

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.H 049 OF 2001

BETWEEN HERMINA HARVEY PLAINTIFF
AND AMY RIGABIE DEFENDANT

Mr. Ainsworth Campbell for plaintiff.

The defendant was not present or represented.

ASSESSMENT OF DAMAGES

Heard: November 13 and December 2, 2003

JONES, J. (Ag.)

It is hard not to feel a pang of sympathy for Miss Hermina Harvey. Here she was trying to be a good pedestrian, using the pedestrian crossing on a busy road; it has brought her nothing but pain and despair. Regretfully, she was knocked down by a car while on the cross-walk at Homestead, in the parish of Saint Catherine.

Liability is not in issue; the defendant filed no appearance or defence and Interlocutory Judgment was entered on June 13, 2001. As a consequence, the sole issue before this court is to assess damages for the injuries to Miss Harvey.

On April 7, 2000, two lines of cars stopped to allow Miss Hermina Harvey to use the cross-walk at Homestead in Saint Catherine. While crossing, a car

suddenly came from the direction of Old Harbour at a fast speed and struck her on the right shoulder, right knee and right hip. Miss Harvey fell to the ground hitting her left side. This car was driven by Amy Rigabie.

Her shoulder was badly hurt, her arm was swollen, and she received bruises to her body. She was taken to the casualty department at the Spanish Town Hospital where she was treated.

Dr. Young was the first to examine her; he said that she was alert and conscious on admission to the hospital. Her injuries consisted of:

- Pain and tenderness to the right side of the body.
- Tenderness to the right shoulder.
- Diffuse swelling and tenderness with superficial abrasion to the posterior aspect of the right forearm.
- Mild swelling and tenderness to the right knee.

In his assessment she had soft tissue injuries. Her treatment consisted of tetanus prophylaxis, analgesics and antacid medications, after which she was discharged. Dr. Young said that the injuries were not expected to be permanent.

Four days after being discharged from the hospital, Miss Harvey visited Dr. Humphrey Lyn to receive further treatment for her injuries. In his assessment he said that Miss Harvey sustained severe contusions to her right shoulder, right forearm, left forearm, thoracic spine and right knee. He sent her for an x-ray of the right knee and received a report that it was normal. He gave her

analgesics and advised her to rest. Dr. Lyn also concluded that no permanent disability was expected.

Miss Harvey visited Dr. Akshai Mansingh a consultant orthopaedic surgeon, three years later, complaining of persistent pains to the right shoulder, right knee, and right hip. In his examination he found that the right shoulder had full range of motion, but a painful arc. He said she had a positive impingement and lift off test, suggestive of tears in the supraspinatus and subscapularis muscles respectively. It was his opinion that these rotator cuff muscles are commonly injured when trauma as described by Miss Harvey takes place. He gave her an injection with lignocaine, which increased the range of motion. He concluded that they are not massive tears. He also included in the injection, corticosteroids, to help with the inflammation.

Dr. Mansingh found that Miss Harvey's right knee had no effusion although there was some pain on full flexion. Her lateral, collateral and medial collateral ligaments were normal, but she had a positive pivot shift and McMurray test laterally. He believed that these were as a result of an anterior cruciate ligament tear, and lateral meniscal tear respectively. He concluded that these injuries could account for some instability in the knee; nevertheless, he found no abnormalities on an examination of the hip.

In his opinion, if both the shoulder and knee failed to respond to physiotherapy, surgical options may have to be considered, but he felt it was difficult to give a long term prognosis. In any event, he was of the view that it was unlikely that Miss Harvey's injuries were going to be permanent in nature,

although there was some possibility that there would be some sort of impairment. He felt unable to give a definitive answer unless she undergoes full physical therapy. He recommended physiotherapy, which Miss Harvey has availed herself of.

General Damages:

On the issue of general damages, counsel for the claimant Mr. Ainsworth Campbell submitted two cases for consideration. First, in *Charmaine Powell v Milton O'Meally and Edward Allen* reported at Volume 4 Khan's Reports. Damages were assessed by McIntosh J. (Ag.) on June 13, 1997. The plaintiff, a sales representative, was injured in a motor vehicle collision. She was admitted to the University Hospital, had surgery, and was discharged with a cylinder plaster. When the cast was removed she commenced physiotherapy.

On examination it was noted that the circumference of the right thigh was 43.8 cm and that of left was 46 cm. and that the right calf was 1 cm larger than the left. There was also a 14.5 cm. transverse scar across the anterior aspect of the knee in the region of the tibial tubercle. The doctor noted that the plaintiff experienced pain on resisted extension of the knee and he assessed her disability as:

- Restriction in flexion - 10% of lower extremity equivalent to 4% whole person disability.
- Impairment from difference in size circumference between right and left thigh - 9% of lower extremity equivalent to 3% whole person.

- Total partial percentage whole person disability - 7%

General damages were awarded in the sum of \$450,000.00 for pain and suffering and loss of amenities which when updated to today's dollars is \$750,000.00.

The second case submitted for consideration is the case of *Delroy Bucknall v Altimont Forrester* reported at Khan's Vol. 3 page 99. Damages were assessed by Reckord J. in January 1990. In that case, the plaintiff was a pedestrian who was knocked down by a motor vehicle. He suffered the following injuries:

- Fracture of the humeral head of the left shoulder.
- Pain and swelling of the left shoulder.
- Laceration to the left forearm 3" X 1" X ½".
- Laceration over the right eyebrow ½" X ½" X ½".
- 6 inch incision scar to the left shoulder.

The resultant disability was assessed as:

- Abduction of shoulder limited to 80 degrees.
- External and internal rotation and forward flexion restricted.
- Wasting of the deltoid.
- Permanent Partial Disability assessed at 15 to 20%.

General damages for pain and suffering and loss of amenities were awarded in the sum of \$50,000.00 and when updated to today's dollars amounts to \$650,000.00

Mr. Campbell submitted that the injuries in this case are more severe than the injuries in the cases cited. It doesn't quite wash. It is apparent on a brief examination of the cases cited, that the injuries referred to are far more serious and of a different nature than the injuries in this case. Accordingly, I did not derive much assistance from them.

A more appropriate starting point in my view is the case of *Delroy Williams v Adina Daley* Suit No. C. L 1991/W144 (unreported) in which damages were assessed by Reckord J. on March 30, 1992.

The following Injuries were accepted as proved:

- multiple bruises and abrasions,
- swelling and pain to the right ankle.
- permanent disability of 5% of the function of the right lower limb.

General damages for pain and suffering and loss of amenities were assessed by the court at \$40,000.00. When updated to today's dollars amounts to \$200,416.08. Nevertheless, in this case there appears to be some residual discomfort which the plaintiff seems to be experiencing, and I therefore propose to increase the award to reflect that fact.

In addition to the claim for pain and suffering and loss of amenities, Mr. Campbell has asked the court to consider an award to the claimant for handicap on the labour market, as well as future medical expense. First, in relation to handicap on the labour market, he suggested that an appropriate award would be to give her four years purchase on her handicap.

A claim for handicap on the labour market arises where the claimant resumes her employment without any loss of earnings or at a higher rate of earnings. However, because of the injury received, the claimant has suffered a disability that increases the risk that if her present employment ceases and she has to seek alternative employment, she would be less able to compete because of her disability. What the court is asked to assess is the "*plaintiff's reduced eligibility for employment or the risk of future financial loss*": see *Gravesandy v Moore (unreported) SCCA 44/85* delivered 14th February 1986. In this case, the claimant has not resumed her employment, and therefore, is not entitled to compensation under this head.

Second, Miss Harvey has asked for a further six sessions with the physiotherapist. Dr. Mansingh recommended that she have a further six sessions to assist with her treatment. Future medical expenses are an acceptable head of damage and are normally claimed as an item of general damages. The court accepts that there will be need for some future physiotherapy and will consider six weeks at the rate of \$1,200.00 per week as reasonable.

Special Damages:

Miss Harvey has asked the court to consider payment for the services given by her daughter-in-law in respect of household services for the period in which she was injured. Miss Jacqueline Turner (daughter-in-law) said that she helped with the washing of the clothes and the cleaning of the house. She says

that she has been doing this for the past year on the weekends. She was not paid for her services.

The court adopts the following statement of principle set out in *Donnelley v Joyce* [1973] 3 All ER 475. This extract is taken from the headnote.

“In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need.”

At the time of the accident Miss Harvey was paid \$1,000.00 per day for her services as a household helper. Using that as a guide, and accepting that the assistance from Miss Turner was given for one day on the weekend, I am prepared to allow a claim for third party assistance for a period of six weeks. I reject the contention that Miss Harvey was unable to do her own cleaning for the last three years.

The court also rejected Miss Harvey's claim for \$6,200.00 to be paid to Dr. Mansingh; although this was a significant sum, it was not referred to in the pleadings, nor was it supported by receipts. Miss Harvey had a duty to mitigate her loss after a reasonable period, and therefore, the court will limit her claim for loss of earnings to a period of six weeks after the accident.

The court accepted the following items of special damage as proved to its satisfaction.

1. Loss of earnings for 6 weeks	\$24,000.00
2. Medical Bill	\$ 450.00
3. X-ray	\$ 800.00
4. Travel Cost	\$ 00.00
5. Physiotherapy	\$ 7,200.00
6. Cost of medical reports	\$ 1,500.00
7. Prescription	\$ 475.00
8. Doctor's visit	\$ 950.00
9. Extra help from Daughter -in- Law	<u>\$ 6,000.00</u>
Total:	\$42,775.00

This court assesses damages for the claimant Miss Hermina Harvey as follows:

General Damages:

Pain and suffering and loss of amenities	\$240,000.00
Future medical expense (physiotherapy)	<u>\$ 7,200.00</u>
	\$247,200.00

Interest on the sum of **\$240,000.00** at the rate of 6% per annum from April 27, 2001 to the date of this judgment.

Special Damages:

\$42,775.00

Interest on the sum of **\$42,775.00** at the rate of 6% per annum from April 7, 2000, to the date of this judgment.

So, there shall be final judgment for the claimant in the sum of **\$289,975.00**, together with interest and cost, in accordance with Appendix B of the CPR 2002.