[2016] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 59/2014

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**KAMRAN ABBAS**	**APPELLANT**
AND	**SHERON CARTER**	**RESPONDENT**

Miss Audrey Clarke instructed by Judith M Clarke & Co for the appellant

Mrs Allia Leith-Palmer instructed by Kinghorn and Kinghorn for the respondent

6 November 2015 and 29 January 2016

PHILLIPS JA

[1] I have had the opportunity to peruse in draft the very clear and comprehensive judgment written by my learned sister P Williams JA (Ag) and I am entirely in agreement with the same. There is nothing that I can usefully add.

P WILLIAMS JA (AG)

[2] On 3 January 2008 Miss Sheron Carter (the respondent) sustained injuries when the vehicle, in which she was a passenger, collided with a truck travelling in the opposite direction along the Mount Rosser main road in the parish of St Catherine. The

vehicle she was in, was being driven by Kamran Abbas (the appellant) who was also the owner of that vehicle.

[3] The respondent filed suit in July 2008 in the Supreme Court of Judicature, claiming damages for the injuries sustained as a result of the appellant's negligence. The appellant did not contest liability but challenged the quantum of damages which ought to be awarded to the respondent.

Damages were duly assessed by Lindo J (Ag) (as she then was) on 24 February 2014 and the following award was made on 19 May 2014:

> "General damages for pain and suffering and loss of amenities in the sum of $3,500,000.00 with interest at 3% from the date of service of the claim being August 13 2008 to the date hereof
>
> Cost of future medical care in the sum of $150,000.00
>
> Loss of earning $1,080,000.00
>
> Special damages in the sum of $350,000.00 with interest at 3% from the 3rd day of January 2008 to the date hereof
>
> The claimant is entitled to costs to be agreed or taxed."

[4] This is an appeal from the judge's award of damages. In his notice and grounds of appeal dated 1 July 2014, the appellant sought an order that the damages assessed should be reduced on three grounds, namely:

> "That the award of three million five hundred thousand dollars ($3,500,000.00) for general damages is inordinately high in the circumstances and is not supported by the evidence.

> That the award of one million eighty thousand dollars ($1,080,000.00) for loss of earnings is inordinately high in the circumstances and is not supported by the evidence.
>
> The above sums awarded are unreasonable having regard to evidence."

The evidence

The injuries

[5] The respondent gave some detail of the injuries she suffered in two witness statements. She said that when the vehicles collided she was knocked unconscious. She awoke to find herself in the Linstead Hospital before losing consciousness again, five minutes later. She next awoke in the Kingston Public Hospital. She said she was unable to move and was in extreme pain all over her body. She felt as if she was dying. She lost consciousness once more and when she next awoke she was in the Spanish Town Hospital where she was admitted and remained for 28 days. She said she did several X-rays and it was revealed that she had several fractures all over her body. Her pelvis was fractured along with three of the ribs on the right side of her body. There was also what she described as scars all over her body with the most gruesome being to her face.

[6] The respondent described how she was in extreme and severe pain for the entire time she was in hospital. Upon being discharged from hospital, she said she remained bed-ridden for nine months and needed assistance to do almost everything - including going to the bathroom, eating and bathing. She said it was a year before she started to

feel better and stronger but she could only walk with the aid of a crutch. This continued for approximately one year thereafter.

[7] In October 2013, the respondent in a further witness statement described the adverse effect the injuries had had on her life which she said had changed significantly. She no longer enjoyed things that would have normally made her happy and preferred being alone than with company of any sort. She said as a result of how she looked and felt she "drove" her partner away due to a tendency to wanting to be alone and being aggressive towards him. She also said she no longer enjoyed or wanted to have any sexual relationship.

[8] She said she had a permanent scar to her forehead as well as being permanently tilted to the left side because of her broken left hip. She was not able to run or stand up for any long period or lift anything heavy. She was also unable to sit for long periods. This impacted on her ability to work as a higgler. She expressed that while feeling grateful to be alive she was unhappy with the way she looked and felt. She was still experiencing pain and felt that the accident has left her less than she used to be as it had left her handicapped.

[9] The respondent when cross-examined by Miss Clarke was confronted with questions about injuries she had received in a previous motor vehicle accident some five years before this one which caused her now to be seeking damages. She acknowledged that at that time she had received injuries but said it was only to her neck and back and had not involved her lower body or her face.

The medical reports

[10] The first substantial report was from the East Regional Health Authority – Spanish Town Hospital dated 20 May 2008. It stated the following:

> "Findings on Examination and Investigation:
>
> Pain to chest and left hip
>
> Chest X-ray showed fracture to ribs and left acetabulum
>
> Diagnosis:
> Fracture ribs
> Fracture left acetabulum
>
> Treatment
> Traction in hospital for 6 weeks
> Analgesia
> Non-weight bearing on left leg for 4 months
>
> Outcome
> Arthritis to left hip in the future"

[11] The first report of Dr Phillip D Waite, consultant orthopaedic surgeon, dated 12 October 2008, indicated that he first saw the respondent on 3 September 2008 for the purposes of evaluation and management of injuries allegedly sustained during a motor vehicle accident on 3 January 2008. He gave this provisional assessment:

> "1. Healed laceration to the forehead
>
> 2. Aggravation of a previous chronic cervical whiplash injury with left cervical myelopathy/radiculopathy for further assessment
>
> 3. Healed fractures through the 3rd and 4th ribs on the right with residual pain
>
> 4. Aggravation of a previous mechanical low back pain with possible lumbar radiculopathy

5. Healed comminuted fracture/dislocation through the left acetabulum with a stiff left hip

6. Possible concentrically reduced right hip dislocation

7. Healed undisplaced pelvic fracture with injury through the right superior and inferior pubic rami and the left sacral iliac joint with muscular tenderness and weakness

8. Mechanical upper back pains

9. Left shoulder pain possibly secondary to an acromioclavicular joint injury for further evaluation

10. Visual impairment

11. Resolved head injuries

These injuries are consistent with the mechanism of the accident."

On the matter of assessing any disability the doctor had this to say:

> "Estimated impairment cannot be assessed at this time as my client has not reached maximal medical improvement MMI."

[12] Dr Waite gave a second report dated 7 September 2011 which he titled "Addendum to Medical Report done on 12th October 2008". He noted that the respondent had presented on 8 June 2011 for a follow-up medico-legal assessment. His assessment was as follows:

> "1. Chronic neck pain with subjective cervical radiculopathy
>
> 2. Chronic thoracic pain
>
> 3. Chronic lower back pain with subjective lumbar radiculopathy

4. Advanced avascular necrosis (AVN) with osteoarthritis (OA) to the left hip."

He noted that impairment could not be properly assessed without the following investigations:

"RECOMMENDATION

1. MCRT of the left hip to assess articular congruity and extent of the AVN

2. MRI of the cervical and lumbar spines

3. X-rays of the acromioclavicular joint of the left shoulder

4. Repeat orthopaedic evaluation with the results of these investigations."

[13] On 6 May 2013, Dr Waite gave a second addendum to the report of 12 October 2008. He noted that further investigations had been done namely MRI of the cervical spine and lumbar spine. An X-ray had been done of the left shoulder and a MDCT scan of the left hip. He then went on to assess her impairment and said:

"Estimated impairment is based on the American Medical Association's Guide to Evaluation of Permanent Impairment, Sixth edition.

1. Chronic cervical whiplash injury with nonverifiable cervical radiculopathy has a class 1 impairment with 1 to 3% whole person impairment, page 564. The functional history modifier is 1 while the physical examination modifier is 0 and the clinical studies modifier is 2. The net adjustment modifier is (1-1) + (0-1) + (2-1) = 0 which is equivalent to a grade C Class 1 injury or 2% whole person impairment. This has to be apportioned between the previous and the present accident.

2. Chronic low back pain with subjective lumbar radiculopathy has a class 1 impairment with 0 to 3% whole person impairment. Page 570. The functional history modifier is 2 while the physical examination modifier is 0 and the clinical studies modifier is 2. The net adjustment modifier is (2 - 1) +(0-1) + (2 -1) = 1 which is equivalent to a grade D class 1 injury 3% whole person impairment. This has to be apportioned between the previous and present accidents.

3. Status post uncomplicated dislocation right hip has a class 1 impairment with 3 to 7% lower extremity impairment, page 513. For this patient, the functional history modifier is 0, the physical examination modifier is O and the clinical studies modifier is O. The net adjustment modifier is (0-1) + (0-1) + (0-1) = -3 which is equivalent to a grade A Class 1 injury, 3% lower extremity impairment or 1% whole person impairment.

4. Status post fracture/dislocation to the left hip with evidence of severe cartilage narrowing has a class 1 impairment with 7 to 13% lower extremity impairment page 513. For this patient, the functional history modifier is 0, the physical examination modifier is 2 and the clinical studies modifier is 4. The net adjustment modifier is (0-1) + (2-1) + (4-1) = 4 which is equivalent to a grade E class 1 injury; 13% lower extremity impairment or 5% whole person impairment.

<u>Maximum Total Impairment</u>

Maximum Impairment = 2 and 3 and 3 and 5 combined % = 13% whole person impairment

<u>Actual Impairment</u>

This will be dependent on the apportionment of the neck and back pains between the previous and the present accidents

= 13% - (Adjusted impairment for previous accident as was previously discussed)."

Dr Waite gave his prognosis relative to the injuries the respondent had sustained to her neck and back and her left hip.

He said, in part:

> "Neck and back
>
> My client's condition is permanent. She will continue to have actute exacerbations of the neck and the back pains, the timing and extent of which cannot be predicted. The condition is expected to worsen; the timing and extent of which cannot be predicted. These may affect/continue to affect activities of daily living and work especially with activities that involve flexion and loading of the neck and back; such as reading, using a computer, sleeping with a pillow, prolonged sitting (including driving), prolonged standing, walking, washing, household chores, lifting, bending and sexual intercourse …
>
> Left hip
>
> She is expected to develop very early severe arthritis necessitating hip replacement surgery."

Dr Waite noted that the respondent had had a neck and low back accident in 2002 and he referred to a report which had been supplied by Dr C Rose. In that report Dr Rose had estimated impairment for the neck as 8% of the whole person and for the back as 5% of the whole person, for a total of 13% impairment. Dr Waite had concluded that this estimation by Dr Rose would "have to be converted to AMA 6th edition impairments…" so that the impairment can be apportioned accordingly.

[14] The respondent had also visited Dr Guyan D L Arscott, a cosmetic and reconstructive surgeon, on 8 September 2008. He had supplied a report of his findings which was dated 15 October 2008. In the report he noted that on examination the

respondent was found to have "an obvious 9cms overriding type scar over the (L) forehead" which was "oblique in shape and extended for about 2cms into her (L) eyebrow".

His assessment was as follows:

> "This patient was assessed by me regarding the residual scar to her face. This scar is permanent. Corrective surgery will provide only forty to fifty (40-50%) percent improvements in the appearance of the scar. This will involve a "Z" Plasty type scar revision."

The loss of earnings

[15] The respondent gave her occupation as a higgler. At the time of the accident she said she had been earning the sum of at least $30,000.00 to $40,000.00 per week working in the Falmouth market. She explained that the nature of her occupation did not allow for the keeping of records. She did not have payslips, accounting records or income tax returns. She said that at the time the least she made was $10,000.00 because she was in a weekly "pardner" in which she contributed $10,000.00 every week without default.

[16] In her witness statement she gave some detail as to these earnings. She said she worked three days per week Wednesday, Friday and Saturday. She estimated that on Wednesday her profit would be at least $5,000.00 but on a Friday and Saturday she would make a profit of at least $15,000.00 per day. She explained how she made this profit. She said she would buy products from farmers at a low discounted rate and then sell them in the market with a mark up of at least 15%.

[17] She went on to give examples of how this mark up and resultant profit actually worked. She bought yam for $30.00 per pound and sold it back for $50.00 per pound. She would buy lettuce at $80.00 per pound and sell it for $120.00. Onions and irish potatoes she would purchase for $50.00 per pound and sell for $80.00 per pound. Sweet potatoes she would buy for $30.00 and sell for $50.00. She also bought corn for $100.00 per dozen and sold it for $150.00 per dozen.

[18] The respondent also outlined the quantity of products that she would sell. She said on a Friday she would sell about 300 pounds of yam, 200 pounds of sweet potatoes, 20 dozen corn and 150 pounds of onion and irish potatoes. She pointed out that there were other items she would sell to make a profit and said she "made a good profit working as a higgler at the time of the accident". After the accident she was not able to work for 18 months.

[19] At the assessment, she said, under cross-examination, that she earned up to $50,000.00 for three days per week depending on time or season and sometimes she earned less and other times more. She then estimated lost earnings of "$3 million over 18 months to year after collision."

[20] At the hearing of this appeal both counsel agreed to actually calculate the amount the respondent was alleging she had been able to earn at the time of the accident based on the amounts she had given in her witness statement. Based on their calculations the amount of profit the respondent would have earned in a day was agreed as being $20,000.00.

The decision of the learned trial judge in relation to the awards being appealed

[21] The learned trial judge was not favourably impressed by the respondent, as a witness. She found that the respondent was not a credible witness and in particular that her evidence was not consistent with the medical history as revealed by the doctors as she claimed to have been incapacitated for a period of about 18 months but this had not been substantiated by the medical evidence.

[22] The learned trial judge however found that the injuries suffered by the respondent were serious. She observed that the respondent was not sure how long she had spent in the hospital but the medical reports indicated she spent six weeks in the Spanish Town Hospital. She also found that there was no support for the respondent's claim that she was unconscious as the only mention of unconsciousness is that which was reported to the doctor.

[23] The assessment which the learned trial judge made took into account the medical report which had been given by Dr Rose touching the injuries the respondent had suffered in the motor vehicle accident in 2003. The report was considered and found to be quite informative. She noted that the doctor had made a prognosis that the respondent would "be plagued by intermittent neck and lower back pains which will be aggravated by sudden neck movements, prolonged sitting, standing, bending and walking as well as lifting heavy objects". She further referred to the fact that at the date of assessment, the doctor had noted that in addition to back pains, the claimant

complained of "persistent dizziness and intermitted headaches … inability to hear clearly from both ears since the road accident".

[24] Counsel for the respondent had submitted to the learned trial judge that the injuries sustained by the respondent were "exceptional in its [sic] severity". The cases canvassed with her as being instructive were:

(i) **Icilda Osbourne v George Barned et al** Suit No 2005 HCV 294, delivered 17 February 2006

(ii) **Vincent Schoburgh v Michael Fletcher and Robert Fletcher** Claim No CL 2001/S124 delivered 23 September 2004

(iii) **Janice Forrest v Mark Todd** Khan, Vol 5 page 44

(iv) **Lloyd Robinson v Denham Dodd** Khan, Vol 4 page 47

[25] For the appellant it had been urged that the respondent's evidence of her injuries were totally exaggerated. The cases of **Cecil Bassaragh and Sheldon Bassaragh v Roger Brown** Khan Vol 6 page 51 and **Enid Haughton v Michael Wallace and Susan Thompson** Khan Vol 5 page 145 were referred to as useful guides.

[26] The learned trial judge found that the injuries suffered by the respondent in the instant case were less severe than those sustained by **Vincent Schoburgh** and that the case of **Cecil Bassaragh and Sheldon Bassaragh v Roger Brown** was also distinguishable. She found the cases of **Janice Forrest**, where the claimant sustained a broken hip, and **Lloyd Robinson**, where the claimant had, inter alia, suffered a comminuted fracture of the left acetabulum and posterior dislocation of the left hip, to

be closest in comparison. However she believed that the injuries the claimant in **Forrest** sustained were more serious than those of the respondent. She used those cases as preferred guides and found that based on the medical evidence an award which was less than that made to **Janice Forrest** and more in keeping with that made to **Lloyd Robinson** would be appropriate in the circumstances.

[27] On the matter of the claim for loss of earnings, the learned trial judge firstly referred to certain aspects of the viva voce evidence. She noted that in response to questions about her earnings, the respondent had said she earned $50,000.00 for three days depending on the time or season and had lost earnings of $3,000,000.00 over 18 months to a year after the collision. She however noted the evidence in the respondent's witness statement that she earned $30,000.00 - $40,000.00 for three days per week.

[28] Relying on the authority of **Desmond Walters v Carline Mitchell** (1992) 29 JLR 173, the learned trial judge found that the court could use its own experience in these matters to arrive at what is proved in evidence. She was satisfied on the evidence that the respondent's earnings came from selling in the market and the nature of that work was such that there were no records kept or any proper accounting. She also believed that from her earnings, the respondent paid her weekly "pardner" of $10,000.00 and never defaulted. The learned trial judge was therefore inclined to accept the lower figure of the range in the witness statement as the gross earnings per week. She also found that the respondent would have gone back to work in or about October of 2008 based on the evidence given under cross examination, this meant the

period for which earnings were lost was about nine months. The learned trial judge thus made the award for nine months at $30,000.00 per week, the amount of $1,080,000.00.

The submissions on appeal

For the appellant

Ground 1 – the award of three million five hundred thousand dollars for general damages is inordinately high in the circumstances and is not supported by the evidence

[29] Miss Clarke, for the appellant, submitted that the main issue being challenged in respect of this award was concerned with the matter of the permanent partial disability. She noted that the respondent had had a previous accident and had received injuries then which were related to and affected the same areas of the body as the more recent injuries. The respondent had made a claim and received compensation for the previous injuries which Miss Clarke noted had been ascribed 13% permanent partial disability.

[30] Thus it became Miss Clarke's contention that the amount awarded under this aspect of the claim is inordinately high because the respondent had already been compensated for the level of impairment which had not increased on account of the injuries sustained in the later accident. She submitted that the learned trial judge in dealing with the issue had noted that the court was not given any guidance as to the percentage impairment of the respondent and had then found that the award in keeping with the **Lloyd Robinson v Denham Dodd** case was in order.

[31] It was of significance to Miss Clarke that in the **Lloyd Robinson** case the claimant was found to have had 12% impairment relative to the injuries sustained. These injuries were more serious than those of the respondent in the instant case. Miss Clarke's conclusion on this ground was that it could clearly be seen that the sum awarded here was excessive and not referable to the extent of the injuries sustained.

[32] Mrs Leith-Palmer, for the respondent, submitted that this court had no basis on which to overturn the decision made in the lower court. She cited the decisions of **Garfield Hawthorne v Richard Downer** Suit No 12/ 2003 delivered on July 29, 2005 and **The Attorney General v Ann Davis** Suit No 114/2004 delivered on 9 November 2007 as illustrative of the settled principle on which an appellate court must be guided when asked to overturn an award made in the lower court. The award by the judge in the court below ought not to be disturbed unless the judge is proven to have acted upon some wrong principle of law or that the award was unreasonably low or high.

[33] She submitted that it cannot be said that the learned judge erred in the principles she applied, neither was the award out of line with the relevant authorities and was not so high to be an entirely erroneous estimate.

[34] Mrs Leith-Palmer noted that "heavy weather" was being made of the 13% permanent partial disability especially in light of the fact that the doctors' evidence had not been challenged at trial. She submitted that the learned trial judge was obliged to accept the evidence presented in the medical report as the appellant had waived his right to challenge the percentage. She contended that it would have been difficult to

separate the two impairments as given and the court could not apportion what percentage should be ascribed to this second set of injuries as distinct from the first. She recognised that there may have been a weakness in the report however ultimately the actual impairment should be accepted as 13% taking into consideration the adjustment which must have been made.

[35] She went on to submit that in any event the focus should not be on the permanent partial disability but on the actual injuries. She submitted that the injuries suffered by the respondent were more severe than those suffered by the claimant in the **Lloyd Robinson** case, on which the learned trial judge relied in arriving at her award.

[36] Mrs Leith-Palmer concluded her submissions on this point by noting that based on the injuries sustained by the respondent, and comparable injuries in the authorities relied on, an award of $10,000,000.00 had been requested. The learned trial judge made an award of $3,500,000.00 which was palpably a reasonable award.

Ground 2 – the award of one million eighty thousand dollars ($1,080,000.00) for loss of earnings is inordinately high in the circumstances and is not supported by the evidence.

[37] Miss Clarke submitted that this award reflected a classic case of the respondent literally tossing figures at the court. She noted that "the fact that there was no rational index which could be used as a guide to determine the true earnings of the [respondent] is a matter which tends to distinguish this case where at least a minimum wage category was discernible by the court".

[38] She went on to note that in the **Desmond Walters v Carline Mitchell** case a precise figure was pleaded which was found to be reasonable such that a fair apportionment could have been arrived at. She submitted that this is not what obtained in the presentation of this case. She contended that the learned trial judge had erred in selecting one of the various figures presented by the respondent. Further she submitted that this was not a situation where all that was required was a mathematical analysis of what was presented by way of the evidence and if it is that an award was to be made then the figure to be accepted should be the lowest evidence of earning which was $10,000.00 per week and not $30,000.00.

[39] Miss Clarke found the decision of **Lydia Martin v Industrial Commercial Development Company & Anor** Suit No CL 1986/M 158 delivered 26 November 1992 useful and in support of her contention that the lower figure should be used. In that case the claimant had given different amounts representing the lost earnings. The learned trial judge found that she had kept no records and that there existed no reliable basis for her estimated income and accepted the lower sum as a reasonable starting point in determining her income. Further the learned trial judge made allowance for a reduction for the income tax payment deductions.

[40] In the instant case, Miss Clarke concluded that the lesser sum of $10,000.00 should be used and that there should be at least a reduction of the amount of $1,080,000.00 to the sum of $360,000.00. She however submitted that it was not being conceded that the quality of evidence on this issue warranted an award if any sum at all

because on the respondent's evidence "she kept no records, there existed no reliable basis for her estimated income".

[41] Mrs Leith-Palmer submitted that this was one of those cases where the cultural realities of this occupation meant that there was no keeping of records or books and no accountants with appropriate documentation. She also acknowledged that there was no comparable index. However, she went on to submit that the respondent was not just throwing up figures but attempted to explain in detail how she came up with her earnings.

[42] Further, Mrs Leith-Palmer submitted that on the evidence it was not unreasonable for the learned trial judge to have accepted that the respondent earned $30,000.00 per week. This earning, she contended, would be the amount after expenditures thus there would be no need for further reductions for income tax considerations.

[43] Mrs Leith-Palmer concluded by noting that the respondent had sought an award based on her earning $40,000.00 per week which would have amounted to $3,800,000.00. The award made was nothing near to what had been sought and was grounded firmly in law and ought not to be overturned.

Discussion and analysis

[44] The principle governing an appellate court in its review of damages awarded by a lower court is well settled.

In **Flint v Lovell** [1935] 1 KB 534 at page 360 Greer LJ stated:

> "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it in the judgment of this court an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This principle has been applied and endorsed by this court in several cases and indeed the two relied on by the respondent in her submission provide helpful guidance in matters such as these. In the **Attorney General of Jamaica v Ann Davis**, Harrison JA had this to say at paragraphs 19 and 20:

> "19. In **Dixon v Jamaica Co** SCCA 15/91 unreported delivered 7th June 1994, Rattray P said:
>
> > 'The Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. It requires looking at decided cases in the past with necessary adjustments having regard to inflation and any special features of the injury.'
>
> 20. In order to ascertain whether the damages awarded are excessive or insufficient, this Court has to examine the method employed by the trial judge in assessing these damages. The Court will only interfere with the award of the trial judge either where he or she acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See **Dixon (bnf Maxwell) v Jamaica Telephone Company** SCCA 15/91 (unreported) delivered 7th June 1994, **Nathan Clarke v Gernel Hancel** SCCA 96/89

(unreported) delivered December 18, 1992; **Gravesandy v Moore** SCCA 44/85 (unreported) delivered 14th February 1986; **Dryden v Layne** SCCA 44/87 unreported delivered 12th June, 1989, **Alcan Jamaica Ltd v Mighty** SCCA 94/97 unreported delivered 20th December, 1999."

Analysis

Ground one

[45] The complaint launched against the learned trial judge's award for general damages concerned the matter of the permanent partial disability. As the submissions unfolded before this court it became apparent that the evidence of the doctor contained in his medical report touching his assessment of the permanent partial disability of the respondent was not clear. He did factor in the previously ascribed impairment but ended up with an amount which on the face of it was not clear as to whether the adjustment had been made before arriving at his final percentage or whether it was still to be made to arrive at one.

[46] To properly appreciate the problem, it is useful to bear in mind the finding of the doctor who had reported on the respondent's condition at the time of the first accident in 2004. Dr R C Rose, consultant orthopaedic surgeon, had supplied a report dated 14 July 2004. He had given the following diagnosis, prognosis and disability rating:-

"**Diagnosis**

1. Whiplash injury (cervical strain)
2. mechanical lower (back pains)

Prognosis

> Ms Carter will be plagued with intermittent neck and low back pains which will be aggravated by sudden neck movements, prolonged setting, standing, bending and walking as well as lifting heavy objects.
>
> **Disability Rating**
>
> Her permanent partial percentage disability as it relates to the cervical spine has been evaluated as eight percent of the whole person. The partial percentage disability as it relates to the mechanical lower back pains is five percent of the whole person. Her total permanent partial percentage disability is thirteen percent of the whole person."

[47] It is now to be noted that Dr Waite had stated that there had been aggravation of a previous chronic cervical whiplash injury and aggravation of a previous mechanical low back pain with possible lumbar radiculopathy. The respondent however suffered fractures to her ribs, through the left acetabulum, to her pelvic area and was now having mechanical upper back pains. Dr Waite in estimating the impairment consequent on these injuries received in the second accident had given a percentage for each area and arrived at a total which was arithmetically incorrect.

[48] I will briefly set out the injury and its assessed impairment -

1. Chronic cervical whiplash injury – 2% of whole person
2. Chronic low back pain – 3% of whole person
3. Status post uncomplicated dislocation right hip – 1% of whole person
4. Status post fracture/dislocation left hip – 5% of whole person

The total impairment then would be 2+3+1+5 = **11%**

However the doctor gave the maximum total impairment as 2+3+3+5, a combined percentage of **13%** whole person impairment.

He stated the following about the actual impairment:

> "This will be dependent on the apportionment of the neck and back pains between the previous and present accidents = 13% - (adjustment impairment for previous accident as was previously discussed)"

This did not make sufficiently clear whether the adjustment had already been made or whether further adjustments ought to have been made on the basis of the subsequent injury.

[49] The learned trial judge in considering the evidence as presented in the various medical reports had this to say:

> "In the case at bar, the court has not been given any guidance by the medical personnel as to the percentage impairment of the claimant. The medical evidence is that she had a previous accident and the medical report of Dr. Waite dated October 12, 2008 speaks specifically of the aggravation of previous cervical whiplash injury as well as aggravation of a previous mechanical low back pain. This I believe should be taken into consideration in any award being made."

[50] Further she stated at paragraph 40:

> "No assistance has been given to the court in relation to her present whole person PPD, neither has he indicated any bases on which an apportionment between the previous condition (from the accident in 2003) and the instant case could be done."

From this approach it is clear that the learned trial judge was not relying on the percentage permanent partial disability. In the circumstances she cannot be regarded as falling into error in adopting this approach. This is not a case where the percentage permanent partial disability could be used as a good guide for making an award or for making comparisons in respect of arriving at uniformity with other awards. The learned trial judge to my mind quite correctly chose to pay attention to the specific injuries suffered by the respondent.

[51] Of the cases canvassed before her the learned trial judge had found that of **Lloyd Robinson** most useful. Miss Clarke's complaint was that in that case the claimant was found to have 12% impairment relative to the injuries sustained then. She also submitted that the injuries sustained by that claimant were clearly more serious than those of the respondent in this case. Before this court Miss Clarke did not cite any case which covered injuries similar to that suffered by the respondent.

[52] In **Lloyd Robinson**, the claimant had suffered the following injuries:

1. Comminuted fracture of left acetabulum
2 Posterior dislocation of left hip
3. Blow to head, left hand
4. Chip to lip – loss of dentures

An amount of $650,000.00 was awarded, this amount at the time of trial in the instant matter after indexation amounted to $3,051,700.00. The learned trial judge found that that claimant had spent about the same number of days in hospital as the respondent

but had lingering complaints some three years after the accident. The evidence shows that the respondent had suffered fractures through the 3rd and 4th ribs and had received a 9 cm laceration to her face as well as suffering aggravation of a previous chronic cervical whiplash injury and a previous mechanical low back injury in addition to the comminuted fracture through the left acetabulum. At the time of his final report on her condition in May 2013, Dr Waite indicated that she would continue to have acute exacerbations of the neck and back pains and that these may affect/continue to affect activities of daily living and work such as reading, prolonged sitting, prolonged standing, walking, household chores and sexual intercourse. The respondent blamed the breakup of her relationship with her partner on how she had come to look and feel as a result of the injuries she suffered arising from the accident. She also asserted that she felt permanently tilted on the left side causing her to "walk with a lean and a limp".

[53] The learned trial judge to my mind carefully assessed the facts and applied the relevant legal principles to arrive at the award of $3,500,000.00. She arrived at an award which was appropriate in the circumstances and cannot be regarded as having made an entirely erroneous estimate of the damages to which the respondent is entitled. This ground therefore must fail.

Ground two

[54] This court has come to recognise the difficulty involved in the presentation of exact figures for loss of earnings for certain categories of workers. Wolfe JA (Ag), as he then was, made certain observations in **Desmond Walters v Carline Mitchell** which remain relevant. He said:

> "Without attempting to lay down any general principles 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 organised corporation may well be what Bowen L.J. referred to as 'the vainest pedantry'."

[55] In the instant case, the respondent's attempts to provide the court with evidence of her earnings were as detailed as could reasonably be expected in the circumstances. She specified how much she bought her goods for and how much she sold them for and the expected profits derived from this "buying and selling" activity. From the calculations done by both counsel, it was determined that the respondent was asserting that she could earn $20,000.00 per day and since she worked three days per week, this would mean she could earn $60,000.00 per week. The learned trial judge chose the lowest amount the respondent gave as her earnings in her witness statement. Miss Clarke complained that this amount should be $10,000.00. The learned trial judge found that the $10,000.00 represented the amount the respondent had to earn every week to fulfil her "pardner" obligations. The learned trial judge in finding that the respondent could have earned more than $10,000.00 and at least $30,000.00 per week cannot be viewed as having made an incorrect assessment of the evidence presented. Thus the award of $1,080,000.00 representing an amount of $30,000.00 per week for nine months cannot be viewed as an erroneous estimate of the damages to which the respondent was entitled. Hence this ground must also fail.

Conclusion

[56] The learned trial judge gave due consideration to the authorities cited against the background of the injuries suffered by the respondent. In the circumstances, the amount awarded for general damages cannot be said to be excessive.

[57] The correct principles were applied in assessing the appropriate award for loss of earning. The learned trial judge in making the award was doing what she considered her best in what was an imprecise exercise. I cannot say the award made was wrong in the circumstances.

[58] Accordingly, I would dismiss the appeal with costs to the respondent.

F WILLIAMS JA (AG)

[58] I too have read the draft judgment of my sister P Williams JA (Ag). I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

Appeal dismissed. Costs to the respondent to be taxed if not agreed.