



[2017] JMSC Civ 82

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010HCV02371

BETWEEN	DAVID CAMERON	CLAIMANT
AND	FERON WILLIAMS	1ST DEFENDANT
AND	DAVE BIRCH	2ND DEFENDANT

Ms. Shantal Bailey for the claimant

Mrs. Pauline Brown-Rose for the defendants

May 4, 2017 and May 31, 2017

Assessment of damages – Approach of court - whether lump sum award or multiplier applicable

WINT-BLAIR, J (Ag.)

[1] I appreciate the effort that went into preparing the written submissions of counsel appearing in this matter. In this judgment I will reference the evidence and submissions only to the extent necessary to explain my findings and decision. The parties should rest assured that in order to arrive at my decision I have considered all the evidence and the submissions of counsel.

- [2] This matter concerned a motor vehicle collision on September 26, 2007 in which Mr. David Cameron, was severely injured. At the material time he was employed as a housekeeper at Hedonism III in Negril, Westmoreland.
- [3] As a result of this collision he was rendered a paraplegic from the waist down. Mr. Cameron now has to use a wheelchair for mobility. A judgment on admission was entered on February 15, 2015.
- [4] The agreed medical evidence was that the claimant had suffered:
- i. Paraplegia and posterior dislocation
 - ii. Lower spinal cord injury
 - iii. Spinal cord compression
 - iv. Vertebral body displacement into spinal cord
 - v. Fracture subluxation and facet dislocation.
- [5] Mr. Cameron had first been taken to the Noel Holmes hospital in Hanover then transferred from Cornwall Regional hospital and then to the Kingston Public hospital. There he was diagnosed with paraplegia 2nd L1 disc fracture and posterior dislocation, spinal cord injury at T12 – L1 level. He was unable to move his lower limbs and lost control of his bowel movements. His injuries were found to be permanent and as such he would be unable to carry on his occupation.
- [6] He was treated extensively, underwent surgery and was admitted to the Mona Rehabilitation Centre where he remained for more than three months
- [7] The question of special damages was settled by the agreement of both counsel in the sum of \$493,126.70.

General damages

Pain and suffering:

- [8] It is well established that the assessment of damages is comprised of both subjective and objective elements. The injury sustained forms the objective part and the effect of the injury upon the life of the claimant the subjective part.

[9] In the case of **H.W. West & Sons v Shephard** [1963] A2 All E.R. 625 at 633 D-G, Lord Morris said:

[I]f it is remembered that damages are designed to compensate for such results as have actually been caused. If someone has been caused pain then damages to compensate for the enduring of it may be awarded...Apart from physical pain it may often be that some physical injury causes distress or fear or anxiety."

[10] Pain and suffering depends on the claimant's awareness of and capacity for suffering. There is compensation for both physical and mental suffering. See **Lim Poh Choo v Camden and Islington Health Authority** [1980] A.C. 174. Sykes, J interpreted the dictum of Lord Scarman in **Lim Poh Choo**, Sykes, J in **Kenroy Biggs v Courts Jamaica Ltd and Peter Thompson** (unrep.) Sykes, J underscores that where a claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from his injuries, then the award is going to be a high one.

Sykes, J also in **Icilda Osbourne v George Barnes et al** 2005 HCV 294) (unrep.) delivered on February 17, 2006 made it clear that a court is not compensating an abstract claimant but the one before the court.

General damages

Pain and suffering

[11] On the question of general damages, both sides cited the authority of **Sylvester Frazer v Charles Brown and Michael Ferguson**, reported at Khan's Volume 5 page 203. In that case Reid, J delivered the decision of the court on June 5, 1998 in it the 62 year old claimant, had suffered the following injuries:

1. Loss of consciousness;
2. Swelling, cuts and pain to the head, neck and back;
3. Fracture of the glenoid process of the scapula;
4. 2cm abrasion to the right shoulder;

5. Restriction of range of movement in the right shoulder;
6. Compression fracture of T12 vertebrae displaced to the right;
7. Decreased muscle tone
8. Grade zero muscle power in lower limbs
9. No perianal sensation in sensory level T10 (right) and T 12 (left side) with tenderness over T12 vertebrae;
10. Paralysis of the lower body.

[12] That claimant had been admitted to the hospital until he was stable, then transferred to the Mona Rehabilitation Centre. It was diagnosed there by Dr Myint as unlikely that the claimant would be able to walk again. He was awarded \$5,320,000 in general damages with \$4,500,000 for pain, suffering and loss of amenities with interest at 3%.

[13] I accept that case as applicable to the injuries presented in the findings of the instant claimants agreed medical reports.

[14] The instant claimant was 54 years old at trial. He was 44 years old on the 26th of September, 2007 the date of the accident. He had been sitting in the front seat of the car secured by a seat belt. Upon impact, he felt a sharp pain run through his body, he tried to exit the vehicle but couldn't walk. He was in excruciating pain for several hours in the Noel Holmes hospital then he was transferred to the Cornwall Regional hospital. There he was told he would never walk again which was devastating when he contemplated his future as a disabled person. He was transferred to the Kingston Public hospital after two weeks. His condition did not show significant improvement there and he was admitted to the Sir John Golding Rehabilitation Centre for physiotherapy. He was unable to afford the cost of travelling to Kingston upon his discharge and began seeing a local physiotherapist Patras Sardar, in the parish of Hanover.

- [15] He describes his life after the accident as having taken a devastating turn. He has lost his independence, mobility, ability to earn a living. He is in agonizing pain each day. He is now disabled from the waist down being confined to a wheelchair He cannot perform any physical activity, perform bowel functions or have normal sexual relations with his wife. He described his life as reduced to wearing diapers and dependent upon others. His home is not wheelchair friendly though, he tries to assist himself it is frustrating because of this. He pushes himself on the floor to get from one part of the house to the next. He was formerly the family breadwinner working as a housekeeper at Hedonism III in Negril, Westmoreland and was able to meet his family's needs. Now, his standard of living and quality of life have considerably decreased. All of his savings have been depleted paying for his medical care.
- [16] He no longer plays dominoes or watches football as he cannot go out unless someone takes him in a car. He cannot engage in family activities outdoors or play with his children. He is depressed, now having no socialization or enjoyment as he used to before the accident.
- [17] There is absolutely no doubt in my mind that the claimant has been deprived of his health and vitality, his life as a married, family man as he knew it has been irrevocably altered and the tortfeasor will have to compensate him for this.
- [18] The award in **Sylvester Frazer v Charles Brown** and **Michael Ferguson** was submitted to the court by both sides and updates to \$24,744,298.54. While the claimant Sylvester Frazer suffered greater injuries in that he had a fractured scapula and several cuts, in my opinion the award should not be discounted as the instant claimant's paraplegia and posterior dislocation, lower spinal cord injury, spinal cord compression, vertebral body displacement into spinal cord and fracture subluxation and facet dislocation means that his injuries were concentrated on the lower body rather than both upper and lower body as was Sylvester Frazer and are in fact more serious.

Loss of earning capacity

[19] Both sides diverged on the approach the court should take in respect of the award under this head, whether a lump sum was appropriate or whether the multiplier/multiplicand method should be employed.

[20] In **Alphonso v Deodat Ramnath** (1997) 56 WIR 183, Singh, JA of the Eastern Caribbean States CA. (at p 192) as follows:

“In determining the multiplier a court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once-for-all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident (see Lloyd v Phillip).”

[21] In determining the multiplicand I acknowledge the principle enunciated in **Cookson v Knowles** [1979] AC 556 and **Alphonso v Ramnath** at p 183, *ante*, that for the purpose of arriving at the multiplicand, the basis should be the least amount the plaintiff would have been earning if he had continued working without being injured. The claimant was earning \$15,000 per fortnight as his basic pay. His additional earnings are unquantifiable and subjective, I have not taken them into account. This yields weekly earnings of \$3,750.00 or a gross sum of \$390,000.00.

[22] The case of **Moeliker v. A Reyrolle and Co Ltd** (1977) 1 All E.R. 9 sets out the principles that are to guide a trial judge when assessing an award for handicap on the labour market. The court first considers, where the claimant is employed at the time of the trial, what is the risk that he will at some point before the end of his working life, lose his job and be thrown on the labour market. The court is to determine if this is a substantial or real risk based on the facts of each particular case.

[23] If the court comes to the conclusion that there is no substantial or real risk, then no damages are recoverable under this head. If, however, the court decides that this risk exists, it must assess and quantify it in damages.

Some of the factors that the court is to take into account when determining the existence of this real or substantial risk includes the age and qualifications of the claimant, his length of service, his remaining length of working life, the nature and prospects of the employer's business, the nature of his disability and any statement of intention or undertaking by his employers as to his future employment.

The court was asked to assess Mr. Cameron's reduced "eligibility for employment or the risk of future financial loss." (See **Harrisons' Assessment of Damages** 2nd edition page 49). Mr. Cameron at the date of the accident was employed as a housekeeper at Hedonism III in Negril, Westmoreland.

He is completely paralyzed from the waist down. The evidence is that as a result of this disability he will be unable to work. I am convinced that due to this disability the claimant cannot compete with other workers not so affected. I am satisfied that Mr. Cameron should receive an award for loss of earning capacity.

An assessment under this head can be arrived at by employing one of three methods. These are (i) the lump sum method; (ii) the multiplicand/multiplier method or (iii) increasing the award for pain, suffering and loss of amenities to include an unspecified sum for handicap on the labour market. (See **Kiskimo Ltd v. Salmon** SCCA 61/89 (delivered February 04, 1991) and **Icilda Osbourne v George Barnes et al** 2005 HCV 294).

[24] The courts have tended to be conservative with respect to the figure that is awarded for damages under this head, especially when the multiplicand/multiplier method is employed as the means of calculation. The award is also discounted in cases where the claimant would not entirely lose his ability to earn especially in

the early years. (See **Carlton Campbell and Others v. Natalie Whyllie** SCCA 68/97 (delivered November 03, 1999).

[25] Mr. Cameron was fifty-four years at the time of the accident and had most of his working life behind him. He was employed at the time of the accident,

[26] I am guided by the decision of Sykes J in the case of **Icilda Osbourne v George Barsed et al** (supra) and have formed the view that a lump sum which is a distinct from the figure awarded for pain, suffering and loss of amenities is appropriate. I therefore award the sum of \$1,500,000.00 for handicap on the labour market.

[27] In determining the multiplier, the claimant was a 54 year-old male with an expected working life of up to 65 years. In arriving at this figure, I considered that in **Alphonso v Ramnath** (supra) a man of 45 years with a working life expectancy of 65 years was given a multiplier of 12. In that case, there is also disclosed a multiplier of 10 with respect to a 57-year-old doctor where the evidence disclosed a working life of up to 70 years. (*Lloyd v Phillip* (unreported). I take into account the fact that it has been 10 years since the accident, the claimant is completely unable to walk, he could not resume his former occupation as a housekeeper however he could do duties where he sits to perform it such as clerical work. There is no indication that he has sought or could obtain such employment, there was no evidence that his former employer had offered him any such position.

[28] The claimant would have an expected retirement age of 65; he would have had 11 more years of employment.

[29] Khan's volume 2 at page 112 reports the case of Timothy Williams Caribbean Steel Company Ltd., a 53 year old factory worker to whom was ascribed a multiplier of 8. I have also considered the case of Lilly Hall v Barrett Mills, reported at Khans Volume 1 at page 175 of a 53 year old haggler who also received a multiplier of 8. Both cases involved far less severe injuries than that

of the instant claimant and their quality of life would not have been as severely impacted. The instant claimant's home is not configured for his wheelchair, to date he has had to push his body along the floor to get from point to point, he has been reduced from walking upright to this state. This would be a factor in any employment he could have pursued. The multiplier should therefore be increased from 8 to 10.

[30] The multiplicand would be 52 weeks at \$3,750 per week totalling \$195,000. Applying the multiplier of 10 the total sum is \$1,950,000.00

[31] Loss of future earnings has not been pleaded, had it been, the claimant would have merited an award under this head also.

[32] The court makes the following awards:

1. Special damages agreed at \$493,126.70 with interest at 3% from September 26, 2007 to May 4, 2017.
2. General damages for pain, suffering and loss of amenities \$24,744,298.54 with interest at 3% from the date of service to May 4, 2017.
3. Loss of earning capacity \$1,950,000.00.
4. Costs to the claimant to be agreed or taxed.