

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

**CLAIM NO 2013HCV00700**

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| **BETWEEN** | **RICARDO MOODY** | **CLAIMANT** |
| **AND** | **NATIONAL SOLID WASTE MANAGEMENT AUTHORITY** | **DEFENDANT** |

**Miss Cavelle Johnston instructed by Townsend Whyte & Porter for the Claimant**

**Miss Lisa Whyte instructed by the Director of State Proceedings for the Defendant**

**Assessment of damages – Personal injury**

**Heard: January 16, 2015 and February 27, 2015.**

LINDO J. (Ag.)

**[1]** On May 27, 2011 Ricardo Moody, the claimant, was a passenger in a motor vehicle owned by the Office of the Prime Minister and designated to the Defendant when it collided with another vehicle. He filed a claim form on February 7, 2013 and an Amended Particulars of Claim on December 4, 2014 in which he claimed damages for personal injuries and loss suffered as a result of the negligence of Alvin Mitchell, the authorized driver of the defendant's vehicle.

**[2]** On January 15, 2014 the defendant filed a defence limited to quantum and on July 2, 2014 the court entered judgment on admission against the defendant.

**[3]** At the hearing of the assessment of damages on January 16, 2015, the following documents were agreed and tendered in evidence: (1 - 44 of list in Notice of Intention to tender into evidence hearsay statements made in a document)

Copy of medical reports of Dr. Phillip Waite dated February 2, 2012 and April 11, 2014;

Copy of medical report of Dr. Kurt Garfield dated March 6, 2012;

Copy of medical report of Dr. Dwight Webster dated August 2, 2012;

Copy of neuropsychological examination report of Dr. Tamika Haynes-Robinson (Breath) and copy of medical report from Rehabilitation institute of the Caribbean under the signature of Dr. Haynes Robinson

Report of Dr. Steven Lewis dated January 9, 2014

Report of Konrad Kirlew, MD dated February 24, 2014

Report of Dr. Peter Johnson dated May 17, 2012

Report of Dr. Steven Lewis dated November 1, 2011

Report of Dr. Ann Bridgewater dated September 8, 2011

8 Patient Receipts from Rehabilitation Institute of the Caribbean dated July 15, 2014; June 23, 2014; June 27, 2014; June 18, 2014; July 3, 2014; July 1, 2014; July 10, 2014 (2 receipts);

Copy Apex health Care Associates receipts dated June 1, 2012 and march 9, 2012

Copy UHWI receipt dated may 17, 2012

Copy Winchester Global receipt dated August 9, 2011

Copy of receipt from Spanish Town hospital dated June 5, 2011

Copy of Apex X-Ray and ultrasound services receipts dated September 9, 2011, September 1, 2014, November 11, 2011, July 21, 2014

Copy of Winchester MRI Limited receipt dated February 24, 2014

Copy of receipts (3) from Dr Phillip Waite each bearing date March 13, 2012

Receipt from Dr Waite dated September 29, 2014 (addendum to medical report)

Invoice from Dr Waite dated June 9, 2014 in the sum of $158,000.00

Copy receipt from Breath Limited dated May 1, 2012

Copy of receipt from Neurodiagnostics Limited dated February 13, 2014

Receipt from Breath Limited dated May 17, 2012

Copy receipt from Dr Webster for medical report dated May 13, 2014 (from June 5, 2013, apparently incorrectly noted as June 5, 2014) in the sum of $35,000.00

2 receipts from Kimberly Powell dated January 2014 and February 8, 2014 for $31,500.00 and $3,500.00 respectively

Copy of receipts from Dick Kinkead Pharmacy dated October 1, 2013; April 7, 2014, July 4, 2014, January 21, 2014 and December 13, 2013

Copy of receipt from Winchester Global dated August 9, 2011

**[4]** The witness statement of the claimant dated November 18, 2014 and the supplemental witness statement dated December 3, 2014 were admitted as his evidence in chief after they were both identified by him.

**[5]** The claimant's evidence is that he is a landscaper and that on May 27, 2011 while he was an "on duty employee" of the defendant and in transit to a location in a motor vehicle "designated to the NSWMA" he was involved in an accident. He indicates that he heard a crash and does not recall what happened but woke up at the Linstead Hospital "feeling groggy and with excruciating pain to my neck, right upper limb, back and the left side of my body..."

**[6]** He states that he was transferred to the Spanish Town Hospital where he was admitted for two weeks after which he was referred to the Kingston Public Hospital Orthopaedic department for further treatment but due to overcrowding he decided to pursue an orthopaedic specialist privately.

**[7]** Mr. Moody also states that he visited Dr. Phillip Waite an Orthopaedic Surgeon and was referred to Dr. Dwight Webster, Consultant Neurosurgeon by which time he had begun to suffer severe depression and had flashbacks among other things and was diagnosed as having "post traumatic headaches and cognitive impairment" and was referred to a neuropsychologist, Dr. Haynes-Robinson "wherein I was diagnosed as having major depression and chronic pain consistent with ...traumatic brain injury...".

**[8]** In amplification of paragraph 4 of his witness statement dated November 19, 2014, the claimant explained the procedure he went through to have a 'halo collar' and

a ‘body armour’ fitted which he said he wore for “a couple of months” and after that was removed he had to get a neck support, which he called a “whiplash” and which he has to use when feeling pain and when standing for too long as well as “when my neck cannot manage the weight of my head”.

**[9]** In cross examination by Miss Whyte, the claimant indicated that at the time of the accident he was working with NSWMA, he used a weed whacker and was “like a labourer in a group of persons working together.” He agreed that he had no professional qualification in landscaping and indicated that he did not have any certificate to say he was qualified.

**[10]** The claimant stated that the first time he tried to work again after the accident was in 2013 when he worked in his own cookshop in which he was assisted by a friend and that he could not continue because of pain he was feeling. He could not indicate the exact date when he stopped, but stated that it was in 2014.

**[11]** Witnesses Doreen Freckleton and Tyrone Dyer gave evidence on behalf of the claimant. Ms Freckleton’s evidence is to the effect that she worked for Mr. Moody and was paid $4,000.00 which she received in cash on a Friday. She indicated that in a month she worked for him “maybe three weeks”. Mr. Dyer gave evidence that he helped Mr. Moody with transportation to his lawyer downtown and to various hospitals/doctors offices in Kingston, St. Andrew and Portmore and that he kept track of the number of times he transported him.

**[12]** Miss Johnston submitted that the claimant “gave a window into his pain and suffering and loss of amenities” as he made demonstrations to the court what had to be done in order for him to be fitted with the halo collar vest and body armour and noted that he was subjected to “this state of immobility for several months’. She stated that the totality of the circumstances, the unchallenged documented physical, psychological, emotional trauma and multi-faceted cognitive impairments make an award for general damages in the region of $10,000,000.00 to $11,000,000,00 appropriate. Counsel noted that aggravating the case is the fact that the claimant suffers from documented cognitive deficits and major depression.

**[13]** She referred to the case of **Isiah Muir v Metropolitan Parks & Markets Limited and Dennis Whyte** reported in Khan 4 page 185, where the claimant's injuries included blow to the head; laceration of left forehead; central concussion; compound fracture of the skull; headache; change of personality and undue irritability and anxiety and depression and in July 1995 an award of $1,500,000.00 was made for pain and suffering and loss of amenities which updates to $10,800,000.70 using the CPI for October 2014.

**[14]** Counsel for the defendant on the other hand, submitted that the sum of $7,000,000.00 is a reasonable award under this head of damages. She referred to the following cases:

1. **Dudley Burrell (bnf Margaret Hill) and Margaret Hill v United Protection Limited and David Lloyd Simpson** Khans 4 p. 182 where the claimant sustained injuries in a motor vehicle accident and experienced unconsciousness, periorbital swelling and a fracture of the base of his skull, his intellectual functioning was affected and was awarded $1,372,000.00 in October 1996 (CPI 41.391) which updates to $7,428,311.00 (CPI 224.1 December 2014)

2. **Marie Bryan v Yvonne Terrelonge et al** Personal Injuries Harrisons Revised Edition of Casenote N0.2 p. 48. Where the claimant, injured in a motor vehicle accident experienced unconsciousness, a swollen forehead, three loosened front teeth, abdominal pain, headaches, dizzy spells, inability to concentrate, forgetfulness and inability to work and was awarded $150,000.00 in (CPI 18.559 ) which updates to $1,811,251.00 (CPI 224.1 for December 2014)

**[16]** For pain and suffering and loss of amenities, the claimant has provided evidence to show that as a result of the accident he has suffered a permanent disability which has affected his lifestyle.

**[17]** In the case of **Dudley Burrell**, as the claimant was 8 years old at the time of the accident I am of the view it is not a good one for comparison and in the case of **Marie Bryan,** while the court found that she suffered a concussion which caused some short term memory loss, at the time of the assessment this was no longer a problem and she had a permanent partial disability (PPD) of 5-10% of her right elbow but there was no indication of any PPD of the whole person.

**[18]** I prefer the case of **Isiah Muir**, taking into consideration that that claimant suffered post traumatic epilepsy, complained of loss of consciousness on 5 occasions although he was given no PPD rating, I am of the view that the award made to him should be discounted for in relation to the case of this claimant in the case at bar.

**[19]** I have considered the physical injury itself, the pain and suffering as well as the procedures the claimant had to undergo and the effect the injury has had on the his capacity to enjoy life. This includes that fact that he was placed in a Halo cervical neck collar which he wore for eight months. I have also taken account of the frustration he has expressed and the fact that the medical reports speak to the fact that he suffered major depression and has a PPD of 8%.

**[20]** It is my view that a reasonable compensation in this case is $9,000,000.00 and I so award.

SPECIAL DAMAGES

**[21]** The claimant has pleaded a total of $2,392,000.00 in respect of special damages. This includes the sum of $58,000.00 for a “220 weed whacker damaged beyond repair in accident”, medical and transportation expenses and loss of earnings.

**[22]** Counsel for the claimant submitted that the claimant was the lawful custodian of the weed whacker and has an obligation to recover the value of same if it is damaged at the instance of another and suggested that the court in its discretion could make a conditional order “that the right owner, upon a showing of proof of ownership in the form of an affidavit or statutory declaration, have the funds turned over directly to him, by the court.”

**[23]** Counsel for the defendant indicated that the claimant had to establish that the accident caused the loss and damage in respect of the weed whacker and that the evidence of the claimant provided no nexus between the accident and the weed whacker such as to establish any tortuous liability on the part of the defendant

**[24]** I find that the claimant has failed to prove that the damages claimed in respect of the weed whacker is a result of the accident and as such I am not prepared to make an award in respect of that item.

**[25]** In relation to the medical expenses, Counsel for the defendant expressed the view that there were duplications in relation to receipts from Dr. Waite and Rehabilitation Institute. However, I find that three receipts by Dr. Waite dated March 13, 2012 indicate three separate dates of the consultations and in my view are not duplications. Additionally, although the receipts from Rehabilitation Institute of the Caribbean dated July 10, 2014 show charges for July 4, 8 and 10 and show the date of payment as July 10, only the receipts numbered 008117 and 008118 were admitted in evidence for a total of $7,000.00. The claimant has only proved the sum of $616,284.21 for medical expenses.

**[26]** For transportation expenses, I accept that the claimant made the four trips to Dr. Waite's office in Portmore at the cost of $2000.00 per trip. Additionally, I accept as true the evidence that he paid $3000.00 per trip for the outpatient visits as well as the trips in September and November 2011 for the purpose of doing the CT Scan. He proffered no evidence in relation any trips he made to his attorney's office so I will make no award in respect of that item. The sum for transportation is therefore $86,000.00

**[27]** The claimant has claimed the sum of $240,000 for helper to wash clothes. His evidence is that he had to pay $4,000.00 for the services of the domestic helper per month and that he received assistance from family members. I prefer his evidence to that of the witness Doreen Freckleton who claims that she was paid $4,000.00 weekly, on a Friday. I am therefore inclined to award the sum of $120,000.00 for 30 months at $4,000.00 per month.

**[28]** The claimant has also claimed for loss of earnings at $44,000.00 per month for 30 months. He has provided proof that he was paid by NSWMA and the letter from them indicate that his net income per month was $30,000.00. However, he has not provided any evidence to substantiate his claim in respect of overtime pay. The pay slips tendered in evidence show varying amounts which he was paid on a weekly basis and

makes no reference to overtime. While it is probable that the claimant earned from overtime work, the court is in no position to make an award as this has not been proved on the evidence.

**[29]** I will therefore make an award based on the letter from NSWMA in the sum of $1,290,000.00 being from the date of the accident to the date of trial, which is three years and seven months. I have considered the issue of the payment of taxes and I will make no deduction from this sum as it is based on his net salary.

Loss of future earnings

**[30]** I am of the view that the claimant's claim for loss of future earnings is sustainable as based on the medical evidence he has shown that there is some diminution in his earning capacity. The medical report of Dr. Webster shows inter alia, that the claimant complained of intermittent vertigo, and memory impairment (predominantly short term)

**[31]** The claimant in cross examination also pointed out that he had a memory issue and the court having seen him in the witness box accepts his evidence, although there is evidence from the occupational therapist that he could seek a job as a security guard. I note also that the claimant states that the question of seeking a job as a security guard was not discussed with him.

**[32]** In **United Dairy Farmers Ltd. v Goulbourne** (1984) 21 JLR Carberry JA stated: *"...in making awards for prospective loss of earnings the courts are not dealing with the immeasurable..., but are attempting to make an award which can be justified as a pecuniary loss that is measurable to a degree..."*.

**[33]** The case of **Gayle v The Jamaica Public Service Co. Ltd. and Anor** .SCCA111/98, unreported, delivered July 31, 2001, decided that a plaintiff was required to establish by evidence that as a result of the injury suffered by him, his physical condition has now resulted in his being unable to perform any gainful employment.

**[34]** Counsel for the defendant expressed the view that the evidence does not show that the claimant has attempted to mitigate his loss. However, there is authority that the defendant has the burden of proving that the claimant could have mitigated his loss. I

am guided by the decision in the case of **Geest PLC v Lannsiquot (St. Lucia**) 2002 UKPC 48(7 October 2002) PC Appeal No. 27 of 2001, where the issue for the Board was whether the claimant acted unreasonably in refusing surgery and therefore failed to mitigate her loss. Lord Bingham of Cornhill in delivering the judgment of the Board, at paragraph 16 of the judgment had this to say:

> *"...it should however be clearly understood that if a defendant intends to contend that a Plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the Plaintiff long enough before the hearing to enable the Plaintiff to meet it. If there are no pleadings notice should be given by letter..."*

**[35]** The defendant apart from suggesting that the claimant could have mitigated his loss has not discharged that burden.

**[36]** I find that the claimant's attempt at operating a cookshop with his friend Alrick which he said he could not continue because of the pain he was feeling, shows that he in fact sought employment.

In arriving at an award for loss of future earnings a suitable multiplier has to be found.

**[37]** Counsel for the claimant referred to the following decisions:

1. Linnette Duncan-Walker CL2002/D081(unreported) delivered April 15, 2003 where the court declined to make an award for loss of future earnings as the plaintiff gave evidence of her earnings at the time of resigning her job but gave no evidence of attempts at finding other employment, relying on the principles in Fairley v John Thompson Designs and Contracting Division Limited, [1973] 2 Lloyd's Rep. 40 and

2. **Omar Wilson v VGC Holdings Limited** Claim No. 2010 HCV 04996, delivered November 21, 2011 where the claimant, aged 30 at the time of the accident, who was found to have a 55% whole person disability and refused an offer to return to his previous place of employment on the basis that it was

physiologically tormenting to see the offending machine that had deprived him of his hand, and whose average weekly wages were determined to be $6,000.00 and the court accepted his evidence of not wanting to return to his previous workplace, made an award using a multiplier of 8.

**[38]** She submitted that as the claimant in the case at bar has shown a willingness to work, it is reasonable to use a multiplier of 12 and reduce it by 1/3 as the claimant's possibilities on the labour market have not been extinguished. She noted that as the base salary was $7,500.00 per week, not including overtime, this would amount to $320,000.00, using the formula of 52 weeks by a multiplier of 8. She asked the court to rely on the witness statement of the claimant where he speaks to averaging $44,000.00 per week based on regular overtime and make an award in the sum of $4,576,000.00

**[39]** Counsel for the defendant on the other hand submitted that the amount should be $3,120,000.00 using the net average income of $7,500.00 per week and the multiplier of 8.

**[40]** Having noted that there is no evidence to substantiate the claim for overtime, the court will not take that into consideration in calculating the award for loss of future earnings. I am of the view that the amount should be based on that which has been borne out in evidence as his average income. Using the multiplier suggested by both parties, the award for loss of future earnings will therefore be $3,120,000.00

Loss of earning capacity/handicap on the labour market

**[41]** Counsel for the claimant submitted that the case of **Omar Wilson v VGC Holdings Limited** (supra) is authority for the proposition that the claimant "is able, in the interest of justice to receive an award under the heads of loss of earnings and loss of earning capacity"

**[42]** She referred to the case of **David Mills v Smith & Stewart Mobile Corporation Limited** Claim No. 2004HCV01533, (unreported) delivered October 4, 2005.where the court, considering the case of **Campbell v Level Bottom Farms Ltd.** Khans Vol. 5 p.122-125, noted that where the claimant is able to resume employment, the correct

approach in calculating the multiplicand is to take the difference between what the claimant earned before he suffered the injury and what he is now able to earn after the disability. She noted that the court applied that approach in the case of David Mills as he had not been able to resume steady employment despite his attempts and suggested that that approach be adopted by the court.

**[43]** Counsel for the defendant, however, expressed the view that as the claimant has not provided any medical evidence to demonstrate what he can do, while it is arguable that he experienced a loss of earning capacity, any assessment would be speculative.

**[44]** Under this head of damages, the court is asked to assess the claimant's reduced eligibility for employment or the risk of future financial loss and in my view involves some amount of speculation. I find that the medical reports have not specifically addressed the issue of loss of earning capacity, but I am not of the view that there is a requirement that the claimant should produce medical evidence to "demonstrate what he can do". There is indication that there would be some diminution in his earning capacity based on the nature of his injuries as outlined in the medical reports.

**[45]** I find that in view of the circumstances of this case and based on the totality of the evidence before me, following the decision in **Kenroy Biggs v Courts Jamaica Ltd. et al** Claim N0. 2004HCV00054, unreported, January 22, 2010, a lump sum award would be appropriate in assessing the loss of earning capacity of the claimant. I will therefore make an award of $500,000.00 which in the circumstances I find reasonable.

Damages are therefore assessed and awarded as follows:

GENERAL DAMAGES for pain and suffering and loss of amenities awarded in the sum of $9,000,000.00 with interest at 3% from the date of service of the claim form to today

SPECIAL DAMAGES (for medical expenses, transportation and extra household held and loss of earnings) awarded in the sum of $2,112,284.21 with interest at 3% from May 27, 2011 to the date hereof.

Loss of future earnings $3,120,000.00 (No interest)

Loss of earning capacity $500,000.00. (No interest)

Costs to the claimant to be taxed if not agreed.