

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/R 186

Judgment Book

B E T W E E N

BARBARA ROBERTS

PLAINTIFF

A N D

OMKAR PARSHAD

DEFENDANT

ASSESSMENT OF DAMAGES FOR PERSONAL INJURIES

Anthony Pearson instructed by Mrs. Shirley Playfair of Playfair, Junor and Pearson for the Plaintiff.

E. DeLisser instructed by D. O. Kelly and Associates for the Defendant.

HEARING on October 26, 28, and December 2, 1988

JUDGMENT

BINGHAM J.:

In this matter the question of liability is not in issue what has to be determined is the quantum of damages to be awarded to the Plaintiff.

The Claim arose out of a collision on November 12, 1984 between a motor car owned and driven by the defendant and a motor cycle ridden by the husband of the Plaintiff on which the Plaintiff was the pillion rider. As a result of the collision the Plaintiff suffered the following injuries:-

1. A closed comminuted fracture of the left femur.
2. A twenty centimetre laceration on the dorsum of the left foot.
3. A compound fracture of the first metatarsal of the left foot.

She was admitted into the University of the West Indies where she was examined by Dr. Christopher Rose, an Orthopaedic Surgeon who found her to be suffering from the injuries described above.

Dr. Rose in his medical report of June 21, 1985 (Exhibit 2), stated that:-

"Due to the segmental fracture of the left femur internal fixation was not advisable. She was treated non-surgically with skeletal traction. The wound was cleaned and dressed regularly. She was also placed on antibiotics. Skeletal traction was maintained from November 13, 1984, to January 16 1985 and discharged from hospital on January 22, 1985 with an appointment to the clinic.

Alignment of the fracture was very difficult to maintain due to the segmental nature of the fracture. The proximal fragment has remained angulated resulting in shortening of the left lower limb. The plaster hip spica was removed on May 24, 1985. She has been started on gentle physiotherapy.

Mrs. Roberts will be left with a leg length discrepancy. It is too early to state whether there will be any restriction of hip and knee function."

Following her discharge from the hospital on January 22, 1985, the Plaintiff continued to receive treatment for physiotherapy as well as to make bi-monthly visits to the Orthopaedic Clinic where she was examined by one of the team of doctors scheduled to see patients at that clinic from time to time.

The Plaintiff who was at the date that she suffered and who is still employed as a Housekeeping Aid at the same hospital was incapacitated from November 12, 1984 to November 1986.

Following her return to work, she was given light duties to perform but suffered a set back in the same month as while walking along one of her corridors at work, "she felt her foot give away." She went to see one of the doctors assigned to her case and as a result of the advice she was given she had to cease working. The situation continued up to June 1987.

Although she has since June 1987 resumed her duties at the hospital her leg still pains her from time to time. This has resulted in the plaintiff having to apply for sick leave whenever the pain becomes intense. The Plaintiff testified to being on two weeks sick leave at the time of the hearing of this matter for the same reason.

The Plaintiff was admitted into hospital on five separate occasions as a result of the injuries she received. Her account is supported by the medical reports (Exhibits 1 - 3) from Dr. Rose, Professor Sir John Golding and Dr. Paul Wright, all of whom at varying periods attended to her.

Following her first discharge from hospital on January 22, 1985 (Dr. Rose's report), the plaintiff was on January 27, attended to by Professor Sir. John Golding. His medical report of September 5, 1986 stated:-

"She was found to have an angulated non-union of the shaft of the femur about 4 inches below the greater trochanter. On 1st February, 1986 I performed an open reduction having freshened up the bone and using a Rush Rod to maintain alignment. Her recovery from surgery was complicated by her diabetes which proved to be unstable. Her general condition slowly stabilised and she was put into a hip spica on 12th February, 1986 and discharged home that day.

The plaster cast was removed on 14th April, 1986 the radiographs at that time showed little bone formation.

3.

She was referred back to me on 11th August, 1986. At that time there was evidence that the fracture had not united and that there was still some movement at the fracture site. On 13th August I performed strain radiographs which confirmed that there was a non-union. It would be necessary to perform further surgery to stabilise this fracture.

Mrs. Roberts is still totally disabled from the injury. She will certainly have a permanent disability which is not possible to estimate at the time but will not be less than 25% of the function of her left lower extremity."

Following her discharge from hospital after her treatment by Dr. Golding, the Plaintiff had to be re-admitted into hospital on October 21, 1986. Dr. Paul Wright in his medical report of December 23, 1977 stated:-

"On the following day he had the Rush Rod removed from her left femur and a metal plate with screws inserted into the femur. During her post-operative period, she had the unfortunate complication of a non-union of her fractured femur - secondary to metal fatigue of the plate. She was re-admitted to hospital on 30th April, 1987 and had the broken plate and screws removed and the Smith Person Pin and Plate inserted. She was further immobilised in a plaster of paris hip spica.

On 17th July, 1987, the plaster was removed and the fracture was now healed and she was fully ambulated. She progressed from non-weight bearing to full weight-bearing."

She was examined for the purpose of Dr. Wright's report on 10th December, 1987. On that occasion he made the following observations:-

1. The fracture of her left femur was healed solid and tender.
2. Flexion of her left hip was 90°.
3. Flexion of her left knee was 90°.
4. She had no external rotation of her left lower limb.
5. Internal rotation of her left lower limb was 20° only, which is 50° of normal.
6. She had no dorsi flexion of her left great toe.
7. There was a loss of sensation of this digit with a neuropathic ulcer-distally.
8. She was 3/4 inch shorter on the left than on the right."

She was then assessed by Dr. Wright as reaching her maximum recovery.

Based upon this examination he formed the opinion that her total disability amounted to 50.0% of the left lower extremity which converts to an approximately 20% of disability of the whole person.

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Although in his report (Exhibit 1) as well as in his evidence he had stated that the total disability amounted to 66% of the lower extremity which converts to 26% of the whole person when the breakdown of the figures are examined in order to determine how he arrived at this conclusion it was discovered that there was an error in the calculation which based upon the report, the data in respect of:-

1. Loss of flexion of the hip.
2. Loss of flexion of the knee - were erroneously described in arriving at the degree of disability. As Dr. Wright had previously stated in his report that there was in respect of these two areas a 90° loss, the above figures in relation to the extent of the disability these two areas would accordingly be halved resulting in the lower figure referred to above.

The plaintiff's claim falls to be assessed under two broad heads:-

1. Special Damages.

This would include:-

(a) Medical expenses including:-

- (i) medication
- (ii) cost of obtaining three (3) medical reports.
- (iii) costs of transportation to hospital for medical examination and physiotherapy.

(b) Loss of Income.

- (i) Salary as a Housekeeping Aid for a period that Plaintiff was absent from work.
- (ii) Loss of earnings as a Higgler from 11th November 1984 to October 1987.
- (iii) Extra domestic help at \$62 per week,
- (iv) Other incidental expenses.

2. General Damages based upon:-

- (a) Pain and suffering.
- (b) Dependent upon 1. (b) (ii) above, loss of prospective earnings.

Special Damages

In turning to this area of the Claim, Learned Counsel for the defendant has taken issue with the sum claimed for Loss of Income as:

1. Housekeeping Aid,
2. Higgler

In this respect of the Claim for salary this represented a claim for the period that the Plaintiff was away from work as a result of injuries she received without pay. It is of significance and a factor going towards establishing her credibility in this area of her claim that she has not sought to recover her salary for the entire period that she was away from work following the accident. This is borne out by the fact that although the accident took place on 11th November, 1984 her claim in this regard commences from February 1985 to 13th July, 1985 on which date the Writ was filed. The Claim, however, being a continuous one, she has now sought to recover her salary in respect of the entire period that she was away from work. When this is considered based on her evidence, which is supported by that contained in the Medical Reports (Exhibits 1 - 3) as well as the evidence of Dr. Paul Wright this period would cover two separate stages being:-

1. 12th November, 1984 to October 1986.
2. 21st October 1986 to 30th May, 1986.

On the totality of the evidence lead in this area of the claim it appears that a part from a very short period in early October, 1986 the Plaintiff was unable to return to her duties as an Housekeeping Aid at the hospital until June, 1987.

Given the fact that her claim in the Particulars of Special Damages as set out in the Statement of claim is in respect of the period from February 1985, when this is examined it would amount to a total of 120 weeks, given the plaintiff evidence that she eventually resumed her duties at the hospital after her setback in November 1986, in June 1987.

As she gave evidence of being in receipt of a fortnightly salary of \$270, her claim, if successful in this area would be calculated at \$261 as this is the sum pleaded.

Learned Counsel for the defendant has submitted that the plaintiff has failed to bring any documentary evidence in support of her oral testimony in this area of her claim. He contended that as she must have received payslips, the Court is entitled to enquire from the hospital authorities before the payment of her salary was discontinued, and equally for consideration the first payslip she received after resuming work. In so far as she has failed to produce this proof, her claim, ought to be rejected.

From the testimony given by the Plaintiff, and the medical evidence, it is clear and beyond question that the plaintiff was away from work for the period under review. On a broad common sense approach to the matter her claim appears to me to be quite reasonable and justifiable. Moreover, it asking much to expect that the hospital authorities would be required to keep the Plaintiff on full salary for the entire period of 120 weeks that she was away from work. The fact that based on the pleadings they continued to pay her from 12th November, 1984 to the end of January 1985, a total period of 13 weeks would appear to have been overgenerous.

Even assuming that the hospital authorities continued by some special arrangement to pay the plaintiff while she was away from work the fact that she now sought to recover this sum from the defendant, it is no defence on the defendant's part to say that the Plaintiff has suffered no loss. He certainly cannot expect to benefit from what was in effect his wrongful act of negligence.

When the matter is fully examined what it boils itself down to is that the plaintiff has adduced evidence that she was not in receipt of a salary for a stated period. This amounts to prima facie proof of that fact. The evidential burden now shifts to the defendant to bring such evidence as he could to displace this evidence. No such evidence being forthcoming, I am obliged to accept the Plaintiff's testimony in this regard and to act upon it. I would accordingly conclude that there has been satisfactory proof establishing this head of the Claim and I, therefore, award the sum of \$15,660 being total salary for the period in question.

I now turn to the claim for loss of earnings as a Higgler at \$200 per week over the same period as set out above. Here I found the Plaintiff's evidence to be less than frank. Although she claimed \$200 per week as her loss of income

which would have amounted to \$800 per month, her evidence was that she earned \$2000 per month in the good times and from \$1000 to \$1700 in the bad times. She further sought by her evidence to lead me to believe that she travelled regularly to Cayman to buy her goods which she in turn sold to members of the hospital staff at her work place. From her evidence, it later emerged, however, that the goods were sent from Cayman by means of some family connection and her husband, a part time tailor, was instrumental in transporting them when cleared from the Customs area at the airport to the home and at the distribution stage. This prompted Learned Counsel for the defendant to contend that the evidence lead to the conclusion that the higglering was a family business which could just as easily be conducted by the Plaintiff's husband.

I find myself persuaded to accept this contention as being what in all probability was the true situation. The lack of frankness on the Plaintiff's part further lead me to the conclusion that her claim in this area was for the most part speculative. I would therefore, make no award under this head.

I would now turn to the Claim for a domestic help at \$62 per week for 29 weeks to 1st June, 1985 and then continuing thereafter which based upon the Plaintiff's evidence, would have lasted until November 1987.

Although this may appear on the face of it, to be highly unlikely or improbable that someone with the Plaintiff's background would employ a domestic help even given her condition following the injuries received, assuming that her daughter was old enough to undertake these chores did in fact carry them out, the authorities clearly establish that the Plaintiff would be entitled to recover a reasonable sum for the services which were rendered on her behalf during the period that she was laid up. Having regard to the Plaintiff's condition over the relevant period, it would have been reasonable to expect that she would not have been able to perform her domestic chores in the home and that someone would have had not only to carry these out for her but also assist the Plaintiff in certain respects. Whether this person was a member of the family or not this is neither here nor there. The fact of the matter is that they would be performing a service on behalf of the Plaintiff for which they would ordinarily be entitled to remuneration. The Plaintiff's evidence is that she paid someone to perform

these services. That evidence has not been countered by any evidence coming from the defendant. I am therefore, obliged to accept the Plaintiff's account, it being both reasonable and highly probable and to act upon it in making an award under this head. The period in this regard amounts to 142 weeks commencing from a few days after the accident and when the person stopped working in November 1987. As the sum claimed was \$60 per week, the sum recoverable amounts to \$8520.

There is no challenge being made in respect of the sums claimed in the pleadings and to which the Plaintiff has testified in respect of:-

- a. Tonic and Medication.
- b. Cost of preparation of medical reports.

The Plaintiff's evidence regarding these two items were in excess of sums pleaded being \$80 and \$50, respectively.

A similar situation arises in respect of her claim for transportation and for loss of her eyeglasses. No issue is being taken as to the validity of the claim. What is being challenged is the sum stated by the Plaintiff as her evidence is not supported by the pleadings.

Although the Plaintiff testified to paying \$40 and \$60 on various occasions to travel to get physiotherapy treatment and to visit the Orthopaedic Clinic for medical treatment, only \$20 was pleaded. As there was no application made by her Counsel to amend her claim in this regard, the amount recoverable is limited to \$20 for each visit.

The Plaintiff's evidence is that she made forty four (44) visits for physiotherapy treatment and also bi-monthly visits to the Orthopaedic Clinic to her doctor. Her visits to her doctor commenced from 14th April, 1987 and would ^{have} continued up to 10th December, 1987 when Dr. Paul Wright made his final assessment as to the Plaintiff's condition. On that basis this would have amounted to a total of 18 visits.

This would result in a combined total of 62 visits which when calculated would result in an award based on the sum pleaded of \$1240.

As the evidence given as to the cost of the eyeglasses was \$270, the amount recoverable is \$220 which is the sum pleaded.

There was also no issue as to the sum of \$75 claimed and proven for shoes and stockings destroyed in the accident. An award is made accordingly for this sum.

When all these amounts are quantified the total sum recoverable as Special Damages is \$25,845.

General Damages

The award under this head will as a consequence of the manner in which the claim for Special Damages under the head of Loss of Income been determined, will now take into consideration the factor of Pain and Suffering based upon the nature and extent of the Plaintiff's present condition as revealed by:-

1. The Plaintiff's testimony
2. The medical evidence available.

Based upon the medical evidence of the Plaintiff being subject to a 50.5% permanent partial disability of the left lower extremity, Learned Counsel for her submitted that a reasonable award under this head ought to be in the area of \$150,000. He relied in support of:-

1. Harold Ellis vs. Edward Miller Volume I page 39 of Mrs. Ursula Khan's Book on Personal Injuries Awards.

Here the Plaintiff, a 44 year old man with a 20% permanent partial disability of the right lower limb was in 1979 awarded a sum of \$16,000 for general damages. As it is to be borne in mind that the Plaintiff in the instant case suffered a permanent partial disability of 50.5% of the left lower extremity, this case cited is not of much assistance. However, when the necessary adjustments are made, this would have amounted to a sum in the region of \$40,000 in 1979. This sum when updated to the present date thereby making allowances for inflation, (see Central Soya and Junior Freeman Limited (the Plaintiff being entitled to damages having regard to the value of money at the time of the award), this would convert to a sum in the region of \$120,000.

He also relied upon:-

2. Thomas vs. Arscott and Patterson S.C.C.A. 74/84 an unreported Judgment of the Court of Appeal of Jamaica (Learned President, Carey, and Ross JJA) where the Plaintiff suffered a 75% functional loss

of the limb. The award in this case for general damages was \$70,000 in February, 1984 being:-

1. \$40,000 for pain and suffering;
2. \$30,000 for loss of future earnings.

Although based upon Dr. Dundas' evidence in that case the extent of the disability was of the range of 65% to 70% of the right leg, the Plaintiff required an operation to correct his condition, which if successful would reduce his disability to about 10% of the whole leg. Because of the infection caused by a bone protruding through a section of the leg, however, the Plaintiff could end up with a 75% disability of the right leg. When this case is examined, however, it is clearly taken out of the range of the injuries in the instant case which were far more serious than that in the present case. The only similarity that I can find is that whereas two operations were done in the instant case, the corrective surgery had not yet been carried out on the Plaintiff up to the time that the Appeal was heard and the Court of Appeal handed down its Judgment in May 1986. I find myself, in the circumstances, unable to derive any assistance from this case.

Learned Counsel for the defendant submitted that an award of \$40,000 ought to be the sum arrived at.

He relied upon the following cases:-

1. Donald Johnson vs. Stafford Evelyn page 75 Volume 2 Mrs. Khan's Book on Personal Injuries Awards.

In that case the sum awarded in 1984 was \$22,000. The extent of the Plaintiff's disability in that case was 12% of the left lower extremity. This case although on the face of it appears not to be of much assistance, when the necessary adjustments are made, having regard to the extent of the disability in the instant case when calculated and the award is increased by say 20% to bring it in line with present money values one would arrive at a sum in the region of \$105,000.

2. Sydney Malcolm vs. Roydall Williams and Sydney Malcolm (3rd party) page 77 of Volume 2 of Mrs. Khan's Book, where an award of \$25,000 was made in respect of injuries which amounted to a 15% to 20% permanent partial disability of the function of the right leg.

3. Hornes McLean vs. Thelma Evelyn page 82 of the same volume of Mrs. Khan's Book.

The Plaintiff here suffered a 5% permanent partial disability and was awarded in October 1984, \$16,000. This case can, therefore, be of very little assistance.

4. Falconer vs. Cooke page 92 of same volume of the Book where the Plaintiff suffered a 15% permanent partial disability of the right foot and was awarded in November 1985, \$54,120.

Based on the medical evidence in particular that of Dr. Paul Wright who assessed the Plaintiff in December 1987 as having at the maximum stage of her recovery a permanent partial disability of the left lower extremity amounting to 50.5%, I am of the opinion that on the authorities cited in relation to awards for similar injuries and making such adjustments as the justice of the case demands, the Plaintiff in this case would be entitled to an award for pain and suffering falling within the range of \$100,000 to \$105,000. I would in this case opt for the higher sum in the light of the long period that the Plaintiff was totally disabled and the added fact that she had to undergo two operations. Although it is quite probable that her recovery was delayed due to her diabetic condition, one has to take his victim as he finds them.

As the Plaintiff has resumed her duties at the hospital and in the light of my refusal in respect of the head of her claim for loss of income as a Nigler, I have refrained from acceding to the submission of Learned Counsel for the Plaintiff urging that an award be made for loss future prospective earnings and no such award was made.

In fine, damages will be assessed at \$130,845 with costs to be agreed or taxed being:-

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|--------------------|------------------|
| 1. Special Damages | \$ 25,845 |
| 2. General Damages | <u>\$105,000</u> |
| | <u>\$130,845</u> |

Mr. Pearson asks for the usual award for interest.

Court - Interest awarded on Special Damages at 3% from 11th November, 1984 to 2nd December, 1988 and on General Damages at 3% from Entry of Appearance on 9th August, 1985 to 2nd December, 1988.