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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL 2002/M199

BETWEEN	VINROY McDERMOTT	CLAIMANT
AND	MOHAN RIGG	1 ST DEFENDANT
AND	MICHAEL RAMSARIOOP	2 ND DEFENDANT

Mrs. Dorothy Gordon for Claimant

Mr. Kevin Williams instructed by Grant Stewart Phillips & Company for first Defendant

Heard : 3rd, 10th March and 2nd April, 2004

Sinclair-Haynes, J (Ag.)

The claimant is 34 years old. On the 31st day of March 2002 he was injured whilst he was a passenger in a motor vehicle owned by Mohan Rigg, the first defendant and driven by Michael Ramsarioop, the second defendant.

Calamitously, he subsequently fell and sustained further injury to his leg whilst he hobbled on his crutches in his bathroom. Prior to the fall he was assessed as having permanent disability of 14% of the whole person. Since the fall, this figure has increased by 25%. His total partial percentage disability is now 35% of the whole person. He now claims special and general damages.

Claim for General Damages

The injuries sustained by Mr. McDermott are outlined in Dr. Rose's second medical report dated 27th February, 2004 as stated below:

Present Complaints

1. "Mr. McDermott reports that he is unable to run, play sports and dance, secondary to the onset of pains in the right thigh.
2. A feeling of instability in the right lower limb after walking for approximately one mile as well as if he attempts to run, participate in sports or dance. The instability in the right lower limb frequently results in falls.
3. He continues to experience pains extending from the right knee to the right hip when sitting for approximately one to two hours.
4. Lying on the right side precipitates pains in the right thigh.

His lower back pains are very mild and episodic."

Physical Examination

"On examination, he is a healthy-looking male who walks with a trendelenberg gait with the right lower limb in more external rotation than the left lower limb. Attempts to walk on the toes of both feet are difficult due to the onset of pains in the right femur especially at the point of angulation of the femur. The circumference of the right thigh is 52.8cm and that of the left 54cm. The right lower limb is 3cm shorter than the left. There is pain in the right thigh on resisted knee extension. There is marked tenderness on palpation of the lateral aspect of the right extending from the right greater trochanter to the right knee. There is full range of motion of the right knee.

Examination of the right hip reveals internal rotation 0° to 3° and external rotation 35°."

Diagnosis

1. "Malunited femoral fracture right femur with an angular deformity of 10°.
2. Limb length discrepancy of 3cm.
3. Fibrosis of the quadriceps muscle especially the vastus lateralis with adherence to the femur and plate."

Disability Rating

“The impairment caused by the angular deformity of the right femur remains unchanged as twenty-five percent of the lower extremity which is equivalent to ten percent of the whole person. The limb length discrepancy remains unchanged and this has left him with a ten percent impairment of the lower extremity which is equivalent to four percent of the whole person.

The fibrosis and adherence of the quadriceps muscle which is the cause of the pain and instability in the right lower limb has been evaluated as twenty-five percent of the lower extremity which is equivalent to ten percent of the whole person. The restriction of internal rotation of the hip has been evaluated as ten percent of the lower extremity which is equivalent to four percent of the whole person. The mechanical lower back pains have been assessed as zero percent of the whole person. **His total partial percentage disability remains at twenty-five percent of the whole person.**

Mr. McDermott’s disability would certainly have been much less had the unfortunate incident of him slipping in the bath two weeks following his surgery not occurred. **The impairment caused by the angular deformity would certainly not be present.** It is impossible for me to state whether there would have been any change in the extent of scarring and fibrosis of the vastus lateralis muscle. In addition, his limb length discrepancy will have been less. **His disability rating without the angular deformity would be seventeen percent of the whole person.** This is in accordance with the American Medical Association, Guides to the Evaluation of Permanent Impairment.”

It is the submission of Ms. Dorothy Gordon that the sum of \$2.5M is fair compensation for his pain and suffering and loss of amenities. She relies on the cases of **Naaman Smith v Venley Williams and Lexmore Munroe suit No. CL 1996 S301 and Marcia Bradford v Melrose Martin and Delroy Mascoe suit No CL 1999 B150 Cited at Volume 5 of Mrs. Ursula Khan’s compilation** of cases on personal injuries at pages 32 and 40 respectively and submits that the injuries sustained by the complainant in those cases were similar to those of Mr. McDermott’s.

Mr. Kevin Williams, on the other hand, submits that the sum of \$600,000.00 is an appropriate sum to compensate the claimant for his pain and suffering and loss of amenities. He contends that the fall subsequent to the first injury was a supervening

event for which the defendant cannot be held liable. Consequently, the Partial Percentage Disability ought to be 14% and not 35%.

It was Dr. Rose's testimony that the surgery caused Mr. McDermott to be more susceptible to falls and the crutches may have caused the fall. Mr. McDermott's testimony was that the weight of his body on his leg caused him to fall. At the time he fell he was alone in the bath. He had not begun doing anything in his bath. In the absence of any evidence to the contrary I accept the claimant's testimony as to how he fell. I also accept the doctor's testimony that the surgery and use of the crutches made him more susceptible to falls.

I reject Mr. Williams' contention that the fall was a supervening event and find that the fall and injury sustained were directly related to the first injury.

It is also the submission of Mr. Kevin Williams that the claimant has not established any loss of amenities and hence I should reject his claim that he played cricket and football and ran before the accident, as there was no evidence that he played cricket and football or ran before the accident. According to Mr. Williams, this is evident from the fact that he worked seven (7) days per week and ended work at the late hour of 9:00 p.m. The unchallenged evidence is that Mr. McDermott played cricket or football and ran.

The doctor has corroborated his evidence that he can no longer do those things. He has undoubtedly lost the ability to play football, cricket and run whenever time is available.

The case of **Naaman Smith v Venley Williams & Lexmore Munroe** is an appropriate guide. The claimant in that case was assessed total permanent disability at

29% of the whole person. That claimant suffered only leg injury whilst Mr. McDermott sustained injury to his neck, back and elbow. Naaman Smith was awarded \$1,300,000.00 in 1999 for pain and suffering and loss of amenities. Using the January 2004 Consumer Price Index of 1798.2 that figure today would be \$1,835,432.97.

Claim for Special Damages

I will deal with the items of the plaintiff's claim under this head which are disputed by Mr. Kevin Williams.

1. Loss of Income

Mr. McDermott told the court he earned about \$8,500.00 to \$9,000.00 per fortnight. A pay slip tendered into evidence revealed a figure of \$7,572.00.

Mr. Ainsworth Williams, the former employer of Mr. McDermott testified that Mr. McDermott earned approximately \$8,000.00 per fortnight as a security guard. His evidence was that Mr. McDermott earned \$70.70 per hour and he worked approximately 110 hours fortnightly.

Mr. Kevin Williams submitted that Mr. McDermott's true salary ought to be 110 hours multiplied by \$70.70 which amounts to \$7,700.00 per fortnight. In light of the evidence elicited, I cannot disagree with those submissions.

Mr. McDermott has not worked since the accident. He testified that his job as a security guard required him to patrol and stand for long hours. This was supported by his former employer, Mr. Ainsworth Williams, who told the court that he was dispatched to a pharmacy which required him to patrol. As a result he was on his feet for long hours. Prior to that job he sold bag juice.

Mr. Kevin Williams submits that Mr. McDermott has sat back and made no effort

to mitigate his losses. Further, there has been some healing of his bone.

Dr. Roses' opinion

Dr. Rose, however, told the court that he could not say whether Mr. McDermott would have been able to return to work because even if the bone healed the soft tissue damage takes paramount importance to the bone. Mr. McDermott, he told the court, had a long plate put in the bone. Its presence could cause soft tissue damage. The subsequent fall aggravated the soft tissue damage and soft tissue damage can be permanent. Quite apart from damage to his leg, Mr. McDermott suffered injury to his back. As a result of his injury, his ability to move about for prolonged periods is affected. Dr. Rose opined that Mr. McDermott can do light work which involves sitting.

Has Mr. McDermott failed to seek alternative employment or is he unemployable given his obvious limited educational background?

It is the doctor's testimony that he can do light work which involves sitting. Sedentary employment is usually of a clerical nature which requires some qualifications. His level of education precludes him from easily obtaining such employment.

Mr. McDermott sold bag juice before his job as a security guard, that job required some manual labour, such as lifting the bags. His ability to lift heavy things is affected thereby affecting his ability to fetch the juices upon purchase and take them to his home to offer them for sale.

I do not find that he has sat back and failed to mitigate.

I will therefore award the sum of \$123,200.00 as loss of income at \$7,700.00 per fortnight from 31st March, 2002 to today's date.

2. **Claim for Jewellery and Groceries**

The following items claimed by Mr. McDermott have been challenged by Mr. Kevin Williams:

lost gold chain	-	\$7,700.00
lost gold chaperitta	-	5,500.00
groceries lost	-	3,150.00

Mr. Kevin Williams submits that I should disallow the claim for the gold chain and bracelet as the claimant has failed to discharge the burden of proving that he was indeed wearing these items and that they were indeed lost or destroyed at the time of the accident. I am mindful of the fact that Mr. McDermott lost consciousness after the accident. He is therefore not able to account for the items. I believe that he was wearing the items of jewellery. The reasonable inference is that he lost them in the accident. I come to the same conclusion with regards the groceries.

3. **Claim for Transportation**

Under this head, Mr. McDermott has claimed as follows:

a.	Scene of accident to Linstead Hospital	-	\$ 500.00
b.	Home to Spanish Town Hospital and return home 8 times	-	25,700.00
c.	Home to Bog Walk Health Centre and return home 5 times at \$2,000.00 per trip	-	10,000.00
d.	Home to Linstead Drug Store and return	-	2,820.00
e.	Home to Linstead Hospital for X-ray and return home 4 times	-	9,400.00
f.	Home to Spanish Town Police Station and return home 6 times	-	<u>20,500.00</u>
		c/f	\$68,920.00

		b/f	-	\$68,920.00
g.	Home to Dr. Rose - Old Hope Road and return home		-	<u>5,000.00</u>
		Total	-	\$73,920.00 =====

With regards the claim for transportation cost, Mr. McDermott provided no documentary evidence. It is, however, unchallenged that he attended the hospital, health center, drug store, police station and Dr. Rose's office. In fact he has produced receipts from these various places which have been accepted by Mr. Williams. There is no doubt that he did attend these various places and must have incurred the attendant travel expenses.

Under cross-examination he told the court that he lived in Bog Walk which was two (2) miles from Linstead. He attended the hospital, health center, and drug store in Linstead. He also attended the hospital and police station in Spanish Town. He attended Dr. Rose's office in Kingston. His ability to move around properly at the time was affected. In the circumstances I do believe he used private transportation at the times he testified he did and at the cost he claims. In the circumstances I will allow the claim.

4. Claim for Domestic Help

The claimant has claimed the sum of \$3,000.00 for domestic help. He testified that prior to the accident he performed his domestic chores himself. However, since the accident he has been forced to employ help. Miss Annette Taylor, he testified has been in his employ since the accident.

Mr. Williams submitted that no award ought to be made under that head since Mr. McDermott has not supplied any documentary proof of these payments. Further, he submitted that it is not believable that the claimant who has no earnings could afford to

pay a helper's salary.

Miss Annette Taylor testified that since the accident she has been in his employ as a helper and she receives a salary of \$3,000.00 per week. I accept her evidence that she was so employed. In the absence of her credible testimony, proof of payments might have been required.

It was never suggested to Mr. McDermott that he could not afford the services of a helper since he had no earnings. The possibility exists that he had some savings or received some assistance. It is noteworthy that he received \$600,000.00 as an interim payment in December.

Conclusion

Upon perusal of comparable awards and being mindful of the injuries suffered by Mr. McDermott I will award \$1,900,000.00 for pain and suffering and loss of amenities. The sum of \$600,000.00 is to be deducted from the general damages. Interest of 6% on the sum of \$1,900,000.00 from the 31st March, 2002 to the 5th December, 2003, the date of order for interim payment and thereafter interest at 6% on the sum \$1,300,000.00 to today's date. I award the sum of \$348,390.00 for special damages with interest of 6% from 31st March, 2002 to today's date.

Accordingly, damages assessed to the claimant in the sum of \$2,248,390.00 with interest as aforementioned and costs in accordance with Table 1 of Appendix B of Civil Procedure Rules 2002.