

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 2000/ G 140

BETWEEN SHARON HALL-GRAHAM PLAINTIFF
AND DERVAN LUMSDEN 1ST DEFENDANT
AND LLOYD WILLIAMS 2ND DEFENDANT

Miss Antonica Coore for plaintiff instructed by Messrs.
Vacianna & Whittingham
No appearance for or by defendants

Heard July 9 & 10, 2002 and July 18, 2002

ASSESSMENT OF DAMAGES

Sykes J (Ag)

EVIDENCE BEYOND THE STATEMENT OF CLAIM

1. Before dealing with the facts and the assessment of damages I would like to deal with an issue that has arisen in this case. Under the head of special damages the plaintiff claims the following:

- i. Loss of earning for 34 weeks
at \$12,000.00
per week and continuing \$408,000.00
- ii. Cost of helper for 34 weeks
\$1,500.00 and continuing \$ 51,000.00

2. At the hearing the plaintiff has proven that the loss of earnings and cost of helper were greater than that pleaded in the statement of claim. No application was made to amend the statement of claim. The additional sums proven were not allowed for the reasons given below.
3. The Court of Appeal of Jamaica has given guidance on the meaning of the phrase "**and continuing**" in the case of *Thomas v Arscott & Another* (1986) 23 J.L.R. 144, 151. Rowe P, said:

In my opinion special damages must both be pleaded and proved. The addition of the term "and continuing" in a claim for loss of earning etc. is to give advance warning to the defendant that the sum claimed is not a final sum. When, however, evidence is led which established (sic) the extra amount of the claim, it is the duty of plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum....The learned trial judge was not entitled to award a loss of earnings a sum in excess of \$3,840.00 and his award for special damages must be reduced from \$9,369.00 to \$3,840.00. (My emphasis)

In that case claim for loss of earnings in the particulars of special damages was stated as:

Loss of earnings from the 18/11/82 to the 13/5/83 at \$160 per week and continuing - \$3,840.00.

4. It must be observed that the court reduced the learned trial judges award to the sum pleaded despite the presence of the words "**and continuing**". I take note of the fact that a specific time period was mentioned. In

the instant case the specific time period is thirty four weeks.

5. The learned President founded his proposition on the case of *Ilkiw v Samuels* [1963] 1 W.L.R. 991. Diplock L.J. (and not Goddard L.J. as indicated at page 151 of *Thomas' case* (supra) as reported in (1986) 23 J.L.R. 144) said at page 1006:

As regards the question of damages, I would put it in this way. **Special damage, in the sense of a monetary loss which the plaintiff has sustained up to the date of trial, must be pleaded and particularised.** In this case it was so pleaded and particularised at the sum of £77 odd. Shortly before the trial, the special damage (as so particularised) was agreed at £77 by letter. In my view, it is plain law - so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years - that you can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000 - at any rate, a very much larger sum than £77. **This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at, at the sum of £77 for special damage.** The evidence about the loss of earnings in excess of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be. (My emphasis)

Both cases appear to be ones where counsel represented both parties at first instance. There was no application to amend; the amount actually proven could

not be recovered. In the instant case only the plaintiff is present and represented by counsel. Not only was there no application to amend, there is also no indication that the defendants were notified of this intended application.

6. In the light of these authorities I am convinced that I am not able to permit recovery of loss of earnings and the cost of helper beyond what was pleaded despite the evidence. The stated period was thirty four weeks.
7. Miss Coore applied, after the evidence, to amend the statement of claim to increase the sum claimed for cost of X ray and Cat Scans from \$18,900.00 to \$21,400.00. She also sought to increase the sum for medical services by \$1,500.00.
8. Miss Coore submitted that these costs were for expenses already incurred and not remote. They were for medical care arising from the injury suffered. To my mind these submissions cannot avail her because they are directed to the issue of relevance. There is no question that they are relevant but as the cases cited above show the expenses were not disallowed because they are irrelevant but because they were not specifically pleaded.
9. In a final effort to secure these expenses Miss Coore submitted that the court has wide powers of amendment and those powers should be exercised in favour of the plaintiff. She added that the defendants were served with the relevant documents pursuant to section 31E of the **Evidence Act**. This last submission does not assist. To inform the defendant of evidence that may be used is quite different from the issue under consideration. I cannot see how telling the defendant

what evidence the plaintiff intends to deploy at the hearing can be "metamorphologised" into a notice of intention to amend the statement of claim to increase the special damages. The authorities are quite clear: plead what you intend to claim as special damages and prove it, if you can, at the trial.

10. If I am correct that in the two cases cited the hearing was conducted with legal representation on both sides and the plaintiff was not able to claim the sums he wanted despite the evidence being led then a fortiori in a situation in which the defendants are not represented, not present and were not notified of any intention to apply for amendment to the statement of claim. The amendment simply cannot be allowed.

THE FACTS

11. On April 16, 2000 the plaintiff was walking along the Yallahs main road in the parish of St. Thomas. She reached Poorman's Corner when she was hit by a motor vehicle driven by the second defendant. The car was owned by the first defendant.
12. She was taken up and transported to the Princess Margaret Hospital in the same parish.
13. On impact she lost consciousness. When she regained consciousness she was on the ground in premises next to the main road. She did not know how she got there. The evidence about this came from her niece Antionette Smallwood who was walking with her at the time. Miss Smallwood said that the plaintiff was

struck, carried on the bonnet of the car and then deposited over a fence adjacent to the road.

14. The plaintiff said that when she regained consciousness she felt pain

- i) all over her forehead;
- ii) in her chest;

15. She said that she lost all sensation in her arms and legs. She could not move them. She could not breath normally. At the hospital she was in a lot of pain. She was admitted at the Princess Margaret Hospital and transferred to the Kingston Public Hospital (KPH) the very next day.

16. She remained at KPH for eleven days. She was given liquids intravenously. She received pain killers and oxygen. She had a tube inserted into her left side. She was in a lot of pain.

17. She was taken to the University Hospital for the West Indies (UHWI) for a Cat Scan.

POST HOSPITALISATION

18. After she was discharged from KPH she went home to Yallahs to continue recuperating in the comfort of her home. Even at home she was in pain. She suffered from pain in her forehead, stomach, back, left side and left shoulder. She could walk but only slowly. She is the mother of young children and during her time of difficulty she had to hire someone to assist her around the house.

19. Her after-hospital-care required her to go to the Yallahs Health Centre every three days. The centre is about a mile away and she hired a taxi to take her there and back home. She stopped going to the health centre in July/August 2000.
20. The doctor at KPH referred her to Dr. Batchelor who had his surgery in Morant Bay, St. Thomas. She travelled by taxi to see Dr. Batchelor approximately five times.
21. Dr. Batchelor required her to get an X ray done but there were no X ray facilities at the Princess Margaret Hospital at the time. This necessitated a trip to Kingston.

THE MEDICAL EVIDENCE

~~22.~~ Perhaps the most remarkable thing about this case is the absence of a medical report from KPH, the largest hospital in the English speaking Caribbean. The only reports are from Dr. Batchelor.

23. The report dated June 20, 2002 noted the following:

- i. plaintiff seen on April 16, 2002;
- ii. tender on palpation over the chest with compression in the anterior posterior plane;
- iii. cardiovascular system and abdomen normal and stable;
- iv. no deficit in central nervous system;
- v. multiple abrasion and contusions on all four limbs and chest;

- vi. fracture of all ribs from 2nd to 7th inclusive on left side of chest with double fracture of 2nd, 3rd and 4th ribs;
 - vii. fracture of 2nd, 5th and 6th ribs on right side of chest;
 - viii. history of being unconscious;
 - ix. she was given pain killers, antibiotics;
 - x. her wounds were cleaned and dressed;
 - xi. the next day her respiratory rate increased slightly. It was this that precipitated her transfer to KPH for management of her flailed chest condition;
22. The doctor said that the plaintiff had received a life threatening injury. Her ribs and soft tissue injuries should be healed within four months from the date of the accident. The pulmonary contusion should also be healed. The plaintiff would require another two months to recover her full lung capacity. During this two month period she would not be able to walk or run quickly. Thankfully no neurological deficit is anticipated.
23. In November 2, 2001 Dr. Batchelor gave a follow up report. He said that:
- i. the injuries she received resulted in respiratory distress that necessitated the insertion of a chest tube into the left chest to drain off and evacuate a left haemo-thorax;
 - ii. by April 2001 her severe soft tissue injuries were healed as well as the bony injuries;

- iii. she complained of pain in the left chest and she was given skeletal muscle relaxants and analgesics;
 - iv. she was reexamined on October 27, 2001. She still complained of pain in left chest and left scapula region. The pains were aggravated by movement of the upper limb but not by compression of the left haemo-thorax. Breathing was normal;
 - v. she was able to move around the room without shortness of breath. She had residual soft tissue injury with muscle strain. She got anti-inflammatory drugs;
 - vi. ~~it would be difficult~~ to say when she would be pain free;
 - vii. she tried to resume work in March 2001 but ~~had to stop~~ because of shortness of breath and fatigue;
 - viii. the projections set out in the previous report (June 20, 2000) had to be revised;
 - ix. her symptoms had largely subsided;
 - x. no significant functional or anatomical deficit should be experienced;
 - xi. an accurate estimate of when she will be symptom free now seems impossible.
24. The plaintiff says that she still suffers from "shortness of breath". She still feels pain in her left breast and left rib area.
25. She has scars on her forehead, left thigh, just below left knee, under her left breast, left side just above the buttocks and right shoulder blade.
26. Whenever she climbs a stair case she is out of breath.

SPECIAL DAMAGES

27. She claims

| | |
|---|--------------|
| 1) medical services | \$ 6,400.00 |
| 2) cost of prescription | \$ 1,826.91 |
| 3) cost of medical cert. | \$ 2,500.00 |
| 4) cost of x rays & cat scan | \$ 18,900.00 |
| 5) hospital and health centre fees | \$ 5,330.00 |
| 6) Loss of earning for 34 weeks at \$12,000.00 per week and continuing | \$408,000.00 |
| - 7) Cost of helper for 34 weeks \$1,500.00 and continuing | \$ 51,000.00 |
| 8) Travelling to and from Yallahs Health Centre | \$ 3,600.00 |
| Travelling to and from Doctor in Morant Bay | \$ 5,500.00 |
| KPH to Yallahs | \$ 2,000.00 |
| Travelling to and from St. Joseph's Hospital | \$ 2,500.00 |

28. At the beginning of this judgment I indicated why the plaintiff could not recover any amounts in respect of items (6) and (7) as pleaded. I accept the plaintiffs testimony in respect of item (7) and so she can recover \$51,000.00

29. Item (6) requires greater scrutiny. The plaintiff is a travelling saleswoman. She purchases good which she sells to her customers as she traverses the country side. She said that she went back to work in March of

last year. The minimum amount of money she earned was \$5,000.00 per week. During the two weeks before Christmas she earned between \$20,000.00 & \$30,000.00 per week. I accept her evidence. It is true that she did not produce receipts but this is not uncommon in this country. The increase in sales in the period leading up to Christmas are acceptable. It is well known that consumer spend much more a Christmas than at other times of the year.

30. The plaintiff said the during "school time" she earned \$12,000.00 per week. I understood this to mean during the regular school terms. However on inquiry from me she said that during the September to December school term she earned approximately \$5,000.00 per week. During the January to March school term she earned approximately \$5,000.00 per week and during the April to August term she earned approximately \$5,000.00 per week. She said that sales increased in the period July to August but she did not say what was that figure.
31. Now that the evidence has been heard the loss of earning is substantially less than was pleaded. Thirty four weeks from April 16, 2000 ends December 10, 2000.
32. The maximum that can be claimed for loss of earnings is \$170,000.00
33. In respect of item (1) the plaintiff claims \$6,400.00. This was made up of the fees paid to Dr. Batchelor (see exhibit 7). The sum is supported by receipts totalling that amount. I have already said why this figure cannot now be increased by another \$1,500.00.
34. No evidence was presented in respect of item 2 and so that sum is not recoverable.

35. Item 3 is nor recoverable because it is not apart of cost of treatment but a litigation expense that is recoverable in other ways.
36. Item 4 is supported by an bills in the sum stated (see exhibit 1, 8a & 8b)). I have already dealt with this item to some extent already. I will only say here that the sum claimed has been proven. The additional sum was not allowed for reasons already stated.
37. Item 5 comprises \$5,000.00 for the services at KPH; \$180.00 in fees paid at the Yallahs Health Centre (see exhibits 5). These expenses were supported by invoices and receipts. The trip to Kingston to have the X ray done at St. Joseph's was reasonable. The plaintiff has proven expenditure of \$5,018.00 which is recoverable.
38. I have already stated my conclusion about items 6 and 7.
39. Under item 8 the plaintiff has clearly proven the \$2,000.00 from KPH to Yallahs. There is a receipt for that sum (see exhibit 3). She has also proven the cost of travel from her home to the health centre and back. The receipts have been tendered and the dates are consistent with a person going to the health centre approximately every three days (see exhibit 4). The cost of her trips to Morant Bay and back to see the doctor are supported by receipts (see exhibit 6). There is no receipt to support the cost of her trip to St. Joseph's but I accept her testimony. Exhibits 8a and 8b clearly show that she went to St. Joseph's. I accept her testimony of the cost which was \$2,000.00. She can recover this sum and not \$2,500.00 as pleaded.
40. The evidence was that the total sum for the Cat Scan has not been paid. She has paid \$10,000.00. Following

Lord Denning M.R. dictum in *Jefford v Gee* [1970] 2 Q.B. 130, 146 it would seem that interest would only be payable on the \$10,000.00 since that is the sum the plaintiff is in fact out of pocket. He however went on to say that special damages should be dealt with along broad lines and the losses, expenditure and receipts should all go into one pool (see page 147). The case has been approved by the Court of Appeal of Jamaica. Therefore I will treat the \$18,000.00 as one sum and not divide it into \$10,000.00 representing the sum paid and \$8,000.00 as the outstanding balance.

GENERAL DAMAGES

41. In this case the plaintiff has suffered fractured ribs, some fractured in two places. The fractured ribs were on both sides of the chest. Her breathing was impaired and is still impaired. It is exacerbated whenever she climbs staircases. The doctor's prognosis in the report of June 20, 2000 was revised in the report of November 2, 2001. He said in the second report that he really cannot say when she will be symptom free. In the report of June 20, 2000 he described the injuries as life threatening.
42. There is no indication that there is any loss of earning capacity and neither is there any indication that there will be any loss of future earnings. This assessment is therefore concerned only with the heads of pain and suffering and loss of amenities.
43. Miss Coore referred me to the cases of *Corine Peart v Chin's Transport* and *Osmond Campbell v The Attorney General* [Suit No. C.L. 1989/C007]. Both are found in

Harrison & Harrison, *Assessment of Damages for Personal Injuries*, at page 95. In the first case the plaintiff's 7th, 8th, 9th, 10th & 11th ribs were fractured. There was tenderness and swelling over the right lower chest with severe pain in the right chest. The assessment was done on July 26, 1991 and the sum awarded for general damages for pain and suffering and loss of amenities were \$65,000.00. The consumer price index at that time was 219.2. The index in May 2002 was 1480. The value of that award now is \$438,868.61.

44. In *Cambell's case* (supra) the plaintiff received "fracture of left side of his ribs, cut on left side of head and nose bleeding". Damages were agreed at \$12,000.00. -I need not dwell on this case any further because it is so far removed from the instant that it is not of any assistance at all.
45. In *Eroy Willary v Happy J's Transport* [Suit No. C.L. 1986/W430] Harrison & Harrison at page 95 the plaintiff received multiple right side rib fractures and right haemo-pneumothorax. He had no permanent disability. The pain in the chest persisted for 6 -9 months. General damages for pain and suffering and loss of amenities were \$50,000.00. This was on July 23, 1991. The cpis are identical to Peart case (supra) and need not be repeated here. The value using the indices is \$337,591.24. The *Willary* case (supra) did not say how many ribs were fractured and whether any rib had a double fracture. This last observation applies equally to the *Peart case* (supra). In fact the plaintiff in the instant case has twice the number of fractured ribs than the plaintiff in *Peart's case*

(supra). The plaintiff here has double fractures of three ribs on the left side of her chest.

46. What the **Peart** and **Willary** cases(supra) do is to indicate that the starting for assessment in this case has be at least between \$337,591.24 and \$438,868.61. This must be so because the injuries to the plaintiff in the instant case are far more serious and extensive that in any of the cited cases. Further her breathing is still affected.
47. Miss Coor submitted that the sum to be awarded should be \$800,000.00. She arrives at this by saying that the court should use the current value of the award in Peart's case (supra) as the starting point. This should be for just the pain and suffering without any rib fracures. Add \$200,000.00 for the rib fractures and round up the figure to \$800,000.00.
48. I must say that even without the benefit of authority this approach must be wrong. It is the rib fracture and other injuries that have caused the plaintiff's pain and suffering. I do not see how it is possible to make an assessment in isolation of her injuries and the consequential pain and suffering.
49. The plaintiff seems to have fully recovered but for her impaired breathing. She can now walk. She has resumed her occupation and is not impaired in carrying it out in any way.
50. The plaintiff in this case must have been in severe pain. She was in effect scooped up from the road side and deposited with more than a bump over the wall. Even at home she was in pain. She could not care for her children. Her quality of life suffered and continues to suffer because of the impaired breathing.

51. I believe that an appropriate sum is \$850,000.00 for pain and suffering and loss of amenities. Interest is awarded at the rate of 6% from January 5, 2001 to July 18, 2002.

FINAL AWARD

52. SPECIAL DAMAGES

| | |
|---|--------------|
| 1) medical services | \$ 6,400.00 |
| 2) cost of x rays & cat scan | \$ 18,900.00 |
| 3) hospital and health centre fees | \$ 5,018.00 |
| 4) Loss of earning for 34 weeks at \$12,000.00 | |
| per week and continuing | \$170,000.00 |
| 7) Cost of helper for 34 weeks \$1,500.00 and continuing | \$ 51,000.00 |
| 8) Travelling to and from Yallahs Health Centre | \$ 3,600.00 |
| Travelling to and from Doctor in Morant Bay | \$ 5,500.00 |
| KPH to Yallahs | \$ 2,000.00 |
| Travelling to and from St. Joseph's Hospital | \$ 2,000.00 |

TOTAL **\$264,418.00**

Interest at 6% from April 16, 2000 to July 18, 2002.

53. GENERAL DAMAGES

Pain & suffering and loss of amenities **\$850,000.00**

Interest at 6% from January 5, 2001 to July 18, 2002.

Costs to the plaintiff in accordance with schedule A
of the Rules of the Supreme Court (Attorney's at Laws
Costs) Rules 2000