IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. G012 of 2000

BETWEEN	WESLEY GLANVILLE	PLAINTIFF
AND	DELROY CAMPBELL	DEFENDANT
AND	GWENDOLYN BROWN	DEFENDANT

Mrs. Arlene Harrison-Henry and Ms. Novelette Kidd instructed by Marion Rose-Green & Co. for the Plaintiff and Ms. Debbie Robinson instructed by McGlashan, Robinson & Company for Defendant

Heard 17th and 18th of May 2001 and June 4, 2001

The plaintiff, a sixty-three (63) year old gardener/landscaper, was injured when a motor bus, driven by the first defendant and owned by the second defendant, and in which he was a passenger, overturned on Marcus Garvey Drive, at about 9:00 p.m., on the night of October 31, 1998. He returned to work on December 21, 1998, less than two (2) months later, but resigned from his job on January 7, 2000, because he was physically unable to carry out his duties. He also was unable to help around his home with the normal chores, and helping with his grandchildren, and this had made him feel bad about himself. On the 17th and 18th of May 2001, I heard evidence and submissions from counsel on both sides in relation to the extent of the damages to be awarded to this successful plaintiff. The parties, through their respective attorneys had agreed the special damages, and the evidence as well as the submissions of counsel, were directed at the issue of the plaintiff's entitlement to general damages.

Several local authorities were cited by counsel on both sides, to suggest what would be an appropriate quantum to be awarded given the nature of the injuries disclosed. At the end

of the closing submissions, I indicated that I wished to reserve my decision as to the extent of the award. I did this for two (2) reasons.

Firstly, I wished to make some comments on the evidence which had been presented; and

secondly, I wanted to direct some attention to the issue of damages flowing from handicap on the labour market or loss of future earnings, suffered by a successful plaintiff.

In the course of her submissions on the issue of general damages, counsel for the Plaintiff, Mrs. Arlene Harrison-Henry submitted that the plaintiff should recover damages, *inter alia,* for loss of future earnings, or alternatively, handicap on the labour market. The basis should be plaintiff's annual pre-injury wages of $156,000.00, factored by a multiplier of five (5) years, and discounted for tax purposes by twenty-five per cent (25%), for a net figure of $585,000.00. Ms. Robinson for the defence, on the other hand, submitted that no damages should be awarded to the plaintiff under either;

(1) handicap on the labour market/loss of earning capacity or;

(2) loss of future earnings.

In support of her submission, she cited the decision of the Court of Appeal in MONEX LIMITED AND DERRICK MITCHELL V CAMILLE GRIMES, SCCA 83/96. It seems to me that Miss Robinson's reliance upon this case may be based upon a passage of the judgement of Harrison JA at P.13 of the report of that case, where he states:

> "Loss on the labour market, handicap on the labour market, loss of earning capacity, in my view, may be regarded as synonymous terms. They represent a specific categorization. This head of damages arises where the said victim:
>
> (a) resumes his employment without any loss of earnings;
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> or
>
> (b) resumes his employment, at a higher rate of earnings,
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> but, because of the injury he received, he suffered such a disability that there exists a risk that in the event that his present employment ceases and he has to seek alternative employment on the open labour market, he would less able to vie because of his disability, with an average

> worker not so affected. (See Moeliker v Reyrolle & Co. Ltd, [1977] 1 A.E.R. 9)
>
> Loss of future earnings represents a distinctly different circumstance where a victim who, earning a settled wage, has suffered a diminution in his earnings on resuming his employment or assuming new employment, due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable, in such circumstances."

Since on the evidence in the instance case, the plaintiff returned to work after about a three (3) month lay-off and suffered "no diminution in his earnings" at the time and actually resigned about one (1) year later, purportedly because he could no longer carry on his job as gardener/landscaper, there could not be, so the argument would run, "net annual monetary loss in terms of reduction in earnings." Accordingly, there should be no award under this head.

However, as also pointed out by Harrison J.A., in the same case, citing the judgment of Lord Denning in FAIRLY V JOHN THOMPSON (DESIGN AND CONTRACTING) LTD [1973] 2 W.L.R page 40, and at page 42:

> "It is important to realize that there is a difference between an award for loss of earnings, as distinct from compensation for loss of earning capacity. Compensation for diminution of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages".

I confess that I am not as convinced as to the sharpness of the purported distinction as others may be. What I find of greater assistance than the above quote, is the rest of Harrison J.A.'s judgment itself. I am of the view that his exposition of the these alternatives heads of general damages in the Court of Appeal judgment in the Monex Case, particularly as set out on pages 12-14, and quoted extensively above, represents a clear and correct articulation of the law of damages as it relates to loss of future earnings

or handicap on the labour markets. In particular, I find assistance in his reference, at page 14 of the judgment, to John Munkman's "Damages for Personal Injuries and Death". He states that the author of that text, "although recognizing the above categories, placed a broader definition on 'loss of earning capacity'. With reference to the case where the victim has suffered no reduction in wages or is in receipt of increased earnings Munkman said, at page 75:

> These cases are sometimes described as "loss of earning capacity", but this is inaccurate as all claims for future earnings are based on loss of capacity..... what distinguishes these from other cases is that there is no immediate loss, and future loss is uncertain. This does not prevent an award of damages. The court has to assess and value the chance that there will be actual loss sooner or later".

In the instant case, the evidence is that plaintiff's capacity to work and earn has been diminished and he has had to resign his job. It seems clear to me that on the basis of what Harrison J.A. refers to as "loss on the labour market, handicap on the labour market or loss of earning capacity" which he says are "synonymous terms" this plaintiff who, on the evidence, has not been able to work since January 2000, but who has without success, sought alternative employment, is entitled to damages for loss of earning capacity under this head, and I quantify the amount later.

Having said that, one needs to emphasize the point that, based on the distinction made above, actual loss of earnings which has already occurred at the trial, is classed as "special damages" and will normally be calculated simply by reference to the period of disability and the pre-accident rate of earning. (BRITISH TRANSPORT COMMISSION v GOURLEY, [1956] A.C. page 185 at 206.) There is no "special damages" claim for the loss of earnings from January 2000 to the present, which would seem to be the imperative of the foregoing analysis. As Carey J.A. puts it in his judgment in GRAVESANDY v MOORE (1986) 23 JLR 17 at page 18:

> "In the case of loss of future earnings, the court is therefore concerned with quantifying an item of special damages which, provided the evidence is adduced, is comparatively easy to assess."

I am fortified in these views by a passage of the judgment of Browne L.J. from Moeliker v A. Reyrolle & Co. Ltd. [1977] AER 9, cited with approval by Carey J.A. in Gravesandy, referred to above:

> "In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materializes, having regard to the degree of the risk, the time when it may materialize and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialize. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, in hundreds of pounds, will be appropriate".

Here, far from being at risk, the plaintiff has actually had to give up his employment.

At the outset, I had indicated that one of the reasons for reserving my decision was because I wanted to make some comments on the evidence, which formed the factual basis for submissions as to the quantum of damages to be awarded. The court heard *viva voce* evidence from the Plaintiff himself, from Dr. Adolph Mena, Orthopedic Consultant, and had the benefit of the written report of Dr. Nyi Nyi Than, a resident at the Kingston Public Hospital.

I was left with some reservations after hearing the plaintiff's testimony. Having been involved in what can, undoubtedly, be described as a serious accident and in which he was injured, the plaintiff wore a collar for about six (6) weeks and was taking medication for pain up to January 15, 1999. He states that he still has pain, indeed the extent of his disability forced him to resign his job in January 2000. Yet, apart from a visit to the Kingston Public Hospital on February 1998 when he was not seen because his records could not be found, and a visit to Dr. Mena on May 6, 1998, he has made no attempt to see a physician. Nor is there evidence that he has taken any pain killers, even of the over-the-counter variety. He claims that he was unable to see a doctor because of lack of funds. But certainly once the suit had been filed, he was likely to recover any such expenses. Moreover, once liability was established, any expenses on medications were going to be recovered as special damages. Further, there are several public health facilities which would have engendered minimal financial outlays for pain-killing medication, including government clinics and church-sponsored clinic. There is also the government "Drug for the Elderly" programme, which allows senior citizens to access prescription drugs at a fraction of their cost. Dr. Mena also testified that had the plaintiff sought assistance of a physiotherapist, this would have helped his condition, and the 10% PPD could have been reduced. It is trite law that there is a duty to mitigate one's losses, and the plaintiff seems to have made little effort to do so. Another interesting observation is that in his testimony, the plaintiff spoke of recovering consciousness after the accident, to find what he called "a hole in my head back." This would suggest a major wound perhaps requiring suturing, but his only evidence in regards thereto was that the wound "was dressed." It is also interesting to observe that he testified that after the accident, he felt terrible pain in "my spine, right shoulder and neck", and that "I continued to have pain in those areas, ***but not terrible***." (Plaintiff's words, but emphasis mine)

In this regard, it is also useful to consider the evidence of Dr. Mena. He testified as to the condition he observed on examining the plaintiff and reviewing the X-ray of the cervical spine. Both in his written report and in his oral testimony, Dr. Mena stated that the plaintiff "will develop osteo-arthritis, secondary to the injuries sustained in the accident". His report in which this was contained was dated ~~was dated~~ October 21, 1999. However,

in his oral testimony, he stated that the plaintiff "had developed" the condition as at the time he saw him, although his written report did not so state. Dr. Mena did state his opinion that the degree of pain which the plaintiff would continue to feel would be "moderate to severe." He could not say at what specific intervals the plaintiff would need to visit a doctor. That would depend upon the patient's condition as to how often he may need to see a doctor. He further stated his view, under cross-examination by defendant's counsel, that the pain felt by the Plaintiff would NOT affect his ability to work. I believe that it is not unreasonable to draw the inference that if the plaintiff were suffering significant pain, he would need to have sought medical attention. This evidence, taken with that of the plaintiff referred to above, concerning his not visiting a doctor since May 1999, must perforce raise questions about the credibility of the witness, at least when he speaks of continuing pain, and has implications for the damages to be awarded by this court.

As noted above, the parties had agreed special damages at $50,000.00. Insofar as the general damages are concerned, the main evidence was that of Dr. Mena which concluded that the plaintiff suffered a permanent functional impairment of ten per cent (10%) of the whole person. Dr. Mena's report is set out below.

> Examination Revealed:
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> Cervical Spine – There is pain on touch over right side of neck. Range of movement are slightly restricted and there is pain whenever he attempts to turn his face to the right side.
>
> Right Upper Limb – The muscle power and sensation are slightly reduced in his right hand.
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> X-Ray examination # B1984 done on May 10, 1999 of his cervical spine showed "moderate degenerative changes are present in the lower cervical region." The report further stated that "There is subluxation of C6 on C7, with loss of the disc space, and the associated joints appear narrowed and somewhat distorted, making appearances suspicious for a fracture. There is also narrowing of the C5/C6 disc space."

Mr. Glanville suffers a Permanent Functional Impairment of ten per cent (10%) as a whole body. He will develop osteo-arthritis secondary to these injuries.

Among the authorities cited by the parties, were the following:

1. Katharine Lundy v James McNaughton et alios. Suit CL 1995 L-106, the updated damages in that suit would now yield $1.455 million.
2. Kathleen Earle v George Graham Defendant; (Elvin Nash (Snr) and Elvin Nash (Jnr) Third parties, (PPD 6% of whole person, updated yield, $1.084 million.
3. Levy v Cedar Construction Co. Ltd., & Jamaica Telephone Company Ltd. C.L. 1985 L- 054, (PPD of 12% of the whole person) updated would be $1.058 million.
4. Joy Mae Hall v Gordon Morgan et al at CL 1988 H- 125, (PPD 18% of the whole person) which would yield updated damages of $.588 million.
5. Sylvester Charlton v Super Star Bus Co. Ltd., et al. Suit CL 1987 C – 320, which I find is not really comparable.

I have formed the view that in Katharine Lundy, the nature of the injuries are more serious, and the treatment disclosed therein makes this quite clear. The damages awarded in that case would be out of line in the instant case. On the other hand, Kathleen Earle, despite the finding of a 6% PPD finding, is more comparable with Mr. Glanville's injuries. However, given my comments about the evidence that was led and my reservations with respect to both the plaintiff and Dr. Mena, my findings as to the failure of the plaintiff to mitigate, I believe that it would be reasonable to award the plaintiff the sum of nine hundred and seventy-five thousand dollars ($975,000.00) for pain and suffering and loss of amenities.

As far as the handicap on the labour market is concerned, I believe that in determining what is an appropriate multiplier, the court is entitled to look at all factors including the general economic situation, and the plaintiff's particular situation. I take judicial notice of the fact that a number of gardeners in similar positions to the plaintiff, have lost their jobs and found other jobs difficult to come by in the last several years in Jamaica. The

plaintiff is now sixty-three (63) years old, and I think it would be reasonable to award the plaintiff the sum of three hundred and fifty-one thousand dollars ($351,000.00)

Accordingly, the award is as follows:

A. Special damages of $50,000.00 plus interest at 3% from October 31, 1998 to the 14th of July 1999 and at 6% thereafter;

B. Damages for pain and suffering and loss of amenities, $975,000.00, with interest of 6% from February 23, 2000

For handicap on the labour market, $351,000.00.

Costs to the plaintiff agreed at $110,000.00.

ROY K. ANDERSON
Judge, Supreme Court
June 4, 2001