



[2023] JMSC Civ 137

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2020CV03345**

<b>BETWEEN</b>	<b>BEVERLEY GREEN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ANDRE HINDS</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>PAUL CHIN</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>NATALIE HINDS</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Ms. Zaieta Skyers for the Claimant

Ms. Jamila Maitland for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants instructed by Campbell McDermott

**Heard: June 19<sup>th</sup>, 2023 and July 31<sup>st</sup> 2023**

**ASSESSMENT OF DAMAGES-** Fracture of tibia and fibula – wound caused by protruding bone – effect of injury on peripheral vascular disease – no impairment rating – likely award for general damages

**T. HUTCHINSON SHELLY, J**

**INTRODUCTION**

[1] The matter which came before me for assessment of damages had its genesis in a motor vehicle collision which occurred on the 15<sup>th</sup> day of August 2018. The Claimant was walking along King Street, Linstead in the parish of Saint Catherine when the 3<sup>rd</sup> Defendant who was the servant and/or agent of the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants negligently operated motor vehicle with registration number CK 1120 causing same to hit down the Claimant.

- [2] As a result of the collision, the Claimant suffered injuries and seeks to recover damages for same by way of this Claim which was filed September 7<sup>th</sup>, 2020. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants were served and failed to respond to the Claim, and Default Judgment was entered against them in default of Acknowledgment of Service on June 4<sup>th</sup>, 2022. The Particulars of Claim was subsequently amended on March 7<sup>th</sup>, 2023. On the day of this hearing, the 1<sup>st</sup> Defendant was represented and in attendance.

### **THE CLAIMANT'S EVIDENCE**

- [3] In her witness statement which was permitted to stand as her evidence-in-chief, the Claimant stated that on the 15<sup>th</sup> of August 2018 at about 12:20 p.m., she was walking in the vicinity of the Bank of Nova Scotia, on King Street, Linstead, St. Catherine when she was hit by a Toyota Hiace Motor Truck registered CK 1120 which was being driven by the 3<sup>rd</sup> defendant, Natalee Hinds of Vanfair Gardens, Linstead in the parish of St. Catherine.
- [4] On impact, she fell to the ground and was unable to get up. She then realised that her right leg was injured and the bone was protruding through the flesh. She was placed in the vehicle being driven by the 3<sup>rd</sup> defendant and transported to the Linstead Hospital where her right leg was x-rayed and she was given medication. The wound was washed, cleaned and dressed and she was transferred to the Spanish Town Hospital where she was admitted for approximately six (6) weeks.
- [5] Whilst at the Spanish Town Hospital, the doctors informed her that her right leg was fractured and she would need to do surgery to repair it. The surgery was done at the Spanish Town Hospital on September 6, 2018 and a metal plate and screws were used to fix the fractured leg. She was eventually discharged on September 26, 2018 but did follow-up treatment at the Outpatient Clinic until February 15, 2019. In total, she visited the Outpatient Clinic on six (6) occasions, namely

October 2, 2018, October 23, 2018, November 6, 2018, November 9, 2018, January 25, 2019 and February 15, 2019. She also engaged in physiotherapy sessions at the Spanish Town Hospital.

- [6]** Ms Green stated that for weeks she was unable to move without experiencing pain in her leg. As a result of this, she had to quit her job as a janitor/caretaker which caused her to lose income. In describing the pain, she explained that it is “especially severe when the time is cold and her right leg tends to get stiff.” She is also unable to walk for long distances and feels discomfort when she stands.
- [7]** Ms Green also indicated that she had suffered from poor circulation in her right leg and the fracture compounded that problem. She stated that after completing her sessions at the Outpatient Clinic, she continued to have issues with walking and bending the leg and began seeing Dr. Sandra Nesbeth who advised her that she had developed an infection in the site of the fracture. The doctor then prescribed medication to treat this and also for the pain.
- [8]** In respect of her loss of amenities, Ms Green stated that simple activities that she was able to do prior to the accident now pose a challenge. She is unable to walk for long distances or stand without feeling a discomfort in her leg and moving up and down a staircase is also a challenge. She indicated that in order to carry a load, she now has to rest it on the left side of her body which causes pressure to be exerted on that side.
- [9]** Ms Green explained further that she continues to experience discomfort and pain in her right leg. She also has to avoid exerting herself as this results in intense pain and any contact with the leg now causes bruising and/or a sore. Additionally, the site of the fracture can readily be identified by a large scar running from her ankle to her knee.
- [10]** She relied on medical reports prepared by Dr. Kurt Garfield dated March 12, 2019 and Dr. Sandra-Marie Nesbeth dated March 23, 2021. She also produced receipts

for expenses associated with her treatment. The following documents were admitted into evidence by agreement:

- a. Receipt from Manuchant Ltd – Exhibit 1*
- b. Report of Dr Kirk Garfeld dated March 12<sup>th</sup>, 2019 – Exhibit*
- c. Medical Report of Dr Sandra Nesbeth dated March 23<sup>rd</sup>, 2021 – Exhibit 3*
- d. Transportation Receipts dated 1<sup>st</sup> May 2019 – Exhibit 4*
- e. Receipt from Your Choice Pharmacy dated 14<sup>th</sup> of March 2020 – Exhibit 5*
- f. Police Report dated November 1<sup>st</sup>, 2018 – Exhibit 6*
- g. Questions and Answers from Dr Nesbeth filed June 13<sup>th</sup>, 2023 – Exhibit 7*

**[11]** In amplified examination in chief, a receipt from SMN Medical dated 23<sup>rd</sup> March 2021 was admitted into evidence as Exhibit 8.

**[12]** Ms Green was cross-examined and stated that she had to stop working as her foot was unable to manage the pressure. She was asked about the information provided to Dr Nesbeth and denied telling the doctor that she was a vendor. She stated that this must have been a mistake on the doctor's part. She explained that although she had looked at the report prepared by Dr Nesbeth, she had not been paying attention to that part as it was a long time ago. She admitted that she had poor circulation and that it took a long time for her wound to heal because of this.

**[13]** Ms Green was asked about the prescriptions she had outlined receiving. She insisted that they had been filled but stated that she was unable to locate the receipts. She was asked about the treatment provided by Dr Nesbeth and responded that this took the form of different types of tablets. She was asked about the medical reports which showed that on three occasions she sought treatment at the hospital as well as at Dr Nesbeth's office. She explained that something must have caused her to seek treatment from Dr Nesbeth and she must have gone there for a reason.

- [14] Ms Green was asked about the statement in the medical report from the hospital that her fracture had totally healed. She disagreed that it had and insisted that it had not 'finished knitting up'. She agreed that she continued to see Dr Nesbeth after her discharge from the Orthopaedic clinic and insisted that she did not know that she had poor circulation and only learned of it at the time of the accident.

## **SPECIAL DAMAGES**

- [15] The following items of Special Damages were pleaded as follows:

1.	Cost to Manuchant Ltd	
	Receipt dated 30/08/ 18	<b>\$85,000.00</b>
2.	Cost to South East Regional Health Authority	
	Receipt dated 29/03/ 19	<b>\$4,000.00</b>
3.	Cost to Dr. Kurt Garfield	
	Receipt dated 29/03/2019	<b>\$15,000.00</b>
4.	Cost for transportation	
	Receipt dated 01/05/ 19	<b>\$15,000.00</b>
5.	Cost to SMN Medical Centre	
	Receipt dated 23/03/21	<b>\$79,400.00</b>
6.	Cost to Your Choice Pharmacy	
	Receipt dated 14/03/20	<b>\$5,688.81</b>
7.	Cost to Tashana Buckle-Thomas	
	Receipt dated 24/04/ 19	<b>\$5,000.00</b>
	<b>TOTAL</b>	<b>\$209,088.81</b>

[16] It has long been established that special damages must be specially pleaded and strictly proven<sup>1</sup>. (See also *Lawford Murphy v Luther Mills* (1976) 14 JLR 119) In the case at bar, the issue of special damages did not appear to be especially controversial as the parties were able to agree a number of documents and receipts in respect of expenses incurred for medical reports, transportation and medical-related expenses.

[17] In my examination of the documents pleaded and exhibited, I observed that although there was reference made to receipts for a sum paid to Dr Garfield as well as to Tashana Buckle-Thomas, these receipts were never placed into evidence by the Claimant and as such do not form a part of the expenses which have been proved. The same observation is made in respect of the receipt for the payment made to the South East Regional Health Authority. While this expense was outlined in the pleadings and a receipt for same attached to the notice of intention, it was never placed into evidence during the course of the hearing. In light of the foregoing circumstances, the Court is constrained in making an award in respect of these three items. Accordingly, the Claimant is awarded the sum of **\$185,088.81** as special damages in this claim.

## **GENERAL DAMAGES**

[18] The particulars of the Claimant's injuries were outlined in the Medical Reports prepared by Dr. Garfield and Dr Nesbeth. The report of Dr Garfield, which was dated March 12<sup>th</sup>, 2019 addressed the diagnosis made of the Claimant as well as the treatment which she received at the hospital. Ms Green was recorded as suffering from a compound (open) fracture right tibia and fibula (Grade 111<sup>B</sup>). She was treated by the Orthopaedic Team at Spanish Town Hospital, where her wound was washed and the fracture was reduced and immobilized in a backslab. The

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<sup>1</sup> Caribbean Cement Company Limited v Freight Company Management Ltd [2016] JMCA Civ 2

injury was dressed and she was placed on antibiotics, analgesics and oral Voltaren.

- [19] Ms Green had surgery on September 6, 2018 (open reduction and internal fixation using plate and screws). Postoperatively she received analgesics, limb elevation and physiotherapy. Her wound was dressed and observation of her right leg revealed that she has peripheral vascular disease (PVD). Postoperative x-rays of her right leg showed adequate reduction and alignment of fracture. She was discharged from the ward on September 26, 2018 for follow-up in the Orthopaedic Outpatient Department. She was prescribed ambulatory medications for her peripheral vascular disease.
- [20] She was seen in the Outpatient Department on six (6) occasions between October 2018 and February 2019. X-rays done showed bone healing with good alignment. Ms Green had physiotherapy sessions and it was noted that she started to ambulate on her right leg. She was eventually discharged from the Orthopaedic Outpatient Department on February 15, 2019 and the doctor recorded that her fracture healed with good alignment.
- [21] The prognosis stated that she had a good outcome as her open fracture healed with good alignment and no signs of wound infection. It was observed however that she will experience swelling to the leg as a result of her PVD (peripheral vascular disease) but no permanent disability was expected.
- [22] The report of Dr Nesbeth dated March 23, 2021 contained the following relevant information:

### **Diagnosis**

- *Fracture to the lower limb*
- *Soft tissue injuries to the thigh.*
- *Reduced mobility of the lower limb.*

## **Treatment**

- [23]** The doctor noted that Ms Green was given antibiotics and analgesics. She was also given Clopidogel along with the Daflon. (The literature shows the former is used for the prevention of blood clots and the latter for the treatment of acute or chronic haemorrhoids, varicose veins and lymphedema to improve blood flow in the veins and restore their function). The tibia bone (bone at the front part of the leg) had caused a massive 9cm laceration through the leg when the bone broke and cut through the flesh. The leg was aligned, fixed, pinned and plated during the surgery at Spanish Town Hospital.
- [24]** Dr Nesbeth also observed that Ms Green has peripheral vascular disease (poor circulation) and was given Aspirin and Daflon (for the venous swelling). The doctor noted that these medications were not effective, as Ms Green had swelling extended downward to the entire right ankle and the toes and upward to the knee, thigh and hip. At the time of the first visit, Ms Green had to be lifted by persons into the office.
- [25]** Dr Nesbeth recorded seeing Ms Green on several occasions for treatment and follow-up during the course of her recovery. She was given injections twice weekly for two (2) weeks and her initial three (3) weeks of sick leave extended for another two (2) weeks. She was seen for five (5) consecutive days and given injections which resulted in the swelling being reduced and allowed her to bend the knee. She was given calcium and fish oil to facilitate the healing of the fracture. Dr Nesbeth also recorded that Ms Green was sixty-four (64) years old at the time, with osteoporosis (erosion of the bone), which would also delay the healing.
- [26]** The report also stated that Ms Green was unable to work for approximately eight (8) months. She returned to the market in April 2019 and resumed duties as a vendor which required her to sit for prolonged periods with her knee bent which was not desirable for her kind of injury. The Doctor also commented that this occupation delayed the healing process. Ms Green disputed this information and



stated that it must have been a mistake by Dr Nesbeth as she was a janitor and never worked as a vendor.

## CLAIMANT'S SUBMISSIONS

[27] In submissions on behalf of the Claimant, Ms Skyers stated that in assessing general damages, the Court should be mindful of the factors to be taken into account in determining a fair estimate of damage for the Claimant, which include:

- Nature and extent of the injuries
- Treatment undergone
- Period of incapacity
- Impairment of physical abilities and loss of lifestyle
- Effects of the injury on the Claimant
- Severity and duration of the pain
- Age of the Claimant
- Emotional Suffering

[28] Learned Counsel acknowledged the complex nature of the assessment process which requires the Court to balance all these factors and arrive at a fair estimate of damages. She submitted that in doing so, the Court is obliged to examine comparable cases to achieve uniformity of awards. Ms Skyers expanded on this point by making reference to the following cases which she described as being instructive:

- a) ***Barrington McKenzie v Christopher Fletcher & Joseph Taylor. Khan 5, page 72.*** The Claimant sustained fractures of the fibula and tibia. He was treated conservatively and healed with no residues. The Claimant was awarded **\$420,000.00** in March 1998 which updates to **\$3,006,000.00**.
- b) ***Wayne Howell v Adolph Clarke (t/a Clarke's Hardware [20151 IMSC Civ. 124.*** The Claimant sustained comminuted fracture to right tibia/fibula with post-operative infection amongst other injuries. An award of **\$3,000,000.00**

was made as general damages in June 2015 which updates to **\$4,428,736.96.**

c) ***Douglas Fairweather v Joyce Eloise Campbell (executrix of estate of Griffiths Campbell, deceased) Khan 5 page 74.*** The Claimant sustained a compound fracture of left tibia and fibula and a subsequent union of the fracture. The sum of **\$1,300,000.00** was awarded for general damages in May 1999 which updates to **\$8,716,842.11.**

d) ***Noel Gravesandy v Neville Moore Civil Appeal N044/85*** — the Claimant suffered a compound fracture of the tibia and fibula. The sum of **\$50,000.00** was awarded for general damages in February 1986 which updates to **\$4,550,000.00.**

[29] Ms Skyers submitted that the injuries sustained by Ms Green are similar to those sustained by the Claimants in the cited cases, save for different degrees of seriousness. She argued that the cases of ***Barrington McKenzie*** and ***Noel Gravesandy*** are the 'most similar' to that of this Claimant and as such recommended an award of **\$4,500,000.00** as most appropriate.

## **DEFENDANTS' SUBMISSIONS**

[30] In submissions on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants, Ms Maitland contended that the appropriate award for pain and suffering and loss of amenities is **\$1,800,000.00**. She also cited a number of cases as justifying an award in this sum and these have been outlined below.

1. ***Michael Hughes v Hazel Jarrett and Victor Jarrett C.L. 1987 H 077 reported at 5 Khan 66.*** In this case, the claimant was struck from behind by a motor vehicle as he was walking. He suffered a closed fracture of the distal 1/2 of the right femur, a compound fracture of the right tibia and fibula and a wound to the back of his head. He was admitted to the KPH

for three months. There, the femur was treated by skeletal traction and the tibia and fibula manipulated and plaster cast applied.

The fractures to the tibia and fibula showed evidence of delayed healing and open reduction plating and bone graft were performed. Upon his discharge on the 29<sup>th</sup> November, 1986, he walked with the aid of crutches, with the right leg in a plaster of paris cast. He made several visits to the Outpatient Clinic and the cast was removed on the 9<sup>th</sup> February, 1987. However, an infected wound persisted at that time. On the 26<sup>th</sup> October, 1987, a plate and screw which had been fitted were removed.

His disability was assessed at 25% of the function of the right lower extremity as he experienced shortening of the femur and tibia, combined with external femoral torsion and stiffening of the subtalar joint and ankle. For pain and suffering and loss of amenities, the Claimant was awarded **\$300,000.00**. That award now updates to **\$2,316,867.41**. Ms Maitland submitted that the Claimant in that matter suffered more injuries and unlike the Claimant in the case at bar, was also ascribed a disability rating.

2. ***Delroy Dobson v John's Hall Aggregate Ltd Claim No 2007/HCV 03837***. The Claimant in this case suffered severe injuries when a 7-foot blade chopped into his right foot. He suffered open fracture of the tibia, atrophy of the right thigh and right leg and residual angulation. He was assessed as having a 19% impairment of his lower extremity or 8 % impairment of the whole person. He was awarded **\$1,800,000.00** on November 12, 2009 and this updates to **\$4,048,421.05**.

[31] Ms Maitland argued that it is clear from an examination of the cited cases that those Claimants suffered more severe injuries which will affect them for the duration of their lives. Counsel asserted that in contrast, if the medical report from the Spanish Town Hospital is accepted, Ms Green was discharged from outpatient care exactly 6 months after she sustained injuries. At that time, her fracture was

"healed with good alignment." Additionally, there was no sign of wound infection and no permanent disability. Consequently, any award to her should be significantly less than the awards in the cited cases.

[32] Ms Maitland highlighted the evidence of the Claimant that she was treated at the hospital and by Dr Nesbeth over the same period. She asked the Court to note that based on this evidence, Ms Green has not provided a reasonable explanation as to why she thought it necessary to be treated simultaneously at the hospital and by Dr Nesbeth. Counsel also pointed out that Dr Nesbeth was a General Practitioner and Ms Green was being treated by Specialists at the hospital. Counsel commended to the Court the 'specialist report' which indicated that when Ms Green was discharged, the fracture was healed with good alignment and no sign of infection.

[33] Counsel argued that the Court ought to accept the diagnosis and prognosis coming from the hospital and find that the Claimant's pain and suffering did not extend beyond the date she was discharged from the hospital. Ms Maitland also questioned what she described as a conflict between the evidence of Ms Green and the report of Dr Nesbeth as the former reported being treated with tablets, whereas the report outlined a series of injections. Ms Maitland asserted that in the face of this conflict, the cost of **\$79,4000** in special damages which had been pleaded for this report should not be awarded.

## **ANALYSIS AND DISCUSSION**

[34] It is settled law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as **"nearly as possible"** puts the Claimant in the same position she would have been in if she had not sustained the wrong." (per Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5.A.C. 25 at 39.

[35] A number of authorities have been cited on this point by Counsel for the respective parties and have been reviewed accordingly. On assessment of the evidence

before the Court, I note that while the collision caused the fracture which was previously mentioned, Ms Green also suffered from peripheral vascular disease. Although she testified that she was not aware of this condition prior to the collision, the literature on the illness shows its association with diabetes, obesity and a sedentary lifestyle. The reports from the Doctors also differentiate between this condition and the fracture sustained and make it clear that there was no causal connection observed between the two.

**[36]** Although there was some overlap in the period of treatment by Dr Nesbeth and the medical staff at the hospital, it is clear that Dr Nesbeth largely focused on treating the ongoing issues suffered by the Claimant in respect of the PVD which it appears was worsened by the fracture and the wound sustained by the piercing of the skin by the bone which apparently became infected. While Counsel has sought to depict the situation as a duplication of treatment and expenses, I believe the situations can be differentiated and the visits justified as the Claimant had six (6) follow-up visits to the Orthopaedic department and sixteen (16) visits to Dr Nesbeth during which period she had to have cataflam injections for swelling and pain. I am satisfied that in the circumstances, this medical treatment and expenses associated with it is justified.

**[37]** The issue which remains to be addressed is the period of incapacitation suffered by the Claimant. In the report from the Orthopaedic department, it was noted that Ms Green was discharged in February 2019. The report of Dr Nesbeth states however that the Claimant was unable to return to work until April 2019.

**[38]** While the report of Dr Nesbeth has an incorrect description of the nature of the work that Ms Green had engaged in, it is clear that her work as a janitor with that type of injury would in any event adversely impact her healing. Although different periods have been stated in the respective reports for full recovery, I note that in addition to his statement that the fracture had healed and there were no signs of wound infection, Dr Garfield acknowledged that Ms Green would experience swelling of the leg as a result of the PVD. This was the very situation which Dr

Nesbeth noted had delayed the Claimant's ability to return to work until April. While the period of incapacity would have been extended for an additional two months by the treatment for the PVD, what is of greater significance is that Ms Green's mobility and ability to 'return to normal' was impacted for at least 7 months by the fracture.

[39] In my examination of the authorities cited, I note that although the Claimants in the *Michael Hughes* and *Delroy Dobson* cases suffered injuries which were very similar to this Claimant, they were both assigned disability ratings whereas Dr Garfield opined that no disability was suffered by Ms Green but her PVD would pose an ongoing issue.

[40] Although no impairment rating was assigned, I did not believe that this justified the sum proposed by Ms Maitland. My opinion in that regard was bolstered by the fact that Ms Green's injuries were very similar to those of the Claimants in the cases cited by Ms Skyers specifically the cases of *Barrington McKenzie* and *Noel Gravesandy*. In her situation, however, she had to deal with an infection of the wound which occurred when the skin was broken and her return to mobility was negatively impacted in this regard. In my analysis of all the cases cited, I considered the fact that the *Noel Gravesandy* and *Michael Hughes* decisions are of some vintage and the current practice tends to support reliance on more recent decisions which may better reflect the relevant rate of inflation and price index. Taking these factors into account as well as the guidance provided in the cases, I am persuaded that an appropriate award would be in the sum of **\$3,000,000.00**.

## CONCLUSION

[41] As such, my orders are as follows:

1. Special Damages in the sum of **\$185,088.81** at 3 % interest from the 15<sup>th</sup> of August 2018 to the 31<sup>st</sup> of July 2023.

2. General Damages in the sum of **\$3,000,000.00** at 3 % interest from the 26<sup>th</sup> of October 2020 to the 31<sup>st</sup> of July 2023.
3. Claimant is awarded her costs to be taxed if not agreed.
4. Claimant's Attorneys to prepare, file and serve Judgment herein.