

*Judgment Book*

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. CL 2001/S – 124**

**BETWEEN            VINCENT SCHOBURGH            CLAIMANT  
AND                    MICHAEL FLETCHER                FIRST DEFENDANT  
AND                    ROBERT FLETCHER                SECOND DEFENDANT**

**Mr. Norman Samuels for claimant**

**No appearance for defendants and defendants not appearing**

**June 25, July 27 and September 23, 2004**

**Sykes J (Ag)**

**ASSESSMENT OF DAMAGES: PERSONAL INJURY**

Mr. Vincent Schoburgh, the claimant, was struck from his bicycle while he was riding along the Long Road main road in the picturesque parish of Portland. He does not recall much more other than that he woke up in the Port Antonio Public General Hospital. He was hit down on January 27, 1996.

The sole issue here is quantum of damages, judgment having been entered against both defendants.

It is appropriate to point out at this stage that I have relied to some extent on the testimony of Miss Desrine McKenzie, sister of the claimant. She gives more detail about her brother's earnings, life

before the accident and current disability. The reason is that the claimant does not now seem to have a clear recollection of much of the events surrounding the accident or even life beyond the accident. For example he cannot recall how much he earned from the National Water Commission. He does not recall purchasing any medication yet his sister has testified that she purchased drugs for him. Dr. Dundas' report, set out below, bears out the claimant's apparent lack of memory.

### **A. The nature of the injuries sustained**

He injured his back, side and hand. He also suffered internal injuries.

Five medical reports were put in evidence. The first is from Dr. M Yee Sing from the hospital in Port Antonio, Portland. The second is from Dr. Nyi Nyi Than from the Kingston Public Hospital (KPH), the third from Mr. K Williams from the Department of Surgery at KPH the fourth was from Dr. Paul Scott and the fifth was from Dr. Grantel Dundas.

### **Dr. Yee Sing's report dated March 15, 2001**

Dr. Yee Sing's report covers the claimant's initial hospitalisation at the Port Antonio Hospital and his further hospitalisation after he was discharged from KPH. She reports

- (a) tenderness in the lower abdomen. Guarding and rebound tenderness;
- (b) tenderness on the springing pelvis and a haemotaoma in the suprapubic area;
- (c) tenderness on the moving left hip and tenderness over sternum and neck;

- (d) laceration to the left leg which was swollen in the distal 1/3;
- (e) bruises to the right elbow and forehead;
- (f) intra-abdominal injury, fractured pelvis and soft tissue injury to neck and lower left leg;
- (g) rectal examination initially was negative but later examination showed rectum was blood stained and offensive;
- (h) he was diagnosed as having intra abdominal injury, fractured pelvis, soft tissue injury to neck and lower (L) leg;
- (i) the pelvic fracture was confirmed by x rays done at KPH

**Dr. Nyi Nyi Than's report dated April 3, 2001**

This doctor saw the claimant in 1996. His report shows:

- (a) tenderness over anterior chest;
- (b) abdomen was mildly distended with tenderness over the supra pubic area with crepitation over the right flank and upper right quadrant;
- (c) tenderness over the pelvic bone;
- (d) x ray showed marked diathesis of pubic symphysis and diasthesis (sic) of the right sacroiliac joint;
- (e) an exploratory laparotomy was done and a pelvic haematoma was found. An external fixation was placed on the pelvis.

**Mr. K. Williams' report dated June 1, 2001**

- (a) on admission to KPH on January 31, 1996 the claimant had a temperature of 102.4F;
- (b) mildly distended abdomen with marked tenderness and guarding over the right lower quadrant and over the symphysis pubis;
- (c) large laceration in the anal/rectal area;
- (d) at surgery the surgeons found a very large retroperitoneal haematoma that filled the whole pelvis and extended up the anterior abdominal wall. A loop colostomy was done;
- (e) began hallucinating on February 4, 1996. He was rehydrated and restrained. By February 9, 1996 he was lucid and coherent in time, place and person;
- (f) he developed severe hypertension, acute pulmonary oedema, heart failure and acute renal failure;
- (g) he developed a clot in his left common femoral vein and was treated with anticoagulant;
- (h) there was an upper gastrointestinal bleeding;
- (i) he was eventually discharged on April 19, 1996 and at the time of his discharge he walked with much difficulty.

**Dr. Paul Scott's report dated June 30, 2002**

Dr. Scott is a pulmonologist. He saw the claimant on May 4, 2002. The report contains one inaccuracy. It states that the accident occurred in 2001 but the evidence is that it took place in 1996.

Apparently the reason why the claimant saw Dr. Scott was because he complained of chest pains associated with dyspnoea. After examining him and taking his blood pressure the doctor concluded that the claimant had uncontrolled hypertension, hypertensive heart disease, incipient cardiac failure and ischaemic heart disease.

A chest x ray done at Eureka Medical Ltd on May 4, 2002 showed that Mr. Schoburgh had an enlarged heart. Also the claimant had a history of smoking. He stopped smoking in 1991. The report of Dr. Williams suggests some link between the development of heart disease and the accident. However it is not clear what is meant when he said that the claimant developed "severe hypertension, acute pulmonary oedema, heart failure and acute renal failure". Is he saying that these conditions developed while Mr. Schoburgh was in the hospital or is he saying that the injuries precipitated these complications? The evidence is not clear and in accordance with the burden of proof I will not take these conditions into account.

**Dr. Grantel Dundas' report dated August 2, 2001**

Dr. Dundas saw Mr. Schoburgh on August 23, 2001. This was five years after the accident. He noted that

- (a) there was a 23cm midline scar extending from the epigastrium to the pubic area;
- (b) multiple punctate scars over both iliac crests. These were the places where an external fixator was used to re-approximate his pelvis;
- (c) an 11cm scar which was the sight of his colostomy;

- (d) no palpable asymmetry of the pelvis;
- (e) there was a 2cm of deficit in the right thigh circumference and calf circumference with a negative Hohman's signs;
- (f) straight leg raising was restricted to 75 degrees bilateral and a Lasegue Test was negative bilaterally;
- (g) reflexes were normal;
- (h) power in the Extensor Digitorum longus on the right was a grade four on a scale of 0 – V;
- (i) radiographs or x rays showed
  - i. fracture of the left ischial tuberosity was fractured and healed with mild misalignment;
  - ii. 2cm diastasis of the pubic symphysis;
- (j) lumbar spinal alignment was satisfactory but there was marked sclerosis of the L4/5 pedicles. This indicated that possibility of a healed fracture of the pars interarticularis at L/5;
- (k) left hemi sacralisation of the fifth lumbar vertebra.

Dr. Dundas' examination included the central nervous system. There was no detectable motor sensory deficit when the upper extremities were examined.

He found that Mr. Schoburgh did not know his birthday and important national anniversaries. He did not recall the month or year he was in at the time of the examination. His conversation was otherwise coherent. There was no obvious slurring of speech. The eye movements

were symmetrical. There was a 2cm oblique lateral scar over right external jugular vein. Lateral flexion was restricted in that there was a one third loss of range.

There were other injuries that are not noted here. Dr. Dundas' conclusion from all this was that Mr. Schoburgh was severely injured. He had not fully recovered at the time of the examination which took place five years after the accident. In all probability the claimant would not fully recover from the injuries. The injury to his pelvis left him with a 6% disability of the whole person. Dr. Dundas had recommended that a neurological and/or psychological evaluation should be done. This recommendation was not followed.

### **Evaluation of the medical evidence**

The medical evidence is consistent with Mr. Schoburgh receiving very very severe injuries. He had not only broken limbs but internal injuries as well. This was evidenced by the necessity of having to live with a colostomy for some time.

Dr. Dundas' report is very important. It was done some five years after the accident. At the time of the examination he found no neurological deficit in the upper extremities. If this is correct that it does seem strange that Mr. Schoburgh and his sister could testify that he (Schoburgh) had such great difficulty doing simple things such as feeding himself. There was no further neurological examination of Mr. Schoburgh after Dr. Dundas saw him in 2001.

Mr. Schoburgh testified that after the accident he could not use a wrench. Using a wrench requires the use of the upper extremities. Why

was he not able to use a wrench when Dr. Dundas who saw him in 2001 said he had no neurological deficit? Could it be that the blow to the head that he received at the time of accident has had some unknown effect on him? The suggested neurological and/or psychological evaluation suggested by Dr. Dundas was not done. There is now no evidence showing or capable of showing whether Mr. Schoburgh's ignorance his birthday and national anniversaries was caused by the accident.

Mr. Schoburgh said that since the accident he had a stroke. The reports make no attempt to connect the stroke with the accident.

### **B. The nature and gravity of the resultant injuries**

He has been unable to ride a bicycle since the day of the accident. He says that his two knees "tremble" and his back hurts. Sometimes he feels "giddy". Mr. Schoburgh says that he can no longer stay in the sun for any length of time because the sun causes his head to hurt him. None of the things mentioned so far happened to him before the accident.

His foot can no longer be moved as before. He has lost the use of his left hand. Dr. Dundas' report indicated that at least in 2001 when he saw Mr. Schoburgh there was no neurological reason for this. Mr. Schoburgh said that before the accident he could use his left hand. He worked as a plumber for the National Water Commission and he was also a cultivator. His trembling knees and weak left hand have caused him to give up these vocations.



### **C. Pain and suffering**

Mr. Schoburgh stated that since the accident his back has been hurting him. If he sits down for a long time his back pains him. His left foot has been paining him as well. Miss McKenzie testified that her brother experiences terrible back pains from time to time.

### **D. Loss of amenity**

He has lost the pleasure of riding his bicycle. He cannot walk to the village green to enjoy the keen sporting competitions between the young men and women of the village. He has been denied the ability to walk unaided. At times even a cane is insufficient. His sister said that after her brother came out of hospital she had to do everything for him. She had to hold his hand to steady him on his feet so that he can walk. She bathes him and at times she even has to feed him. To quote Wooding CJ in *Cornilliac v St. Louis* (1965) 7 WIR 491 "for [Mr. Schoburgh] therefore, much of the fun and sparkle has gone from living."

His sister says that he spent six months at KPH after spending two weeks in the Port Antonio Hospital. Miss McKenzie's memory seems to be fading here. The report of Mr. Williams is that Mr. Schoburgh was admitted to KPH on January 31, 1996. The accident is reported to have occurred on January 27, 1996. How then could she have visited him for two weeks while Mr. Schoburgh was in the Port Antonio Hospital? She recalls this because she visited him at both hospitals. While he was at KPH she visited him three times per week. When she first saw him in the Port Antonio Hospital he was unconscious. Is she exaggerating or

is she confusing his hospitalization at Port Antonio before he went to KPH with his subsequent hospitalization post KPH? I will give her the benefit and say that she is confusing the two periods of hospitalization.

### **E. Damages**

The claimant was a small farmer in addition to being a plumber. At this stage he cannot recall with much clarity how much he earned from each of his activities. That evidence comes from his sister Miss Desrine McKenzie. According to her she and her brother have been living on the same land for quite some time.

I will deal first with special damages. I observe the lack of receipts for some expenditures. While I could over look the absence of receipts from the taxi operator with whom he traveled to get medical treatment I would have expected that the receipts from the hospital and other health care professionals would have been tendered in evidence.

#### **(a) Special Damages**

##### ***Medical and related expenses***

There is a bill from Dr. Dundas in the sum of JA\$11,000. The sum pleaded was JA\$9,500. Only this sum is recoverable. Receipts totaling JA\$10,500 from Dr. Paul Scott were tendered in evidence. This is not recoverable because it was not specifically pleaded. The medical report and fees from the Port Antonio Hospital were paid for. This is supported by receipts totaling JA\$1750. There is no receipt to support the expense at the Kingston Public Hospital in the sum of JA\$3,500 and so this is not recoverable.

Because of his injuries a pair of crutches had to be purchased at JA\$1250. Colostomy bags were bought for JA\$250. These sums are not recoverable. They are not supported by receipts. As stated previously one would expect receipts to be tendered in support of these items.

The claimant was transported to and from his health care providers. There are no receipts from the taxi operator who provided this service. According to Miss McKenzie she spent in all JA\$10,400. This is the cost of taking her brother from Belle Castle in Portland to KPH and back. He was also taken to the Port Antonio Hospital.

### ***Loss of pretrial earnings***

There is evidence that Mr. Schoburgh was employed by the National Water Commission (NWC) as a turn cock. It is said pleaded that his salary was JA\$2,500 per week. His sister testified that it was JA\$1750. She said that she saw his pay slip. I accept her testimony on this point. The loss of pretrial earnings as a turncock was JA\$2,500 at 124 weeks. Since the sum proven was JA\$1750 I will use this figure. The pretrial loss of earnings are JA\$217,000.

Mr. Schoburgh was also a farmer. Many of our farmers are either not very literate or not literate at all. It does not appear that Mr. Schoburgh is an exception. Consequently I would hardly expect him to have receipt books supporting this item of special damages. According to his sister he would earn approximately JA\$3,850 per week. This sum is made up in this way: five bunches of bananas at JA\$250 each; three bundles of cane at JA\$300 each and four bunches of bananas at JA\$200 each. This sum is not recoverable because he pleaded that he earned JA\$3,000

per week from his farming. The maximum recoverable therefore is JA\$3000 per week. The pretrial loss of earnings as a farmer was pleaded at JA\$3,000 for 276 weeks. This gives a total of JA\$828,000. This is recoverable.

## **(b) General Damages**

### ***Pain, suffering and loss of amenity***

Mr. Samuels submits that a sum of JA\$7,000,000 for pain, suffering and loss of amenities is appropriate for this case. He adds that I should award JA\$1,300,000 for loss of future earnings. Are these sums justified?

The first case cited by him was ***Mark Smith v Roy Green and Dennis McLaughlin*** (Suit No. C.L. 1994/S175) found in Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Jamaica* Vol. 4, 118. In that case the sum awarded for general damages for pain, suffering and loss of amenity was JA\$3,000,000. The assessment was done in November 1995. The Consumer Price Index (CPI) at the time was 832.8. The CPI in July 2004 was 1872.8. Thus the updated value of the award is JA\$6,746,397.69. In that case the injuries were quite severe. He had

- i. injury to left thigh;
- ii. injury to large intestine requiring colostomy;
- iii. extensive loss of skin and soft tissue injury of left lower leg quadrant of abdomen, left buttock, perineum, genitalia and anus;
- iv. degloving injury to left lumbar area;
- v. laceration of both legs;

- vi. damage to left sciatic nerve;
- vii. laceration of urethra and rectum;
- viii. laceration and contusion of bladder requiring cystosomy;
- ix. multiple fractures of pelvis with dislocation of sacroiliac joint;
- x. fracture of left ilium;
- xi. fracture of iliopubic and ischio pubic rami.

The claimant underwent treatment for two and one half years after the accident and was left severely handicapped. The more severe injuries there were

- a. Injury to large intestine requiring colostomy;
- b. Damage to left sciatic nerve;
- c. Laceration of urethra and rectum;
- d. Laceration of bladder requiring cystosomy;
- e. Multiple fractures of pelvis with dislocation of sacroiliac joint;
- f. Fracture of left ilium; and
- g. Fracture of iliopubic and ischio pubic rami.

All this points to severe injury to the pelvic region of the body. When ***Smith's case*** (already cited) is examined further there is the surprising omission of any mention of any whole person disability. I do not know whether it was omitted from the report or there was no evidence of it. The closest that it gets to the issue of any permanent disability is that it says that after 2 ½ years treatment the plaintiff "was left severely handicapped." I say all this to say that I do not accept Mr. Samuels'

figure of JA\$7,000,000 for general damages even though I accept **Smith's** case as a guide in this case.

The next case cited was **Iris Edwards v Samuel Owen McDonnough** (Suit No. C.L. E. 054 of 1997) Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Jamaica* Vol. 5, 159. The brief report in the text says that there was no permanent disability as a result of the injuries and that "4 – 6 months from the date of the accident should be an adequate period for recovery." Clearly then the injuries in **Edwards** were not as severe as that suffered by Mr. Schoburgh. The value of the case however is that it gives a floor from which one can climb upwards. The assessment was done in March 1999. The sum awarded for general damages was JA\$1,300,000. The CPI at the time was 1182.5. The CPI for July 2004 is 1872.8. The current value of the award is JA\$2,058,892.17.

The third case relied on was that of **Suzette Campbell v Wilbert Dillon** (Suit No. C.L. 1999/C267) Khan, Ursula, *Recent Personal Injury Awards Made in the Supreme Court of Jamaica* Vol. 5, 50. The report indicates that the claimant was fully recovered at the end of four months but complained of occasional pain in the right hip and at extreme of hip movements. It was thought by the doctors that she would be at risk of developing osteoarthritis. She had a permanent partial disability of 10% of the whole person disability. Again the value of the case is that it provides some kind of minimum from which one can move to find an appropriate award in this case. The general damages awarded there was JA\$1,370,000. The assessment was in

June 2000. The CPI then was 1404. The CPI in July has already been stated. The current value of the award is JA\$1,827,447.29.

The assessment process involves and evaluation of the subjective and objective factors. The subjective factors involve the effect of the injuries on the claimant and the objective factor is the injury itself (see ***H. West & Sons Ltd. v Shephard*** [1963] 2 All ER 625). Additionally loss of good health is the loss of something of intrinsic value (see ***Rose v Ford*** [1937] 3 All ER 359 per Lord Roche at page 379E). There can be no doubt that Mr. Schoburgh received severe injuries. Equally there is no doubt that his quality of life has been badly affected. His ordeal was painful and embarrassing (colostomy). There is a 6% whole person disability. Dr. Dundas indicated that in all probability the claimant will not recover from his injuries. I also take into account that Dr. Dundas did not find any evidence of neurological disorder five years post accident. This contrasts sharply with the testimony of the claimant and his sister that he was unable to use his upper limbs to feed himself. No other report touching on the neurological status of the claimant was submitted. I also take into account the absence of any evidence indicating whether the claimant's memory was affected by the accident. Having regard to Dr. Dundas' report I have concluded that the claimant and his sister have exaggerated the impact of the injuries on the upper body of the claimant. The award I make will be discounted to make allowance for this conclusion.

I believe that a sum of JA\$4,500,000 is appropriate for Mr. Schoburgh's injuries taking into account the objective and subjective

factors, his loss of amenity, pain and suffering as well the exaggeration of his condition already mentioned.

***Loss of future earnings***

Haynes C has explained in ***Heeralall v Hack Bros. (Construction Co. Ltd)*** (1977) 25 WIR 117 the method of calculating this head of damages. I will rely on this judgment in this case. The medical evaluation from Dr. Dundas is consistent with the claimant's evidence that since the injury he is unable to engage in riding his bicycle and to engage in farming. The claimant is unable to work with the NWC as a turncock. He is now unable to earn from either farming or plumbing.

I will use the multiplier/multiplicand method. The claimant was born in 1950. This makes him 54 year old. There is no evidence of the retirement age of the NWC. However I will use the age of 65 as the retirement age. Therefore the claimant had at least another 11 years of work before retirement assuming no mishaps. I will use the figure of JA\$1750 as the income from the NWC. The claimant has proven that he earned JA\$3,850 per week from farming. However the statement of claim pleaded JA\$3000. Therefore his total weekly income is therefore JA\$4,750. His annual income is JA\$247,000. Mr. Samuels has suggested a multiplier of 5 years.

According to ***Heeralall*** (already cited) I must take account of two factors (a) the loss of earnings is being awarded now as a lump sum rather than being earned over a period of time and (b) contingencies might have arisen that might have reduced the earnings. The usual way of reflecting these concerns is by altering the multiplier and not the



multiplicand. Bearing in mind these factor and having regard to the multipliers used as indicated by Ursula Khan in her *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica, Vols. 4 & 5* a multiplier of 5 does seem appropriate The award therefore is JA\$1,235,000.

### ***Loss of earning capacity***

The courts have repeatedly said that loss of future earnings and loss of earning capacity are two different things. In many instances the claimant is usually working at the time of trial. However I have not found anything in the case of ***Moeliker v Reyrolle*** [1977] 1 All ER 9 that says that such an award can only be made if the claimant is working at the time of the trial. I have not found any authority that says this award is so restricted. Usual does not mean only. There is no compelling logic to prevent such an award in appropriate cases. This is one such case. The claimant simply has been handicapped on the labour market. No one can seriously contend that he would be, at this point, be a serious contender in the labour market. I therefore make a lump sum award of \$150,000.

### **Conclusion**

The awards for the injury to Mr. Schoburgh are:

(a) special damages

medical and related expenses JA\$11,250 with interest at 6% from date of accident to September 23, 2004.

loss of pretrial earnings is JA\$1,045,000 – no interest

(b) general damages

pain, suffering and loss of amenity – JA\$4,500,000 with interest at 6% from date of service of the writ to September 23, 2004.

loss of earning capacity - \$150,000 – no interest.

loss of future earnings - JA\$1,235,000 – no interest.

Costs to the claimant to be taxed.