



[2016] JMSC Civ. 49

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2009HCV02776

BETWEEN KAMAAL PITTERSON CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

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

Mrs. G. Mitchell instructed by the Director of State Proceedings for the Defendant

Heard: June 30, October 7, November 17, 2015 and February 29, 2016 & April 7, 2016

Damages – Assessment - Gunshot wound to leg necessitating amputation – Loss two fingers on dominant right hand - Pain and Suffering and Loss of amenities - Post Traumatic Stress Disorder - applicability of multiplier/multiplicand approach to replacement cost of prosthesis and for loss of earning capacity

LINDO J

[1] On April 26, 2008, the claimant, then 17 years old, was walking along the Christian Pen Road in the parish of St. Catherine with his friends when they were stopped by a police constable. Whilst alighting from the service vehicle the constable's firearm was discharged and the claimant was hit in the right leg and he sustained injuries and suffered loss and damage. He filed a claim form and particulars of claim on May 29, 2009 against the defendant alleging negligence on the part of the constable who was acting as agent or servant of the Crown.

[2] Liability is not in issue as on September 17, 2009 a defence admitting liability and limited to quantum of damages was filed on behalf of the defendant and judgment on admission was entered on September 21, 2009.

[3] At the hearing of the assessment of damages on June 30, 2015, the following documents were agreed and tendered in evidence:

- I. Medical report of Dr. R Gafoor dated October 20, 2008
- II. Medical report of Dr. Allie Martin dated August 23, 2010
- III. Medical report of Dr. Pierre Anthony-Leake, dated September 9, 2014
- IV. Medical Report of Dr. Grantel Dundas dated October 3, 2010
- V. Medical report of Dr. Wendel Abel dated January 16, 2012
- VI. Prosthetist reports of Mr. Thomas Passero dated February 7, 2011 and March 12, 2014.)
- VII. Medical report of Dr. Rory Dixon, dated May 5, 2014

[4] The sum of US\$560.00, as well as JA\$2,422,410.21 was agreed as special damages.

[5] The witness statement of the claimant dated May 11, 2012 and the supplemental witness statement dated September 23, 2014 were admitted as his evidence in chief and he was subject to cross examination.

[6] On November 17, 2015 at a further hearing, the prosthetist report of Mr Thomas Passero dated and July 29, 2014 was admitted into evidence with the proviso that paragraph (iv) relating to the estimated cost of the sum of the major components of the Helix type prosthesis was excluded.

Submissions of Counsel for the Claimant

[7] With regard to the assessment of general damages for pain and suffering and loss of amenities, Ms Hudson urged the court to be mindful of additional factors apart from the general principles. She noted that Rattray P. in **Jamaica Telephone Co. Ltd. V Delmar Dixon (bnf Olive Maxwell)** SCCA 15/91 (June 7, 1994) urged the court to take into account the importance of athletic prowess to young persons and the effects of disfigurement on them, bearing in mind the claimant's age, the nature and extent of the injuries and the treatment undergone.

[8] Counsel referred to the following cases:

- i. **Trevor Clarke v National Water Commission, Kenneth Hewitt and Vernon Smith** C.L. 1993 C 71 (25.10.2001) Khan, Vol. 5 page 21 the plaintiff aged 54 at time of accident, had his foot smashed in a motor vehicle accident. He was hospitalised for 2 weeks initially, his right foot was amputated and a second amputation was done as the wound was not healing satisfactorily. He was an outpatient of the hospital for 7 months. He assessed as having a 36% permanent partial disability. He was awarded \$3m (CPI 60.4) which updates to \$11,538,079.47
- ii. **Owen McKenzie v The A.G. of Jamaica** Claim No. CL 2001/M181 where the claimant was awarded \$6m in December 2007(CPI 116.8) after having suffered gunshot wounds to both thighs resulting in above knee amputation of the right leg. He was assessed as having 36% PPD of the whole body. The sum awarded updates to \$11,933,219.17
- iii. **Orville Lovelace v Gary Anderson & The A.G. of Jamaica** Claim No.2007HCV00145, unreported, delivered May 26, 2011. He suffered significant fracture injuries to his chest, right shoulder and arm and both lower limbs and underwent several surgical procedures. He had a combined whole person disability of 36% and an award of \$20m was made on May 26, 2011(CPI 171.0) which updates to \$27,169,590.64
- iv. **Mary Hibbert v Reginald Parchment** Khan, Vol. 5, page 191 who was awarded \$900,000.00 in May 1999 (CPI 49.54) having suffered a gunshot injury to the abdomen, undergone colostomy surgery and having to wear a colostomy bag for four months. The award updates to \$4,220,226.07
- v. **Michael Jolly v Jones Paper Co. Ltd. & Anor.** Khan, Vol. 5, page 120. He suffered lacerations to his hand and fingers, underwent surgery and was assessed with 7% PPD of the whole person and was awarded \$800,000.00 in November 1998 (CPI 48.82). This updates to \$3,806,636.62
- vi. **Kenton Hutchinson v Sunny Crest Enterprise Ltd.,** CL1999/H017 unreported, delivered October 19, 2001 where the claimant suffered amputation of three fingers of his dominant right hand and was assessed as

having a whole person impairment of 25%. An award of \$1.4m was made in October 2001 (CPI 60.4) which updates to \$5,384,437.08

[9] Counsel submitted that based on the cited cases and the principles governing the assessment process, an award of \$25,000,000.00 for general damages would be appropriate.

Submissions of Counsel for the defendant

[10] Mrs. Mitchell referred to the cases of **Trevor Clarke** and **Owen McKenzie** as being useful guides, in addition to the following:

1. **Delroy Parchment v Superintendent Brooks & Ors** Khan, Vol. 6, page 39 where the claimant sustained fracture to his right leg and lacerations over his body and was taken to hospital and then to the lock up where he was in pain and an ulcer developed on his right leg and when he was taken to the hospital his leg had to be amputated. The doctor found that there was a penetrating wound to the anterior aspect of the upper leg with exposed bone. He had crepitus and gas gangrene of the right leg which was malodorous and in a decomposed condition. He spent two months in hospital. He was awarded \$2,000,000.00 in June 2002 (CPI 62) for pain and suffering and loss of amenities which updates to \$7,493,548.38 (CPI 232.3 December 2015)
2. **Percival Swaby v Metropolitan Parks and Markets**, Harrison's Assessment of Damages, 2nd Edition, page 299 where the claimant suffered injuries resulting in the amputation of both legs, above the knee; the judge found that there was no question that he must have been in severe pain. He was assessed with a whole person impairment of 72%. In March 2004 (CPI 75.4) he was awarded \$7,300,000.00 which updates to \$22,490,583.55
3. **Icilda Lammie v George Leslie**, Harrison's Assessment of Damages 2nd Edition, page 291. The claimant lost all phalanges of her left index and middle fingers and had a 3 inch laceration running through the left palm proximal to the amputated fingers and in September 1989 (CPI 5.06) was awarded \$35,000.00 which updates to \$1,606,818.18

4. **Marva Protz-Marcocchio v Ernest Smatt**, Khan, Vol. 5, page 284. In this case the claimant was bitten by dogs and suffered physical as well as psychological injuries. She was diagnosed as having severe PTSD and associated phobic response. In October 1993 (CPI 21.41) she was awarded \$100,000.00 for PTSD. This updates to \$1,085,007.00
5. **Angelita Brown v Petroleum Company of Jamaica**, Khan, Vol. 6, page 174 This claimant suffered severe burns and resulting psychological injuries and was diagnosed with major depression and PTSD and in April 2007 (CPI 102.9) she was awarded \$340,000.00 which updates to \$767,560.73

[11] Counsel noted that in the case of McKenzie, he was shot in both legs, spent 5 months in hospital, was re-admitted and surgery was again performed. He spent a further 6 weeks in the hospital whereas the claimant in the case at bar had a shorter stay in hospital and no subsequent infection developed, while in the case of Swaby, it is evident that he suffered more severe injuries than the instant claimant as both legs were amputated. She therefore suggested that an award of \$10,000,000.00 is reasonable for general damages.

[12] In relation to the injury to his fingers, Counsel for the defendant submitted that an award of \$1,000,000.00 be made. She compared the injury to that suffered by Icilda Lammie, noting that Lammie's entire left index and middle fingers were amputated. Additionally, she pointed out to the court that Dr Dundas stated that the claimant was able to write and perform most functions with his right hand, despite the amputations.

[13] For Post Traumatic Stress Disorder (PTSD) Counsel suggested that an award of \$500,000.00 be made based on the report of Dr Abel who indicated, *inter alia*, that the claimant appeared well turned out and his emotional expression was of normal range and intensity. She also noted the fact that the claimant waited three years before going to see the psychiatrist and expressed the view that if he had sought treatment earlier this could have reduced the degree of his psychological injury.

[14] The court notes that a number of the cases referred to by both Counsel can offer some assistance in assessing damages in relation to the physical and psychological

injury suffered by the claimant. The significant injuries and resultant disability, and the effect of that disability on Clarke were somewhat similar to those of the claimant in the instant case. Clarke suffered an open fracture of the lower third of the right tibia, an initial amputation above the right knee and then a further amputation after the onset of gangrene and he purchased an “artificial leg” but was unable to wear it as it pained when he put it on.

[15] I note that the injuries suffered by McKenzie are different from those of the claimant in the case at bar as he was shot in both thighs. He, however, had an above knee amputation of the right lower limb. I also find that in the case of Lovelace, while he was able to ambulate without prosthetic device and was able to do light duties when he resumed work, the claimant in this case is unable to ambulate independently and also suffered the loss of two fingers on his dominant right hand. Additionally, Lovelace underwent more surgical procedures than the claimant in the case at bar.

[16] The case of Lammie I find is useful in treating with the issue of the injury to the claimant’s fingers and is therefore a useful guide in that regard in the assessment of damages in respect of Mr. Pitterson’s injuries.

[17] In relation to his psychological injury, I found the cases of **Protz-Marcocchio** and **Angelita Brown** cited by Counsel for the defendant useful as both claimants, like the claimant in the case at bar, were diagnosed with PTSD.

Pain and suffering and loss of amenities

[18] Mr. Pitterson said that his “right foot felt heavy and numb and was bleeding heavily” at the time of the incident. He was not in pain then, but during his stay in the hospital he was “feeling pain over [his] body, especially in the area where the wound is. The pain was more where the wound had to be dressed...” He also indicated that the use of the crutches blistered his hands and caused pain under his arm. He spent a total of three months in hospital and wore a colostomy bag for fourteen months.

[19] He is no longer able to go about as he was used to. He cannot play football or community cricket and no longer enjoys swimming at Hellshire which he said he did regularly before the incident. It is obvious that the loss of the two fingers on his dominant right hand has affected him in that he is now quite dependent on other persons to assist him despite the great effort he has made to do domestic chores for himself. Additionally, the court noted that the claimant is quite conscious about his hand as he tried to conceal it by covering it with a handkerchief.

[20] In seeking to arrive at an award for pain and suffering and loss of amenities, the court adopts the following dictum by Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481:

“the amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the claimant’s general damages”.

[21] I also bear in mind the reservations expressed by the Privy Council with respect to comparing awards. According to Lord Causwell in **Supersad v Persad and Anor.**, (2004) 64 WIR 378 at 385:

“...the Board entertain some reservation about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparison is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms...”

[22] Due to the age of the claimant, I am also guided by the Court of Appeal decision in **Delmar Dixon (bnf Olive Maxwell) v Jamaica Telephone Company Limited** supra, where the court noted the importance of athletic prowess to young persons and the effects of disfigurement on them.

[23] 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 his capacity to enjoy life, as the incident took place when he was seventeen years old. This includes the fact that having undergone colostomy loop surgery, he had the inconvenience of wearing a colostomy bag for fourteen months and spent a total of three months in hospital, a part of which time was spent in intensive care, as he was deemed critically ill, with the onset of septicaemia.

[24] I have also taken account of the frustration he has expressed and the fact that the medical report of Dr. Wendel Abel states that he “meets the criteria for major depression and exhibits prominent symptoms of Posttraumatic Stress Disorder (DSM IV)” and the report of Dr. Dundas states, *inter alia*, “...The combined impairments of the upper and lower extremity amount to 50% of the whole person.”

[25] I am of the view that for general damages for pain and suffering and loss of amenities an award of \$18,000,000.00 would be reasonable in the circumstances and I so award.

[26] Using the cases referred to as guides, and taking into consideration the fact that Dr Abel was of the view that the claimant’s emotional expression was of normal range and intensity and he was seen some three years after the incident, I find that the sum of \$400,000.00 would be reasonable compensation for PTSD.

Handicap on the labour market/loss of earning capacity

[27] Under this head of damages, the claimant has to provide evidence, however tenuous it may be, for the court to make an award, as the court is being asked to assess his reduced eligibility for employment or the risk of future financial loss.

[28] The claimant states that he was about to take examinations. He had not yet entered the labour market and he does not have a skill. His evidence is that he intended to join the Jamaica Defence Force or become an auto mechanic.

[29] Counsel for the claimant submitted that the claimant is entitled to an award under this head, noting that the fact that he was a student at the time of the incident and had not yet entered the labour market, is not a bar. She traced the history of such an award from the case of **Moeliker v Royrelle and Company Limited** [1977] 1WLR 132 where Brown LJ had said “this head of damage only arises where a claimant is at the time of trial in employment” and noted that as the jurisprudence developed in this area, it is now settled law that the claimant need not be in employment at the date of trial/assessment to be entitled to an award.

[30] Relying on the case of **Kiskimo Ltd. V Deborah Salmon**, SCCA No. 61/89, *Harrisons’ Assessment of Damages*, 2nd Ed., page 187, where the respondent, a 13 year old schoolgirl suffered severe brain damage as a result of severe trauma to the head, Counsel submitted that the multiplier/multiplicand approach is best suited to compute the claimant’s loss under this head of damage. She indicated that in the absence of evidence of the income of the claimant, the court has used the National Minimum Wage as the minimum sum which the claimant can earn.

[31] Counsel noted that this approach was used in **Mark Scott v Jamaica Pre-Pack Ltd**, CL 1992/S279, *Harrisons’ Assessment of Damages for Personal Injuries*, page 284 and **Monex Limited and Derrick Mitchell v Camille Grimes**, SCCA No. 83/96, delivered December 15, 1998, and asked the court to accept the sum of \$5,000.00 as the multiplicand.

[32] With regard to the multiplier to be used, Counsel recommended a multiplier of 14 years, based on the Rough Guides as to multiplier as set out in the case of **Godfrey Dyer Derrick Dyer v Gloria Stone** (1990) 27 JLR 268. She indicated that the claim under this head would be \$3,640,000.00 (i.e \$5,000.00 X 52 weeks X 14 years.)

[33] Counsel for the defendant pointed out that at the time of the incident the claimant was a student and that he dropped out of school and did not resume until November

2011. She expressed the view that his injuries did not prevent him from continuing with his education. In the absence of evidence of what the claimant is likely to earn, she also submitted that the minimum wage should be used as the multiplicand and suggested that a multiplier of 14 be used given the claimant's age.

[34] It is clear on the evidence that the claimant's disability is a factor which would determine his level of employment, in addition to the fact that he was unable to finish school. It is my view that the multiplicand/multiplier approach is appropriate in assessing an award for handicap on the labour market in this case. I also find that a multiplier of 14, as suggested, is appropriate in the circumstances.

[35] Using the minimum wage of \$5,000.00 per week (as it was in 2012, a time at which the claimant would have been likely to be on the labour market) as the multiplicand with the multiplier of 14, I find that an appropriate award under this head is **\$3,640,000.00**.

Costs to future Prosthesis

[36] Counsel for the claimant submitted the claimant is entitled to an award for future prosthesis which would assist him to better ambulate, noting that this is a position recommended by Dr G. Dundas. She noted that he was seen by Mr. Passero, Certified Prosthetist on January 31, 2011 who provided an estimate of the cost of the most suitable prosthesis for him. She further submitted that the multiplier/multiplicand approach is best suited for computing this head of damage as well, and that in assessing the appropriate multiplier, the claimant's life expectancy must be considered. Counsel indicated that, as the claimant is now 24 years, the multiplier would have to be adjusted as the loss to be computed is that of future medical, which is tied to life expectancy. She therefore suggested that the approach of Sykes J. in the case of **Kenroy Biggs v Courts Jamaica Ltd. & Peter Thompson**, Claim No.2004HCV00054, unreported, delivered January 22, 2010, be adopted. In this case the multiplier for a 25 year old male was increased to 22. She asked the court to accept a multiplier of 22 and noted that using the "rounding off" principle as in the case of Biggs, this would result in four replacement prosthesis.

[37] Mrs. Mitchell, Counsel for the defendant noted that there was no evidence before the court to form a basis for comparison between the local prosthesis and the one from overseas and submitted that the cost for the local one should be awarded. She indicated that if the court did not agree it should be noted that there are about four reports from Mr. Passero. She noted the estimated life span of the prosthesis stated by Mr Passero and his indication that in relation to the major components “these components will likely last longer, depending on use, care and maintenance to reach an average life span of 5-7 years” and asked the court to consider the age of the claimant, and recommended that the cost of 3 replacements sockets calculated at US\$13,000.00 each be allowed.

[38] Counsel also submitted that the claimant has produced no evidence in relation to his claim for airfare and accommodation having claimed \$150,000.00, and indicated that the sum of \$100,000.00 is reasonable. She therefore proposed that a total of US\$91,835.30 be awarded in respect of the cost of prosthesis, cost of replacement sockets and components and cost of therapy and the sum of JD\$100,000.00 for airfare and accommodation.

[39] With regard to the prosthesis, Mr. Pitterson’s evidence is that the prosthesis he received from Mona Rehabilitation Centre was heavy and even in using it, he still had to use crutches. He also indicated that he would wish to get the prosthesis from overseas, “so I can feel independent...”

[40] The medical evidence discloses that he had his right lower extremity “disarticulated at the hip with a very irregular skin contour and surgical lines...” and there was “amputation through the bases of the middle phalanges of the second and third digits of the right hand...”. Dr. Dundas strongly recommended that he should have hip disarticulation prosthesis provided which might lead to independent ambulation and better self image.

[41] I accept the recommendation of Dr. Dundas that “In view of Mr. Pitterson’s age and physical status it is strongly recommended that he should have hip disarticulation prosthesis provided ...” and it is clear that he has serious difficulty ambulating. I also

accept the recommendation of Mr. Passero, who indicates that the claimant “will need a custom silicone liner as an interface to protect his skin and minimize discomfortwould derive significant benefit from the multi axial “Helix” hip system from Otto Bock, an appropriate knee control system, as well as an articulating ankle and foot for additional stability...”

[42] I have placed reliance on the reports of Mr Passero in particular the report dated July 29, 2015 which provides some clarification and explanation of the contents of previous reports. According to Mr. Passero, in this report, the cost of the entire Helix type prosthesis is US\$62,638.00 and it has an estimated lifespan of 5-7 years. He further states that “the estimated life span of the major components,... specifically the Helix hip joint, the microprocessor controlled knee (C-leg) and foot are all warranted for 3 years by the manufacturers. These components will likely last longer, depending on use, care and maintenance, to reach the average lifespan of 5-7 years”

[43] Mr Passero has explained that all prosthesis are divided into two main components which are the socket and the mechanical components which in this case consist of hip joint, knee, shin, ankle and foot as well as the connective hardware and cosmetic cover. He has noted that “the socket may need to be replaced within the first 6-18 months.... After that possible, but not certain replacement,...socket will last from 3 -7 years and the cost of such socket replacement is approximately US\$13,000.00”.. He also stated that the estimated cost of training is US\$1,200.00, consisting of 12 “1 hour” sessions, at US\$100.00 per hour session.

[44] Based on this report, I find that the average life span of what is described as the major component parts i.e the mechanical components, is 6 years. I also note that the replacement cost of \$13,000.00 for the socket as stated, is when the socket alone is replaced and that the socket may need to be replaced on average every 5 years. Taking into consideration the fact that the component parts have an average

lifespan of about 5-7 years depending on use, care and maintenance, the socket “will last 3-7 years...” and the complete device inclusive of the component parts have a lifespan of 5-7 years, I am of the view that a reasonable approach would be to allow for the replacements of the entire device.

[45] Using the multiplier/multiplicand approach and following the principle that the multiplier for cost of future care is to be significantly higher than that used for calculation of future earning, I will use the multiplier of 22. When this is divided by the average lifespan of the entire prosthetic device it is 3.6 which will be “rounded off” to 4. The total sum for the prosthesis will be for the initial prosthesis and the replacements which amounts to \$250,552.00. I will also allow the sum of US\$1,200.00 for training in the use of the device.

[46] The claimant has not provided any evidence to satisfy me on a balance of probabilities that he will need to go overseas to be fitted with the prosthetic device so notwithstanding the suggestion by Counsel for the defendant that the sum of \$100,000.00 is reasonable, no award will be made in relation to his claim for air fare and accommodation. Additionally, I will make no award in respect of future mental health care as no evidence was led in relation to this.

Special damages:

[47] With regard to the claim for the cost of **extra help** at \$3,000.00 per week for the period August 1, 2008 to June 30, 2015, the claimant has provided evidence that his grandmother hired someone (Ms. Bromfield) to help to look after him and to wash his clothes.

[48] It has been submitted by Counsel for the defendant that the amount has been “thrown down” and she has recommended a sum of \$2,000.00 per week until the date of judgment, as reasonable. I accept the claimant as a witness of truth and I find that it is necessary for him to get assistance based on his level of disability. Taking into

consideration that the minimum wage as at August 2008 was \$3,700.00 weekly, I find that the sum of \$2,500.00 is quite reasonable. I will therefore make an award at the rate of \$2,500.00 per week. This will be for the period August 1, 2008, the date he was discharged from the hospital, to the date of judgment, as I am of the view that he will continue to need assistance at least until he is fitted with the device to assist him in ambulating independently. This amounts to **\$992,500.00**.

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

General damages -

For pain and suffering and loss of amenities the sum of **\$18,000,000.00** with interest at 3% from June 1, 2009, the date of service of the claim form, to April 7, 2016

PTSD **\$400,000.00** (no interest)

Handicap on the labour market **\$3,900,000.00** (no interest)

Special damages awarded in the sum of **US\$560.00** and **J\$2,422,410.21** (inclusive of costs for transportation) with interest at 3% from April 26, 2008 to April 7, 2016

Costs to future medical care:

Cost of initial prosthesis	US\$62,638.00
Cost of replacements	US\$187,914.00
Cost of training	US\$1,200.00
Total	US\$251,752.00

Extra Help **\$992,500.00** (up to April 7, 2016) (no interest).

The claimant is entitled to costs which are to be taxed, if not agreed.