

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 01533/2004

BETWEEN DAVID MILLS CLAIMANT
AND SMITH & STEWART MOBILE 1ST DEFENDANT
CORPORATION LIMITED
AND PATRICK LESLIE 2ND DEFENDANT

Miss Tamara Francis instructed by Houghton & Associates for the Claimant
Defendant unrepresented, not present.

Heard September 21 and October 4, 2005

McDonald, J (Ag.)

The Claimant Mr. David Mills in this action seeks damages for negligence against the 1st Defendant as the owner and the 2nd Defendant as the driver of a motor truck in which he was a passenger. On the 2nd July 1999 at the Spanish Town roundabout the truck got out of control, hit down a tree and overturned. As a result the Claimant suffered injuries and incurred loss and expense.

He was admitted to the Spanish Town Hospital and transferred to the Kingston Public Hospital where he spent two weeks. After discharge he attended the out patient clinic.

The particulars of injuries pleaded are as follows: -

- (1) Multiple facial and scalp lacerations
- (2) Loss of superior segment of right ear lobe;
- (3) Laceration to the right shoulder;

- (4) Laceration to the left shoulder;
- (5) Stiffness and weakness to the right shoulder;
- (6) Blunt injury to the right anterior of chest wall
- (7) Laceration to the left knee
- (8) Blunt trauma to the right knee
- (9) Lower back pain
- (10) Fracture to the facial bones and mandibular
- (11) Disability of 45 percent of the upper extremity or 27 percent of the whole person.

In his testimony Mr. Mills stated that when he walks in the sun, it affects his head. He feels pains in his shoulder when sweeping. He is right-handed and the hand cannot go right up.

He is still seeing the Doctor because of headaches, and he is taking pain tablets and blood pressure tablets.

Three medical reports were admitted into evidence. Exhibit 1 was the medical report from Dr. Dennis Stephens dated October 24, 2000. Exhibit II was the medical report from Dr. Grantel Dundas dated September 6, 2001 and Exhibit III, the medical report from Dr. Guyan Arscott dated September 17, 2001.

In her address Miss Francis explained that she had experienced difficulty in finding cases which included all the injuries suffered by the claimant.

She highlighted three of the injuries which she said the claimant had sustained, and furnished the court with three cases to assist in arriving at a comparable award.

Miss Francis identified these injuries as dislocation of claimant's right shoulder, facial injuries and whiplash injury. She proposed separate awards for these injuries which when added together totalled \$4,773,162.52 for General Damages – pain and suffering.

In my opinion this approach is incorrect. The court has to be guided by the authorities which make it clear that damages for personal injuries should be awarded for the total injury suffered rather than on an itemized basis.

The court therefore looks at the claimant's total injury, his disability of 27% of the whole man and the pain and discomfort that he has suffered.

In this case the only injuries that the court can consider are those pleaded in the Particulars of Injuries contained in the Particulars of Claim.

It is of paramount importance that the Particulars of Injuries be pleaded in such a manner as to warn the Defendant of the nature and extent of the claim he has to meet. This will determine the compensation claimed; and ultimately awarded.

In my opinion the most serious injuries pleaded are the loss of superior segment of right ear lobe and fracture to the facial bones and mandibular and injury to the claimant's shoulder.

Miss Francis placed reliance on the case of **Florence Samuels v Michael Davis** Khans Volume 4 page 151 in respect to the claimant's facial injuries.

In that case the claimant suffered, unconsciousness, pain in head, chest and back, cuts on right knee and multiple lacerations to face. The wounds had healed with much scarring and keloid formation. On the 28th March 1996, she

was awarded \$380,000.00 as General Damages for pain and suffering and loss of Amenities. This sum converts to \$898,842.23 at today's rate (using CPI of 2214.7 for August 2005).

Miss Francis opined that Mr. Mills facial injuries were more serious than those suffered by Florence Samuels. She submitted that an award of \$1.2 million would be adequate compensation.

In respect of the injury to the claimant's ear Dr. Guyan Arscott's medical certificate speaks to an obvious deformity of the right ear, loss of upper 1/3 of the border of the right pinna.

After an exhaustive search I can find no case involving a similar injury which can be used as a reasonable comparative guide in assessing this injury.

The Particulars of Injuries speak to lacerations to the claimant's right shoulder and stiffness and weakness to the right shoulder.

The Claimant gave evidence that he is right-handed and the hand cannot go right up.

Dr. Dundas' medical report corroborates Mr. Mills' complaint where it states that the complainant had injury to the right shoulder which was treated by a plaster-of-paris cast but has left him with a significant degree of stiffness and weakness and pain.

The shoulder injury in this case has not been pleaded with any particularity. Nevertheless Miss Francis placed reliance on the case of **Rupert McDonald v Earl Ocean Textiles Ltd.** – reported in Harrison's Assessment of Damages for Personal Injuries at page 249.

In that case the claimant suffered injury to the brachial plexus of the right shoulder, hyperaesthesia and numbness in the right upper limb resulting from severe contusion to the nerves in the right side of the neck. Disabilities – He could do very little with the right upper limb. There was 30% permanent partial disability of the upper limb which was equivalent to 18% disability of the whole person.

On June 17, 1992 he was awarded \$400,000 for General Damages – pain and suffering and loss of amenities. In today's money, this converts to \$2,272,069.7.

Miss Francis submitted that Mr. Mills' injury was more severe and proposed that he be awarded \$3 million.

In my opinion such an award would be excessive in the circumstances of this case.

There is no evidence given by the claimant of his inability to pursue any leisure activities which he pursued before hand. The claimant has given no evidence of curtailment of his enjoyment of life.

I am of the view that an award of \$2.8 million is appropriate in the circumstances for General Damages – pain and suffering.

Future Surgery

Miss Francis asked the Court to award the Claimant \$70,000 costs for future surgery. Dr. Guyan Arscott's medical report states that corrective surgery will involve local scar revision and transposition flaps. He said that corrective

surgery will provide partial improvement to the appearance of the right ear to the tune of only 20 – 30 % and will provide approximately 40% improvement to the scars over the right upper eyelid and right cheek.

I find that the amount of \$70,00 is recoverable.

Loss of Earning Capacity

Mr. Mills testified that at the time of the accident he was a salesman. He traveled on the truck and sold frozen novelties such as ice cream, icecream cake, fudge, big dipper and icicles. At the time of the accident in July 1999 he was earning \$2,500 per week.

After the accident he worked at S & S/Crazy Jim in 2003 for four months sweeping up and dealing with dry ice. He earned \$2,000 per week. He told the Court that he could not manage the work as he experienced pain in the shoulder when sweeping.

He could not manage sales work anymore because travelling up and down affects him; and when he walks in the sun it affects his head.

After leaving S & S he obtained a job in 2004 at Riedies Restaurant in Mandeville. His job entailed seasoning up meat, serving and washing up things.

He was paid \$3,000 per week. He remained in that job for 2 months.

He said that he got sick on the job. He had bad pains in his head and right shoulder.

He asserted that he is still sick and seeing the Doctor for headaches. He has not sought any employment since leaving the Restaurant job.

The medical evidence lends some support to Mr. Mills's complaints. Dr. Stephens report made reference to a period during which Mr. Mills complained of persistent headaches and this was diagnosed as post concussional headache.

The principles laid down in the well-known case of *Moeliker v A. Reyrolle & Co. Ltd* (1997) 1All ER 176 are used by the Courts as a guide in assessing loss of earning capacity on the labour market. The principles enunciated in this case are applicable where the Claimant is employed at the time of the assessment.

Miss Francis submitted that although Mr. Mills is not working at this time, he has obtained employment twice since the accident and had to discontinue because of his injury. The injuries have seriously restricted his ability to earn.

In making an award she referred the Court to **Anthony Campbell v. Level Bottom Farms Ltd v Paul Samuels** 5 Khans 122 – 125.

In that case the Claimant:

“bar porter, 34 at trial, motor cyclist, collided into a tarpaulin covered unlit trailer on 12/7/93 – swerved – collided with right rear of trailer negligently parked.”

His PPD equated to 100% loss of the upper limb = 60% impairment of the whole person. This Claimant was unemployed at the date of assessment. He had unsuccessfully tried gardening and selling clothes at one time, but the Court was unaware as to when he stopped working on those jobs.

In his judgment Cooke J (as he then was) said:

“The plaintiff wanted to work and did not find comfort in idleness but his academic and skill training were

rudimentary. He relied on his hand not his head. He now had only one hand. His situation did not fall within the Moeliker principle

It was inconsistent with humanity and justice to deny the plaintiff an award for loss of earning capacity and this award should not be nominal as he wished to work."

The Learned Judge made an award of \$249,000 which on appeal was increased to \$877,500.

In calculating the award, Miss Francis proposed that the Court fix Mr. Mills annual salary at \$124,000 (i.e. 2,400 being the minimum wage x 52) and then apply a multiplier of 15 to the annual salary - resulting in the sum of \$1,872,000.

In the case of Campbell v Level Bottom Farms Ltd the Court of Appeal directed that the correct approach in calculating the multiplicand is to take the difference between what the Claimant earns before he suffered the injury and what he was now able to earn after the disability as the multiplicand.

In the present case the calculation is $500 \times 52 \times 15 = \$390,000$ discounted by 25% for contingencies = \$97,500. I award \$292, 500 for loss of earning capacity.

Special Damages

The particulars of Special Damages claimed are:-

Cost of Medical Report Dr. Arscott 3/10/01	\$ 5,000.00
Consultation 28/7/01	\$ 2,800.00
Consultation and medical report Dr. Dundas 31/8/01	\$ 11,000.00
Brain CT at Apex X-ray 19/3/02	\$ 15,000.00
Medical X-ray Institute 10/9/01	\$ 8,800.00
Medical report from KPH 4/10/00	\$ 1,750.00
Medical expenses KPH 19/9/00; 30/4/01; 14/3/01; 3/4/01 4/10/00; 17/5/00; 21/7/00	\$ 700.00
Bills from KPH 14/7/99	\$ 7,000.00
Cost of Police Report 25/6/03	\$ 1,000.00
Visit to Dr. Martin Clarke 26/3/01	\$ 1,000.00
Cost at Nuttal Memorial Hospital 16/6/01	\$ 1,000.00
Cost for drugs Clock Tower Pharmacy 28/7/01	\$ 662.92
Cost of drugs at Waltham Park Pharmacy 9/5/01 & 27/3/01	\$ 2,120.00
Loss of income from 2/7/99 to 28/6/04 at \$2,500 per week and continuing	<u>\$ 65,000.00</u>
	\$ 122,832.92

The Claimant exhibited receipts in proof of the following expenditure

Exhibit 1 – Bill from KPH	\$7,000.00
Exhibit 2 – Medical Expenses KPH	\$ 700.00
Exhibit 4 – Cost of consultation Dr. Arscott	\$2,800.00
Visit to Dr. Martin Clarke	\$1,000.00
Cost at Nuttal Memorial Hospital	\$1,000.00
Exhibit 5 – Costs of drugs Clock Tower Pharmacy	\$ 662.92
Cost of drugs at Waltham Park Pharmacy	\$2,120.00
Exhibit 7 – Consultation and Medical Report Dr. Dundas	\$11,000.00
Cost of Medical Report Dr. Arscott	\$ 5,000.00
I. Exhibit 8 – Medical X-ray Institute	<u>\$ 8,800.00</u>
	\$40,082.92

Costs of police report and brain CT at Apex x-ray have not been proved.

The Claimant's evidence is that he paid \$900 for medical expenses at KPH, however he cannot recover more than the sum pleaded.

Loss of Income

It is well established law that Special Damages have to be specially pleaded and proved.

Mr. Mills has produced no documentary evidence substantiating his weekly pay.

His evidence is that at the time of the accident he was paid \$2,500 weekly in cash.

The evidence before the Court is that the Claimant was paid in cash, there is no evidence that he received a pay slip or statement.

In light of the suit filed, I am of the opinion that it would have been unlikely that the claimant would have been able to obtain documentary evidence of salary payments.

In the circumstances I am guided by the dicta of Wolfe JA (Ag) (as he then was) in *Desmond Walters v Carlene Mitchell* (1992) 29 JLR 173 at page 176 where he stated

“Without attempting to lay down any general principles as to what is strict proof, to expect a sidewalk or a push cart vendor to prove his loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen L J referred to as the vainest pedantry.”

I find that Mr. Mills is a witness of truth and that he was in fact earning \$2,500 weekly at the time of the accident.

Miss Francis approach to the calculation of his income is that there are 324 weeks from the date of the accident 2/7/99 to 21/9/05 date of assessment. According to the evidence the claimant worked for 24 of these 324 weeks. Using a weekly earning figure of \$2,000 – for the 300 weeks when he was unemployed he would have earned \$600,000. She asked the Court to award \$600,000 for loss of income.

This method of calculation is incorrect.

In the event that the accident had not happen, the claimant would have earned \$810,000 ($\$2,500 \times 324$) over the 324 weeks. The evidence before the Court is that he actually worked for 24 weeks earning a total sum of \$56,000.

The claimant would therefore be entitled to loss of earnings of \$754,000 less 25% for taxes i.e. \$565,500.

The amount claimed in the pleadings is for loss of income amounting to \$65,000 and continuing. The effect of the phrase 'and continuing' only gave advanced notice that the sum claimed was not final. Applying the principles set out in the Court of Appeal decision of Thomas v Arscott (1986) 23 JLR 144 this Court cannot award a greater sum than \$65,000 unless there was an amendment to the pleadings to reflect the increased amount. This is a Court of pleading and no notice of intention to amend was served on the Defendant, nor was any amendment applied for.

Loss of income is awarded in the sum of \$65,000.00.

Judgment for the Claimant in the sum of \$3,267,582.92 being:

General Damages

Pain and Suffering	\$2,800,000.00
Loss of Earning Capacity	\$ 292,500.00
Cost of Corrective/future surgery	\$ 70,000.00
Special Damages	\$ 105,082.92

Interest on the General Damages of \$2.8 million at 6% per annum from 1st November, 2004 to 4th October 2005.

Interest on the Special Damages at 6% per annum form 2nd July 1999 to 4th October 2005.

Costs to the Claimant in sum of \$40,000 pursuant to Part 65 Schedule A of CPR 2002.