IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. C-135 of 2002

BETWEEN	CLASTON CAMPBELL	PLAINTIFF
A N D	OMAR LAWRENCE	1ST DEFENDANT
A N D	DALE MUNDELL	2ND DEFENDANT
A N D	DELROY OFFICER	3RD DEFENDANT

Miss Dorothy Gordon for Plaintiff

David Johnson for 1st Defendant instructed by Mrs. Fay-Chang Rhule.

Heard: February 10, 11 and 28, 2003

MCDONALD J. (Ag.)

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

The plaintiff, a Correctional Officer now aged 21 years, on the 3rd October, 2001 was a passenger in a taxi, which was hit by a Toyota Corolla motorcar owned and driven by the 1st Defendant along the Bogwalk Gorge.

As a result the Plaintiff sustained injuries, particulars of which were described in medical report Exhibit 5 issued by Dr. Douglas Mossop as:

" 1. Laceration to chin 2" x 1/6"

2. Trauma to chest resulting in severe chest pain and difficulty in breathing and minor obsession to chest wall.

3. Trauma to back resulting in severe pain and swelling and difficulty in walking properly for 3 weeks.

4. Whiplash injury to the neck resulting in pain and restriction of movements, collar recommended..."

The Plaintiff testified that he had to wear a bandage under his chin for a period, he had difficulty in breathing, severe chest pains, difficulty in walking. He was unable to move his neck the way he wanted due to pain. He was unable to walk for too long without feeling pain.

In addition at work, he has to ask permission to sit down due to back pain. There are certain duties he cannot perform at the workplace such as pushing the gate, moving chairs, desk and beds.

At home he had to employ someone one day per week for about 6 months to do his washing, ironing and cleaning.

His injuries have also restrained him from his regular activities such as playing football and cricket. He tells the court that he has stopped playing sports.

The Plaintiff states that at present he has to take pills for the pains he feels in his back and neck, sometimes at night. He cannot walk too long without feeling pain, and if he turns his neck at night he still fells pain sometimes and has to take painkillers. He also states that sometimes his chest pains him and sometimes he has difficulty in breathing.

The Plaintiff tells the court that two weeks after the accident he returned to work. The only doctor he consulted for his injuries was Dr. Mossop, whom he last visited in November, 2002.

He testifies that with the passage of time the pain he experienced at the time of the accident and shortly thereafter gets less and less, but at times he still feels heavy pains in his chest and neck and that is why sometimes he has to take over the counter medication.

Neither the medical report nor the Doctor's oral evidence makes reference to any complaint by the Plaintiff of him suffering from heavy pains in chest and neck. I do not accept his evidence that at times he still feels heavy pains in his chest and neck.

Doctor Mossop in his medical report dated June 6, 2002, stated inter alia that the Plaintiff sustained disability of about 10% of function.

He testified that he based this percentage disability on three factors: Firstly, the quantity/amount of injuries, secondly, where the injuries are, and the degree of severity, thirdly, the activity of the patient, "what does he do for a living which would impede him from doing his normal activities".

He told the court that he enquired of the Plaintiff as to what work he does and opined that the injuries would affect his work.

Doctor Mossop states that his findings in respect of the medical report was based on subjective comments of the Plaintiff's plus on his examination and treatment.

Doctor Mossop opined that on examination of the Plaintiff and seeing his injuries, these injuries would affect such a person from lifting chairs, and moving beds. As to whether it would affect such a person from pulling a gate, would depend on the weight of the gate. He opined that such injuries would affect such a person from pushing a large metal gate but not a small gate. It would also depend on the amount of times he would have to do so per day or per week.

The extent to which these injuries would affect such a person standing for long periods would depend on how long he would be standing. In respect to this person doing his own washing, cleaning and ironing again would depend on how often this activity was done per week and the quantity involved.

The Doctor confirmed the Plaintiff's evidence that the injuries he saw would affect someone with such injuries from playing football.

In cross-examination Dr. Mossop stated that in arriving at the percentage disability he did not have regard to the American Treaties which dealt with percentage disability in relation to various limbs of an individual and he was not familiar with same.

He did not refer the Plaintiff to a specialist nor to have physiotherapy. He states that the last time he saw the Plaintiff was in November, 2002, and up to that point he had no reason to refer him to a specialist.

Doctor Mossop testifies that the Plaintiff last visited him for the injuries towards the end of November, 2001. He agreed with Mr. Johnson's suggestion that apart from the list of the Plaintiff's visits to him **Exhibit 7,** it is correct to say that after November 10, 2001 the Plaintiff was not required to attend on him for

formal treatment sessions. However, he came to see him intermittently thereafter with minor problems.

He said that in October/November 2002, when he saw him, he complained for minor pains in the neck, back and chest. He reassured him that it was nothing serious to worry about, and he could get over-the-counter analgesics to ease his pain. Further that this was expected when someone has sustained such injuries and if it became worse he would refer him to a consultant. There is no evidence that any such referral was made.

Doctor Mossop was unable to give a prognosis as to whether or not the Plaintiff's injuries or effects therefrom will come to an end sometime in the future or continue indefinitely.

Mr. Johnson in his address, urged the court to view Dr. Mossop's medical report with caution. He pointed out that although the medical report and the doctor's evidence outlines the injuries it is deficient in its terms as it relates to any permanent disability or permanent partial disability. The report states that the Plaintiff sustained a disability of about 10% of function, it has not been stated whether that is a whole person disability nor to which specific area of the body it relates.

Mr. Johnson referred the court to an extract from Volume 4, Khans Book on Personal Injury Awards at page 227 where Dr. Christopher Rose FRCS (C) Consultant Orthopaedic Surgeon states:

> "An impaired individual who is able to accomplish a specific task with or without accommodation e.g. assistance devices, such as crutches, wheelchairs, hearing aids, prosthesis, is neither handicapped nor disabled with regard to that task.

> Impairments should always be expressed as a percentage of the limb or organ as well as of the whole person. . .
>
> It must be emphasised that impairment percentages derived according to the "Guides to the Evaluation of Permanent Impairment", criteria should be used only as a guide to make direct financial awards or direct estimates of disabilities".

Miss Gordon also referred the court to the same Volume of Khan's book on Personal Injury Awards at pages 310 – 311, where Dr. Dundas FRCS (E) Consultant Orthopaedic Surgeon stated that the American Medical Association Guide for the evaluation of Permanent Impairment "is currently the standard that is used to provide the basis for evaluation of personal disability... It is by no means to be regarded as the absolute and final word in determining disability. It is, as the title implies, a guide".

Mr. Johnson submitted that Dr. Mossop has not told the court how he arrived at the percentage disability. He gave a brief explanation of how he arrived at disability percentage when assessing patients but on the specific facts, he has failed to give evidence either orally or in his report of how he actually arrived at that 10% disability.

Mr. Johnson submitted that the doctor had no knowledge of what the Plaintiff's occupation entailed. Further in respect of any lingering problems of standing or removing objects apart from playing active sports, Dr. Mossop qualified his response by saying it would depend on how heavy a gate it was or how long the Plaintiff had to stand in order to say whether or not he would have been affected.

Mr. Johnson in his submissions pointed out that Dr. Mossop's evidence is that he is not an orthopaedic specialist and that at no stage of his practice has he undertaken that specialist training. His evidence is that he has a Bachelors in medicine and surgery and a B.Sc. in medical microbiology, and further that he has been practicing as a Doctor for 25 years.

Further his evidence is that he sees the type of injuries the Plaintiff presented with at least three times per week at minimum in his practice. However, there is no evidence before the court that he has been dealing with orthopaedic injuries for those 25 years.

I find that the 10% disability of function is not a permanent disability, it is not so stated in the medical report, nor has the doctor in the evidence made any reference to a permanent disability. The section of the Statement of Claim dealing with disabilities and complications paragraph 9, which states "Ten percent (10%) permanent disability", is not supported by the evidence.

I am also of the view that if the doctor had made a finding that the disability about which he spoke had any permanence; one would have expected that the patient would have been referred to an orthopaedic specialist.

The question which now arises is, what would be a reasonable figure to compensate the Plaintiff in respect of his pain and suffering and loss of amenities?

Miss Gordon has urged me to make an award of $1,100,000. She has placed reliance on three cases in support of this head of damages. These cases are:

1. **Kathleen Earle v. George Graham & Ors** – reported at page 173 Khan's Volume 4.

2. **Merlene Nelson v. Edgar Cousins** reported at page 162 of Khan's Volume 5.

3. **Yvonne Scott v. Evral % Everal Webley/Churches** reported at page 163 of Khan's Volume 5.

Mr. Johnson on the other hand sought to distinguish these cases from the instant case and referred the court to the case of **Pamela Brown v. Windell Bryan & Ors** reported at page 168 of Khan's Volume 4 as a guide to be used in arriving at an award. He submitted that this case is more in line with the instant facts as it relates to the nature and type of the Plaintiff's injuries.

It is my opinion that the injuries and resultant disabilities suffered by the Plaintiffs in the case of Kathleen Earle and George Graham & Ors and Merlene Nelson v. Edgar Cousins are more serious than those suffered by the Plaintiff in the instant case. The Plaintiff in Earle's case suffered a permanent disability assessed at 10% of the cervical spine which is equivalent to 6% of whole person disability. The Plaintiff in Nelson's case suffered a permanent partial disability not exceeding 10%.

I am also of the view that the injuries suffered by the plaintiff in Scott's case are far more serious that those suffered by the Plaintiff in the instant case. In Scott's case, the Plaintiff when reviewed by Dr. Dundas on 19/9/85 found her disability was then less that 10%. Dr. Crandon, on neurological examination was of the opinion that she had a flexion – extension injury of the cervical spine and that in this kind of injury damage might occur to the joints of the spine, the ligaments or the muscles among other structures in the neck, and that any or all

of these might give rise to pain in the neck, shoulders and occipital area of the head.

The Plaintiff in the instant case has no history of headaches unlike the Plaintiff in Scott's case, and in the instant case Dr. Mossop was unable to give any prognosis on the plaintiff's future recovery. Inspite of the distinguishing features between both cases I have not discarded this case in my search to find an appropriate award in the instant case.

In the case of **Pamela Brown v. Windell Bryan & Ors, (supra)** the Plaintiff suffered the following injuries: unconsciousness, damage to neck and cervical spine, damage to lumbar vertebrae 1 and 2, severe pains, abrasion to right shin, onset of premature menstrual flow. She lost 25% of movement in the neck and lumbar spine and cannot lift heavy weights, cannot run or stand or sit up for too long. On the 13/7/93 she was awarded $250,000 for general damages – such an award would amount to $375,239.6 today.

Although this Plaintiff did not suffer a whiplash injury, I find that it does offer some assistance in the calculation of an award in the instant case.

In seeking assistance in the calculation of the award I have examined the case of **Evon Taylor v. Eli McDaniel & Ors** [Suit CL 1997 T 128] reported at page 140 of Khan's Personal Injury Awards Volume 5, the plaintiff sustained the following personal injuries and resulting disability: unconsciousness, severe tenderness in back of neck and head, 4 cm laceration in region of occipital area of scalp, pain on flexion, extension and rotation of neck, tenderness over lower

back, fogginess in sight, difficulty hearing from left ear, bruises to right shoulder and forearm.

Doctor Paul Brown, Consultant Surgeon, assessed his injuries as a moderate whiplash and his prognosis was that he would continue to have severe pains for approximately 6 weeks resulting in total disability for this period and afterwards that he would have pains of diminishing severity for a further period of 4 months resulting in partial disability followed by intermittent pain for at least a further 2 months. On the 15.6.99 he was awarded $495,000 for pain and suffering and loss of amenities. This figure updated would be $642, 855.51 today [Using CPI Dec. 2002 of 1566.1.]

It is my considered view, that an award $650,000 would be appropriate compensation for pain and suffering and loss of amenities in this case.

The Plaintiff claims damages for loss of earning capacity in the sum of $100,000. I will now examine the law and evidence to see if this claim can be sustained.

The case of **Moeliker v. A. Reyrolle & Co. (1977) 1 WLR 132** can be regarded as the locus classius on the matter. – Browne L J at page 138 said:

> "This head of damage generally only arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose the employment at some time 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. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial".

Moeliker's case (supra) was approved and applied by the Court of Appeal of Jamaica in **Gravesandy v. Moore (1986) 40 W I R 222.** The headnote in Gravesandy v. Moore reads:-

> "A plaintiff who seeks general damages for loss of earning capacity must show that there is a real or substantial risk that he might be disabled from continuing his present occupation and be thrown, handicapped, on to the labour market at some time before the estimated end of his working life".
>
> The "risk" in such a case will depend on the degree, nature or severity of his injury and the prognosis for full recovery, and evidence must be adduced as to these matters, and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location. [Emphasis mine].

These criteria referred to are necessary so that the court can assess the chances of the plaintiff obtaining other employment or continuing in some other business.

There is no evidence before the court as to the severity of the Plaintiff's injury, prognosis for full recovery, how long he has left to work, the nature of his skills, the economic realities of his trade and location

The evidence points to the Plaintiff remaining in the same job in which he was prior to the accident. There is no evidence to indicate whether or not there is a real risk or even a fanciful risk that the Plaintiff stands to lose his job. There is no evidence from the Plaintiff whatsoever relating to his occupation apart from his evidence that he is a Correctional Officer, and earns $5,000 per week and some evidence relating to his inability to do certain things on the job. There is a paucity of evidence as to what he actually does on the job. In my opinion this claim fails.

The Plaintiff has also claimed damages for future care in the sum of $50,000.

Miss Gordon submitted that after 2001 the Plaintiff visited Dr. Mossop for minor pains in his neck, back and chest. In November, 2002 the Plaintiff complained for pains and the Doctor recommended drugs to ease the pain. The Doctor testified that he expected these pains to last for sometime for those sorts of injuries. She said that based on that suggestion obviously there is some future care the Plaintiff would have to undergo. By this, she meant that he would have to buy drugs and see the Doctor from time to time.

In response Mr. ~~Thomas~~ Johnson submitted that there was no evidence before the court supporting such a claim save for the evidence that the Plaintiff had to take pain killer analagesics.

The court has not been told the costs of these painkillers, and there is no evidence as to the duration of time for which they will have to be taken.

I find that there is not sufficient evidence upon which such an award on this claim can be made.

Special Damages

The plaintiff's claim for special damages were particularized as follows:

1.	Blood stained shirt	$2,000.00
2.	Visits to doctor	$9,000.00
3.	Medication and drugs	$3,000.00
4.	Medical Report	$7,000.00
5.	X-ray	$ 800.00

6.	Police Report	$1,000.00
7.	Extra home help for 6 months @ $4,000 per month	$24,000.00
8.	Collar	$ 900.00
9.	Transportation Expense	
	(a). Scene of accident to Linstead hospital	$ 200,00
	(b) Chartered taxi from hospital to home.	$ 400.00
	(c) Home to private Doctor and return home 8 times at $400.00 per return trip	$3,200.00
	(d). Home to Spanish Town Station to pay for police report and return home	$ 600.00
	(e) Home to Bog Walk Police Station and return home 6 times at $200.00 per trip.	$ 1,200.00
10.	Dr. Mossop's attendance at court	$10,000. 00

Items 1, 2, 3, 4, 5 as amended and 6 were agreed.

The authorities are quite clear that special damages must be specifically pleaded and strictly proved.

On the request of Miss Gordon the court deleted the claim for costs of collar in the sum of $900.00 as there was no evidence led in this respect. I allow the sum of $10,000 claimed for Dr. Mossop's attendance at court.

There is no evidence before the court to substantiate the plaintiff's position that he infact employed someone to wash, clean and iron for him one time per week at $1,000 per week over a period of 6 months. This claim is based only o his "say-so".

Further there is no credible evidence before the court that he infact needed this assistance for 6 months. When the Doctor was asked if someone with the Plaintiff's injuries would be affected in doing his washing, cleaning and ironing, he replied that it would depend on the volume and frequency of such activity. There is no evidence concerning these factors before the Court.

Although the claim is not supported by any documentary evidence, I award the plaintiff $2,000 compensation for extra help for 2 weeks.

Although not supported by documentary evidence I find on a balance of probabilities that the plaintiff has satisfied me that the undermentioned sums were expended:

Transportation Expense:-

i)	Home to private doctor and return home 6 times at $400.00 per return trip	$2,400.00
ii)	Scene of accident to Linstead Hospital	$ 200.00
iii)	Charted taxi from Hospital to home	$ 400.00
iv)	Home to Spanish Town Police Station for Police Report	$ 600.00
v)	Home to Bogwalk Police Station 3 times at $200 per trip	$ 600.00

In respect of this item the Plaintiff gave evidence of a cost of $400. per trip but the pleadings were not amended hence the allowable rate remains at $200.00 per trip.

Judgment for the Plaintiff in the sum of $688,600.00 being General Damages in the sum of $650,000 with interest thereon at the rate of 6% per annum from the date of service of Writ of Summons up to today and Special Damages of $38,600 with interest thereon at the rate of 6% from 3rd October, 2001 up to today.

Costs to the Plaintiff to be agreed or taxed.