

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

SUIT NO. C.L. 2002/C – 047

BETWEEN	MARCELLA CLARKE	CLAIMANT
AND	CLAUDE DAWKINS	1 ST
DEF.		
AND	LESLIE PALMER	2 ND DEF.

Miss Alicia Thomas instructed by K C Neita and Company for the claimant

Miss Thalia Maragh instructed by Jacqueline Samuels-Brown for both defendants

MAY 21, 2004 and June 16, 2004

Sykes J (Ag)

ASSESSMENT OF DAMAGES FOR PERSONAL INJURY

The sole issue in this matter is the quantum of damages. Liability was admitted on the part of the two defendants.

Miss Clarke is an industrious young woman. She was born December 14, 1983. She has not sought to use her injuries as an excuse for inactivity. She is cheerful enough, despite her pain, suffering and decreased enjoyment of life.

On December 21, 2001, one week after her eighteenth birthday, while she was walking along French Street in the historic settlement of Spanish Town, one of the oldest European settlements in this hemisphere and the cite of the famous Emancipation Square, Miss Clarke was struck from behind by a motor vehicle driven by Mr. Leslie Palmer, the

second defendant, and owned by Mr. Claude Dawkins, the first defendant. She felt the blow to her left hand and in her pelvis. She was taken to the Spanish Town Hospital where she was admitted for almost one month.

Since her injuries, unlike some claimants who come before the court, she has sought and found employment with Island Grill in Sovereign Centre in the parish of St. Andrew. Her job requires multitasking – a feature of the modern work world. Even though she was employed to work in the kitchen she also operates the cash register, assists in cleaning the store at the end of the day and prepares food for customers. This involves a lot standing for long periods and bending at the waist.

The claimant has ambitions of moving up in the competitive world of catering. After finishing school in July 2001, she entered the Heart Academy. At the time of the accident she was attending the Academy. She was in the middle of a sewing course since that was what she was accepted to do. She hopes that her current job will give her the edge she needs to be more successful next time round when applying to do the food and nutrition course offered by the Academy.

THE INJURIES

(i) The nature and extent of the injuries sustained

Miss Clarke said that she experienced a lot of pain before she arrived at the hospital. After her arrival at the hospital she was x rayed. The x ray revealed a broken left hand and a shift of the pelvis from its normal position.

She under went surgery in respect of both the left hand and pelvis. After the surgery she could not move without assistance. She was unable to bathe herself or change her clothes while in the hospital. This state of helplessness continued after she was discharged. So disabled was she that, on the day she was discharged, her brother had to lift and carry her from the hospital bed to the car that took her home and from the car into the house at which she convalesced.

She stayed at the house for almost six months. During the six months her mobility gradually returned. She was distraught for virtually the whole period because she could

not move around as much as she used to before. She was suffering from pain in her left hand and pelvis. She had to be assisted to bathroom. Even watching the television was a major undertaking. She had to be carried from her bedroom to the couch to watch the television. Her level of frustration is understandable given that she was only eighteen years old at the time of the accident.

While recuperating she returned, from time to time, to the Spanish Town hospital for physiotherapy and dressing of her injuries.

She stated that she was first able to ambulate, albeit with the aid of a stick, in July 2002. She used the stick for almost one month

(ii) *The nature and gravity of the resulting physical disability*

Miss Clarke said that she cannot lift much or carry weighty objects with her left hand because it is too painful. Her left hand “hook up” from time to time. She has to “fight” to straighten it. Sometimes she has to ask someone to pull it down for her. This is still happening to her. This “hooking up” occurs even during her sleep.

She added that during the operation on her hand, at Spanish Town Hospital, “dem put something” in her hand that pains her, even now, whenever the temperature is cold. She is now left with a surgical scar on her left hand.

She stated that her left foot (meaning the left hip joint) pains her when she walks. She says that if she walks one half of one mile she has to rest. Sometimes the pain is so severe that she has to be off from work as many as two consecutive days. She can no longer run. That causes discomfort. She cannot stand continuously for long periods required if she is working at the cash register.

(iii) *The pain and suffering which had to be endured*

From her testimony there is no doubt that this was a painful episode in the young life of Miss Clarke. Her aches and pains have continued from the time of the accident to the date of testifying in this matter. In addition to the pain suffered at the time of the accident, during hospitalization and while recuperating at home she is still suffering from

pain in her left hip. She says that if she sits for long periods it pains her. I have already recorded the pain and suffering she experiences when she walks and the discomfort she feels in her left hand when the time is cold.

In support of her claim Miss Clarke relied on two medical reports. One report is by Dr. Mark Minott, Consulting Orthopaedic Surgeon of Manuchant Orthopaedic & Sports Medicine Centre and the other by Dr. Melton Douglas, Consultant Orthopaedic Surgeon. The medical reports appear to conflict. Dr. Minott's report does not mention any permanent disability. His report gives the impression that Miss Clarke is as completely whole as she was before the accident. Dr. Douglas' report states otherwise. I now quote from the reports:

Dr. Minott's report states

- (a) *On examination, her surgical scars had matured well and were non-tender. There was a painless, full range of motion in the left elbow, and both lower limbs. In particular, Patrick's test was normal for both sacro-iliac joints.*
- Radiographs of her pelvis and left upper limb confirmed satisfactory healing of her fractures.*

Dr. Douglas' report says

- (b) *Her injuries are serious and in keeping with a blunt injury as described above. The pelvic injury is the more severe of the two. Her left hemipelvic subluxation is the main cause of her pain and disability. There is radiological evidence to support that her pain is genuine. She was assessed as having an 8% permanent disability of the whole person... The*

radiological findings were used in the final assessment of her percentage disability. She has no disability resulting from the fractured left humerus.

I prefer to rely on the report of Dr. Douglas. His report is more consistent with the claimant's testimony than Dr. Minott's. As I have indicated already I do not regard the claimant as a malingerer. I have read both reports very carefully and I have concluded that Dr. Douglas' report is more thorough. His report shows quite clearly that he took a detailed history from the claimant and conducted his own independent clinical assessment including x rays. He then investigated whether she had any history that might explain the pains she was experiencing. In other words there is clear evidence that he compared and contrasted her history with his own clinical examination and then drew his conclusions. He spoke of her gait and seemed to have measured her so that he was able to find a ½ cm shortening of the left lower limb. Dr. Minott's report does not indicate the same degree of thoroughness.

In respect of Miss Clarke's hand, Dr. Douglas said that she had full range of flexion, extension, pronation and supination. He noted marginal difference in the power of the left hand. The x rays showed abnormalities in the left hemipelvis and also that it was displaced proximally by 5mm and slightly externally rotated. All this shows a very careful examination of the patient and great care in the preparation of the report.

(iv) *The loss of amenities suffered*

Miss Clarke cannot leap and bound around the netball court as she once could. She has been deprived of the pleasure of playing netball with her friends. She even fancied herself as football player. But as she says, "If I play mi have to stop and res' mi foot, so it doan mek sense."

As with many young women Miss Clarke likes to wear high heel shoes. The discomfort she experiences when she tries to wear them makes it impracticable.

Her quality of life has further deteriorated by persons who ask, "A fight yuh did a fight over man?" She tells them of her accident but her questioners have foreclosed any

other possibility with the cryptic, emphatic and definitive retort, "A man yuh did fight ova!!" This, she says, has caused her great embarrassment and shame.

(v) The extent to which, consequentially, the appellant's pecuniary prospects have been materially affected

(a) Special damages

Special damages were agreed at \$66,205.

The cost of future surgery to remove implant from left humerus was agreed, as a separate item, at \$110,000.

(b) General Damages

i. Pain, suffering and loss of amenities

I have taken into account all the cases cited by both counsel. I cannot however accept Miss Maragh's submission that \$600,000 would be an appropriate award under this head. This fails to take into account the complete evidence of the claimant. She has experienced pain and discomfort from the date of the injury up until the day of her testimony on May 21, 2004. She has indicated how she has been affected and continues to be affected by the injury. Dr. Douglas, in his report, says she has reached maximum medical improvement. It is true that the Dr. Douglas' report does not state what will or might be the effect of injury, in the future, on the claimant. However there is evidence from Dr. Douglas that her current complaint of pain in her left hip is supported by x ray evidence. This is in the context of him saying that she had reached the maximum medical improvement. She has an 8% whole person disability. She has suffered a serious loss of amenity in that she is denied even the simple pleasure of walking for any appreciable distance and participating in her sporting activities. Cold weather increases her discomfort and suffering. At times, her hand has to be straightened with assistance of others. She is a young woman who is now left with a 12 cm scar on her left hand. She has

to bear the indignity of being accused by ignorant persons of receiving her scar in brawl. I think that Miss Thomas is closer to the mark. I award the sum of \$1,400,000.

(ii) Handicap on the labour market

Her job is physically demanding. She is undoubtedly impaired. At times she says that she has to ask her manager to permit her to sit during the working day. If she sits for too long her hip pains her. There is no doubt that she is hampered by the pain in her left hip, back and left arm. In such physically demanding work, can anyone doubt that she is at risk of losing this job before the end of her working life? Clearly, if she loses this job later in life she will be at a disadvantage. No one could seriously contend that she will be as competitive as a person without her injuries and disabilities.

In making this award I will use the multiplier/multiplicand approach. The Court of Appeal in Jamaica has decisively settled the issue of whether the multiplier/multiplicand approach can be used to calculate the damages under this head. Forte J.A. (as he was at the time) in *Campbell and Others v Whyllie* (1999) 59 WIR 326 approved this method of calculation (see page 341, 342). His Lordship stated that the circumstances of *Campbell's* case (supra) was one in which the multiplier/multiplicand method was appropriate. The question is what are the circumstances that make this method appropriate?

In Campbell's case (supra) there was evidence of:

- a. loss of earning capacity;
- b. the plaintiff's age and likely length of working life;
- c. the plaintiff's monthly earnings;

All this meant that the court in Campbell's case was placed in a position to calculate the multiplicand. I am also in the same position.

There is evidence here of Miss Clarke's current earnings. She currently earns \$6,000 per fortnight. Based on this figure the multiplicand is \$156,000. She is now 20 years old.

I note as well that in *Campbell's* case (supra) the trial judge used a multiplier of 12 based upon the plaintiff's (i) age (26 years at time of assessment); (ii) her whole person disability; (iii) her profession and the impact the injuries will have on her. The Court of Appeal reduced the multiplier to 7.

In the instant case an appropriate multiplier is 14. I chose this figure having regard to (i) her age (20); (ii) the expected length of working life (at least another forty five years); (iii) the injuries have already begun to affect her ability to stand or walk; (iv) she is earning and will continue to earn for some time and (v) there is an 8% whole person disability. I have also taken into account the fact that she is experiencing pain and is at the maximum of her recovery. All these do not indicate a future picture of good health. I have into account the cases cited by Campbell J.A. in *Godfrey Dyer and Derrick Dyer v Gloria Stone* (1990) 27 J.L.R. 268, 275I – 276C. I award the sum of \$2,184,000.

CONCLUSION

Special damages \$66,205 with interest at 6% from December 31, 2001 to June 16, 2004.

Cost of future medical care \$110,000 – no interest on this sum.

Pain, suffering and loss of amenities - \$1,400,000 with interest at 6% from date of service of writ to June 16, 2004.

Handicap on the labour market - \$2,184,000 with no interest.