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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 000366/2004

BETWEEN ROBERT MOWATT CLAIMANT
AND COURTNEY COOTE DEFENDANT

Mrs. Suzette Campbell for the Claimant instructed by Campbell & Campbell.
Defendant unrepresented, not present

Heard: September 20, and 26, 2005

McDonald, J (Ag.)

On the 24th August 2003, Mr. Robert Mowatt, a construction worker was travelling as a passenger in a motor car owned by the Defendant along the Spring Hill main road in the parish of Trelawny, when it collided with a utility pole. At the time the car was being driven by the Defendant's servant and/or agent. Mr. Mowatt sustained injuries and incurred loss and expense as a result of the accident.

He was taken to the Falmouth Hospital and later transferred to the Cornwall Regional Hospital where surgery was performed on his hip and his right pinna was stitched back on. The pinna did not hold and after a couple of weeks a complete separation had to be performed.

The Claimant's evidence is that he remained in hospital for two months during which time he could not move around as his left foot was in traction. After he was discharged from hospital, he used crutches for a month and a half, and then he used a cane for about two weeks. He went back to hospital for treatment twice and visited a private doctor on two occasions.

Mr. Mowatt said that he can no longer do some of the things he could do before the injury such as driving around for long periods of time because of the hip.

Medical reports of Dr. Alberto Hing Soler dated October 28, 2003 and that of Dr. V. Suman dated February 2, 2004 were admitted into evidence as exhibits I and II respectively.

On examination of the Claimant Dr. Hing Soler found blood in the auditory canal, complete loss of pinna with irregular edges of the wound (skin and cartilage) and moderate swelling of right parotid region.

Medical report prepared by Dr. Suman states that the Claimant was diagnosed with dislocated left hip. It was reduced under sedation; skin traction applied and he was admitted to ward 5 East. Patient got upper tibial pin on August 30, 2003.

Mrs. Campbell advised the Court that she was unable to find any one case which involved loss of pinna and dislocation of hip. She therefore proposed to rely on the case of Fitzroy Gordon v Dayton Clarke reported at 5 Khan's Reports page 52 which involved hip injury, and ask the Court to increase the award for injury to the ear. She opined that an award of \$2 million for pain and suffering and loss of amenities would not be excessive.

In Gordon v. Clarke the plaintiff suffered pains in back, dislocation of right hip joint, and fracture of right pelvis on May 15, 1996. On February 26, 1997. Dr. Emran Ali on examination noted the following: -

- (i) 3 healed triangular shaped scars 1"x3/4" in anterior aspect of the left knee with tendency to keloid formation.
- (ii) 2 healed puncture scars at upper end of right leg being the site of the skeletal traction.
- (iii) well healed 10" curved incision scar over right buttock.
- (iv) That movements of the right hip was full except for flexion which was limited by about 10 degrees.
- (v) That x-rays showed a well reduced dislocation of right hip with healed fracture across the acetabulum with plate and screws in situ. There was also some para articular ossification in the soft tissue around the joint.
- (vi) That he walked with a slight limp and complained of pains in the hip.

It was the doctor's opinion that the hip was prone to develop early degenerative arthritis and he assessed permanent partial disability at 15% of the right lower limb. On the 25th January 1999 general damages were awarded in the sum of \$710,000.00. Such

an award would amount to \$1,321,486.06 dollars today – (using CPI of 2214.7 for August 2005).

In the case under review no percentage PPD has been given. The medical reports contain no prognosis of arthritis in the Claimants hip, nor is there any finding of the Claimant walking with a limp.

In respect of the injury to Mr. Mowatt’s ear, Dr. Suman’s medical report speaks to the complete loss of the pinna resulting in the Claimant having “permanent and severe aesthetic defect...”

The Claimant testified that he sometimes feels pain inside the ears especially at night, and people ridicule him most of the time when they see him. They laugh at him and call him names like one-ears”, “monster”, and “spaceman”. He said this breaks his spirit and makes him feel funny like he is not normal.

I am of the view that an award for pain and suffering and loss of amenities in the sum of \$1.7 million is appropriate in all the circumstances.

Special Damages claimed was particularized as follows: -

Loss of earnings for 16 weeks @ \$15,000 per week	\$240,000.00
Cost of CAT Scan	\$ 12,400.00
Hospital fees	\$ 20,000.00
Household assistance on discharge from hospital – 10 weeks-\$2,500 per week	\$ 25,000.00
Cost of medical report	\$, 1,000.00
Cost of transportation	<u>\$ 4,500.00</u>
	\$302,900.00

Loss of Earnings

Mr. Mowatt testified that he was employed as a supervisor at Neville Daley & Co. Construction and earned \$15,000.00 per week. As a result of the accident, he was unable to work for four (4) months and during this period he received no pay. The medical evidence discloses that he was admitted to hospital on August 24, 2003 and discharged from hospital on September 30, 2003 for out patient follow-up. He attended ENT clinic on October 21, 2003. Mr. Mowatt's evidence is that for the two months he spent in hospital he was unable to work and thereafter for another two months. The medical reports do not support his contention that he spent two (2) months in hospital.

Mr. Mowatt said that at the time of the accident he was in charge of the construction of 22 buildings – 2 storey. He had to see to it that material was available and to the general running of the site, including the security.

He testified that he was paid each week, but was given receipts intermittently because of the nature of the job. He said “we don't have time to really get the receipt them on a weekly basis.” There is no evidence before the Court as to the payment of taxes.

It is a well established law that special damage have to be claimed specially and proved strictly –

Rowe J in the case of Hepburn Harris v. Walker SCCA 40/90 delivered on December 10, 1990 stated

“Plaintiffs ought not to be encouraged to throw figures at trial judges, make no effort to substantiate them by even their own books of account and to rely on logical arguments to say that specific sums must have been earned. Court have experience in measuring the unmeasurable

but when they have so acted, their determination ought not to be unreasonably attacked.”

Mr. Mowatt has produced no documentary evidence substantiating salary received.

Miss Campbell has asked the Court to accept him as a witness of truth and award him the sum claimed although there is no documentary evidence in support.

I, have looked at McGregor on Damages and two cases for guidance in respect of this claim. The cases are **Desmond Walters v. Carlene Mitchell** (1992) 29 JLR 173 delivered on June 2, 1992 and Suit no. CL. 2002/B092 **Roger Brown v. Cecil Bassaragh** delivered on July 28, 2003.

The learned author of McGregor on Damages 12th Edition at paragraph 1528 stated: -

“However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen, L J laid this down in the leading case on pleading and proof of damage, Ratcliffe v. Evans (1892) 2 Q B 524 (CA). In relation to special damage he said: the character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

In the case of Walters v. Mitchell, the Claimant was engaged in a partnership with her common law husband. The trial judge accepted that \$950 was the weekly profit realized from the vending partnership. Her weekly income was assessed at \$375. On

appeal it was contended that she had failed to strictly prove her earnings of \$950 per week.

Wolfe JA (Ag.) (as he then was) said that “on the basis of the evidence tendered by the plaintiff as well as the evidence elicited during cross-examination it was open to the judge to properly make the award which he made in respect of loss of earning.”

The learned judge at page 176 said: -

“Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen L J referred to as “the vainest pedantry.”

In respect of the sidewalk vending trade the learned judge said:

“This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of account. They buy and replenish their stock from each day’s transaction. They pay their domestic bills from the day’s sale. They provide their children with lunch money and bus fares from the day’s sale without regard to accounting.”

In the case of **Roger Brown v. Bassaragh et al** – the Claimant operated a route taxi. He stood the cost of purchasing gasoline for the car and the owner paid all other maintenance costs. The Claimant provided the Court with no documentary evidence to support his claim for loss of earnings.

In his judgment Brooks J said:

“Without seeking to relax old and intelligible principles (per Lord Bowen in Radcliffe vs. Evans (1892) 2 QB 524 at pages 532 –3). I shall however have to consider the circumstances of this particular plaintiff. He has a grade eight education and is involved in a cash –only business, dealing with several persons a day, as such is the nature of a route taxi operation. His expense in respect of the vehicle is

limited to the purchase of gasoline, which is another transaction typically devoid of documentation. In the circumstances I am prepared to follow the guidance provided by the Court of Appeal in *Desmond Walters vs. Carlene Mitchell* (1992) 29 JLR 173 and find, based on my acceptance of the evidence of the Plaintiff as being truthful in this regard, that the damage concerning the weekly loss in this area have been proved....”

I find that Mr. Mowatt’s situation is distinguishable from the Claimants in *Desmond Walters v. Mitchell* and *Roger Brown v Bassaragh*. Mr. Mowatt did receive pay receipts albeit intermittently, and more importantly he is still employed to Neville Daley Construction Co. in the same capacity as a supervisor. The company is operational and is presumed to keep proper records. At the time of the accident, he was receiving a set weekly salary and the Court would have reasonably expected him to obtain either salary statements/copies or at least a letter from the company substantiating his income. He has failed to do so. No award is made in respect of this claim.

Hospital Expenses

Mr. Mowatt claims \$20,000 for hospital fees. He has produced no documentary evidence in support of this expenditure. His evidence is that after he left hospital, he was given a bill and his boss took it and it was taken care of by his boss. There is no evidence that he had to repay this money in the future or that it was in any way a charge on his pocket. This amount is not allowed.

Medical Report

The amount of \$1,000 claimed for cost of medical report is allowed. This is supported by receipt – exhibit 3.

CAT Scan

The Claimant testified that a scan was done on his hip and that the boss paid for it. He thinks the boss got a receipt, but he did not get it.

Dr. Suman's medical report dated February 2, 2004 stated that Mr. Mowatt was advised for CAT Scan left hip but never did it. The claimant has produced no documentary evidence in support of the claim. The amount claimed is not allowed.

Household Help

The claim as pleaded for household help is for 10 weeks at \$2,500 per week. The claimant's evidence is that after discharge from hospital he was unable to do normal household chores and he had to pay someone to assist him along with his girlfriend. He paid this helper for about two months.

I accept that this help was reasonable and necessary having regard to the Claimants evidence and the medical report. I award \$20,000 under this head of Special Damages.

Cost of Transportation

Mr. Mowatt stated that after discharge from hospital he made two round trips to hospital and two round trips to a private doctor. In his evidence he claims for eight (8) trips at \$800 per trip totalling \$6,400.

There is no documentary evidence supporting these visits to a private doctor or of the doctor's location.

I will allow the two round trips to the hospital. The medical report speak to the Claimant being seen at the ENT clinic and for review in one week's time.

I award \$3,200 for costs of transportation.

Damages are assessed against the Defendant in the sum of \$1,724,200.00 being:-

General Damages

Pain and Suffering and loss of Amenities \$1,700,000.00

Special Damages \$ 24,000.00

Interest is awarded on the General Damages at the rate of 6% per annum from 29th March 2004 (date of service of the Claim Form) to 26th September 2005.

Interest is awarded on Special Damages at the rate of 6% per annum from 24th August 2003 to 26th September 2005.

Costs to the Claimant in the sum of \$40,000 pursuant to Part 65 Schedule A of CPR 2002