made reference to the following cases:-

- St. Helen Gordon and Anors Royland McKenzie
- 5 Khan's Reports 152
- Dawnette Walker v. Hensley Pink - 5 Khans Report 170
- Patricia Stewart v Caribbean Products Co. Ltd - 5 Khan's Report 245
- Iris Smith v Arnett McPherson & Donald Oldfield - 5 Khan's Report

In St. Helen Gordon & Anors' case (supra) the Claimant suffered a whiplash and pain centered around neck and shoulder. Her whole person disability was 3%.

On July 10, 1998 she was awarded \$400,000.00 general damages which updated amounts \$1,142,857.14.

The instant Claimant's disability relates to the mechanical lower back pains - and not to the whiplash injury - (which gives a zero percent impairment of the whole person). In addition the injury suffered by Miss Buchanan is more serious.

In Dawnette Walker's case the Claimant suffered injury to neck, right shoulder and upper back. Her PPD was assessed as 5% whole person.

Dr. Cheeks gave as his reason for assigning 5% PPD the fact that should she sustain further injury she would be more vulnerable than a normal healthy person.

On December 7, 2001 she was awarded \$220,000.00 as general damages which updated amounts to \$1,424,892.60. In July 2003 the Court of Appeal increased the award from \$220,000.00 to \$650,000.00.

The reason for the doctor assigning the 5% PPD does not exist in the case of the instant Claimant. I do not find this case to be a useful guide.

I do not find Patricia Stewart's case (supra) helpful as the injuries sustained are not related to those of the Claimant in the case under consideration.

I have also considered the case of Icilda Osbourne v George Barned et al 2005 HCV 294 (unreported). In that case the Claimant suffered chronic

mechanical lower back pains and chronic cervical strain. Her total partial percentage disability was 10% of the whole person. On February 17, 2006 she was awarded \$2,500,000.00 for pain suffering and loss of amenities which updated is \$3,646,053.00.

I have also considered the cases of Dawn Vernon v Paulnor Sea Port Company Limited HCV 2282 of 2003 (unreported) where the Claimant suffered mild mechanical lower back pain and whiplash injury. He had a PPD of 10% of the whole person. On 8th April 2005 he was awarded \$1,900,000.00 for pain and suffering and loss of amenities – updated this amounts to \$3,022,329.06.

Having examined the cases referred to it is my considered view that an award of \$2.1 million would be appropriate compensation for pain and suffering and loss of amenities in this case.

Handicap on the Labour Market/Loss of Earning Capacity

Miss Mott asked the Court to make an award of \$500,000.00 under this head.

The case of Moeliker v. A. Reyrolle & Co. (1977) 1 All ER 9 is the locus classicus on the matter.

As pointed out by Sykes J in *Icilda Osbourne* supra at paragraphs 12 and 13.

“Moeliker was first published at (1976) 1 C.R. 253. The version of Moeliker found at (1976) 1 C.R. 253 has these words at page 262.

'This head of damage only arises where a plaintiff is at the time of the trial in employment, but there is a risk that he may lose this employment at sometime in the future, and may then, as a result of his injury be at a disadvantage in getting another job or an equally well paid job.'

The word only does not appear in the version reported in the All England Reports and the Weekly Law Reports. It was replaced by generally (see Moelliker at 1977 1 All ER 9, 15 b and (1977) 1 WLR 132 141 G. This emendation came about because Browne LJ corrected the proof presented to him for publication in the All England report and changed only to generally."

In *Cook v Consolidated Fisheries Ltd* (The Times, January 17, 1977 15 - Browne LJ also addressed this issue.

It is not fatal to the making of an award that the claimant is not working at the time of trial. Miss Buchanan's evidence is that she returned to work 3 months after the accident and worked for about one (1) month, but it was very difficult for her and she had to stop working again. The tasks she had to carry out caused her to have a lot of pain in her neck, back and shoulder.

Dr. Rose's medical report states that Miss Buchanan reported that she began working in June 2007 but discontinued in August 2007 due to lower back pains, since her job involved prolonged walking. The medical report does not reveal the type of employment in which the Claimant was engaged.

She also reported pains along the soles of both feet which were precipitated by walking. In cross-examination the Claimant said that she returned to work in June 2007 and stopped in August 2007.

When asked in cross-examination where she worked for the one (1) month – she replied that she worked at Woodglen Avenue where she had a patient. There is no evidence that she attempted to work after leaving this job.

She said that the physiotherapist told her not to resume work so soon after the accident as her injuries had not sufficiently healed and her job required her to lift old people from time to time, bathe them, feed and take care of their general needs. Nevertheless she had to return to work because she had expenses to meet and she had to take care of her five children.

Dr. Rose's report states that Miss Buchanan will be plagued by neck and lower back pains which will be aggravated by prolonged sitting, bending, prolonged walking and holding of the neck in a fixed position for long periods.

The Claimant's evidence is that she still has pain in her back, shoulder, neck from time to time, but most of the pain is felt in her back and neck.

I accept the Claimant's evidence that she did not work for any length of time after the accident due to her disability.

This coincides with the doctor's finding that she will be plagued by neck and lower back pains.

It also shows some degree of disability which exists in circumstances where she is likely to vie for jobs with other persons who are not so injured.

The risk materialized as she could no longer carry out the duties of a home health nurse.

I award the Claimant \$500,000.00 for handicap on the labour market.

Special Damages

The following receipts for medical expenses were agreed:-

Receipts from Kingston Public Hospital - \$3,500

Receipts from Dr. Rose \$23,000

Transportation costs - \$10,000.

The other items not agreed i.e. paid assistant and loss of income will have to be assessed.

The Claimant's evidence is that her sister was living with her at the time and helped her with chores such as cooking, cleaning and washing. She paid her \$8,000 for assisting her at home, \$2,000 on two (2) occasions and \$4,000 on another occasion.

On this issue of care provided gratuitously by relatives Miss Mott made reference to the case of *Cunningham v Harrison* (1973) QB 942.

Although the claim is not supported by any documentary evidence, I award \$8,000 as claimed. There is no challenge that the sister worked as stated and furthermore the amount claimed is reasonable.

The claim for loss of income was particularized as follows:-

From January 2, 2007 – December 11, 2007 at (US\$500) per week.

50 weeks 1 US dollar equivalent 70JA\$ = \$35,000 per week and continuing \$1,750,000.00.

The Claimant said that at the time of the accident she worked as a Home Health Aide/Security Officer in Miami Florida. She was working as a Home Health Nurse from May 2004 to May 2006 before the accident.

She had returned home to Jamaica on break and would have returned to Florida in January 2007 to resume her employment. She had two (2) jobs in Florida at the time of the accident. She had one patient in the day and one at night.

Her total earnings per week would have been US\$1,100.00. She was not paid in cash and did not receive a pay advice.

She was unable to return to work as planned because of the pain she was having in her neck, back, shoulder and knee.

The Claimant is under an obligation to provide strict proof of her loss of income.

She has failed to provide the Court with any documentary proof as to her income for the time period claimed. Besides stating that she was paid in cash she has failed to offer any explanation as to why her employers could not have furnished her with a letter pertaining to her employment, if so requested.

The claim is for \$1,750,000.00 and the Court cannot just rely on her "say so".

I adopt the words of Anderson J in Ezekiel Barclay & Clifford Sewell vs. Kirk Mitchell C.L. B241 of 2000 (unreported) at page 6 where he says:-

"It is also not unreasonable to posit that the more substantial the claim the stricter the proof that is required."

Additionally, in cross-examination the Claimant admitted that she was neither a citizen nor resident of the United States.

She did not have a work permit. She went to Nassau and then to the United States. She did not have a visa to enter.

Miss Buchanan also said that when she first entered the United States she got six (6) months, went back, and when she returned she got eight (8) months

Miss Mott submitted that whether or not the Claimant was working illegally or legally should not affect her claim for loss of income.

Miss Dunbar's response was that the Claimant went to the United States and worked for two (2) years without work permit, without special visa or any legal documentation that would assist her.

She said that the Court cannot condone an illegal activity to award her loss of earnings in such circumstances. This would be to endorse an illegal activity - and the Court being a Court of law cannot do so.

I am of the opinion that the Claimant is not entitled to benefit or be rewarded from an illegal act or illegality.

There is no evidence before the Court as to the Claimant's earnings before she went to the United States or for the one (1) month period in which she worked after her injury.

Neither is there any evidence as to her earnings as a Security Officer.

The pleadings were not amended to claim an amount for local employment; so that in the absence of figures the minimum wage could be used for computation purposes.

The Claimant told the Court that she is a Security Officer and stated what that job entails.

There is no evidence that she sought employment as a Security Officer at any time after the accident. She has a duty in law to mitigate her losses which she failed to do.

No award is made under the head loss of income.

Damages are assessed as follows:-

General Damages

Pain and suffering and loss of Amenities	\$2.1 million
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Interest at the rate of 3% per annum from 6th May 2008
(date of service of Claim Form) to 26th May 2009

Handicap on the labour market/loss of earning capacity	\$500,000.00
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No interest.

Special Damages

In the sum of \$44,500.00

Interest at the rate of 3% per annum from 19th December 2006 to 26th May 2009.

Costs to the Claimant to be agreed or taxed.