IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2008 HCV – 04481

BETWEEN	DENTON STEWART	CLAIMANT
	JAMAICA URBAN TRANSIT COMPANY LTD	1ST DEFENDANT
AND	METROPOLITAN MANAGEMENT TRANSPORTATION HOLDINGS LTD	2ND DEFENDANT

Mr. John R. Givans instructed by Givans & Company for the Claimant.

Mr. Sheldon Codner instructed by Lightbourne & Hamilton for the 1st Defendant.

2nd Defendant unrepresented.

Heard: December 15, 2010 and January 5, 2011

McDonald, J

On the 27th January 2006, the claimant a 34 year old employee of the defendant or either of them slipped on the floor of a bus by the bus steps and fell down the steps on his buttocks and back. At the time he was a worker in the defendant's maintenance department.

As a result he sustained injuries, loss and damage and incurred expenses.

The particulars of injuries listed in his pleadings are as follows:-

(i) intra muscular haematoma in the lumbar sacral region (area of loin and lower spine).

(ii) Triangular fibro cartilaginous complex tear of the left wrist;

(iii) Tenderness along ulnar aspect of left wrist (area from elbow to wrist, in line with little finger)

(iv) Bruises to left shoulder

(v) Tenderness over erector-spinae muscle of back.

Medical report dated 13th December 2006 prepared by Dr. Christopher Rose who examined the claimant on 19th October 2006 and 8th November 2006 were tendered in evidence as exhibit 1.

His prognosis is that Mr. Stewart will be plagued by lower back pains which will be aggravated by all his activities of daily living except lying supine.

Dr. Rose opined that the diagnosis related estimate (DRE) of the lower back pains place him in category II which is evaluated as 5% of the whole person. In addition, his restriction in ranges of motion of the lumbo-sacral spine had added another 5% impairment of the whole person. His total permanent partial percentage disability is 10% of the whole person.

The claimant in his witness statement treated as his evidence in chief and dated 13th September 2010 – at paragraph 16 stated that

> "at present, if I remain in one position for too long, whether standing, sitting down, driving a vehicle or lying, I feel pain and discomfort to my back and shoulder. I also experience pain and discomfort when the weather is cold. I am unable to exercise or do weight training both of which I used to be fond of doing because when I bend and/or stretch, I feel pain and discomfort. ... from all appearances the incident having occurred in January 2006, I will be plagued by pain and discomfort for he rest of my life".

At the commencement of this trial judgment was entered by consent for the claimant as against the 1st defendant and at the case management conference held on 26th April 2010 an order was made that assessed of damages against the 2nd defendant be conducted at the same time as the trial against the 1st defendant.

The question which now arises is what would be a reasonable figure to compensate the claimant in respect of his pain and suffering and loss of amenities.

Mr. Givans has urged me to make an award of $3.9 million. He has placed reliance on three cases in support of this head of damages. These cases are:

1. **Stephanie Burnett v Metropolitan Management Transport Holdings Ltd & Jamaica Transit Co. Ltd** – reported at page 195 Khan's Volume 6.
2. **Candy Naggie v The Ritz Carlton Hotel Co. of Jamaica** reported at page 198 Khan's Volume 6.
3. **Schaasa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd –** reported at page 200 – Khan's Volume 6

Mr. Codner distinguished these cases from the instant case and relied on **Iris Smith v Arnett McPherson & Oldfield** replied at page 246 Khan's Volume 5 as a guide to be used in arriving at an award.

He urged the court to make an award of $1.8 million under this head of damages.

In Stephanie Burnett's case (supra), the claimant was 69 years old and was injured on 2nd April 2003 when she was boarding a bus and became trapped in the door – the upper body inside and the lower outside bus and dragged for some distance in that position.

She sustained the following personal injuries and resulting disability: tenderness of abdomen and back, tenderness in lower regions especially in iliac and lumbar area probable soft tissue injuries and subs capsular haematoma of spleen.

Examination by Dr. R. C. Rose FRCS FACS Consultant Orthopedic Surgeon on 17th February 2005 revealed compression of lumbar nerve roots, degenerative disc disease and acute chondromalaica of the left patella.

On further evaluation of the claimant on 14th April 2005 Dr. Rose opined that the nerve root compression was precipitated by the trauma to the lumbar-sacral spine which resulted in oedema around the nerve roots which were already situated in

narrow canals. He further stated that the radiological findings of both plain X-rays and MRI were not a result of degenerative changes involving the lumbo-sacral spine. However the severe trauma to the lumbo-sacral spine produced oedema around the nerve roots with resultant irritation and inflammation caused by the surrounding narrow foramena.

She therefore required surgical decompression as these symptoms were unlikely to be resolved without surgery. He assessed whole person disability at 13%.

On 11th December 2006 she was awarded $3 million for pain and suffering and loss of amenities such an award updated would amount to $4,971,000.00 (using CPI 165.7 November 2010).

In my opinion the injuries and resultant disabilities suffered by Burnett are more serious than these suffered by the claimant in the instant case. The injuries suffered are of a different nature. The instant claimant requires no surgery.

In Candy Naggie's case the claimant 25 years old was injured whilst lifting a heaving urn with ice and falling backwards at work.

She sustained severe back pain across lower back radiating to the right thigh and protrusion of L4/L5 to the right side. Dr. Rose diagnosed mechanical lower back pain and opined that the claimant would be plagued by intermittent back pains aggravated by prolonged sitting, standing, bending and lifting. He assessed permanent partial disability as follows:-

(1) Relating to the lumbo sacral spine pathology 5% of whole person (2) restriction in extension of lumbo sacral another 5% impairment of whole person (3) total permanent partial disability 10% of the whole person.

On 13th December 2005, she was awarded $1,750,000 for pain and suffering and loss of amenities. Updated this amounts to $3,063,655.58 (using CPI 165.7 November 2010).

Both Naggie and the instant claimant were diagnosed as having mechanical lower back pains. In the case of Naggie Dr. Rose opined that he would be plagued by intermittent

lower back pains aggravated by prolonged sitting, standing bending and lifting. In the case of Stewart, Dr. Rose opined that he will be plagued by lower back pains which will be aggravated by all of his activities of daily living except lying supine.

Although Dr. Rose made this far reaching finding, the claimant is still able to work as an auto mechanic and driver, and the claimant has not given any specific evidence as to how his injury impacts on his job.

I note that Naggie suffered greater loss of amenities than the instant claimant. Approximately 5 years after the accident Naggie complained of inability to perform household chores, required analgesics to sleep, impaired sexual activity and inability to resume sporting activities like water sports.

In Schaasa Grant, the claimant a 26 year old JUTC conductress was flung from the seat when the bus driver suddenly applied brakes on 3rd February 2005. She was redundant.

She sustained serious back pains, marked swellings, spasms and tenderness to the paravertebral muscles bilaterally.

Dr. Waite diagnosed her with chronic cervicothoracic pain with subjective cervical radiculopathy; chronic mechanical lower back pains with subjective lumbar radiculopathy. She was assessed with a permanent partial disability of 10% of the whole person. The prognosis was that her problem was expected to continue and she was advised against working on a bus and a career change.

On 16th June 2008 she was awarded $3 million for pain and suffering and loss of amenities. Updated this amounts to $3,815,042.21 (using CPI 165.7 November 2010).

Both Grant and the instant claimant were diagnosed as having chronic mechanical lower back pains except that the instant claimant is without chronic cervicothoracic pain.

Stewart unlike Naggie did not have to change his occupation as a result of the injuries.

His evidence is that in March/April 2007 he resumed working overseas as an auto mechanic. In his witness statement dated 13th September 2010 his evidence is that he is a driver and a mechanic.

Having examined the similarities and differences in this case and the instant case I find that the injuries were more serious in Grant's case.

I do not find Iris Smith v McPherson to be helpful as the injuries and percentage disability bear no resemblance to those of the instant claimant. Smith was diagnosed with lumbar strain and had a disability of 5% of the total person.

I conclude that a fair and reasonable award for pain and suffering and loss of amenities is $3.2 million.

Mr. Givans submitted that an award should be made for handicap on the labour market on the basis that the claimant is an auto mechanic and according to Dr. Rose's prognosis Mr. Stewart will be plagued by lower back pain which will be aggravated by all of his activities of daily living except lying supine.

He referred to the claimant's evidence that at present if he remains in one position for too long whether standing sitting down, driving a vehicle or lying he feels pain and discomfort to his back and shoulder.

Mr. Givans submitted that based on the medical evidence the court should find that at some point in the future the claimant's disability will affect his working life.

He asked for a lump sum award of $500,000 under this head.

In order for an award to be made to the claimant under this head, there has to be some evidence of a real or substantial risk of the claimant losing his job as a result of the injuries before the estimated end of his working life and be thrown on the labour market where he is placed at a disadvantage in getting another job or an equally well paid job as a result of the injuries.

In Tyne v Wear Country Council (1986) 1All ER 567, Lloyd LJ stated that the risks a judge has to assess under this head are twofold. He has to consider whether the claimant would be more likely to lose his present job on account of his disability and secondly whether the claimant would be less likely to get another job on account of his disability were he to lose his present job for whatever reason.

In my view there is some medical evidence in this case confirming the likelihood of the risk of loss of the claimant's job arising

Dr. Rose's prognosis of the claimant in November 2006 as stated in the medical report is that he will be plagued by lower back pains which will be aggravated by all his activities of daily living except lying supine.

The claimant has testified to feeling pain and discomfort in his back and shoulder if he remains in one position for too long whether standing, sitting down, driving or lying. He has not given any direct evidence as to how this impacts on his job.

In this case the claimant has continued his occupation as an auto mechanic in March/April 2007 in the USA. In his witness statement he gives his occupation as driver and mechanic.

There is no evidence as to whether or not there is an existing reduction in his earning capacity now as compared to the time of the accident.

The medical evidence coupled with the claimant's evidence as to his physical condition are in my opinion indicia that the

claimant although currently employed might not be able to continue to work in his present employment at sometime in the future on account of his disability.

I find that there is a real and substantial risk that he might before the end of his working life for whatever reason, lose his job as a result of the injuries and be thrown on the labour market to compete with able bodied persons and that this would place him at a disadvantage due to his impairment.

Even if it could be successfully argued that his risk of job loss was low, this does not mean that his competitive position in the labour market was not weakened.

I find that his ability to compete on the open market would be impaired.

I find that a global award of $350,000 is appropriate in the circumstances.

Special Damages

Medical expenses and travelling expenses were agreed in the sum of $30,000 and $10,000 respectively.

Mr. Codner in his submission said that he would not trouble the loss of earnings of $20,000 which I take to mean this amount is unchallenged.

There was contest between the parties under the claimant's particulars of Special Damages under the head of loss of earnings:-

The claimant's case is that he transported market vendors from St. Thomas to Kingston from January 2006 to June 15, 2006; 20 Saturdays at $11,000 per Saturday totalling $220,000; and for his mechanic job – 20 weeks at $6,000 per week - $120,000.

The claimant's evidence is that he used his pickup CR0376 to carry more than three vendors on Saturdays from St. Thomas to the Coronation Market and back in the evenings/nights. His Land rover could take up to 7 vendors including the goods. The vehicle was designed to carry 1 ½ ton.

The claimant tendered in evidence 3 letters written by 3 vendors in support of this claim – exhibit 7.

Based on these letters the total cost per trip for all the 3 vendors would be $3150. The claimant has not indicated how much

more than 3 vendors he would transport and the court cannot speculate. I make an award based on transportation of 3 vendors for 20 Saturdays which amounts to $63,000.

It is the claimant's evidence that he worked daily between the hours of 2pm – 7pm at a garage at 15 Newark Avenue in the Bay Farm Road area of Kingston 11. It was a 5 day work week at the garage where he serviced motor vehicles, took out and rebuilt engines and did general mechanic work – he was paid per job done and he earned an average $6,000 - $8,000 per week as the work was fairly regular.

He stated that he was unable to work for over 20 weeks and his loss in that regard was $7,000 x 20 weeks = $140,000.00.

There is no documentary evidence to substantiate this claim, no letter from the garage owner and no explanation whatever has been given for his omission.

It is well established that one cannot merely throw figures at the head of the court and ask the court to make an award.

See Murphy v Mills (1976) 14JLR and Bonham Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177

This principle has been somewhat relaxed in the case of **Radcliffe v Evans (1892) 2QB 524 at 532 and in Grant v Motilal Moonan Ltd and another (1988) 43 WIR 372.**

However in this case as a mechanic, Mr. Stewart should and ought to have been in a position to tender some form of documentary or other evidence to prove his earnings,

The claim is not allowed.

Damages assessed against the Defendants are as follows:

Medical expenses	- $30,000
Travelling expenses	- $10,000

Loss of earnings

(1) Transporting market vendors from St. Thomas to Kingston 20

-$63,000

From farming
10 weeks @ $2,000 per week -$20,000
Totalling $123,000
Interest therein at 6% per annum from 27th January 2006 to 21st June 2006 and at 3% from 22nd June 2006 up to today.

General Damages

Pain and suffering and loss of amenities $3.2 million

Interest at the rate of 3% from 16th October 2008 up to today's date.

Handicap on the labour market $350,000 no interest.

Costs to the claimant to be agreed or taxed.