

2001

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. J. 113 OF 99

BETWEEN MARIE JACKSON PLAINTIFF
A N D GLENROY CHARLTON 1ST DEFENDANT
A N D GEORGE HARRIOTT 2ND DEFENDANT

Mr. Jeffery Mordecai for the Plaintiff

Mr. Dennis Morrison, Q.C. instructed by Dunn, Cox, Orrett & Ashenheim for the Defendants

Heard: 8th January and 4th May 2001

DUKHARAN, J.

This action came before me for assessment of damages consequent upon interlocutory judgment in default of defence against the defendants. It proceeded to assessment of damages on the 8th January 2001. Liability is not an issue.

By consent of the parties Special Damages was agreed at \$401,209.29 as per the amended Statement of Claim. My main task therefore is to make an award for General Damages.

The plaintiff is a 26 years old Clerk. On the 26th November 1998, she was in a motorcar accident in which she suffered a severe injury resulting in her being permanently disabled. She received a severe whiplash injury and injury to her lumbar spine with a resultant disc prolapse. This has left her with a phobia for travelling in motor vehicles.

The Plaintiff underwent surgery in August 1999 but still has frequent pains. These pains limit her movements at work causing her to be absent from work about twenty-four (24) days per annum. This also limits her physical activities at home and affects normal sexual relations with her husband leading to misery and depression. She has had to seek loans from her previous employer and friends to meet medical bills.

The medical reports were agreed and admitted in evidence. Dr. M. O'Reggio saw the Plaintiff on the 1st December 1998. It reveals the following:

Re: Marie Ashmeade

“Mrs. Ashmeade was seen by me on the 1st December 1998 complaining of persistent pains since being involved in a motor vehicle accident on the 26th November 1998. She complained of pain in the neck, back, and left side. She also had pain in the left elbow. On examination the following was noted:

- (1) Tenderness of the nape of the neck and left rib cage
- (2) Tender swelling to the lateral epicondyle of the elbow.
- (3) Tenderness of the lower back especially to the left sacro iliac joint.

Analgesics were prescribed and she was advised to wear a neck brace.

She was seen again on the 5th December with persistent neck and lower back pain. X-Rays were ordered. These showed no obvious bone or joint injury. Cataflan was prescribed.”

The Plaintiff also visited Dr. G. Dundas, an orthopaedic surgeon on several occasions. On his first examination he stated as follows:

“Examination of the lumbar-sacral spine revealed that she had significant tenderness in the area of the left sacro-spinalis muscles bilaterally. The cervical spine reproduced her low back pain.”

“The diagnosis entertained initially was a whiplash injury with sequelae and left sacro-iliac contusion.

In view of the persistent low back discomfort she was advised to use a special back support and to continue use of her cervical collar for long journeys only. She subsequently developed dysaesthesia in the left lower extremity indicated that she had developed a 2 centimetres deficit in the left thigh circumference and 1 centimetre in her left calf. There was depression of the knee jerks bilaterally and restriction of straight leg rising to 70 degrees

on the left with a negative laseque test. There was blunting of sensation in the L 3 and L 4 dermatones on the left side.”

“A diagnosis of lumbar disc prolapse was entertained and an M.R.I scan was recommended. The scan was done and indicated that she did indeed have an L 4/5 lumbar disc prolapse. The current management is to treat the disc prolapse conservatively and see how she progresses before contemplating surgical intervention.”

The Plaintiff developed a phobia for travelling in motor vehicles as a result of the accident. The memory of the accident remains in her mind. She was referred to Dr. Frank Knight a consultant Psychiatrist for treatment of this phobia.

Dr. Dundas further medical report of the 25th October 1999 revealed that after surgery on the 10th August 1999 the Permanent partial disability to be 8% of the whole person.

Physiotherapy and swimming were recommended to develop her body muscles.

Dr. Dundas’ report of the 25th January 2000, revealed new development of pain and tenderness in the area of the left abdominis which has been a gradual development since the accident. It was suddenly

aggravated as she tried to lift her young daughter, causing some pressure against the abdomen.

He said that it does restrict her ability to function normally in her day to day routines and has recommend analgesics.

The plaintiff requires a course of Lumbar Epidural Steriod injections, for which each course would cost \$12,0000 as per Dr. Ballin's report, dated 27th June 2000.

On the issue of Pain and Suffering and Loss of Amenities Mr. Mordecai referred the Court to the case of Merdella Grant vs. Wyndham Hotel Co. reported in volume 4, page 194 of Khan's Personal Injury Awards. In that case damages were assessed by Walker J, on the 27th February 1996.

The Plaintiff in this case suffered a lumbar injury. Her Permanent Partial Disability was assessed at 25 % of the total person. It was the opinion of the doctor that her condition would worsen with time and that she would need physiotherapy for the rest of her life and doctors visit twice annually. Lifting was forbidden.

For pain and suffering and loss of amenities she was awarded \$1,400,000. This sum when updated at today's value would be about \$2,000.000.

In Wellington Williams vs. Brumdee reported in Khan's volume 4 page 202, Damages were assessed by James J on the 7th and 9th April 1997. In this case the Plaintiff suffered a Prolapse intervertebral disc. He was left with irreversible impotence and the absence of reflexes bilaterally in both lower limbs. Permanent Partial disability was assessed at 10% of the whole person. He was awarded \$1,980,000 for pain and suffering and loss of amenities. When updated would be over \$2,600,000 today. For loss of Future Earning and using a multiplier of 11 he was awarded \$2,430,272.

Mr. Mordecai submitted that in the Grant case, there was a more serious lumbar injury than in the instant case but urged the Court to consider that the Plaintiff Marie Jackson is half the age of Grant and will have to endure her injury, disability and loss of amenities for 44 years while Grant will only have to do so for 16 years. She also suffered two other injuries and that the totality of her injury is similar to Grant.

He urged the Court to consider that in addition to the lumbar injury she suffered a cervical as well as mental injury and a figure of \$2,000,000 for Pain and Suffering and loss of Amenities should be awarded.

Mr. Morrison for the Defendants referred the Court to the case of Cooper et al v. Smith reported in volume 4 of Khan's report page 159, Damages were assessed by Cooke, J. The Plaintiff in this case suffered a

whiplash injury with severe neck pains with radiation of pains into both shoulders. Permanent Partial Disability was assessed at 6% (whole person). The Plaintiff was awarded \$275,000 as general damages which when updated using an index of 1350 amounts to \$359,738.36

The case of **Gardener v. Chin et al was** also cited and is reported in Khan's Report volume 4 at page 156. In that case the Plaintiff suffered unconsciousness and severe pain as well as a fracture of the atlas vertebrae with dislocation of bone in front of the axis. The Plaintiff was left with Permanent Partial Disability assessed at 14% of the whole person. She was awarded \$420,000 which when updated amounts to \$605,575.111.

Mr. Morrison admitted that although the Plaintiff in the instant case had Permanent Partial Disability of only 8% of the whole person she underwent surgery, is a 26 years old mother of a child and that she has to contend with continued pain, in the circumstances and award of \$800,000 would be reasonable in the circumstances.

There is no doubt that the Plaintiff who is a young woman of 26 years that her life will be the same again. She has suffered three injuries, which continues to affect her. Her evidence has not been challenged. The medical reports speak of serious injuries which will continue to plague her for the

rest of her life. In the circumstances I am prepared to award her the sum of \$1,8000,000 for pain and suffering and loss of amenities.

With regard to an award for loss of **Future Earnings** Mr. Mordecai, quite rightly, submitted that there was no evidence of the Plaintiff's current earnings or there was any lessening of her post accident earnings. She would therefore not be entitled to an award under this head. He however, urged the Court to look at **Loss of Earnings Capacity/Handicap on the Labour Market.** He submitted that the Plaintiff severe injuries have limited her ability to attend her job and lessened her performance at work. This absenteeism and limitation of her performance is likely to pose a danger to her employment. To support his contention he relied on the case of **United Dairy Farmers Limited v. Lloyd Gouldborne 21 J.L.R** at page 18 where Campbell J.A. said:

“Loss of earning capacity as a head of damage is peculiarly suited to circumstances where through there is no satisfactory evidence to sustain an award for future loss of earnings because for example the pre-accident level of earning remain the same, yet there is evidence which satisfies the Court that in consequence of injury and disability suffered by the Plaintiff he is deprived of a special earning capacity which he would have had but for his

injury and disability or he is in consequence of such injury and disability at a distinct disadvantage or otherwise handicapped in the labour market.”

In this case there was an award of \$10,000 for loss of earning capacity which when updated at today's value is about \$240,000. Mr. Mordecai urged the Court to award a similar sum under this head of general damages.

In this area Mr. Morrison suggested that in light of the possible risk for the plaintiff's job security due to the continued effects of her injury, if any award is to be made for handicap on the labour market a sum of \$80,000 would be a reasonable figure.

It is quite clear that the Plaintiff in this case will have limitations on the performance in her job. The medical evidence supports this, and there is a real likelihood that with absenteeism she is likely to lose her employment. The nature of her injuries could preclude her from obtaining permanent employment.

Under this head of general damages I am of the view that she should be awarded the sum of \$200,000.

With regards to Future Care it was urged on the Court that an award ought to be made under this head. From the medical reports it is quite clear that continued medication will be necessary. The Medical Report of Dr. Ballen supports this. The proposed management for chronic back pain is for

a course of Lumbar Epidural Steriod Injection at a cost of \$12,000 per session.

The Plaintiff has said in evidence that flare up (pain) has occurred about 3 times a week. She said that the pains are getting more intense. She has had to visit Dr. Dundas on more than one occasion, likewise visits to the physiotherapist. She has also had to expend money for prescription drugs. This is likely to continue in the future. I accept the Plaintiff's stated intention to take the steriodal injections at least three times per year. This would add up to \$36,000 annually. The Plaintiff has a permanent disability and therefore it is quite clear that large sums will have to be spent in the future for alleviating the pains she will more than likely suffer.

I am of the view that taking everything into consideration and on the totality of the evidence the annual cost of future care should be \$40,000 per annum. A multiplier of 14 years has been suggested by Mr. Mordecai and I accept that suggestion. I am guided by:

“Rough Guide to Multipliers” in the Godfrey Dyer v. Stone case
S.C.C.A 7/85

Accordingly I would award the Plaintiff \$560,000 (\$40,000 x 14 years) for Future Care.

Special Damages (as agreed) for \$401,209.20 with interest at 6% per annum from the 26th November 1998 to 4th May 2001.

General Damages

- (a) Pain and Suffering/Loss of Amenities - \$1,800,000 with interest at 6% per annum from the 24th January 200 to the 4th May 2001.
- (b) Loss of Earning Capacity/Handicap on the Labour Market - \$200,000
- (c) Future Care - \$560,000

Interim Payment made by the Defendant on the 20th June 2000 of \$5000,000 to be credited.

Cost to the Plaintiff to be taxed if not agreed, according to schedule A.