

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. CL C451 OF 1997

BETWEEN MARGARET CAMPBELL PLAINTIFF

AND ANTHONY CLARKE DEFENDANT

Mr. Lawrence Haynes for plaintiff

Mr. Leslie Campbell for defendant

June 24 and 29, 2004

Sykes J (Ag)

ASSESSMENT OF DAMAGES

Mrs. Campbell (the claimant) is a school teacher. She was on her way home from work on Friday November 8, 1996 when her car was hit by another car driven by Anthony Clarke (the defendant). This took place on St. John's Road in the parish of St. Catherine. The accident was precipitated by the ill advised act of a young girl who dashed across the road in front of the car driven by Mr. Clarke. He swung to avoid hitting her and collided with the car driven by Mrs. Campbell. The sole issue is the quantum of general damages for pain, suffering and loss of amenity.

The assessment here is a bit more difficult than usual because, before the accident, the claimant was already handicapped by a degenerative condition known as cervical spondylosis. She was being treated for this condition. There is no medical

evidence, in this trial, that distinctly indicates the extent to which the accident has contributed to the stated whole person disability. What then is an appropriate sum to be awarded in these circumstances? Special damages were agreed at \$72,100. Before the assessment can be made an issue of admissibility of evidence has to be resolved.

Admissibility of the taxi bill under section 31E of the Evidence Act

The document purports to be a bill from a taxi service showing the amounts expended by the plaintiff on taxi fares. The monies were allegedly paid to various drivers of this taxi service who took her to get various treatments. The plaintiff relied on section 31E to admit the taxi bill into evidence. Mr. Campbell objected to its admissibility. I have set out the section so far as is relevant to explain why the bill is inadmissible.

31E.-(1) Subject to section 31G, in any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.

(2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.

(3) Subject to subsection (4) every party so notified shall have the right to require that the person who made the statement be called as a witness.

...
...

(6) The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection (2).

Section 31E (1) means that a statement is admissible only to the extent that whatever facts the statement contains would also have been admissible had the witness turned up in court and testified under oath (ignoring the problem of children

of tender years who cannot be sworn). The section is not a conduit for hearsay. The hearsay rule still applies. It is a time and cost saving section. It is permitting evidence to be put before the court without calling the witness. This is all it does, nothing more.

Section 31E (2) requires the person relying on the statement to do two things: they must give twenty one days notice to all the other parties of the content of the statement **and** who made the statement. These are mandatory requirements unless subsection 6 can be invoked. It is not necessary in this case to decide the scope of subsection 6.

I now apply this understanding to the document in this case.

Taxi receipt

There is no indication, either in the notice or the document, showing the person who made it. Mr. Haynes submitted that the document was admissible because it was prepared by the taxi service. The mention of “taxi service” reveals the nature of the problem. In my view section 31E presupposes that a natural person has to be identified. If it were not so, then none of the other parties could exercise their right under section 31E (3) to have the person who made the statement called as a witness. Even, assuming Mr. Haynes is correct that the section applies to non-natural persons, such persons can only testify through a natural person and unless the natural person called as the witness was the person who made the statement, any evidence they give would be hearsay unless the evidence would be coming in as a document prepared in the course of a trade, business or occupation (see section 31F).

I also do not accept Mr. Haynes’ secondary argument that the defendant should have given notice under section 31E (3) that they wanted to cross examine the person who made the statement in the document. This submission merely reinforces by first reason for not admitting the document. If the defendant had chosen to exercise the right of cross examination, who would Mr. Haynes have identified as the person who made the statement in this case? The necessity for the other parties to indicate that they wish to cross examine the make of the statement does not arise

unless and until the person relying on section 31E gives the requisite notice **and** identifies the person who made the statement. The two conditions must be met. Once the two conditions are met then prima facie the statement is admissible unless the other parties invoke section 31E (3). As I have said this is subject to subsection 6. I now turn to the injuries.

A. The nature and extent of injuries sustained

Mrs. Campbell says that she was unconscious for sometime after the impact but regained consciousness before she was taken from the scene. When she regained consciousness she had difficulty breathing.

There are two relevant medical reports. One is from Dr. Ivor Crandon, Consultant Neurosurgeon, and the other from Dr. Rosemarie King. In looking at this matter I am obliged to indicate that this plaintiff had a preexisting condition called cervical spondylosis. This is dealt with in the report of Dr. Ivor Crandon. I will deal with the report of Dr. Rosemarie King first.

Report of Dr. Rosemary King

This report is dated December 2, 1996. It speaks to the plaintiff's complaint of tenderness and discomfort while breathing. A chest x ray showed a fractured first left rib, anteriorly and posteriorly with no displacement. The fractured rib was not likely to result in permanent damage but, as a result of the accident, her condition may have been exacerbated.

Report of Dr. Ivor Crandon, Consultant Neurosurgeon, dated July 23, 2002

(a) Pre-accident condition - Cervical spondylosis

Dr. Crandon first saw the plaintiff on May 5, 1995 when she was referred to him by Dr. Owen James. She complained of neck and right arm pain for four months prior to seeing Dr. Crandon. The onset of pain was sudden and unexpected. Within one month it had radiated to her right shoulder and upper arm. This was

accompanied by a cramp like sensation in her right arm which became so weak that she had difficulty lifting her handbag. The pain got worse. It did not respond to Ponstan tablets. The pain affected her ability to lie or sit comfortably.

Her prior medical history showed that she was being treated for dizzy spells from as far back as 1993. She says that she has been cured of them.

An examination of Mrs. Campbell showed the following:

- (a) impaired sensory perception over the right C6 and T1 dermatomes;
- (b) an abnormal posture of 5 degrees flexion and rotation of the neck while at rest and reproduction of pain on lateral rotation or extension of the neck; and
- (c) there was a trigger spot over the right paravertebral muscles at T7

The doctor suspected cervical radiculopathy. With the aid of a medical dictionary I found out that *radiculopathy* means any pathological condition of the nerve roots. Cervical refers to the neck of the body. I conclude from this that there was a disease of the nerve roots in the neck. An MRI was done. The MRI showed:

- (a) posterior central disc bulging at several levels (C3-7) with degenerative spondylosis and actual impingement of the spinal cord without overt compression at C3/4.

She was treated and her clinical condition improved. She had intermittent bouts of pain in the neck and right shoulder region. She was seen for these sporadic pain episodes on several occasions.

I understand the medical condition of the claimant, before the accident, to be that

- (a) she suffered decreased sensory perception over the right C6 and T1 dermatomes;
- (b) the pain was reproduced whenever her neck was turned from side to side or extended; and significantly

- (c) she had pain in her back in the muscles that ran alongside the spine. The pain source was located at T7;
- (d) the claimant had two pathologies going on **before the accident**, namely, cervical spondylosis **and** bulging disks. A spondylosis is a disease of the spine. The adjectives, cervical or thoracic or lumbar only give the general location. The added description such as C3 or T1 gives a more precise site.

The Oxford Dictionary defines a spondylosis as a painful degenerative condition of the spine. The adjective “degenerative” is self explanatory.

(b) Post accident examination

Dr. Crandon also examined her, after the accident, on November 11, 1996.

She complained to Dr. Crandon of cramps in both arms and legs. He found that pain killer and a cervical collar had not improved her condition.

He also found:

- (a) the x ray of the spine showed that it was normal;
- (b) her neck was immobile but voluntary movement was possible to 10 degrees of flexion and rotation;
- (c) marked tenderness of the trapezius and sternocleidomastoid muscle.
- (d) marked tenderness of the spinous processes of the C4, C5, and C6 vertebrae;
- (e) reduced sensory appreciation over the right C5 and C6 dermatomes but no motor deficit; and
- (f) her reflexes were symmetrically brisk.

He stated that since the accident he has seen her over thirty occasions for neck and arm pain, low back pain, arm numbness and pain in finger in right hand.

The cervical spine x rays and the MRI were repeated on July 18, 2002.

The x rays showed severe muscular spasm. The lumbo-sacral x rays were normal. The MRI showed large central disc herniations at C4/5 and C5/6. There was no evidence of spinal cord compression.

It is significant to me that the MRI of July 18, 2002 speaks to large central disc herniations at C4/5 and C5/6. This is in the same area where, before the accident, there was “posterior central disk bulging at several levels (C3-7) with degenerative spondylosis.” The medical report is not clear on whether what was seen in the 2002 MRI was caused by the disorder, the accident or both.

B. The nature and gravity of the resultant physical disability

Dr. Crandon concluded that Mrs. Campbell had a “flexion-extension injury of the cervical spine on a background of cervical spondylosis”. He also said that there was clinical and radiological evidence of cervical spondylosis prior to the injury. She has continued to have persistent symptoms with intermittent exacerbation. He concluded that she may have to accept a level of sporadic discomfort in the future. His conclusion is so important that it is better that I quote him. He said

While it is likely that a quantum of her present symptomatology is due to the pre-existing cervical spondylosis, it is impossible to be certain about its extent and the exact extent of the residuum, which may reasonably be ascribed to the injury to the spine. Her present condition is consistent with a DRE Cervicothoracic Category 11 (Minor Impairment without structural inclusion): 5% Whole Person Impairment (American Medical Association 1993). (my emphasis)

I understand this to mean that the doctor is unable to say the extent to which the pre-existing condition contributed to the claimant’s present condition and how much of her present condition may reasonably be said to have been caused by the accident.

C. The pain and suffering endured

Mrs. Campbell testified that when she regained consciousness at the scene, breathing was difficult for her. She had to mouth breathe. Breathing itself was painful. She had serious pains in her chest, neck and spine. Her pain worsened during the weekend following the accident despite being seen by the doctor on the evening the accident occurred. Over the next nine months of treatment by a physiotherapist and Dr. Crandon, she experienced great pain.

She said that when she saw Dr. King on the Monday after the accident she was in great pain.

She added that after the accident she had pain and is still having pain in her left shoulder. According to her, her current pains are now confined to her left hand and spine. It will be recalled that Dr. Crandon's report noted that before the accident she suffered intermittent pain in the neck and right shoulder region. There is no explanation for the disappearance of these pains of the neck and right shoulder.

Significantly, she says that the cervical spondylosis did not cause her pain. This is contradicted by the medical report of Dr. Crandon which stated quite clearly and categorically that the pain was such that it affected her ability to lie or sit comfortably. Her ability to drive was affected especially the manoeuvre of reversing. Dr. Crandon spoke of the pain being reproduced when her neck was rotated laterally and that there was a trigger spot beside her vertebrae. In light of this is the plaintiff exaggerating her pain and suffering? She claims that she has a fear of driving that has not been completely overcome. Whenever passes near the scene of the accident she "chokes".

D. The loss of amenity suffered

She was deprived of conjugal relations with her husband for three months. She can no longer do the usual household chores. Her left arm is now weak. She has difficulty combing her hair even now.

E. Damages

Special damages

The parties have agreed special damages at \$72,100.

General damages

Pain, suffering and loss of amenity

In all assessments where there is personal injury the assessment involves a combination of objective and subjective factors. In this particular assessment I will lean heavily on the objective side of the assessment because there is evidence to suggest that the plaintiff may not be as truthful about the subjective part of her injuries. I refer in particular to her testimony that she did not suffer any pain from the pre-existing cervical spondylosis. Her own doctor said in his report that she was in pain. I will accept that she suffered some pain from the accident. However I have reservations about her overall credibility on this aspect of the matter.

Mr. Haynes relied on three cases: *Olive Henry v Robert Evans* [Suit No. C. L. 1988 H 019. Assessed February 1999]; *Iris Edwards v Samuel Owen* [Suit No. C. L. E. 054 of 1997. Assessed on March 3, 1999] and *Merlene Nelson v Cousins* [Suit No. C. L. N. 078 of 1986. Assessed between December 1991 and November 1996]. All these are found in Khan's Volume 5 at pages 156, 159 and 162 respectively.

In *Olive Henry's* case the doctor was able to say that the accident was 50% responsible for the plaintiff's whole person disability of 11%. In addition the report isolates the sum awarded for pain, suffering and loss of amenity at \$750,000 out of a total general damages award of \$1,830,000. The updated value of the pain, suffering and loss of amenity part of the award is \$1,147,816.11 using the March 2004 Consumer Price Index (CPI) of 1808.

In *Iris Edwards* the total award for general damages was \$1,300,000. There is no indication of the components of that award. Additionally there was no permanent disability and the medical report indicated that the plaintiff should recover fully. The updated award is \$1,987,653 using the March 2004 CPI.

In *Merlene Nelson* total award was \$525,000. The updated value is \$956,876 using the March 2004 CPI.

I think that the award in *Iris Edwards* is too high and quite likely included other items in the award that is not told in the report. In the other two cases cited by Mr. Haynes where there was evidence of cervical spondylosis and those awards even when updated do not exceed \$1,000,000. The doctor in *Olive Henry* was able to say precisely that the accident was responsible for 50% of the plaintiff's whole person disability. The medical evidence in this case does not go that far.

Mr. Campbell relied on *Walker v Pink* SCCA 158/01 delivered on June 12, 2003. The Court of Appeal increased the award to \$650,000. In that case there were injuries to the spine that led to extreme pain in the neck, shoulder, upper back and right arm. There was also numbness of the fingers in the right arm. The MRI showed damage to the C3-4 cervical intervertebral disk which bulged posteriorly. There was no injury to the spine and neither was there any pre-existing malady. The plaintiff had a 5% whole person disability.

The implication of Mr. Campbell's submission is that in the *Pink* case (supra) the injuries were solely caused by the defendant and the Court of Appeal felt that that \$650,000 was an appropriate award. Given the imprecise medical evidence in this case the award should not exceed \$600,000.

I am guided by the discussion in the *Pink* case. There the Court of Appeal cited a number of cases that provide a useful guide for the kind of injuries that exist in the instant case. An appropriate sum is \$650,000.

CONCLUSION

Special damages are \$72,100 at 6% from November 8, 1996 to June 29, 2004.

General damages for pain, suffering and loss of amenity are \$650,000 at 6% percent from date of service of writ to June 29, 2004. Costs to the plaintiff to be agreed or taxed.