



[2015]JMSC Civ. 65

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2010 HCV 06026**

BETWEEN	CALVIN ROWE	1st CLAIMANT
	EVERTON BAILEY	2nd CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	1st DEFENDANT
	SHELDON JAMES	2ND DEFENDANT

ATTORNEYS: Ms Christine Hudson instructed by Churchill Neita and Company for the Claimant. Ms. M Chisholm for the State Proceedings.

HEARD: 26th of February 2015 and 26th of March 2015 & 27th March, 2015

Assessment of Damages, dislocation of right hip, callus fracture of left distal radius, right sciatic nerve palsy, fracture of right superior ramus, fracture of right iliac crest fracture of acetabulum with sciatic nerve damage.

SHELLY-WILLIAMS J, (Ag)

BACKGROUND

[1] This is an assessment of damages, liability having already been determined in favour of the claimant against the Defendant. The circumstances giving rise to this assessment are that on the 2nd of December 2008 the claimants were travelling in a taxi along Luana main road in the parish of St Elizabeth when the second defendant, the agent/servant of the crown overtook a line of cars and collided with the said taxi.

[2] The Attorney General is sued by reason of the crown proceedings Act. As a consequence of the accident the first claimant who was 45 years old at the time of the accident suffered dislocation of right hip, right acetabulum fracture, callus type fracture of left distal radius, multiple abrasion to limb and tranck, right sciatic nerve palsy. The second defendant suffered fracture of acetabulum with sciatic nerve damage, fracture of right superior ramus, fracture of the right iliac crest.

CALVIN ROWE

[3] According to the evidence contained in the medical report of Dr Curtis Thompson, the claimant suffered the injuries listed above. According to the medical report of Dr. Grantel G Dundas, Consultant Orthopaedic Surgeon, this claimant was taken to the Black River hospital after the accident and from there he was transferred to the Mandeville hospital. A below elbow cast was applied to his left wrist for distal radial fracture. A tibial skeletal traction pin was then inserted, and weight applied for right hip dislocation. After three weeks the cast for the left wrist was removed, and the fracture stabilized using Kirschner wires. A further month passed and then the hip was approached surgically with removal of the skeletal traction and open reduction and internal fixation of the right acetabular fracture. He was discharged home at the end of eight weeks.

The doctor's report was in the following terms;-

[4] Past medical history, His past history is hypertensive and was diagnosed as such at admission at the Mandeville hospital. He developed osteomyelitis of the left humerus as a child with repeated episodes of abscess formation and discharge of sequestered bone. This followed on a blunt injury to his elbow as a child. He has had many courses of antibiotics for this ostemyeletic bone but there have been no surgery interventions for that. Examination by Dr Dundas revealed a quiet man of medium build. Mucosae were fair. His respiratory system was unremarkable.

[5] In addition the cardiovascular system his pulse was 86/minute, regular, with a blood pressure of 189/97. Jugular venous pressure was not elevated and he had no peripheral odema. There was a soft systolic murmur at the left sternal edge.

[6] In the abdomen he was tender in the right iliac fossa with some induration. There was 20cm oblique scar over the iliac crest starting from the anterior axillary line and ending up at the public symphysis. The anterior superior iliac spine landmark on the right was indistinguishable.

[7] He had 1.5cm of apparent shortening of the right extremity. He had a 32° flexion contracture of the right hip and could flex to 60° compared to 90° on the left.

Current status;-

1. The left wrist has only marginal symptoms. It tends to feel a bit numb when the time is cold but there is no pain otherwise.
2. The right hip makes clicking and chucking noises. He has tenderness in the right groin and thigh. Hip movements are stiff. The right foot often swells. The toes are weak and he is unable to dorsiflex the ankle. The right lower extremity feels short. He still requires the use of single crutch full time as the right lower extremity is too weak to take his weight.

Impairment

Computation of residual impairment is based on the American Medical Association Guides to the Evaluation of Permanent Impairment 6th Edition. There is a twenty one percent (21%) whole person impairment.

[8] It was the opinion of Dr Dundas that the 1st claimant was not a candidate for surgery as the outcome of the hip replacement would result in the same residues as that which currently obtains.

GENERAL DAMAGES

[9] The submission of the counsel for the 1st claimant is that the sum of \$11.5-\$12 million should be awarded in relation to general damages. To support her submissions she supplied the case of **Desmond McLean v Yorkwin Walters and Anor.** [Suit No.CL1987/M087 (Cor: Patterson J.) Damages assessed November 9, 1989] this case involved a Sgt. of Police, 39 years old at trial, who was injured in a motor vehicle accident on 27th May 1979. Injuries – unconsciousness severe fracture dislocation of left hip; fracture of shaft of left humerus; small cuts in face and head. His hip fracture was reduced and plaster cast applied to the left arm. He was placed in traction and confined to bed with the left arm suspended. He could only move if assisted. He could not wear clothing up to two weeks before his discharge. His arm cast was removed after two months. Traction lasted 3 ½ - 4 months. He had a second operation to reduce hip and was discharged in a wheel chair. Later he used crutches. He resumed duties in early 1980. He had out Patient treatment and physiotherapy. He could not wear regulation Boots provided by the force or the cummerbund as it caused pain.

[10] With no recurrence of bone formation his whole person disability could be put at 6%. He was unable to swim or fish and his sex life was affected. The special damages awarded were \$23,465.00 and the general Damages were \$201,000.00 of which \$190,000.00 was for Pain and Suffering and Loss of Amenities, with interest. When revalued the general damages would amount to \$8,217,408.10. In the McLean case the disability was 6% whilst the claimant in this case had a 21 % whole body disability.

The counsel for the 1st claimant also submitted the case of **Eric Buchanan v Elias Blake SCCA 2** of 1993. The injuries suffered in the case of **Blake** were personal injuries and resulting disability (plaintiff/appellant)

1. Fracture of right Sacro-iliac joint with dislocation [Acetabulum (cup) was fractured and his allowed for dislocation of the joint].
2. Rupture of Ligaments – not practical to repair the torn ligament in the joint.
3. Weakening and flexion deformity 5 degrees.
4. Internal rotation restricted by 15 degrees.
5. 1 cm loss of muscle bulk.

6. Permanent Partial Disability of right lower extremity assessed at 12%.
7. A high probability of the development of osteoarthritis in the joint and lower back which the Doctor expected to show up around the age 45. Physiotherapy was recommended to mobilised the joints.

[11] Dr. G.G. Dundas F.R.C.S. who gave evidence at the trial suggested an alternative method of treatment either total hip replacement or fusion of the joint with preference for the former as this would remove hip pain completely. However the artificial hip would place limitations not now existing e.g. He could not jump, run, stoop, or squat or take part in active sports other than golf or swimming. Cost of surgery was estimated at \$100,000.00. The general damages awarded in October 1992 were \$400,000 which revalues to \$5,226,822.00.

[12] Counsel for the Director of State Proceedings who was representing the defendant in arguing general damages submitted some cases that were useful. These cases are:

1. ***Naaman Smith v Venley Williams & Leson Munroe*** [Suit No. C.L. 1996 s 301] delivered November 9, 1999¹; and
2. ***Sandra Minot v Master Blends Feeds Co. Ltd et al*** [Suit No. C.L. 1998 M056] delivered May 27, 1999²

[13] In the ***Smith*** case, the claimant suffered injuries consequent to a car accident. These injuries are not exactly the same as those suffered by the instant claimant. Mr. Smith also was treated in hospital with traction and underwent surgery. He suffered a different injury to his hip and was assessed as having 29% whole person impairment. General damages for pain & suffering and loss of amenities was assessed at \$1,300,000.00. applying the CPI for February 2015, this award updates to $(221.5/52.426 \times 1,300,000)$ \$5,492,503.72

[14] In the ***Minott*** case, the claimant suffered a fracture of the right acetabulum and

Inferior pubic ramus as well as periorbital hematoma, right subconjunctival hemorrhage and a cerebral concussion. A reduction of her hip was performed at hospital and she was placed in traction thereafter. She also underwent surgery to remove bony fragments within the space of the hip joint. She was discharged on crutches after being in hospital for approximately a month. As a result of other injuries other than that sustained to hip which included sciatic nerve injury of a type different than that suffered by the instant claimant, she was assessed as having 26% whole person impairment. General damages were assessed at \$1,400,000.00. This award updates to $(221.5/49.542 \times 1,400,000)$ \$6,259,335.51. The sum suggested for general damages by the defendant is \$6 million.

[15] The defendant is suggesting a reduction of the general damages due to contributory negligence as the claimant was not wearing his seat belt. This was not part of the decision on the issue of liability and as such I will not reduce general damages based on contributory negligence.

[16] I have considered both submissions and the cases accompanying them and find that the cases most on point with regards to the injuries of the claimant are **McLean** and **Minott**. I have taken into consideration that in the case of **Minott** the whole body impairment was higher than the injuries of Mr. Rowe. In the case of **McLean** the whole body impairment is less than the claimant's but the injuries appeared to be greater than those of the claimant. I would averaged the sums awarded in both cases and award the sum of \$8,000,000.00.

Special Damages

Agreed sum

The sum of \$82,400 was agreed in relation to special damages which covered the medical expenses of Mr. Rowe.

Travelling expenses

[17] The sum of \$21,000 was pleaded and there was evidence given in support of this by the claimant. There are no receipts provided in relation to this sum but there some expenses that do not lend themselves to receipts. The claimant gave evidence that he had to take trips to the doctor on a number of occasions. He gave evidence that he paid \$500.00 for each trip to the doctor after the accident although he paid \$120.00 prior to the accident.

[18] Counsel for the defendant argued that there is no evidence to support the claim that he visited the Mandeville hospital on 32 occasions as an outpatient. In these circumstances, the 1st Defendant submits that this claimant ought to be restricted to pleaded sum of \$8,000 under this head.

[19] This sum pleaded on the further Amended Particulars of Claim for travelling expenses is \$21,000.00. I find the sum being claimed is not unreasonable. Although there is no direct evidence as to the amount of times the claimant attended the doctor there is evidence of his constant attendance at the hospital for treatment and to attend for physiotherapy. I will award the sum of \$21,000 to the claimant under this head.

Extra help/helper

[20] In relation to this claim the evidence of the claimant is that due to the accident he had to hire someone to take care of him for which he paid \$2,000 per week for one year. Under cross examination he indicated was the extra help was for 6 weeks but then under re-examination he then went back to a one year period. Counsel for the defendant argued that there is no specific medical evidence that he required extended care for a year counsel argued that in addition in cross examination, the claimant's evidence is that he paid the sum of \$2,500 per week for six weeks. It was only after paragraph 29 of his witness statement was read to him on re-examination that he indicated that he paid a helper for one year.

[21] No receipts were produced in support of this claim however the nature of the injury and the evidence of the claimant and the doctor would indicate that he would have required assistance after the accident. I am not satisfied that he would have required help for one year and I will award a sum for half of the year which is \$52,000.

Loss of Earnings.

Counsel for the claimant concedes that the claimant did not produce sufficient evidence to satisfy the court as to the sum pleaded.

Handicap on the labour Market

[22] Counsel for the claimant in her submission is claiming the sum of \$1 million which amount to four years the minimum wage as the potential loss of earning of the claimant. In cross examination the evidence of the claimant is that he cannot do any job since the accident and the he is maintained by family members. Counsel for the defendant submitted that his inability to work is not supported by his medical evidence. Further, there is no reason why he could not continue to work with “Swaby” as a team. The Defendant submits that the medical evidence does not award under this head and the claimant was at all material not at risk to be thrown on the labour market having had a steady job.

[23] I have examined the medical report of Dr Dundas and he indicated that as it relates to the daily activities that the claimant cannot bend forward or lift anything heavy and that he is unable to do household chores effectively. He however went on to state in his medical report that as Mr Rowe is right handed the impairment to his left wrist will not prevent him from painting. He also stated that although the injury to his hip would significantly affect his ability to climb ladders or stairs, he would be able to work exclusively at floor level once he was not required to stoop, bend or carry heavy items.

From the evidence of the claimant he is in considerable pain at this time even though the accident was 2008 and that he is unable to work. I will award the sum of \$525,200 which is two years of salary utilizing the minimum wage 5,050 per week.

EVRTON BAILEY

[24] The 2nd claimant suffered the following injuries, fracture of acetabulum with sciatic nerve damage, fracture of right superior ramus, fracture of the right iliac crest. The 2nd claimant's had a hip surgery by way of open reduction and internal fixation. The period of rehabilitation was protracted extended for eight months as he returned to work, nine months post surgery. The 2nd claimant was seen two years after the accident by Dr Dundas. The doctor after examination of the claimant found that he had irregular bony thigh of right iliac wing, 2.5 mid lateral scar to thigh, 25 degree flexion contracture of right hip, 40 degree internal rotation, 25 degree internal rotation, weak hip adductions, reduction sensation along the right side, restricted range of movement of the ankle. Radiographs confirmed fracture of note the fracture of the right acetabulum to be mildly displaced. The 2nd claimant impairment was 25% of the whole person.

[25] The 2nd claimant according to the doctor was likely to progress to sever post traumatic arthrosis which makes him a candidate for hip replacement. A successful surgery would result in eliminating the flexion contracture of 25% and reduce the current impairment to 17% whole person. A successful implant would relieve the claimant of his pain.

General Damages

[26] The submission of the counsel for the claimant is that the case of **Desmond McLean** could be instrumental in assessing the award the claimant should be awarded. The injuries of the claimant were greater than the claimant in the case of **Desmond McLean** and that the court should award the sum of \$10.5 million as general damages.

Counsel for the defendant submitted that the sum to be awarded is \$5-7 million based on the fact that he had major chest injury.

[27] Having reviewed the case of **Desmond Mclean** the whole body impairment was 6% whilst in this case it is 17%. The injuries in the case of **Desmond McLean** were higher than in this case. I would award the sum of \$7.5 million as general damages.

Special Damages

The parties had agreed the sum of \$115,847.05 to cover medical expenses. The parties also agreed the sum of \$2,005,150 for cost of future medical care.

Travelling expenses.

[28] The sum of \$41,000.00 is being claimed by the claimant under this head. The defendant acknowledges that although there are no receipts that an award can be made for travelling expenses. Counsel for the defendant however argued that the sum of \$41,000 was excessive and the sum of \$20,000 should be awarded. This is a claim that does not lend itself to producing receipts. Having examined the evidence of the claimant, the medical reports and the procedures the claimant had been required to undertake the sum of \$41,000 will be awarded.

Loss of Income

[29] The claimant prior to the accident was employed to a number of pharmacies. There were letters admitted into evidence to support this evidence. The claimant has argued that the defendant has not challenged the authenticity of the letters submitted in support of the claimant's income, nor have they challenged that the claimant returned to work 9 months post injury.

[30] Counsel for the claimant has conceded that the sum claimed represent the gross earnings and as such is subject to statutory deduction. The sum being claimed is

(i)	Kandu Pharmacy	-	\$216,000.00
(ii)	Rite Care Pharmacy	-	\$320,000.00
(iii)	St. Bess Pharmacy	-	\$320,000.00
(iv)	Superior Care Pharmacy	-	<u>\$424,000.00</u>
Total		-	\$1,280,000.00
Less 25%		-	<u>\$ 320,000.00</u>
			\$ 960,000.00

Counsel for the defendant argued that the sum awarded should be adjusted for income tax and other deductions amounting to approximately 30%

Having reviewed the evidence submitted which included not only the evidence of the claimant but also the letters from the different pharmacies confirm that the claimant was working for the pharmacies and shows his loss of income. I will award the sum of \$960,000 for loss of income which is the net income.

Conclusion

Calvin Rowe

- (1) General Damages - \$8,000,000.00 with interest at a rate of 3% per annum from 7/12/2010 to 27/3/2015
- (2) Special Damages \$155,400 with interest at a rate of 3% per annum from 2/12/2008 to 27/3/2015
- (3) Handicap – on the open market \$525,400
- (4) Cost to be agreed or taxed

Everton Bailey

- (1) General Damages – \$7,500,000.00 with interest at a rate of 3% per annum from 7/12/2010 to 27/3/2015 at 3%

(2) Special Damages \$1,116,847.00 with interest at a rate of 3% per annum from
2/12/2008 to 27/3/2005

(3) Future medical care \$2,005,150.00

(4) Cost to be agreed or taxed.