JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 119 OF 2007

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| BEFORE: | THE HON. MR. JUSTICE SMITH, J.A.<br>THE HON. MR. JUSTICE HARRISON, J.A.<br>THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.) | |
| BETWEEN | STEPHEN CLARKE | APPELLANT |
| AND | OLGA JAMES-REID | RESPONDENT |

**Miss Sherry-Ann McGregor, instructed by Nunes, Scholefield, DeLeon & Co., for the Appellant**

**Mr. Christopher Samuda and Miss Keita-Marie Chamberlain, instructed by Samuda & Johnson, for the Respondent**

**February 11 & May 16, 2008**

**SMITH, J.A:**

I have read in draft the judgment of Harrison, J.A. I agree with his reasoning and conclusion and there is nothing further I wish to add.

**HARRISON, J.A:**

1. On the 30th October 1996, the respondent, Mrs. Olga James-Reid who was sixty years of age, was involved in a motor vehicle accident at the intersection of Constant Spring Road and South Avenue in the parish of St. Andrew. She suffered serious injuries for which she had to be medically treated and which left her with an impairment of the lower extremity which amounts to 10% - 12% of the whole person. She filed an

action in the Supreme Court and sought damages in respect of her injuries and the loss of her motor vehicle.

The Medical Reports

2. The medical reports which were tendered and agreed at a Case Management Conference are set out below:

MEDICAL REPORT RE DR. OLGA JAMES-REID - 590054

> "Dr. James-Reid was a restrained driver of a motor car, which was struck on the side by a bus as she negotiated an intersection. There was no history of head or neck injuries, but she was unable to ericate (sic) herself from the car as she had severe pain in the right buttock and hip region. She was allegedly removed from the motor car by a bystander, who took her to the University Hospital of the West Indies. Dr. Reid is a known Diabetic which (sic) is controlled. She is also Hypertensive.
>
> Dr. Reid was found to be in significant pain, but her vital signs were all stable. She was alert and orientated in time and place and person and a full neurological examination was found to be normal. Significant findings were confined to the lower limbs. Abrasions were seen on both legs distally but no painful deformities were found. She was very tender in the right ischial region, but there was no pain on springing the pelvis and no tenderness over the right femur. The lumbar spine and the lumbar para—spinal muscle arc not tender. Radiographs done did not reveal any fractures in the ulna or over the greater trochanter.
>
> She was subsequently admitted to the Orthopaedic Ward for pain control, which was achieved with the aid of Physiotherapy and Analgesics. She was subsequently discharged on the 3rd November 1996 and her pain, though present, could be controlled with a combination of oral analgesics and oruvail gel.
>
> Over the next two years she had been followed in the Orthopaedic Out-Patient Department on several occasions, where her main complaint was of a constant discomfort in the hip area with ache in the right buttock after a prolonged period of sitting or lying. On examination

her gait was normal and there was no neurological abnormality. Radiographs done at the time were similarly normal.

Mrs. Reid's injuries are consistent with a motor vehicle accident as outlined. At the time of the accident she required hospitalization for approximately five days and a temporary disability which has kept her from her employment for approximately three months. She continues to experience severe pain in the right buttock area, however, and which appears to be a direct result of the blunt trauma to the right buttock at the time of the accident. None-the- less she is able to sustain all activities of daily living and pursuing her own career as Lecturer and Head of a Department at the University of the West Indies. At the end of the day however she has difficulty coping with the requirements for sitting for long period at her desk or walking to lecture. Her impairment therefore is related to the frequent pain of moderate intensity and is estimated at approximately 10% of the whole person.

Sgd. M. MINOTT MB,BS,FRCS(Edin), DM(Ortho)
SENIOR ORTHOPAEDIC RESIDENT."

MEDICAL REPORT RE OLGA REID - 590054

"Mrs. Reid was seen by me for the purposes of writing this medical report on the 2nd December, 1999. I had available to me her University Hospital of the West Indies medical records and radiographs, and a medical report dated 29th June, 1998 written by Dr. Mark Minott. Mrs. Reid stated that she was the driver of a car which was hit by a bus as she negotiated an intersection. The accident took place on the 30th October, 1996. She sustained no loss of consciousness, however she complained of pain in her right buttock area.

When examined Mrs. Reid had normal vital signs. There was however marked tenderness over the right buttock area. There were superficial abrasions on both legs. Radiographs of the pelvis done showed no fractures. Mrs. Reid was admitted for pain control and physical therapy to assist in her mobilisation. While in hospital, Mrs. Reid had difficulty sitting because of the pain in the right buttock. patient appointment to the Orthopaedic Clinic. While in

hospital, Mrs. Reid required a combination of narcotics and non-sterodial anti-inflammatory pain killers for control of her pain.

Mrs. Reid was next seen on the 2nd December, 1996. At that point she reported that her pain was much less, but she had burning which involved her right lower limb, which was made worse by prolonged sitting. She was continued on her physical therapy and was next reviewed on the 17th February, 1997. At that occasion she reported that she still had the burning sensation in the right buttock, however it was getting progressively less. She was discharged from the clinic at that point, to continue on a home programme of physical therapy.

Mrs. Reid was referred back to the Orthopaedic Clinic on the 8th September, 1997 because of the persistence of the pain and the burning in the right buttock. Her clinical examination revealed that she had some tenderness on palpation over the right buttock area. Her straight leg raising was limited on the right side as compared to the left, however there were no abnormal neurological findings. A diagnosis of post-traumatic myo-fascial pain was made and she was again started on a course of physical therapy. Her next appointment was on the 10th November, 1997 at that visit she reported some relief with the aid of physical therapy, and this modality was therefore continued.

She was next seen in June of 1998 again complaining of pain in that right buttock and hip area. She reported that she had morning stiffness in the right hip, but this eased after she started walking. Sitting for prolonged periods would lead to stiffness and discomfort in the buttock. Repeat radiographs done on the 11th June,1998 showed no bony changes within the pelvis. She was provided with a Medical Report, as written by Dr. Minott, and discharged from the Clinic.

Mrs. Reid was next seen on the 5th November, I998. She reported then that the pain had recurred with greater intensity from mid-October of that year. The pain had kept her from sleeping and in spite of non-steroidal anti-inflammatories anti-spasmodics and sedatives this had not relieved the pain. She had been seen and had an injection

of steroids to the trochanteric bursa as it was thought that she had a trochanteric bursitis. This relief from the pain was short-lived, and after two days the pain recurred.

Examination at this visit showed that she had a relatively normal gait. In her back there was no localised tenderness, however there was tenderness over the buttock area which had extended towards the greater trochanter of the hip. She was unable to bend to touch the floor with her hand, however hyperextension of the spine and lateral flexion produced no discomfort. Her straight leg raising was 70° on both sides with no evidence of neurological compromise. The radiographs of the lumbo-sacral spine, which was done on the 16th October, 1998 were reviewed and these showed only mild evidence of early degenerative changes on the lumbar spine. A possibility of lumbar-disc disease as a cause of her persistent pain was entertained. She-had full blood investigations along with physical therapy. She was reviewed again on the 19th November, 1998 at which time she reported that she was now able to sleep at night. She did however report that she had fallen as she alighted from a car as her right leg would not support her. The results of the blood investigations done were essentially normal. Her physical examination apart from her decreased knee jerk on her right side was within normal limit. As a result of her persistent pain Mrs. Reid had a series of investigations, including nerve conduction studies, bone scan, a CT Myleogram and her physical therapy was continued.

Mrs. Reid was admitted on the 6th December, 1998 for a CT Myleogram, and she was discharged from hospital on the 8th December of that year. The CT Myleogram was reported as normal. She was reviewed in the Orthopaedic Clinic on the 10th December, 1998 at which time it was reported that the right buttock pain had continued and that the weakness in the right lower limb had extended down to the right foot. A scheduled appointment was made for her on the 24th December, 1998, at which point she would have had her bone scan. She was continued on pain relieving medication. On the 24th December, 1998 Mrs. Reid was reviewed again in the Orthopaedic Clinic, at which point she reported that she was making stride in her ambulation, however on that very morning her right leg gave way. She had difficulty moving the right leg and as a

result of the fall the leg had become swollen. She had application of ice to the area and this had soothed it somewhat.

Clinical examination revealed that she had weakness in the proximal muscles of her pelvic. The result of the bone scan was normal. She was referred to the neurology clinic for an opinion at this time. Her pain relieving medication, which included non-steroidal anti-inflammatory medication, anti-depressants and anti- epileptic drugs were continued. Miss Reid was next reviewed on the 11th February, 1999. Her general condition remained essentially the same and she was referred on for nerve conduction studies. These were done on the 15th February, 1998. Clinic appointment on the 25th February, 1999 saw her condition essentially unchanged. On the 4th March, 1998 Mrs. Reid was reviewed and again complained of the pain in the right buttock, that had persisted and which radiated down to the right knee. She reported that the right knee sometimes buckled under her. The results of the nerve conduction studies showed sensory and motor neuropathy of the sciatic nerve. She was next reviewed on the 1st July, 1999 where she reported that she had gone to Florida to seek further advise, and had been prescribed Quinine along with another anti-epileptic drug in an effort to control her pain.

This combination seemed to have given her some relief and on examination she had decreased discomfort She had however been forced to use a cane to assist in her mobilisation.

Mrs. Reid was next reviewed on the 9th October, 1999 when she reported itching and burning over the right hip and buttock area. She was advised to continue her anti-epileptic pain relieving medication, as this seems to have been the only combination that had worked.

When seen for the purpose of writing this report, Mrs. Reid's complaints remained the same. Her clinical examination revealed tenderness over the buttock area which was exaggerated with internal rotation of the hip joint. There was some wasting of the right lower limb as well. Clinically Mrs. Reid has developed the Piriformis Syndrome as a result of the injury — that is compression of the sciatic nerve as it passes from the pelvis to the buttock enroute

> down the thigh. She therefore has an impairment of the lower extremity which is due to the weakness of the muscles, and the sensory impairment which amounts to 12% of the whole man.
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> Sgd. K. VAUGHAN McH (Ortho), FRCS (EDIN) ORTHOPAEDIC CONSULTANT."

**The judgment below and grounds of appeal**

3. In a judgment delivered by Mangatal, J on the 5th October 2007, the plaintiff/respondent was awarded damages as follows:

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| General damages: | $4,000,000.00 |
| Special damages: | $ 590,198.12 |

Interest was awarded on general damages at the rate of 3% per annum from March 20, 2002 and on special damages at the rate of 3% per annum with effect from October 30, 1996.

4. The award of $4,000,000.00, under the head general damages, represents a sum in respect of pain and suffering and loss of amenities. It is this head of damages which is being challenged by the defendant/appellant on appeal to this Court. We are being urged to say:

> "(i) The Learned Judge erred in relying on the case of **Marie Jackson v Glenroy Charlton** as the most useful guide for determining an appropriate award for pain and suffering and loss of amenities.
>
> (ii) That the award of $4,000,000.00 for general damages is inordinately high and not in keeping with authorities.
>
> (iii) That the sum awarded for general damages is not in keeping with awards made in similar types of cases in these courts.
>
> (iv) That the Learned Judge erred in failing to take into account factors which distinguish the Respondent's case

> from Marie Jackson; in particular the fact that Marie Jackson was forty seven (47) years older than the Respondent and that the (sic) Marie Jackson's disability was associated with the injury to her back and not to the lower extremity, as in the Respondent's case".

**The principles applicable on a review of damages**

5. We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the trial judge it must be satisfied that the judge made a "wholly erroneous estimate of the damage." This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving this uniformity.

6. The principles governing an appellate court in its review of damages awarded by a lower court are well established. They were stated clearly by Greer L.J in ***Flint v Lovell*** [1935] 1 KB 354 at p. 360 as follows:

> "... I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.
>
> To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the Judge acted on 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 damages to which the plaintiff is entitled." (emphasis supplied)

**The submissions and the authorities cited**

7. This brings us now to a consideration of the award of $4,000,000.00 for the pain and suffering and loss of amenities.

8. Miss McGregor, Counsel for the appellant, submitted that there were cases other than ***Marie Jackson v Glenroy Charlton*** Suit No. C.L 1999/J113 reported at page 167 of Khan's Recent Personal Injury Awards Vol.5, which could have been of more useful assistance to the learned Judge in determining an appropriate award. She referred to the following cases:

(i) ***Sandra Minott v Master Blend Feeds Co. Ltd. and Others*** - Page 29, Khan's Vol. 5.

(ii) ***Marcia Bradford v Melrose Martin and Another*** — Page 31, Khan's Vol. 5.

(iii) ***Lloyd Robinson v Denham Dodd and Another*** — Page 37, Khan's Vol. 5.

(iv) ***Otis Gordon v Carlton Brown*** — Page 45, Khan's Vol. 5.

She submitted that the trial judge had made a wholly erroneous estimate of the damages and based on the cases referred to above, the respondent ought not to have been awarded in excess of $2,500,000.00 for pain and suffering and loss of amenities.

9. Mr. Samuda, Counsel for the respondent, submitted on the other hand, that the court has to look at the injuries sustained in context with the loss of the quality of life which the victim had suffered. He said that loss of the ability to go on courses offered by the University or to teach may be materially different, depending on the occasion and the disposition of an accident victim.

10. The plaintiff ***Marie Jackson***, was much younger than Mrs. James-Reid and had an 8% permanent partial disability ("ppd") which was related to the area of the spine. Her disabilities included a limp and loss of muscle in the left thigh and left calf. She also sustained a depression of the knee which restricted her raising the leg to 70°. The Court made an award of $1,800,000.00 on May 4, 2001 in respect of pain and suffering and loss of amenities. When updated at September 5, 2007, that award is converted to $3,300,000.00.

11. In the ***Otis Gordon*** case, the percentage of permanent disability was high – 22%. He was 27 years old at the time of injury and was hospitalized for 3 months. His loss of amenities included the inability to have an erection; sacro-iliac osteoarthritis, shortening of 1 cm on the left side; slight limp; weakness in the left lower extremity and a sensation of deadness in the left after for a long period of time. This court in assessing damages awarded him $1,800,000.00 on the 20th December 1999 in respect of pain and suffering and loss of amenities. That award is valued $3,600,000.00 when updated at 5th September 2007.

12. In ***Lloyd Robinson*** (supra) the plaintiff sustained a comminuted fracture of the left acetabulum; posterior dislocation of the left hip, stiffness in the hips, cramps in the thigh and tenderness whenever he stood for a long period of time. He had a 12% ppd which the doctor opined could increase with age. His disabilities included a moderate limp, advanced osteoarthritis, inability to work as a duco man, weaker hip and external restriction of the hip. He was awarded $650,000.00 for pain and suffering and loss of amenities on April 16, 1997. There was an appeal - SCCA 61/97 delivered July 31, 2000 - but the award was not disturbed. The issue on appeal concerned the non-disclosure of a partial settlement which was not brought to the learned judge's attention below. That award would have valued $1,600,000.00 on the 5th September 2007.

13. In ***Minott's*** case the plaintiff was 32 years of age at the time of the accident. She sustained more serious injuries than the respondent in this case. Her total whole person

disability amounted to 26% and on the 27th May 1999 she was awarded $1,400,000.00 in respect of pain and suffering and loss of amenities.

14. ***Marcia Bradford*** had sustained a fracture of the posterior acetabulum with fibrous anklyosis. Her disabilities included: (i) severe acetabular and peri-acetabular sclerosis in the hip; (ii) she was unable to resume her farming; (iii) she had difficulty in walking, bending, running, climbing stairs and lifting weights; (iv) there was a 2cm shortening of the leg; (v) she suffered from chrondolysis; (vi) there was marked loss of joint space of the hip with signs of early osteoarthritis and; (vii) she had a 23 degree flexon deformity of the right hip. She had a 25% ppd of the whole person and was awarded $2,000,000.00 on the 21st January 2000. When that sum is converted it valued $3,980,000.00 on the 5th September 2007.

15. The respondent in the instant case sustained blunt trauma to the right hip and buttock and this caused severe pain in the buttock area due to compression of the sciatic nerve. There was wasting of muscles and weakening of the knees. Her 10% - 12% ppd of the whole person was related to muscle weakness and sensory impairment. Evidence was adduced through her at the trial that she was still suffering after almost 10 years of the accident. She still has cramps in the lower back and pain in the buttock area and is unable to sit or drive for any length of time.

Conclusion

16. It is always difficult to find comparable cases when it comes to making an appropriate award but this Court must strive to achieve a level of uniformity when awards for personal injuries are made.

In our view, the injuries suffered by the respondent are far less serious than those in **Otis *Gordon, Marcia Bradford*** and ***Sandra Minott*** cases. When one compares the nature of the injuries and the amounts awarded it would seem that the learned judge's award in Jackson's case was on the high side. Mangatal J., would therefore have fallen into error in relying on the Jackson's case of Marie Jackson as the most useful guide for determining an appropriate award for pain and suffering and loss of amenities.

17. We do believe that an award of $4,000,000.00 is extremely high, and amounts to an erroneous estimate of the damages to which the respondent is entitled. An award of $3,000,000.00 would be more consistent with awards that were made at and around the time of assessment. We accordingly reduce the award of $4,000,000.00 to $3,000,000.00 under the heading of pain and suffering and loss of amenities. The appeal is therefore allowed with costs to the Appellant.

**DUKHARAN, J.A. (Ag.)**

I too have read the judgment in draft of Harrison, J.A. I agree with his reasoning and conclusion. I have nothing further to add.

**ORDER:**

**HARRISON, J.A.**

The appeal is allowed. The award of $4,000,000.00 is reduced to $3,000,000.00 under the heading of pain and suffering and loss of amenities.

Costs are awarded to the appellant.