IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2009HCV01383

BETWEEN MICHAEL PASSLEY (b.n.f Mark Passley) CLAIMANT

AND SOUTH EAST REGIONAL HEALTH AUTHORITY 1ST DEFENDANT

AND THE ATTORNEY GENERAL 2ND DEFENDANT

Ms. C. Hudson instructed by K Churchill Neita & Co. for the Claimant

Ms. M. Chisholm instructed by the Director of State Proceedings for the Defendants

Assessment of damages- minor aged 18 months at date of incident – right femoral artery injury resulting from injection – subsequent amputation of 2nd to 5th toes – Quantum of damages

Heard: April 24th and June 17th, 2015.

LINDO J. (Ag.)

[1] The claim in this matter arises out of an incident in which the claimant, was taken to the Morant Bay Health Centre on July 17, 2006 for treatment due to skin rash and he received an injection of penicillin and as a result suffered injuries and "resultant amputation of the 2nd - 5th toes of the right foot and severe cosmetic deficit…"

[2] Liability is not in issue as on November 25, 2009 a defence limited to quantum was filed on behalf of the defendants and judgment on admission was entered on November 26, 2009.

[3] On April 24, 2015 Mark Passley, the father of the claimant, gave evidence that after the injection was administered to the claimant he could not stand up and that the

following day “his right foot turn black and blue and swell up...”. He states that he took him back to the Health Centre where he was examined by a doctor and sent to the Princess Margaret Hospital (PMH)from where he was transferred to the Bustamante Hospital for Children,(BHC) was admitted, and spent about three months during which time he underwent surgery to remove some of his toes. His evidence further is that the claimant was discharged from the BHC and sent back to PMH where another surgery was performed and he spent 4 days after which he had to take him to the clinic two times per week for a month “for dressing”.

[4] In cross examination Mr. Michael Passley indicated that he had to visit his son at the hospital and he incurred costs for transportation and suffered a loss of income as he worked in a hardware. He stated that he had to visited his son Mondays, Wednesdays and Fridays, “and sometimes Saturdays and Sundays” and had to spend the day. He further explained to counsel that he had to pay bus fare “from Bath to Morant Bay, Morant Bay to down town Kingston and to go up to BHC”.

[5] On behalf of the claimant it was submitted that the court should be mindful of the gravity and intensity of the injuries, the treatment undergone and the residues. Counsel also noted that significant premium be placed on the age of the claimant at the date of the injury in determining a fair estimate of damages.

[6] As a useful guide, counsel commended the comments of Rattray P. in the case of **Delmar Dixon (b.n.f. Olive Maxwell) v Telecommunications of Jamaica Limited** SCCA 15 of 1991 (June 7, 1994) where he said:

> “*In determining a proper award for a young boy in the Jamaican jurisdiction in considering the effect of an injury which as in this case causes an obvious disfigurement which is permanent and affects the injured person in terms of mobility, a court in our view may properly take into account two additional factors:*
>
> *i. The importance of athletic prowess in a culture not only in respect of games but of recreation involving movement of the body and form e.g.*

dance. The recognized phenomenon in dance hall and carnival as avenues of enjoyment and expression are well established.

ii. *The inhibiting effects of an obvious deformity particularly among young people in terms of social relationships.*

These elements may not assume such magnitudes in countries which have been subjected to wars with their aftermath of obvious scarring on numbers within the population, a feature to which its populace has become conditioned and accustomed."

[7] Counsel however noted that in the case at bar, the physical and cosmetic impairment is not obvious and can be disguised, but that this does not take away the fact that the residues are permanent. She asked the court to find that at some stage of the claimant's life he will suffer some psychological sequelae. She added that due to the traumatic events of the nature occurring at such a relatively young age where physical agility is important, she was asking the court to find that the impact on his mobility and agility is and will be compromised when compared to children of a similar age suffering from none of his disabilities.

[8] Counsel referred to the case of **Delroy O'Connor v West Indies Aluminum Company** 2006HCV03551, unreported, delivered June 1, 2010, as the only case found with injuries similar to that suffered by the claimant. She noted that the claimant in that case suffered amputation of 4 toes, spent 8 days in hospital, was unable to walk for 8 weeks, was assigned a PPD rating of 7% and was awarded $2.2m (CPI 160.70) which revalues $3,061,107.70. She submitted that the award to the claimant in the case at bar should exceed that in O'Connor's case, as the claimant spent 83 days in hospital, underwent several surgical procedures and has a myriad of abnormalities which will necessitate the use of prosthetic orthotic device to correct. Counsel submitted that an award of $5.5m would be reasonable.

[9] Counsel for the defendant Ms. Chisholm, referred the court to the following cases in assessing the general damages to be awarded:

1. **Delroy O'Connor v West Indies Alumina Company** (supra)

2. **Andrew Crawford v Tikal Limited (Trading as Super Plus Food Stores Limited**) Khans, Vol.6, page 68 where the claimant, 19, was injured on February 17, 2004 when his right foot was trapped in a malfunctioned elevator resulting in amputation of great toe. He was discharged from hospital within seven days and the stump completely healed by July 14, 2004. His prognosis was that he would be permanently impaired from the injury in his ability to participate in any activity that required speed and endurance. It was opined that the use of orthotics in his shoe could help him to be more functional on his job. He was assessed as having a PPD of 2% whole person. He was also found to have suffered PTSD. In January 2007 he was awarded general damages in the sum of $990,000.00 which updates to $2,186,821.78 using the CPI for April 2015
3. **Simmone Moore (an infant suing by her next friend Aneita Evans v Ansle Tulsie and Michael Grant** Khans Vol. 4, page 37. The claimant was injured in a motor vehicle accident on March 3, 1987 and her left leg was amputated below the knee joint. She suffered excruciating pain and prolonged hospitalisation owing to wound infection. When assessed in March 1989 she had a well healed stump with full range of movement at the knee. She complained of phantom pains in the stump. Her whole person disability was assessed at 10-12% and an award of $1.1 was made on October 4, 1996 (CPI 41.391) which updates to $5,929,066.71 using the CPI 223.1 for April 2015.

[10] Counsel submitted that the cases referred to suggest that the awards involving amputation of the lower extremity range from $2.2m (great toe) to $5.9m (amputation below knee) and expressed the view that **Delroy O'Connor** provides the most useful guideline based on the resulting injury although it is more severe than the case at bar.

[11] Counsel further submitted that having regard to the age of the claimants in **Delroy O'Connor** and **Andrew Crawford** the impact of the loss of amenity would be greater than the infant claimant who was only 18 months and not yet able to appreciate the value of the loss of amenity. She suggested that $3.5m would be a reasonable compensation.

[12] With regard to the general damages to be awarded, I find that the case of **Delroy O'Connor** is a useful guide and is the most comparable. I have considered the physical injury itself, the pain and suffering as well as the procedures the claimant had to undergo at such a tender age, and the effect the injury has had on the claimant's and will continue to have on his capacity to enjoy life. I have also considered the fact that he has been assessed by Dr. Grantel Dundas and found to have 13% impairment of lower extremity or 5% of the whole person while O'connor was assessed at 7%. I have also borne in mind that the claimant in the case at bar had a longer period of suffering and hospitalization. I therefore believe the sum awarded to O'Connor should be increased for the claimant to reasonably compensate him for his injury. I am of the view that a reasonable compensation would be $4,500,000 and I so award.

[13] Special damages were agreed in the sum of $60,000.00 as follows:

Cost of the medical report of Dr. Dundas dated September 18, 2012 **$45,000.00**

Cost of report of Hope Julal dated October 21, 2013 **$15,000.00**

Loss of earnings

[14] Mr. Passley indicated under cross examination that he earned $4,000.00 per week working at a hardware as a labourer delivering blocks, steel, cement and lumber and that he had no pay slips and no job letter to substantiate this. It is difficult for the court to make an award for loss of income in a situation where there is no documentary evidence from which calculations can be done. However, there is authority that the court has to use its own experience in these matters to arrive at what is proved in evidence: **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173**.**

[15] I have taken into account the fact that the nature of his work, he being a labourer, is such that he would not necessarily have proof of his income. I accept that during the period the claimant was in the hospital he visited him and therefore lost income on those days. I agree with the submission of counsel for the defendant that it would not have been reasonably practicable for Mr. Passley to visit his son everyday while he was in the BCH. Bearing in mind his evidence on cross examination that he visited

"Mondays, Wednesdays and Fridays and sometimes Saturdays and Sundays", I am prepared to make an award of **$16,800.00** based on the minimum wage in 2006 of $2800 per week, and allowing for forty two days.

Transportation

[16] The claimant has claimed $74,380.00 for travelling expenses. His evidence is that he paid $100/$150.00 from Bath to Morant Bay, $250.00 from Morant Bay to Kingston and he could not recall how much he paid from downtown Kingston up to the BHC. In view of the fact that I do not find on the evidence that Mr. Passley visited his son everyday while he was in the hospital, I am prepared to allow the sum $**15,000.00** for transportation.

Cost to future medical care

[17] The claimant has pleaded and provided evidence that he will require prosthetic footwear to assist with ambulation and that the current cost is **$60,470.00**

[18] Counsel for the claimant submitted that based on the medical evidence the claimant has satisfied the evidential burden for an award in relation to future medical care. She noted the life span of the device and suggested that a multiplier of 16 would have been appropriate for computing loss of future earning capacity but given that the claim is for future medical care and such an award is based on life expectancy, she suggested a multiplier of 20 and recommended that the claimant would be entitled to 13 replacements as he is now 10 years old.

[19] Counsel for the defendant in relying on the case of **Kenroy Biggs v Courts Jamaica Limited** 2004HCV00054, unreported, delivered January 22, 2010, also submitted that the multiplier/multiplicand approach be applied. She referred to the case of **Tyrone Gregory ((b.n.f Alton Gregory) & Alton Gregory v Dervan Blackstock and Richard Kerr** Suit No CL1998G098 reported in Khan Vol. 5. at page 195, where a multiplier of 12 was used for future medical and other expenses for a boy who was 12 year old at the time of the motor vehicle accident and suggested that a multiplier of 16 would be appropriate in this case.

[20] I accept the assessments of Dr. Dundas and Hope Julal that the claimant will need the recommended device to assist with ambulation.

[21] I agree with the suggestion of both counsel that the multiplier/multiplicand approach be applied to calculate the costs of future medical expenses. Bearing in mind that the life expectancy of a man in Jamaica is about 70 years and taking into consideration the fact that the claimant may not necessarily live to that age, I believe an appropriate multiplier would be 20 as suggested by counsel for the claimant. With the device needing to be replaced every 1½ -2 years this leads to about 11 replacements. The total cost of replacements allowed will therefore be **$677,264.00**

[22] Damages are therefore assessed and awarded as follows:

General damages for pain and suffering and loss of amenities awarded in the sum of **$4,500,000.00** with interest at 3% from March 26, 2009, (the date of service of the claim form) to today

Special damages awarded as follows: $**75,000.00** with interest at 3% from July 17, 2006 to today (being agreed medical expenses and transportation)

$16,800.00 for loss of earnings (no interest)

Cost to future medical care awarded in the sum of **$677,264.00** (no interest)

Costs to the claimant to be agreed or taxed.