[2024] **JMSC Civ. 116**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2021 CV 03923

BETWEEN	**J. S.** **(A Minor Who Sues by his Next Friend Paula Dixon)**	**CLAIMANT**
A N D	**WESSELL WILLIAMS**	**DEFENDANT**

IN OPEN COURT

Ms. Kimberly Facey instructed by Facey & Partners for the Claimant

Mr. Joerio Scott instructed by Messrs Samuda & Johnson for the Defendant

HEARD: September 30, 2024 and October 1, 2024

Assessment of Damages – Damages for Negligence – Quantum of Damages – Fractures to Left and Right Femurs – Mild Brain Injury – Degloving Injury to Eyelid – No PPD assessed – Unable to Play Football or Contact Sports – Impact on Male Child – Medical Practitioners Referencing PPD as a Percentage – Whether Acceptable in a Claim Outside of Workman's Compensation.

STAPLE J

BACKGROUND

[1] On the 4th December 2018 young Mr. Sharpe was standing at a bus stop at 7 West Greater Portmore in the parish of St. Catherine. Whilst standing there, a vehicle, owned by the Defendant, collided into him. The question of liability for the collision is not in dispute and the issue to be now determined is the quantum of damages to be awarded the Claimant.

[2] As the matter has proceeded by way of Default Judgment, the question of the nature and cause of the injuries to the Claimant, on the pleadings, is no longer in issue.

[3] The Defendant has filed a form 8A and was therefore able to participate in the assessment of damages. However, they have filed no Witness Statement to challenge any evidence provided by the Claimant or his mother concerning the quantum of damages.

The Evidence on Behalf of the Claimant

[4] The Claimant testified that he was born on the 28th January 2007. This evidence really ought to have come from his mother and it is technically hearsay. But it was stated in the Claim Form in accordance with Rule 8.11(2) therefore I see no great issue with the date of birth of the Claimant and accepting it as such.

[5] So at the date of the collision on the 4th December 2018, the Claimant would have been a wee lad of just 11 years of age.

[6] According to the testimony of the Claimant, at around 7:00 am on the day of the collision, he was standing at the 7 West bus stop in Greater Portmore in St. Catherine. He said at paragraph 5 of his Witness Statement, filed on June 3, 2024, that he heard tyres and then saw a vehicle reversing speedily to him. He then blacked out.

[7] His mother, in her statement, said that the Claimant had just left the house before her. She left her house and was walking along the walkway when she heard an explosion coming from the 7 West bus stop. This was right around the same time as the Claimant testifying that he saw the bus reversing to him.

[8] I find that this was clearly a violent collision based on the evidence of the noise of the tyres and the loud explosion that the mother heard.

[9] The Claimant's account of the immediate aftermath of the collision are quite harrowing. He said he went blank and when he woke up, he could not open his eyes as blood was coming down from his left eye and running over to his right eye. He could not move his legs and one of them was twisted.

[10] He was put into a car and taken to the Spanish Town Hospital where he was admitted for 2 days. Whilst there they set his twisted leg straight and put him in a neck brace. He remarked about the large size of his swollen knee. I accepted his evidence as being truthful.

[11] On December 7, 2018, he was transferred to the Bustamante Hospital for Children to do surgery on his right eye, legs and his hip. It was at the Bustamante Hospital that it was discovered that his right leg was broken. He said that he cried continuously and he was concerned about whether he would walk again. I accept his evidence as being truthful and one can only imagine the impact that such a thought would have on a young boy of 11 years old.

[12] Following surgery on the 9th December 2018 he testified to being dizzy and his head, legs and hip were hurting him. He says he was put on morphine and was on that drug up to the day of his discharge on December 15, 2018. His evidence of the skin graft in paragraph 11 was not accepted as it would constitute hearsay.

[13] Next, the Claimant says he was bedridden for a time. He testified to having to repeat 1 year of school due to missing the entire academic year as a consequence of the incident and recuperation. He was required to wear a colostomy bag and he said he got an infection. I accept this evidence as true. One of the impacts on him, which I accept, is that he had a hard time mentally due to being confined to bed. He testified that he was normally an up and about person before the accident. I accepted this as being the truth and I so found.

[14] It was not until September 2019, nearly a year later, that the Claimant resumed school on crutches. Eventually, he started physiotherapy in the latter part of 2019.

He testified, and I accepted as being truthful, that the physiotherapy sessions were painful for him and that he had to miss classes due to attending the sessions.

[15] In 2020, which I accept as true, the Claimant started being able to move about independently. But he still had to use crutches for a majority of the time as he could not walk properly due to the inability to bend his feet to a certain degree. Indeed, at paragraph 20, he testified that he still cannot bend his left knee to a certain extent. I accept this as true, however, I have no report from an orthopaedic expert to give me any further guidance in this regard as it relates to the degree of extension that he has or what PPD can be expected.

[16] The Claimant testified that his favourite subject is agriculture, but he wanted to be a soldier. He is not sure about whether he could pass basic training and if he would be accepted. He said he loved football and would often play football a lot. I accept this evidence as true. He says that he is no longer able to play this sport. He said he used to play rugby at Cedar Grove Academy, but does not so do now on doctor's advice, however, I have seen no such report or recommendation from any expert. I accept it as likely though that given his injuries, playing a violent sport such as rugby would pose a challenge. It is simply common sense.

[17] The evidence of his love for football was confirmed by his mother.

[18] He testified, and I accept, that he has not removed all implants, that he still experiences pain in his hip and left leg, and that he has nightmares. I was not able to accept, without medical evidence, that his present hypertension is connected to the collision nor that his need for glasses was as a result of the collision.

[19] Ms. Dixon testified as to the expenses she incurred as a consequence of dealing with her son's injury on his behalf. I did not accept all of her evidence as only those aspects related to her pleaded expenses were relevant. Therefore, all other aspects of her evidence of expenses outside of what was pleaded were not considered as they would have been irrelevant.

The Medical Evidence

[20] Though not an expert's report, I accepted a medico-legal report dated the 16th March 2020 prepared by Dr. Shulin Fong from the Bustamante Hospital for Children into evidence as a hearsay document setting out the findings and treatment of the claimant whilst he was at the Bustamante Hospital for children.

[21] The document stated that the Claimant was confirmed to have suffered:

a) Segmental fracture of left (Lt) Femur;
b) Salter Harris (II) fracture with Right (Rt) Femur;
c) Degloving injury to left (Lt) upper eyelid;
d) Mild traumatic brain injury.

[22] The report went on to confirm that the Claimant did indeed have surgery to treat the degloving injury above the eye as well as the factures and that he was put in a hip cast. It also confirmed that he was seen on multiple outpatient visits as well as for physiotherapy. The implants were removed on the 6th February 2019 (Right Femur) and then nearly a year later on the 16th January 2020 (Lt Femur). I also found and accepted that the Claimant still has implants in his foot and I was able to observe his gait as he walked into the witness box and he walked with an obvious (but slight) limp.

[23] Clearly the evidence from the Claimant shows a very serious injury with a long recuperation period that has had a significant negative impact on the Claimant. This is my finding.

[24] Mr. Scott made heavy weather of the fact that there was no medically assessed impairment rating. Mr. Scott provided a further authority of ***Devon Gordon v Keith Roy Morris et al*** (Unreported Supreme Court of Jamaica, April 25, 2002 Sykes J (as he then was). Mr. Scott argued that there must be medical evidence to support his claim that he has a disability. At best, the document is a "diagnostic" document. It does not take him any further beyond the days of examination.

[25] I asked if I cannot see that he has an impairment. Mr. Scott replied that there would need to be a medical report to create the causal link between what I am seeing as his limp and the collision which he had suffered from 2018. This creates a level of speculation which is improper. And we could not assess the rate of impairment. I reject this submission as there is a clear line of evidence from the Claimant and his mother, which I accept, which shows the causal link between the collision and his present limp. Indeed, Mr. Scott did not cross-examine the Claimant along this line (or at all) and so I see no basis to reject the Claimant's evidence.

[26] Further, the Privy Council in ***Seepersad v Persad et al***[1], approved of the Trinidad and Tobago Court of Appeal's disapproval of the use by medical practitioners in claims for personal injury of impairment rating percentages. There was a passage taken from the judgment of Kangaloo JA from the Court of Appeal of Trinidad and Tobago in the same *Seepersad* case[2] which was what was approved by the Privy Council. I will set it out in full here:

> *"On the issue of "permanent partial disability" I have noted that doctors generally in their medical reports resort to an assessment of a plaintiff's disability in terms of a percentage figure. I have no doubt that the origin of this practice is to be found in the Workmen's Compensation Act where the amount of compensation payable to a workman injured at work is determined by a mathematical formula, one element of which is the percentage of incapacity caused by the injury. In the Act the term used is "partial disablement" which is defined solely by reference to earning capacity. 'Permanent partial disability' is not a term of art in the context of the assessment of damages at common law and one wonders whether doctors have a common understanding of what it means as they tend to give percentage assessments which differ markedly, as in the instant case. The case of* ***Victor Cornilliac v Griffith St. Louis (1965) 7 WIR 491*** *sets out the matters to be considered by a Court in assessing damages for personal injury. They are as follows: (a) The nature and extent of the injuries sustained; (b) the nature and gravity*

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[1] [2004] UK PC 19 at para 10

[2] (Unreported) Court of Appeal of Trinidad and Tobago, Civil Appeal Nos 136 and 137/2000, delivered February 28, 2002 at pp 7-8.

> *of the resulting physical disability; (c) the pain and suffering endured; (d) the loss of amenities suffered; and (e) the extent to which consequentially, the plaintiff's pecuniary prospects have been materially affected. The "permanent partial disability" percentage is relevant to consideration (e) and possibly in a very general way to (b). An explanation of the effect of injuries on a person's earning capacity in words as opposed to figures, would be of greater use to the Courts in their assessment of damage at common law.*
>
> *It Is suggested respectfully that doctors set out in their reports, together with the basis for their conclusions, their opinion on how the injury suffered is likely to affect the lifestyle and earning capacity of the injured Plaintiff, and leave percentages of incapacity for Workmen's Compensation cases."* ***(emphasis mine).***

[27] Therefore, I will not be fixated on the absence of any impairment rating. Rather, I will focus on the effect that the injury has had and will have on the Claimant's lifestyle and amenities. I would also encourage personal injury practitioners to bear the admonition of Kangaloo JA (which was approved by the Privy Council) in mind regarding permanent partial disability ratings.

PRINCIPLES ON ASSESSMENT OF DAMAGES

[28] I agree with counsel for the Claimant in her written submissions that the starting point on an assessment of damages is the position of Wooding CJ in ***Corneliac v St. Louis***[3]***.*** We are to consider:

a) The nature and extent of the injuries sustained;
b) The nature and gravity of the resulting physical disability (if any);
c) The pain and suffering which had been endured;
d) The Loss of amenities suffered;
e) The extent to which consequently the injured person's pecuniary prospects have been affected.

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[3] (1965) 7 WIR 491

[29] I am also mindful of the guidance from my sister Judge J. Pusey J in the case of ***Sherona Golding v Patrick Richards***[4], where she said as follows:

> *"In **Pogas Distributors et al v McKitty** SCCA 13&16/ 94 the Court of Appeal emphasized that the focus of the court in the assessment of damages should be on the nature and severity of the claimant's injuries and the amount of time she would be affected by pain and the impact on her life as a result of the damage caused by the defendant's tortuous [sic] actions. Impact on litigants is assessed by the findings of the medical experts but regard is to be given to what the litigant says about the effect on her. Careful scrutiny of such evidence is necessary as efforts can be made to embellish and exaggerate impact to attract increased damages."*

[30] It is patently clear that the Claimant, at the age of 11, underwent a tremendous ordeal. He was not cross-examined by Mr. Scott. So his evidence was unchallenged. I accept his evidence of the amount of pain he would have suffered in the immediate aftermath of the collision, during the treatment phase and even up to now. I found him to be a credible witness. I also found his age to be significant as it was quite a lot for a young person to undergo.

[31] The Claimant and his mother testified, and I accept, that it took the Claimant quite some time to regain the use of his feet, let alone his independence after the collision. He was confined to bed for nearly a year; he could not walk for sometime at all and then he had to use crutches for a considerable time afterward. He had to utilise a colostomy bag for a period and even got infected as a consequence. I accept this as true. So I find he would have lost, for a time, the basic ability to just go to the bathroom in the normal way. All of this would have been in the time of a boy's life when playing and running up and down would be among the things at the forefront of their minds.

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[4] [2021] JMSC Civ 84 at para 21

[32] I also accept that the Claimant's quality of life declined significantly. His mother testified, and I accept, that he had to miss GSAT and repeat one year in school due to the recuperating. In addition, the Claimant testified, and I accept, that he could no longer play football for more than a year (at least) in the recuperation phase. For a young boy of 11, this would be a major blow and he testified to this and I accept this as truthful. Separate and apart from the loss of football, he was largely confined to bed. He said, and I accepted as true, that he was an up and down person. For someone used to this lifestyle, confinement to bed can be quite devastating.

[33] Further evidence of the depreciation of the quality of life comes from his testimony that he is no longer able to play contact sports such as rugby and football. He also testified, and I accept, that his walking is impaired due to the fact that he still cannot bend one of his knees. He also has 2 implants inside of him and he still experiences pain even now, some 6 years post incident.

[34] There is no evidence that he will not be able to enjoy a career in agriculture, engineering or even in the JCF as a soldier. I have no evidence before me that says that he would not be able to become a soldier. In that regard, I do not regard this as having any significant impact on his quality of life.

[35] All told, I find that the Claimant endured tremendous pain and suffering, lost his amenities and experienced and continues to experience a loss in the quality of his life.

MEASURE AND QUANTUM OF DAMAGES

General Damages

[36] The measure of damages in claims for Negligence is that the Claimant should be put back in the position he would have been in, insofar as money is able so to do, had the tort not been committed.

[37] Counsel for the Claimant submitted two authorities for the Court's consideration: ***Marlene Brown v Lema Malcolm et al***[5] and ***Janet Thompson v AG of Jamaica et al***[6].

[38] In the ***Brown*** case, the Claimant suffered brief loss of consciousness, fracture of the right tibia, soft tissue injury to left leg, hyperpigmented scars to right leg. She was in a cast for 2 months post collision. Damages were assessed in May of 2007 and she was awarded $850,000.00 for pain and suffering and loss of amenities. That sum updated to $2,873,809.52.

[39] I must confess that I did not find this case very helpful. It was a different bone that was involved (tibia in the *Brown* case vs femur in this case at bar). The significance of this is that the femur is a far more dense and strong bone in comparison to the tibia. So it is not an appropriate comparison. What is more, the Claimant in this case suffered far more serious injuries than the Claimant in the ***Brown*** case.

[40] The ***Thompson*** case is more appropriate. There the Claimant suffered the following:

a) Hematoma and laceration to right forehead;
b) Small laceration (1/2 inch) corner of the right eye brow;
c) Multiple abrasion and excoriation to the mid third of right arm;
d) Multiple abrasions and excoriation to medial aspect distal third of left leg;
e) Right hip tender lateral rotation of right foot;
f) Fracture to the head of the right femur.

[41] She was assessed as having a 3% whole person PPD. She was further examined by Dr. Grantel Dundas, but the reporting from the case, does not show what her PPD was as assessed by him.

[42] An important finding of fact in the ***Thompson*** case is that she had to have hip replacement surgery in 2017 in relation to the accident which occurred in 2013.

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[5] Khan's Vol. 6 p. 8
[6] [2020] JMSC Civ 93

There is no evidence that the Claimant in the case at bar will have to undergo any hip replacement surgery or any further surgery for that matter.

[43] The Court awarded the Claimant in ***Thompson*** the sum of $6,500,000.00 for pain and suffering and loss of amenities. That updates to approximately $8.4m after indexation.

[44] I would say that this is a good starting point. The ***Thompson*** case concerned 1 leg, whilst this claimant had 2 broken femurs. He also had a brain injury and the injury over the eye. On the other hand, in the ***Thompson*** case, the injury was to a more elderly patient and she has to have hip replacement surgery. She was extensively treated for a number of years by many orthopedic surgeons.

[45] I do consider that the loss of quality of life for both to be relatively similar, but I would say that the impact on the young claimant may be said to be more serious in my view. Here was a young 11 year old boy cut off from the enjoyment of the usual pleasures of life of a young child of playing football and running up and down. What is worse, he can no longer play football. So he will have to contemplate other forms of physical activity. Indeed, at one point, he thought he would not walk again.

[46] It is true that there was no PPD assessed in the case at bar. But I consider the 2 femur fractures and the resulting evidence, which I accept, that he still isn't able to walk properly as quite significant. So this reflects some form of permanent impairment. Though not assessed.

[47] I had regard to another case of ***Devon McFarlane (BNF Violet Curry) v Frederick Barnett et al***[7]. In that case, the minor plaintiff of 17 years suffered multiple lacerations on his left upper face and right leg; deformity left thigh and right leg; comminuted fracture of the proximal third of left femur and right tibia; there was a shortening of one of his lower limbs and a PPD was assessed as 15% whole

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[7] Unreported Court of Appeal of Jamaica SCCA 57/88 delivered on October 28, 1991.

person. That Plaintiff was also deprived of the enjoyment of playing cricket which he loved.

[48] The initial award of $35,000.00 for pain and suffering and loss of amenities handed down in July of 1988 was increased by the Court of Appeal to $60,000.00 in October of 1991. That sum converts to $5,058,750.00 today after indexation.

[49] I sent this authority to the parties ahead of the hearing for their consideration. I received no real comment on same beyond Ms. Facey advising the Court not to be considered absolutely bound by much older authorities.

[50] The other authority considered was another decision of our Court of Appeal in ***Nathan Clarke v Gernel Hancel***[8]. In that case the Claimant suffered

a) Head injury with loss of consciousness;
b) 2 cm laceration to dorsum of right forearm;
c) 3 cm laceration to posterior aspect of right elbow;
d) Fracture of the right femur; and
e) 10% PPD of the left lower limb.

[51] The Plaintiff was awarded the sum of $100,000.00 by the trial court. On appeal, that award was reduced to $60,000.00. One of the cases considered by the Court of Appeal was the case of ***McFarlane v Barnett et al***[9]. Having considered that authority (among others), the Court of Appeal opined that in those cases, the Plaintiffs all suffered some form of deformity as well as a PPD of some sort in a range of 5-15%. They accepted that, even though the Plaintiff Clarke had a limp, since the injury was to one leg only, the award of $100,000.00 was out of line with the other cases.

[52] They came to the position that $60,000.00 was appropriate. This was the **same figure** (emphasis mine) as awarded in ***McFarlane*** a year earlier. This was so even

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[8] Unreported Court of Appeal of Jamaica SCCA 96/89 delivered December 18, 1992
[9] Id at n. 5

in the face of *McFarlane* where the injury was to two legs. At first blush, one would be tempted to question this logic. But, the Court of Appeal relied on the well established authority **of *H. West & Son Ltd v Shepherd***[10] and the opinion of Lord Reid where he said,

> *"So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man's consequential difficulties in his daily life."*

[53] What is also interesting about ***Clarke's*** case was that the Court of Appeal accepted that the Plaintiff had a limp, but was otherwise fully recovered based on the statement in the medical report from Dr. Paul Wright. Yet they still felt that an award of $60,000.00 was fully justified. This amount now updates to $4,047,000.00 (approximately) in today's money.

[54] *Clarke* was cited with approval by the Court of Appeal again in the later decision of ***Reynolds v Lewis***[11]. In that case the Claimant suffered, in summary, a fracture to the mid shaft of the right femur with severe hypertrophic scarring covering several areas of his body. R. Anderson J (as he then was) assessed damages and awarded the sum of $950,000.00 for pain and suffering and loss of amenities. The Court of Appeal upheld the award. That sum now updates to approximately $5,825,227.27 today after indexation.

[55] Interestingly, Forte P (as he then was) featured in the panels for *McFarlane, Clarke* and *Reynolds*.

[56] So where does that leave us in relation to this Claimant before the Court? More recent awards, as submitted by counsel for the Claimant, have dramatically increased the quantum of the award for such injuries beyond what the Court of

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[10] [1964] AC 326 per Lord Reid at p 341
[11] Unreported Court of Appeal of Jamaica SCCA 74/01 delivered November 7, 2002.

Appeal had set them over nearly 30 years ago. Counsel reminded the Court that older awards should be looked at carefully[12].

[57] Having reviewed the authorities and the injuries, I would award the Claimant the sum of $6,000,000.00 for pain and suffering and loss of amenities.

[58] Like the Plaintiff in ***McFarlane*****,** this Claimant was a minor who suffered injuries to both feet. The impact is similar in that they were both minors who lost the pleasure of playing sports that they loved. The Claimant in this case suffered a serious degloving injury to his eyelid that required surgery to fix as well as a brain injury. He has some form of impairment, but the extent of it is not assessed. So I find that this Claimant has suffered more serious injuries than those of the Plaintiff in *McFarlane*. I also find that the loss of enjoyment of life was worse for this Claimant as his injury was at the age of 11 whereas the Plaintiff in ***McFarlane*** suffered his injury at 17. So that is 6 more years of loss of enjoyment of some of the prime years of a young boy's life in high school. So this would warrant an increase in that award.

[59] Likewise, I found that this Claimant would have suffered a more serious injury that the Plaintiffs in *Clarke* and *Lewis* respectively because they both only had injuries to one leg and in the case of *Clarke* the loss of enjoyment of life of the instant Claimant would have been for longer, and in the case of *Lewis*, there was really no substantial loss of enjoyment of life as there was no PPD assessed and he was said to have recovered fully. Accordingly, the award should be increased.

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[12] She cited the case of *Seepersad v Persad et al* [2004] UKPC 19 where the Privy Council stated that some reservations should be entertained about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when the awards are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.

[60] I did not accept the ***Thompson*** case as it was out of sync with three decisions of our Court of Appeal from very strong panels. Therefore, it was discounted.

Special Damages

[61] The Claimant's pleadings for special damages was confined to the cost for the medical report. This was pleaded as $7,000.00. The evidence put in as exhibits 2A and 2B were accepted as satisfactory proof of same. Therefore, this sum was awarded as special damages. I agreed with the submissions on the principles of Mr. Scott in this regard, just not the quantum.

CONCLUSION AND DISPOSITION

[62] All told the Court finds that the Claimant should be awarded damages as set out below:

1 **General Damages** in the sum of six million dollars ($6,000,000.00) with interest at 3% from the 9th October 2021 to the 1st October 2024.

2 **Special Damages** in the sum of seven thousand dollars ($7,000.00) with interest at 3% from the 4th December 2018 to the 1st October 2024.

[63] Costs are awarded to the Claimant to be taxed if not agreed.

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Dale Staple
Puisne Judge