



[2022] JMSC Civ 147

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

**CIVIL DIVISION**

**CLAIM NO. 2010HCV02345**

<b>BETWEEN</b>	<b>YANIQUE MENDEZ</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ONEIL COLE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>RANDY POWELL</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>SYDNEY MENZIES</b>	<b>3<sup>RD</sup> DEFENDANT</b>
<b>AND</b>	<b>RONALD MENZIES</b>	<b>4<sup>TH</sup> DEFENDANT</b>

**IN OPEN COURT**

**Miss Jacqueline Cummings instructed by Archer, Cummings & Co, for the claimant.**

**The defendants not appearing and not being represented.**

**Heard June 13, 2022 and July 28, 2022**

***Assessment of damages – paraplegia - 70% whole person impairment***

**CORAM: JARRETT, J (Ag)**

**Introduction**

**[1]** The start of high school is the beginning of a watershed in the life of any child. It is typically a time of excitement and enthusiasm as the child leaves behind primary or preparatory school, to begin a more advanced programme of secondary education. September 4, 2008 was to have been the start of the claimant Yanique

Mendez's watershed. She was 12 years old and on her second day of high school at Ferncourt High School. While on her way to school that morning, the taxi in which she was travelling as a passenger, which was owned by the 1<sup>st</sup> defendant and being driven by the 2<sup>nd</sup> defendant, collided with a motor vehicle driven by the 4<sup>th</sup> defendant, and owned by the 3<sup>rd</sup> defendant. As a result of that accident, she suffered very serious injuries which left her permanently paralysed in her lower limbs and unable to go to school for over two years. On May 12, 2010, with her mother as her next friend, she filed suit in negligence against the defendants. The claim against the 3<sup>rd</sup> and 4<sup>th</sup> defendants ended with judgment in their favour. A default judgment was obtained on December 6, 2010, against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Before me is the assessment of the claimant's damages in relation to that default judgment. The claimant turned 18 years of age on October 8, 2014, and on May 5, 2016, she filed a notice indicating that the appointment of her next friend had ceased. Although being served with all the relevant documents in this matter, the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not appear at the assessment of damages and were unrepresented.

## **The evidence**

### **The claimant's evidence**

- [2] The claimant's witness statement stood as her evidence in chief and was amplified with my permission. She said that on the morning of September 4, 2008, right outside the front gate of her home in Moneague, in the parish of St Ann, she boarded a taxi to get to school. Ferncourt High School is approximately 15 minutes from her home. Five minutes into the journey, the collision occurred. After the collision she remembered hearing people screaming and she had a "spinning" feeling. It appears she fell unconscious; as the only thing she remembers after that is waking up in the St. Ann's Bay Hospital. She was "strung up" on many machines and was in and out of consciousness. During the periods of consciousness, she felt excruciating pains over her entire body and was unable to move her legs. She was seen by Dr. Aung Myint Aye who diagnosed her with

cerebral concussion, suspected intra-abdominal and mediastinal injury and bilateral femur fracture.

- [3] Due to the seriousness of her injuries, she was airlifted to the University Hospital of the West Indies (UHWI) in Kingston where she was placed in the Intensive Care Unit (ICU). She recalls waking up in that facility with several doctors around her. In the ICU she was initially unable to speak due to a feeding tube that was in her throat. After the removal of the feeding tube, her speech was impaired for a few months. While she could form words, no sound would come out of her throat. The doctors at the UHWI told her about the extent of the spinal cord damage she suffered at T4-T6, and that she had undergone several surgeries and would not be able to walk for a while.
- [4] Many scars remain from the surgeries. One goes straight down the centre of her belly. Two extend from the centre of her back to below her left breast. There is a scar on each of her thighs and one on her side where a tube was inserted to remove fluid that was gathering in her lungs. All the scars are ugly and disgusting. She says that they look like an alligator's skin. They are huge, swollen and long.
- [5] There was no improvement in the sensation or mobility of her legs. Eventually she was told that she would never walk again and diagnosed with paraplegia or paralysis of the lower extremities. After her stay at the UHWI, she was moved to the Sir John Golding Rehabilitation Centre (SJGRC) in Mona, in the parish of St. Andrew where after an evaluation, she was given the same grim diagnosis and prognosis she had received from the UHWI. At the SJGRC she was taught to adapt to using a wheelchair and to regain control of her bowel movements. She became depressed, did not eat and lost a significant amount of weight. After a period of over two years, she returned to the Ferncourt High School in May 2010. In preparation for her return, the school was outfitted with ramps and her classes were scheduled for down stairs. She was initially placed in second form but was promoted to third form after a fairly good performance on her end of term examinations. Presently she is a student at the University of the West Indies.

- [6] According to her, generally she is unable to feel anything below her navel. She is concerned that being wheelchair bound will make it difficult for her to secure employment and to care for herself. She believes she will be unable to do the normal things that persons her age can do. She says she will never be able to dance at a college party and will probably never be able to experience sexual intercourse. The doctors have told her that she will never be able to have children. She loves dancing and would have loved to attend the Edna Manley College of the Visual and Performing Arts to be trained as a dance choreographer, but she will not be able to pursue that desire. She also wanted to become a lawyer but will never be able to stand in court.
- [7] She was bedridden for over a year and had to purchase and wear adult pampers. She had an indwelling catheter. Her medical expenses have exceeded \$700,000.00 and remain outstanding. She is unable to take the traditional public transportation and therefore she must charter taxis. She still incurs medical expenses as she must do follow up checks with her doctors. She has had to be in and out of hospital since her discharge and had to do surgery to remove a bone cyst. Her mental and emotional health has been "tumultuous". She still suffers from anxiety and has depressive episodes from time to time and continues to use a catheter.
- [8] Evidence was given of medical expenses totalling \$720,551.47 and transportation costs of \$6,800.00. No claim was made for future medical care.

### **The medical evidence**

- [9] The claimant relied on the medical reports of Dr Aung Myint Aye, Dr Roger Irvine and Dr Rory Dixon. Dr Aung Myint Aye was the medical doctor who attended to the claimant at the St Ann's Bay Hospital. His findings on presentation were initial loss of consciousness, chest pain, abdominal pain and bilateral thigh pain and deformity. He diagnosed the claimant with cerebral concussion, suspicion of intra-

abdominal and mediastinal injury, and bilateral femur fracture. Before being referred to the UHWI, the claimant was resuscitated by way of a blood transfusion.

[10] Dr Roger Irvine is a consultant cardiothoracic surgeon at the UHWI. In his medical report dated September 8, 2016, he says that upon presentation at the UHWI on September 4, 2008, some 5 hours after the collision, the presence of an acute abdomen was confirmed, and the claimant was thought to be in hypovolemic shock as evidenced by hypotension, tachycardia and depressed neurological response. After she was resuscitated, she was taken to the operating theatre for an exploratory laparotomy and anterolateral thoracotomy. The findings of these procedures were as follows: -

1. 2.5 litres of blood in the abdomen
2. Laceration to the ileal mesenteric vessels with active bleeding
3. 2.5 cm laceration to segment 5 of the liver
4. 300mls blood in the left chest
5. Left lower lobe lung contusion
6. Contained aortic transection with a rapidly expanding hematoma.

After abdominal haemorrhage control was achieved, the claimant was repositioned for emergency repair of the thoracic aortic transection.

This was achieved by a procedure known as aortic cross clamping. After the closure of the thoracic wound, she was repositioned for the orthopaedic surgeons who treated her femoral fractures by wound debridement and the placement of Steinman pins to facilitate skeletal traction. Post-operative care was in the ICU.

[10] Dr Irvine reports that on the first day of post-operative care, it became apparent the claimant had no sensation below the abdomen and there was no voluntary movement of the lower limbs. A diagnosis of hypoxic spinal cord injury secondary to aortic cross clamping was made. By the second day of post-operative care, the claimant began showing evidence of renal impairment. A diagnosis of pre-renal kidney impairment due to massive blood loss and preoperative hypotension as well

as relative hypovolemia in the post-operative period. She responded to increased fluids and on post-operative day seven, she was taken to the operating theatre by the orthopaedic team for open reduction and internal fixation of the fracture femurs using plates and screws.

**[11]** The claimant was discharged from the ICU on September 16, 2008. Due to the paraplegia, she was referred to the child psychiatry service for evaluation and was diagnosed with post-traumatic stress disorder and depression. She was transferred to the Mona Rehabilitation unit for assessment as well as the urology service for the management of her neurogenic bladder which was a consequence of the paraplegia. Long term bladder catheterization was prescribed. She was referred on September 30, 2008, to the Mona Rehabilitation unit. According to Dr Irvine, the paralysis of her lower limbs is permanent

**[12]** Orthopaedic surgeon Dr Rory Dixon's medical report is dated September 26, 2017. He says that he first saw the claimant at the SJGRC where she was referred from the UHWI following surgery. He describes the injuries she sustained from the motor vehicle accident as follows: -

1. Spinal cord injury at T4 with inability to move the lower limbs
2. Injury to small bowel
3. Lung contusion
4. Liver contusion
5. Bilateral fracture of femur

On admission to the SJGRC, Dr Dixon says that the claimant had a 6x7 cm ulcer on the occipital region of the scalp, an indwelling urinary catheter, healed surgical scars on the abdomen, left chest and both thighs. On examination of her limbs, she had a sensory level at T5-6 below which she had no normal sensation. There was no power in the lower limbs. She was assessed as having paraplegia secondary to spinal cord injury and according to Dr Dixon, an intensive

multidisciplinary rehabilitation programme was commenced involving the psychiatrist, psychologist, urologist, social worker, physiotherapists, and occupational therapists.

[13] Dr Dixon reports that the claimant was eventually taught self-catheterization. She developed a pressure ulcer on her left buttock which was treated by plastic surgery on October 26, 2009. She was discharged home on February 12, 2010. In relation to her activities of daily living, Dr Dixon says that she adapted well to wheelchair mobility and returned to school on discharge. He described her in 2017 as being: “fairly independent in activities of daily living within the limitation of the wheelchair”. Based on physiotherapy received, she can now propel herself in a wheelchair and is able to sit unsupported. In assessing her impairment, he said that to function satisfactorily in her home environment, modifications will have to be considered. Doors will have to be wide enough to accommodate a wheelchair and grab rails should be installed in bathrooms to facilitate her personal hygiene. A regular bath should be replaced with a shower stall with wheelchair access and a shower chair. In the kitchen, cupboards will have to be remodelled to make countertops accessible to her.

[14] In terms of future medical treatment, Dr Dixon said that the claimant will need regular follow up with a urologist and a physiotherapist/ orthopaedic specialist. She is at a constant risk of sustaining damage to the kidneys, and she will have to do regular strengthening exercises under the supervision of a physiotherapist to maintain power in the upper limbs. He assessed her impairment as significant and permanent with a whole person permanent impairment of 70%

### **Submissions**

[15] For general damages, counsel Miss Cummings relied on the decisions in **Lloyd Clarke v Corp. E F. Quest, Constable Barrett, Dist. Constable M Bernard and The Attorney General**, decided on December 12, 2008 and reported in **Volume 6, Recent Personal Injury Awards made in the Supreme Court of Judicature**

of Jamaica , compiled by Ursula Khan; and **Anthony Wright v Lucient Brown**, decided on March 3, 2000, and reported in **Volume 5, Recent Personal Injury Awards made in the Supreme Court of Judicature of Jamaica , compiled by Ursula Khan**. Counsel argued that in both cases, the claimants suffered from paraplegia. She submitted that in **Lloyd Clarke v Corp. E F. Quest, Constable Barrett, Dist. Constable M Bernard and The Attorney General**, the spinal cord was completely severed at T10 vertebrae. He was wheelchair bound, had to wear a catheter and his whole person disability was assessed at 65%. As to **Anthony Wright v Lucient Brown**, Miss Cummings argued that he too was wheelchair bound. He had no faecal or urinary control and was impotent. She said that **Anthony Wright's** lack of faecal control was comparable to the difficulties that the claimant would have using the bathroom due to being wheelchair bound.

### **Analysis and discussion**

- [16] The considerations to be borne in mind when assessing damages in personal injury cases were most helpfully set out by Wooding CJ in **Cornilliac v St Louis [1965] 7 W.I.R. 491 at page 492**. They are the nature and extent of the injuries, the nature and gravity of the resulting physical disability, pain and suffering, loss of amenities and the extent to which pecuniary prospects have been affected. When analysing the nature and extent of any injury, a court not only looks objectively on the injury itself, but it has equal regard to the effect of the injury on the particular claimant before it. Awards for loss of amenities seek to compensate for the reduction of the claimant's enjoyment of life caused by the injury.
- [17] Assessing non-pecuniary losses is never an easy undertaking for a judge. Money cannot fully compensate for the losses occasioned by personal injuries. Nevertheless, guided by the considerations outlined by Wooding CJ in **Cornilliac v St Louis**, as well as by comparable authorities, and doing the best I can, I embark upon the assessment of the claimant's general damages. Her pecuniary losses are far easier to assess. These are the out of pocket, dollar and cents



expenses incurred by her, and must be specifically pleaded in the claim and proven by the evidence.

**[18]** From Dr Irvine's medical report it is evident that the spinal cord injury that led to the claimant's paralysis, stemmed from the aortic cross clamping, and that this procedure would not have been necessary but for the need to urgently repair the claimant's thoracic aortic transection, caused by the motor vehicular accident. I therefore find that the motor vehicular accident was the proximate cause of the paralysis suffered by the claimant and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are liable to pay her damages arising from this injury.

**[19]** At the time of the accident the claimant was a child of 12 years old at the cusps of starting secondary school. At the time of trial, she was 26 years old, a young woman, pursuing university education at the University of the West Indies. Her evidence is that when she woke up at the UHWI in 2008, she was in excruciating pain over her entire body and she recalls not being able to move her legs. She was, in her words: "strung up to machines" and was fed by a feeding tube during the time that she was unconscious. She underwent numerous surgeries which left physical scars on her body. The scars are huge and long and she is obviously affected by them, as she testified that they are ugly and disgusting and likens the way they look to an alligator's skin. She was diagnosed with post-traumatic stress disorder and depression. Her immobility led to a bed sore to her buttocks which required treatment with plastic surgery. Between her stay at the UHWI and the SJGRC, she was an inpatient at a medical facility for about two years and eight months. She was deprived of her secondary education for as long. She is paralyzed in her legs and is bound to a wheelchair for the rest of her natural life. Up to the time of the trial, she was still using a catheter to enable her to pass her urine. The evidence makes it plain, whether viewed subjectively or objectively that the injuries the claimant suffered were significant and serious and I so find.

**[20]** I find that the claimant's enjoyment of life has been significantly reduced. She gave evidence that she will not be able to pursue her love of dancing, will never be able

dance at a college party and her desire to pursue law is now tempered by her inability to “stand in court”. She will never have children, and doubts whether she will ever experience sexual intercourse. Dr Dixon in his report spoke of the retrofitting that will need to be done of her place of abode in order to make it accessible to her wheelchair.

[21] While at the SJGRC the claimant was depressed, did not eat and lost weight. She had to receive counselling. In her oral evidence, she described her mental and emotional health since making her witness statement in 2016 as ‘tumultuous’. She still gets anxious when driving and has episodes of depression. Dr Dixon spoke of the need for follow up urological and orthopaedic care. In light of the two plus years of hospitalisation, her continued use of a catheter (which no doubt will require intermittent medical attention) and Dr Dixon’s prognosis, it is clear to me and I so find that the duration of her suffering and medical treatment is markedly long.

[22] The two authorities relied on by Miss Cummings are very useful. The claimant in **Lloyd Clarke v Corp. E F. Quest, Constable Barrett, Dist. Constable M Bernard and The Attorney General** was 17 years old when he was shot in the back and right elbow. He suffered a completely severed spinal cord at T10 vertebra, complete paralysis from the navel down, and a gunshot wound to the right elbow with exit right epicondyle. The medical report of Dr Delroy Fray, consultant orthopaedic surgeon stated that he had complete paraplegia below T10-T11. He was a patient at the Cornwall Regional Hospital from July 24, 2006 to August 2, 2006, and spent 42 days at the SJGRC. He was wheelchair bound for the rest of his life and suffered faecal and urinary incontinence. There were pressure ulcers at both trochanteric areas and the sacrum and he had an indwelling catheter. The doctor’s prognosis was that he was unlikely to recover and would be totally dependent on someone to help him with his personal hygiene. The indwelling catheter would remain for life, but would need changing every six weeks and he was prone to urinary tract infections. He was assessed as having a whole person permanent impairment of 65%. On December 12, 2008 he was awarded

\$ 26,000,000.00 for pain and suffering and loss of amenities. Using the current consumer price index that figure updates to \$60,550,666.00.

[23] There are similarities and differences between the claimant in **Lloyd Clarke v Corp. E F. Quest, Constable Barrett, Dist. Constable M Bernard and The Attorney General** and the claimant at bar. Lloyd Clarke was 17 years old at the time of the incident, the claimant was 12 years old. Her combined stay at the UHWI and SJGRC was two years and eight months or approximately 970 days, while the claimant Lloyd Clarke's combined stay at Cornwall Regional Hospital and the SJGRC was 52 days. He had both faecal and urinary incontinence, while the claimant had only urinary incontinence. But I agree with Miss Cummings, that the fact that the claimant is bound to a wheelchair, would make using the bathroom to pass her stool difficult. Besides the evidence is that she was taught to control her bowel movements, this means that there was a time when she did not have such control. Both are wheelchair bound for the rest of their lives. Both use a catheter. While the claimant **Lloyd Clarke** was prone to urinary tract infections, the evidence is that the claimant at bar will need both urological and orthopaedic follow up.

[24] The claimant had a serious bed sore which required treatment by surgery, while the claimant **Lloyd Clarke's** ulcers did not require this type of intervention. The trial judge in **Lloyd Clarke v Corp. E F. Quest, Constable Barrett, Dist. Constable M Bernard and The Attorney General**, placed emphasis on the fact that that claimant was totally dependent on others. In the case at bar, no evidence was given as to the level of the claimant's dependency. There is no reported psychological effect of the injury on the claimant **Lloyd Clarke**, while the claimant at bar suffered from post-traumatic stress disorder and depression, and at the time of trial, 14 years after the accident, she still suffers anxiety in relation to driving and has depressive episodes. She has ugly scars on her body which she describes as disgusting. It is completely understandable that a young woman would be disturbed and troubled by such scars. There is no report on the loss of amenities of the claimant **Lloyd Clarke**. The claimant's significant loss in this regard I have earlier chronicled. She has been assessed as having a whole person impairment

of 70%, which is 5% more than that of the claimant **Lloyd Clarke**. Although I take the view that on a whole the nature and extent of claimant's injuries were more severe than those of the claimant **Lloyd Clarke**, and her period of inpatient hospital care of much longer duration, I take into account the fact that unlike **Lloyd Clarke**, the claimant is not totally dependent on others.

[25] In **Anthony Wright v Lucient Brown**, the claimant had his 9<sup>th</sup> rib and thoracic vertebrae fractured by a gunshot to his right upper arm and right chest. The bullet after passing through his arm and chest lodged in his spinal cord and caused damage leading to paralysis of the lower extremities. Like the claimant at bar, he was confined to a wheelchair for life and suffered paralysis in the lower extremities. He had no faecal or urinary control, was impotent and suffered from bed sores. He had scars at the sight of his injuries, but unlike the claimant at bar, there is no report on the nature of those scars and whether they had any impact on him. His whole person impairment was assessed at 70%, as was the claimant. Save for his impotence, there is no report on his loss of amenities. Neither is there any indication that he suffered psychologically as a result of his injuries. The duration of his hospitalisation is not very clear from the report. On March 3, 2000, he was awarded \$8,000,000.00 for pain and suffering and loss of amenities. Using the current consumer price index this figures updates to \$47,764, 705.00.

[26] Given the nature and extent of the claimant's injuries, the duration of her medical care, her pain, suffering and significant loss of amenities and, guided by the similarities and differences between the claimant at bar and those in above mentioned authorities, I award the sum of \$55,000,000.00 in general damages for pain and suffering and loss of amenities. I also award the sum of \$ 728,351.47 for special damages which have been proven by the evidence.

[27] In the result, I make the following orders: -

- a) General damages in the sum of \$55,000,000.00 for pain and suffering and loss of amenities with interest at 3% per annum from September 20, 2010 to July 28, 2022.
- b) Special damages in the sum of \$ 728,351.47 with interest at 3% from September 4, 2008 to July 28, 2022.
- c) Costs to the claimant to be agreed or taxed.