



[2022] JMSC Civ 227

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2016HCV03527

BETWEEN	CHADWICK BARRETT	CLAIMANT
AND	JUNIOR FERGUSON	1 ST DEFENDANT
AND	WAYNE EVANS	2 ND DEFENDANT

Miss Antoinette Wynter, instructed by K Churchill Neita & Co for the claimant.

The defendants not appearing and not being represented.

Heard July 6, 2022, and December 19, 2022

Quantum of damages - partial amputation of right thumb-closed fracture right femur-open type II fracture mid to distal tibia and fibula-degloving injury to right ankle - degloving injury to right forearm - 44% whole person impairment

CORAM: JARRETT, J (Ag)

Introduction

[1] The claimant Chadwick Barrett was riding his motorcycle on the Dawkins Pen Main Road heading home to Bog District Lionel Town P.O in the parish of Clarendon, on the evening of September 3, 2015. The sun was just setting but his visibility was not impaired. At around 6.45pm, he was close to home. As he came within reach of a section of the Dawkins Pen Main Road which is riddled with potholes,

he saw a speeding motor car approaching from the opposite direction. The driver swerved onto the claimant's side of the road in an attempt to avoid the potholes, but in doing so he violently hit into the right side of the claimant's motorcycle. The collision caused the claimant to be violently flung from the motorcycle and into the storm drain on the soft shoulder. He suffered multiple injuries and was hospitalised. On August 23, 2015, he sued the 1st and 2nd defendants in negligence. The 1st defendant was the driver of the speeding motor car and the 2nd defendant, the owner.

- [2] The defendants filed a defence, but a failure to comply with case management conference orders led to an unless order and the ultimate striking out of their statement of case. On May 10, 2021, judgment was entered in favour of the claimant. At the hearing of the assessment of damages, the defendants did not appear and were unrepresented.

The evidence

- [3] The claimant gave evidence orally and by way of his witness statement. According to him, when he was thrown from his motorcycle, he felt "a lot" of pain. He tried to get up from the storm drain but found that he could not move. His right hand and right foot "felt dead", and he was unable to move them. His right hand was bleeding heavily, and his right leg was "twisted". He was first taken by ambulance to the Lionel Town Hospital where his wounds were cleaned and dressed. Thereafter, the ambulance transported him to the May Pen Hospital. At that hospital, his wounds were again cleaned and dressed, and he was sent to do x-rays. He learnt that he had suffered a broken right hand, a broken right ankle and that his right thumb was amputated. Surgery was performed on him, and he was admitted to the ward. There he stayed for four days until he was transferred to the Mandeville Regional Hospital. During his stay at the May Pen Hospital, he was in a "lot of pain" and the nurses administered pain medication by injection.

- [4] At the Mandeville Regional Hospital, he was admitted to surgery where the doctors placed pins and screws in his right foot. His right ankle and right hand were bandaged, and a collar was placed around his neck. He received pain medication and antibiotics daily. When the pains did not abate, the doses and frequency of the medications were increased. Because of the pains particularly in his neck, back, shoulder, hip, right hand and foot, the nurses had to help him to “do everything”. His wounds were dressed three times daily and he had to use a bedpan and a catheter, which he found uncomfortable. He had the use of a catheter for about two months.
- [5] On September 17, 2015, surgery was performed on his right hand to straighten his little finger because it was twisted. The damaged part of his right thumb was also “cut off”. He was transported from the Mandeville Regional Hospital every week by ambulance to the National Chest Hospital to have his right foot checked on. He was taken by the doctors at that hospital to the Kingston Public Hospital where plastic surgery was done on his right foot to “put flesh and skin in the foot”. He developed an infection after surgery and the doctors at the Mandeville Regional Hospital removed “a piece of the bone” in his foot. The pains he experienced during that time were severe and were at the level of 10 out of 10. He started weekly physiotherapy on his right hand and foot in November 2015. On January 3, 2016, he was discharged home from the Mandeville Regional Hospital. On discharge, he got a wheelchair to move around as he was unable to put any pressure on his foot. His knee was stiff, and his ankle was twisted.
- [6] At home he required assistance from his family to move around. Although the medication helped, there were times when the pain was unbearable. He remained an outpatient of the Mandeville Regional Hospital and continued physiotherapy there. He also continued as an outpatient at the Chest Hospital until around September 2016. He started to use crutches and, within a couple months of using them, the doctors at the Mandeville Regional Hospital removed the “irons” from his foot and replaced them with a cast to see whether the bone would heal. On or around September 2017, a bone marrow transplant was done to assist with the

healing of the bone in his foot. He was released and sent home with a cast the same day of the surgery. By March 2018, another surgery was performed by the doctors at the Mandeville Regional Hospital using bone cement. About three months later, bone grafting was done.

- [7] He continues follow up treatment at the Mandeville Regional Hospital as his leg is still “not 100%”. He has stopped using the crutches, but from time to time he still feels pain although not as much as he used to. Sometimes he takes pain medication. He currently walks with a limp as his right foot is shorter than the left. He is unable to run, jump, dance or walk fast, as his ankle is very stiff. In addition to the foot pains, he still gets pain in his right thigh, knee shoulder and hand. The finger on his right hand cannot “straighten out” and his “strength is weak in that hand”. His right hand and right shoulder are numb at times, and he cannot feel “anything” in his foot. His knee is unable to bend “all the way” and when he tries to do so it is very painful. He can no longer play football and dance. These were activities he enjoyed prior to the accident. When he rolls in his sleep, he feels pain and he has had to “change” his sex life due to the pain and the stiffness in his foot.
- [8] Prior to the accident his primary job was that of an air condition technician. When business was slow, he worked at Barrett’s Block Factory. Since the accident, he has been unable to return to work as his job requires him to be active on his feet. On average he earned \$30,000.00 per week as an air condition technician, whenever he received a contract. When he worked with Barrett’s Block Factory, he earned on average \$21, 000.00 per week.
- [9] The claimant gave evidence of incurring transportation expenses amounting to \$82, 000.00 and medical expenses totalling \$434,560.00 He pleaded loss of earnings of \$ 1,296,000.00 representing two years and three months’ weekly earnings of \$12,000.00 as an air condition technician, for the period September 2015 to December 2017.

The medical evidence

- [10] Four medical reports were tendered and admitted into evidence: the medical report of Dr Carolyn Melbourne of the Lionel Town Hospital, which is undated; the medical report of Dr Dale Laws of the May Pen Hospital dated April 5, 2016; the medical report of Dr Errol Thomas of the Mandeville Regional Hospital dated April 25, 2016; and Dr Grantel F. Dundas's report dated September 3, 2017. Dr Carolyn Melbourne in her report states that the claimant arrived at the Lionel Town Hospital on September 3, 2015. On presentation he had no loss of consciousness and on examination he was alert and oriented. His right thigh was swollen and deformed and there were multiple macerated abrasions to his right leg and right foot. The anterior and mid aspect of his right leg and the proximal dorsum of his right foot were bleeding heavily. There were multiple abrasions to the right forearm dorsally and small abrasions to the anterior aspect of the right knee and left cheek. He was treated with tetanus toxoid injection, intravenous fluids, intravenous antibiotics and intramuscular analgesics. Before being transferred by ambulance to the May Pen Hospital as an emergency, his wounds were cleaned and dressed and a splint applied to the right lower limb.
- [11] Dr Dale Laws says that the claimant was admitted to the May Pen Hospital on September 3, 2015. He reports that on the claimant's arrival, a complete blood work was done and radiographs taken of the cervical spine, chest, pelvis, and the right upper and lower limbs. The diagnoses made were, partial amputation of the right thumb, closed fracture of the right femur and open fracture dislocation of the right ankle. The claimant's treatment consisted of fracture reduction and immobilization, wound irrigation and debridement, antibiotics and analgesics. He remained at the May Pen Hospital until September 7, 2015, when he was transferred to the Mandeville Regional Hospital's Orthopaedic Service for further management.

[12] The Mandeville Regional Hospital's report prepared by Dr Errol Thomas states that the claimant was admitted as an inpatient of that facility from September 7, 2015, to January 3, 2016. The diagnoses made were as follows: -

- a) fracture closed right midshaft of femur
- b) open type II right mid to distal tibia and fibula
- c) degloving injury to right ankle
- d) degloving injury to right forearm
- e) partial amputation of right thumb

Surgery was performed on the very day of admission and consisted of wound debridement and external fixation to the right tibia of ankle. Further surgery was done ten days later. This time the procedure was open reduction and internal fixation to the right 5th proximal interphalangeal joint. The claimant's further treatment is stated as including skeletal traction, pin site care, dressing of wounds, referral to physiotherapy and referral to plastic surgery clinic at the National Chest Hospital. The medical report concludes with the prognosis: "Patient still on clinic".

[13] In his report, Dr Grantel F. Dundas states that he saw the claimant on July 27, 2017. He says that on presentation, the claimant had the following complaints:

- a) numbness in his right shoulder,
- b) phantom symptoms in his amputated right thumb,
- c) scars on the extensor surface along the ulnar border of the right forearm,
- d) inability to extend the proximal interphalangeal joint of the right 4th finger,
- e) flexion deformity of the left 5th finger,
- f) pain in the right thigh,
- g) misalignment of the right thigh,
- h) pain in the right knee,
- i) loss of range of motion of the right knee,

- j) bone loss of the right tibia,
- k) stiffness in the right ankle and,
- l) loss of sensation in the right foot.

According to Dr Dundas, the claimant said that he had these complaints for twenty-two months.

[14] On his examination, Dr Dundas said he “entertained” the following diagnoses: -

- a) Right shoulder contusion query rotator cuff injury.
- b) Status post amputation right thumb through interphalangeal joint.
- c) Flexion contracture of the right 4th and 5th fingers.
- d) Malunion of the fracture of the right femur.
- e) Traumatic arthrosis right knee.
- f) Cruciate ligament deficiency right knee.
- g) Non-union fracture shaft of right tibia.
- h) Ankylosis right ankle.

[15] X-rays revealed the following:

- a) mild wasting of the infraspinatus and deltoid muscles in the right shoulder,
- b) multiple scars on the right forearm which were mildly hypertrophic.
- c) ulnar claw deformity in the right hand,
- d) a shortening of the right lower limb by 3 centimetres and,
- e) an anterior leg scar measuring 32 centimetres in length and 7 centimetres in width extending from the mid leg to the tarso metatarsal junctions of the right foot.

Dr Dundas described the claimant as sustaining a “multiplicity of serious injuries to his right limb” and assessed him as having a 44% whole person impairment. He

said that the claimant gave a history of a prior road traffic accident four to five months earlier where he sustained a fracture to his right foot and was treated with a below knee cast. The cast was maintained for three months.

Submissions

[16] Counsel Miss Wynter made oral and written submissions. She posited that the decisions in **Raymond Reid v Dalton Wilson reported in Khans Vol.6, Martia King v Matthew Hibbert and Rohan Grant [2017] JMSC Civ 122**; and **Adrian Smith and Devon Edwards v The Attorney General of Jamaica and the National Solid Waste Management Authority [2017] JMSC Civ 97**, are helpful in assessing the claimant's general damages. In her oral submissions, counsel argued that these decisions support an award within the range of \$15,500,000.00 to \$16,500,000.00. This is a departure from her written submissions in which she recommended an award of \$9,000,000.00

Analysis and discussion

[17] Arguably, no amount of money is ever enough to compensate a claimant for personal injuries. But judges must do the best they can to award a reasonable sum to place claimants, as far as possible, in the position they were in, prior to the commission of a tort. I remind myself, as I embark upon the process of assessing the claimant's damages in this case, that I am to consider the nature and extent of his injuries, any incapacities that result from them, and the effect if any of the injuries on his pecuniary prospects. In the process, I am to give due regard to any available earlier comparable authorities which may provide me with useful guidance, to achieve consistency with previous awards.

Non-pecuniary loss

[18] After an analysis of the evidence of the claimant and the medical reports on which he relies, I am satisfied that the injuries he sustained are consistent with him being

flung from his motorcycle when it was hit by the speeding motor car on September 3, 2015. Dr Laws' medical report indicates that he was hospitalised at the Mandeville Regional Hospital for three days' shy of four months. That report is dated April 25, 2016, and states that the claimant is "still on clinic". This corroborates the claimant's evidence that after his discharge home on January 3, 2016, he remained an outpatient of that hospital. When he saw Dr Dundas, over two years later, he is reported as still complaining of pain in the right thigh, pain in the right knee, stiffness in the right ankle, loss of sensation in the right foot, numbness in the right shoulder and phantom symptoms in the amputated right thumb. In his evidence, the claimant says he continues to feel these pains and experience numbness. I accept his evidence and find that his recovery has been long and painful.

[19] It is not clear from the claimant's evidence how long he had the use of crutches to help with his mobility, but I observe that Dr Dundas makes no mention of the claimant presenting with them. Dr Dundas referred to the claimant's prior history of a fracture to the right foot, which from all indications healed after treatment with a cast. There is no evidence before me, of the September 4, 2015, accident, exacerbating this earlier injury. I am satisfied that the injuries sustained by the claimant in the September 4, 2015, accident have reduced his enjoyment of life. I accept his evidence that he can no longer enjoy playing football and dancing, he cannot jump and walk fast, and that his sex life has had to be modified.

[20] The claimant in **Raymond Reid v Dalton Wilson**, was also involved in a motor vehicular accident. He suffered the following injuries:

- a) a posterior dislocation of the left hip,
- b) fracture of the left acetabulum;
- c) a 6 cm T laceration over the medial aspect of the right foot with extensive degloving injury to the sole of the right foot which required sutures and skin graft.
- d) a 14.5 cm oblique hypertrophic scar in the left gluteal area;

- e) abrasions over the left medial aspect of the right thigh;
- f) a wound to the left buttock,
- g) deep vein thrombosis,
- h) a reduction in the range of movement of the left thigh;
- i) shortening of the left limb by 2 cm resulting in short leg limp and mild antalgic gait
- j) osteoarthritis of the right hip secondary to the fractured left acetabulum.

He could no longer jog, or play cricket or football, had difficulty sleeping and became sexually dysfunctional. He was assessed by Dr Grantel Dundas as having 19% whole person disability. At trial he continued to have pain in his right foot. On December 20, 2004, he was awarded \$2,790,000.00 for general damages. On appeal that figure was reduced to \$2, 500,000.00. That award updated using the current consumer price index is \$9, 891,304.20.

[21] It is plain, that both the claimant at bar and the claimant **Raymond Reid** suffered serious injuries, some of which are comparable and some are not. The claimant **Raymond Reid** fractured and dislocated his left hip and fractured his left acetabulum, while the claimant at bar fractured his right femur and right ankle. They both had degloving injuries to the right foot and had the shortening of their legs. The claimant's right leg being short by 3cm while the claimant **Raymond Reid's** left leg by 2cm. **Raymond Reid** had a wound to the buttocks. The claimant did not. He however had the partial amputation of his right thumb, multiple abrasions of his upper right arm and abrasions to the right knee. **Raymond Reid** developed osteoarthritis secondary to the fracture of his left acetabulum. While the claimant does not have that complaint, he has a traumatic arthrosis right knee, mild wasting of the muscles in the left shoulder and a right-hand ulnar claw deformity. Both claimants have had their enjoyment of life similarly hampered by their injuries. The claimant's whole person disability assessment is however much higher than that of the claimant **Raymond Reid**.

[22] In **Martia King v Matthew Hibbert and Rohan Grant**, the claimant's injuries suffered in a motor vehicular accident were:

- a) pain in the chest and in the back;
- b) pain in the left foot with tenderness to the lateral aspect;
- c) fracture of the left calcaneus and fracture of the left lateral malleolus with mild motion deficit;
- d) comminuted fracture of the left calcaneus with depression of the medial and articular surfaces;
- e) recurrent swelling to the left ankle and foot;
- f) pain in the left foot with weight bearing;
- g) L-shaped scar 15cm lateral aspect of ankle joint;
- h) ankle range of motion -10 dorsiflexion and subtalar range of motion limited by pain.

The trial judge described her as suffering: "grave injury to her subtalar joint". He found that the injuries caused her to: "lose important career opportunities and have altered her career choices". He also accepted her whole person disability assessment of 9%. General damages in the sum of \$3,500,000.00 for pain and suffering and loss of amenities were awarded on September 6, 2017. That figure updates to \$ 4,753,731.11. Both the claimant at bar and the claimant **Martia King** suffered serious injuries to the foot. **Martia King's** fractures were to her left calcaneus and her left lateral malleolus; while the claimants' were to his right femur and right ankle. The whole person disability assessment of **Martia King** was however far lower than that for the claimant.

[23] The claimant in **Adrian Smith and Devon Edwards v Attorney General of Jamaica and the National Solid Waste Management Authority** was also in a motor vehicular accident. He suffered swelling, deformity, abnormal mobility, and bony crepitus of the left femur. He was diagnosed with a closed fracture of the left femur and whiplash injury of the lower back. He underwent surgery in relation to the fractured femur and it is discerned from the judgment, that the surgery left him

with implants in his left thigh which caused him some minor discomfort. On June 30, 2017, he was awarded general damages of \$2,300,000.00. That figure updates to \$3,171,212.12. The only similarities I can find between the injuries suffered by the claimant **Adrian Smith** and those of the claimant at bar, are that both of them had a closed fracture of the femur and underwent surgery as a result. It would seem to me however, that the injuries suffered by the claimant at bar, were more serious than those suffered by the claimant **Adrian Smith**.

[24] The claimant in **Calvin Prendergast v Jolly Walker [2022] JMSC Civ 68**, was flung from his motorcycle when a motor vehicle collided with him. He landed on the roadway and sustained serious injuries. He suffered a fractured right humerus; a fractured left ankle with displacement in angulation; abrasions to the right knee; deep lacerations to the right leg; a wound to the left thigh; deformity of the left lateral malleolus and decreased range of motion to the knee. His wounds became infected and were sutured under operating theatre conditions twice. Due to the non – union of the fracture to the right humerus, he underwent open reduction and internal fixation with the implantation of an intramedullary nail. He had open reduction performed twice. The second open reduction surgical procedure involved internal fixation, the removal of the intramedullary nail and bone grafting. He had decreased range of movement to his right elbow and right shoulder. His recovery was protracted. He was assessed with a 17% whole body impairment. At the time of trial, seven years later, he still complained of swelling and pain in his ankle. On May 26, 2022, I awarded him \$8,000,000.00 for pain and suffering and loss of amenities. That figure updates to \$8,430,107.20

[25] I believe useful guidance can be had from the decision in **Calvin Prendergast v Jolly Walker**. Both claimants had multiple serious injuries. Both suffered two fractures of the lower extremity and both underwent fracture reduction and fixation surgeries. In the case of **Calvin Prendergast**, he had fracture reduction surgeries twice. Unlike the claimant at bar however, **Calvin Prendergast** did not have an amputation. The claimant had partial amputation of his right thumb and suffered an ulnar claw deformity of the right hand. **Calvin Prendergast** had no such injury.

The claimant wore a catheter for two months which he found uncomfortable. The Claimant **Calvin Prendergast** did not have to use one. The claimant had a bone marrow transplant to help with healing. **Calvin Prendergast** had a bone graft of his right humerus. Both had several abrasions, with **Calvin Prendergast** having multiple scars. **Calvin Prendergast** did not suffer any reduction in the length of any of his legs, while the claimant's right leg is 3 cm shorter than his left because of the accident. Both had to use wheelchairs on discharge from hospital. The claimant has a significantly higher percentage whole person impairment assessment than **Calvin Prendergast**.

[26] After a careful review of the above-mentioned cases, I am of the view that a reasonable award for the claimant's pain, suffering and loss of amenities is \$11, 000,000.00. I believe that the claimant's injuries and the length of his incapacity, come closest to the injuries and incapacity of the claimant **Calvin Prendergast** and the claimant **Raymond Reid**. However, the injuries suffered by the claimant, were in my estimation more serious than theirs, and his percentage whole person impairment assessment much higher. It is for these reasons, that I have increased his award beyond the updated figures for the awards in those two earlier cases.

Pecuniary losses

[27] It is commonplace that special damages must be specifically pleaded and proven. The claimant pleaded medical expenses totalling \$ 290,913.00, but gave evidence of incurring expenses under this head in the amount of \$ 434,560.00. Costs incurred in January and February 2018 at Medical Technologies in the total sum of \$ 131,147.00 were not pleaded. So too were the costs to attend mediation in the amount of \$12, 500. 00. The pleadings were amended on January 9, 2018, but no application was made since then to seek to make any further amendments. There was ample opportunity to have done so. My award for special damages will therefore not include these expenditures. Transportation expenses were also not pleaded. The accommodation that the court typically makes in relation to this

expenditure is in the proof of it. The question in each case being whether it is reasonable to allow recovery without documentary proof. No amendment was sought to include transportation expenses in the pleadings. I will consequently not include this expenditure in my award of special damages.

[28] There is an inconsistency between the claimant's evidence and his pleadings in terms of his alleged loss of earnings. His evidence is that whenever he had contracts as an air condition technician, he earned on average \$30,000.00 per week. Yet he pleads that he lost earnings of \$12,000 per week for two years and three months from September 2015 to December 2017, as an air condition technician. In addition to this inconsistency, he has not provided any documentary proof to support his claim that he worked by contract as an air condition technician. Neither has he provided any evidence of the number of contracts he would typically receive in any given month, supported, for example, by proof of his earnings from such contracts in the year or so prior to the accident. It is reasonable to expect that he would have produced invoices, bills or receipts reflecting work done in the past on these contracts. He has failed to do so.

[29] In his pleadings he makes no reference to working at Barrett's Block Factory, yet his evidence is that when he is not working on contracts as an air condition technician, he earns on average, \$21, 000.00 per week working for Barrett's Block Factory. I would have expected him to produce some documentary proof from Barrett's Block Factory to support his evidence that he worked at this establishment. He has not done so. For all the forgoing reasons, I reject his evidence of loss of earnings. However, I am prepared to accept that he was earning an income at the time of the accident and that he would have been unable to obtain employment during the two-year period of his convalescence. I will therefore award him loss of income based on the average minimum wage payable for the two-year period September 3, 2015, to September 2, 2017. Using the average minimum wage for that period of approximately \$ 5,900.00, I award the claimant the sum of \$613,600.00 for 104 weeks of loss of earnings. I make no

deduction for income tax, as his annual earnings based on the minimum wage for that period would have been below the tax threshold.

[30] In the event, the total special damages I will award the claimant is \$904,513.00, representing medical expenses of \$ 290,913.00 and loss of earnings of \$613,600.00.

Conclusion

[31] In the result, I make the following orders in favour of the claimant: -

- a) General damages in the amount of \$11, 000,000.00 for pain and suffering and loss of amenities with interest at 3% from August 30, 2016 to December 19, 2022.
- b) Special damages in the amount of \$ 904,513.00 with interest of 3% from September 3, 2015, to December 19, 2022.
- c) Costs to be agreed or taxed.