

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. 2007 HCV 01550

BETWEEN	LLOYD CLARKE	CLAIMANT
AND	CORPORAL E. F. QUEST	1 ST DEFENDANT
AND	CONSTABLE R. BARRETT	2 ND DEFENDANT
AND	DISTRICT CONSTABLE M. BERNARD	3 RD DEFENDANT
AND	THE ATTORNEY GENERAL	4 TH DEFENDANT

Heard December 10 and 12, 2008

Assessment of Damages; Spinal injury arising from gunshot wound inflicted by police officer leading to paralysis below waist; Incontinence of bowels and bladder; allegation of impotence

Mr. Don Foote for Claimant; Ms. Stephanie Orr and Ms. Danielle Archer instructed by the Director of State Proceedings for the defendants.

ANDERSON J.

This is an assessment of damages, liability having been determined in favour of the Claimant against the Defendant by Order of this Court, Thompson-James J (Ag) on the 2nd day of May 2008. By her Order made on that day, her ladyship also ordered an interim payment in the sum of Six Million Dollars (\$6,000,000.00)

The circumstances giving rise to this assessment was the shooting of the Claimant in the back and right elbow, by the one or other of the 1st, 2nd, or 3rd Defendants acting as agents of the state on July 24, 2006 while walking on Barclay Street, Savanna-La-Mar in the Parish of Westmoreland. The Attorney General is sued by reason of the Crown Proceedings Act. As a consequence of being shot, the Claimant, then a 17 year old apprentice mason, suffered a completely severed spinal cord at T10 vertebra which caused complete paralysis from the navel down.

According to the evidence contained in the medical report of Dr. Delroy Fray, Consultant Orthopedic Surgeon, the Claimant had complete paraplegia below T10-11 urethral level. He was treated at the Cornwall Regional Hospital between July 24, 2006 and August 2, 2006 and thereafter spent forty-two (42) days at the Sir John Golding Rehabilitation Centre.

The doctor's report was in the following terms:

Past Medical History:- He reported good health and was not any medication.

Social: - He is a mason who enjoys cycling, swimming and walking.

Examination:- Since the injury he moves around in a wheel chair. He has dense paraplegic at T10 with incontinence at faeces and urine. Pressure ulcers were noted at both trochanteric areas and the sacrum. They were clean with healthy granulation tissue. He had an indwelling catheter in place. Healed gun shot wound to his right elbow with exit right epicondyle. No neuron-vascular deficit was seen. Review of his x-rays showed bullet fragments in spine at T10. Magnetic Resonance Imaging revealed spinal chord injury T10-11 with fracture of the right T10 lamina, bullet fragments were noted in the spinal canal at this level.

Prognosis:- It is unlikely that this patient will recover at this stage. He will certainly not be able to work as a mason again. He will totally be dependent on someone to help with his personal hygiene and the pressure ulcers will take time to heal. The indwelling catheter will remain for life. This has to be changed at least every six weeks. He is prone to repeat urinary tract infections. His only source of ambulation is a wheel chair which he will need for the rest of his life.

Using Guides to the Evaluation of Permanent Disability 5th Edition page 397, his disability with respect to the total person is 65%.

Claimant's attorney closing submissions.

For special damages, Claimant sought the following expenses incurred prior to trial, based upon amendments to the Particulars of Claim in light of the evidence.

Loss of Income (112 weeks @ 5000.00 per week =)	560,000.00
Medical Expenses (Agreed with Defendants)	108,632.51
Cost of Pampers, catheter	2,702.23
Wages for extra help	48,000.00
Transport	<u>18,500.00</u>
Total	737,834.74

The Claimant also claimed U.S. \$10,000.00 being the estimated cost of a motorized wheelchair.

The Defendants contend that the receipts for the transportation purportedly in relation to trips undertaken for medical reasons do not indicate the purpose for which the trips were made and ought not to be awarded.

Defendant's counsel were prepared to concede that based upon the documentation submitted to the Court, they believed that the Claimant had only proven, consistent with the strictures of my learned brother Brooks J. in the unreported case of McKenzie and McKenzie and Watson v Brown and Mendes citing previous authorities, (See Robinson & Co. Ltd v Lawrence (1969) 11 JLR 453), special damages to the tune of \$681,334.75.

With respect to special damages, the Claimant in my view was wise to amend so as to relinquish claims in the particulars which were not supported by the evidence. I am satisfied that there is appropriate evidence to support the special damages as claimed by the Claimant.

It should be noted however, that the Court may take account of any tax liability which would have attached as in this case, to the lost pre-trial earnings of the Claimant. I believe it would be appropriate to make an adjustment for statutory deductions/taxes of about 20% of the sum for pre-trial loss of earning, thereby reducing that item by \$140,000.00. For these purposes, I bear in mind that the threshold income before the imposition of income tax was \$193,440.00 in tax years 2006 and 2007 and \$196,872.00 for 2008.

In relation to the claim for pain and suffering and loss of amenities under the head of General Damages, the Claimant relied on the decisions of this Court in the following cases:

Young v Book Traders Khan Vol. 4 P135.

In that case, a 25 year old warehouse clerk suffered a spiral injury which left him paralyzed. There the Claimant was more severely injured being paralyzed from the 6th vertebra. He had no control of bowels or urine, and was also impotent. His P.P.D. was assessed at 80% by Dr. Golding in May 1995 and at 84% by Dr. Dundas in April 1997.

Marva McIntosh J (Ag) (as she then was) in July 1997, awarded the plaintiff \$10,000,000.00. for pain and suffering and loss of Amenities, and used a multiplier of 16 years for the

purpose of determining loss of future earnings. That \$10,000,000.00 would now translate at the present CPI of 136.9 to a figure of \$31,184,510.

Walker v Smith & Others, Suit # CL W-018 of 1997

This case was decided by Norma McIntosh J, in January 2003. There the 26 year old plaintiff, Walker suffered a spinal injury as a result of a motor vehicle accident which left him paralyzed below C5 vertebra. In fact, Walker was a tetraplegic, unable to move any of his limbs. He was totally dependent on others, incontinent and impotent and was also subject to depression. He suffered muscle spasms and his PPD was assessed as 80% of the whole person. The Plaintiff there was awarded the sum of \$14,600,000.00 which would now amount to \$30,859,039.00

Viola Barrett v Steward & The Attorney General of Jamaica.

This was also a case of a severed spine injury resulting in paralysis of both lower limbs. The plaintiff was a 65 year old farmer. In May 2005 Jones J. gave judgment for pain and suffering and loss of amenities in the amounts of \$14,600,000.00. That figure is now worth \$22,523,552.

This latter case was also put forward by counsel for the Claimant as authority for a claim on behalf of the Claimant, for aggravated damages.

On the other hand, the Defendant submitted that **Anthony Wright v Lucient Brown C.L. W-184 of 1997 (Khan Vol. 5 p101)** was a more relevant authority.

There the Plaintiff suffered similar injuries including wounds on the upper right arm, bullet wound injury to spinal cord, fracture of rib. He was confined to a wheelchair and was incontinent. His P.P.D was estimated at 70%. He was awarded general damages of \$8,000,000.00 which would now be worth approximately \$20,547,852.00. Counsel suggested that an award to this Claimant should be less than that sum as the injuries were more severe in the **Wright v Brown** case.

Claimant's attorney-at-law also sought damages in relation to loss of future earnings using a 20 year multiplier; the cost of future care using the services of a registered nurse at the rate of \$24,000.00 per week for 20 years; future domestic help over the same period at a cost of

\$4,160,000.00; the cost of pampers, urine bags, catheters and weekly trips to Kingston and Montego Bay from his home in Sav-La-Mar. He also claimed that the Claimant should be awarded a sum for future physiotherapy and occupational therapy.

Finally, the Claimant submitted that he should be awarded a sum for handicap on the labour market as well as aggravated damages.

Defendants' Response

The defendants' counsel, however, while agreeing that the Claimant would need constant help in the future, submitted that based upon the evidence of Dr. Fray, there was no need for the Claimant to have a registered nurse for four days per week. The doctor had said that it would only be necessary to have a nurse to treat the Claimant when his bedsores, an almost inevitable consequence of his paralysis, became infected. It was submitted that he could get by with the help of family members, in dealing with the everyday challenges of his life. It is trite law however, that while a claimant has a duty to mitigate his damages, he is not obliged subsidize the tortfeasor by using his family and not paying them what it would have cost for proper non-family help.

It was also submitted for the defendants that no award should be made for handicap on the labour market as this would be a double counting where loss of future earning was already being awarded. (See **Maurice Francis**) I agree. Defendant also submitted that the sum for a motorized wheelchair should be limited to the sum for which there was evidence that one is available in Jamaica. The evidence in that regard was that one could be acquired in Jamaica for around US \$6,580.00. I also agree with this submission but I believe that that sum should have in contemplation an amount built in for the need for service and repairs which will be necessary given the nature of anything that runs on a motor. I would consider a figure of US\$7,500.00 to be appropriate.

Defendants also submitted that, based upon a look at three authorities and using as a guide, the table provided by Khan, in doing the relevant calculations, a multiplier of 15 should be used, rather than the 20 year multiplier submitted by Claimant

(See **Mark Scott** Volume 4 Khans', **Owen Small** Vol. 5, and **Maurice Francis**)

Award

I share the view expressed by Norma McIntosh J in Walker above, that "awards for personal injuries of the severity of those suffered by Mr. Walker should be geared towards the provision of as comfortable a life as possible for a plaintiff who has lost almost everything". I do, however, find myself largely in agreement with the submissions in relation to several of the heads of claim. Thus, for example, I agree that the cases of Young and Walker are more serious than the present Claimant. But the loss occasioned by becoming totally dependent upon others is not to be underestimated. I believe that an appropriate award for pain and suffering and loss of amenities should be the sum of **\$26 million dollars**.

I believe, however, that a multiplier for this young man, not yet eighteen years old at the time of the incident and now twenty years old, should be at least sixteen (16) years.

I accordingly make the following awards:

Special Damages

Loss of Income (112 weeks @ 5000.00 per week =)	560,000.00
Medical Expenses (Agreed with Defendants)	108,632.51
Cost of Pampers, catheter	2,702.23
Wages for extra help	48,000.00
Transport	<u>18,500.00</u>
Total	737,834.74
Less Income Tax on Lost income @ 20%	<u>140,000.00</u>
	597,834.74

Interest on this sum will be at 3% from the date of the incident to the date of judgment,

With respect to General Damages, it will be recalled that the Claimant was given an interim payment of \$6,000,000.00 in two tranches, \$3,000,000.00 on May 22, 2008 and \$3,000,000.00 on July 1, 2008.

General Damages
Pain and Suffering/Loss of Amenities 26,000,000.00
With interest from April 10, 2007 to
May 22, 2008 on \$26,000,000.00;
Interest from May 23, 2008 to July 1, 2008
On \$23,000,000; and interest on \$20,000,000.00
From July 2, 2008 to today's date, all interest to
be calculated at 3% per annum.

The Claimant is to be awarded a sum for
a motorized wheel chair in the sum of US\$7,500.00

In respect of future costs for which the Claimant is to be indemnified, the following is
awarded.

Loss of Future earnings \$5,000.00 per week	
Multiplier of 16 years	4,160,000.00
Less Income Tax @ 20%	<u>832,000.00</u>
Net Due	3,328,000.00
 Future Nursing/Personal Care	 3,328,000.00
Cost of urinary bags	107,520.00
Cost of Catheters	36,000.00
Pampers \$740 per 10 pack/week for 16 years	864,320.00
Nurse to change and insert catheters	<u>144,000.00</u>
TOTAL	7,807,840.00

The cost of future personal nursing care is calculated at \$4,000.00 per week; urinary bags at 2 bags per month at a cost of \$280.00 each bag; catheter ((\$247.03 each) to be changed every six (6) weeks and cost of nurse to change catheters over the period.

The Claimant is to have his costs, agreed at \$76,000.00.

Defendants granted leave (if necessary) to appeal as to the quantum of damages.

Roy K. Anderson J.
December 12, 2008