



[2017] JMSC Civ. 143

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 03496

BETWEEN	BARRINGTON BARNES	CLAIMANT
AND	GARETH DALEY	DEFENDANT

IN OPEN COURT

Danielle Archer instructed by Kinghorn and Kinghorn for the Claimant

Defendant unrepresented

Heard: 11th May, 2017 Delivered: 10th October, 2017

Personal Injury – Assessment of Damages – Pain and Suffering - Handicap on the Labour Market – Future medical expenses – Claimant amputee hit off bike.

BERTRAM LINTON, J

BACKGROUND

[1] On the 3rd January, 2014, Mr Barrington Barnes was involved in an accident when he was traveling along the Hellshire Main Road in Saint Catherine. At the time, Mr Barnes was riding a motorcycle heading towards Greater Portmore when a car being driven by Mr Gareth Daley overtook another vehicle and collided into Mr Barnes who was thrown from his motor cycle into nearby bushes.

[2] Mr Barnes was taken to the Spanish Town Public Hospital where doctors assessed that he suffered a grade 3B compound fracture of the distal 3rd of the right femur,

a grade 3C compound fracture of the distal 3rd of the right femur and mangled right ankle and foot. He was advised he would have to undergo a below the knee amputation as his right foot could not be saved.

- [3] Mr Barnes was released from hospital on the 27th February, 2014 and was advised to walk with crutches. He was treated with analgesics and antibiotics and was to return for clinic review within a week. When reviewed in clinic on the 7th March, 2014, he was assessed as having no pain in his right thigh and amputated stump. The wounds were fully healed. He was advised to maintain regular clinic follow ups.
- [4] On the 21st July, 2014, Mr Barnes filed a claim against Mr Daley. Mr. Daley could not be found and as such, the court ordered substituted service so that Mr Barnes could serve the defendant's insurers, Advantage General Insurance Company. They did not defend the claim. Having proved that the initiating documents were served on the insurance company, default judgment was entered against the defendant on 5th June, 2015.
- [5] The matter has now come up for assessment and this will be the sole consideration for the court.

CLAIMANT'S CASE

- [6] The claimant submitted that having regard to the case of ***DeSouza v Trinidad Transport Enterprise Ltd & Nanan (No.1) [1971] 18 WIR 138*** the court is to assess damages by examining the nature and extent of the injuries, the gravity of the resulting physical disability, the pain and suffering endured, the loss of amenities suffered and the extent to which the claimant suffered actual pecuniary loss.

- (1) Pain and Suffering

- [7] The claimant has asked the court to consider three cases, ***Richard Rubin v Saint Anns Bay Hospital & Another*** claim number CL 1987 R 206 (delivered January 26th, 1999), ***Oswald Espeut v K. Sons Transport Limited et al*** claim number CL 1992 E 043 (delivered June 6, 1997) and ***Lealan Shaw v Coolit Limited & Another*** claim number CL 1991 S 109 (delivered July 26, 1995).
- [8] In ***Richard Rubin***, the claimant sustained a compressed fracture of T7/T8. He had no resulting PPD. He was awarded \$3,000,000.00 in damages which updates to \$13,624,798.06. It was argued that since Mr Barnes had an amputation, his case is more severe than that of ***Rubin***.
- [9] In ***Oswald Espeut***, the claimant underwent above knee amputation. He was assessed as having PPD of the right leg of 80%. He was awarded the sum of \$1,501,360.20 which updates to \$8,253,677.56. It was also submitted that Mr Barnes' injuries were more severe even though he had a below knee amputation.
- [10] ***Lealan Shaw*** had multiple injuries which resulted in functional impairment of his right lower limb. He was assessed as having 70% impairment and was awarded \$1,500,000.00 in damages. This updates to \$11,417,410.10. It was submitted that this amount could be increased to fit the circumstances of the present claimant.
- [11] The court has been asked to award the claimant \$13,000,000.00 in damages for pain and suffering

Handicap on the Labour Market/ Loss of Earning Capacity

- [12] The claimant argued that the court should consider the case of ***Andrew Ebanks v Jephther McClymont*** Claim number 2004 HCV 2172 (delivered March 8, 2007) in which Sykes J outlined the three methods used to calculate damages for handicap on the labour market. Based on that case, the three methods are (1) the multiplier/multiplicand method, (2) the lumps sum method and (3) increasing the sum for pain and suffering and loss of amenities to include an unspecified sum for loss of earning capacity. In relation to the third method, the Court of Appeal, in

Campbell and others v Whyllie (1999) 59 WIR 326, outlined that such a method of calculation is not accepted. It was however noted that there are no guidelines which determine how a particular method is to be selected.

[13] It was submitted that the claimant is able to claim damages for handicap on the labour market based on his circumstances. The court was asked to consider the case of ***Richard Rubin*** who received \$150,000.00 for damages under this head. This award updates to \$681,239.90 and the claimant has asked that ***Rubin's*** award be increased to \$1,000,000.00 as Mr Barnes' injuries were much greater.

[14] Since the claimant has indicated that he cannot work because of his injuries, it was submitted that he is entitled to a lump sum award \$1,000,000.00 as damages for handicap on the labour market.

(2) Special Damages

[15] The claimant acknowledged that the law requires him to specifically plead and prove the sums claimed as special damages.

(a) *Medical Expenses*

[16] It was submitted that the claimant had to spent \$79,000.00 on pins for his leg. Even though he was not able to produce the receipts for this expense, he has asked the court to grant him this cost as a reasonable expense in the circumstances. It was further argued that the claimant spent \$47,000.00 for medical reports; for which he has provided the receipts.

[17] As such, the court has been asked to granted the claimant a total of \$126,000.00 as damages for medical expenses incurred.

(b) *Transportation Expenses*

[18] The claimant submitted that he ought to be reimbursed for the transportation costs which he incurred while injured. He submitted that this was clear on the evidence

and as such he ought to receive \$10,000.00 as costs for transportation even though he is not able to specifically prove this fact.

(c) *Cost of Future Medical Care*

[19] It was submitted that since Mr Barnes has given evidence that he needs a prosthesis, he is entitled to an award for future medical expenses so as to purchase and attach a prosthesis, maintain it, replace it when necessary and to do adjustments if needed. The court has been asked to calculate this award by using a multiplier of 8 years so as to arrive at a reasonable sum. The multiplicand would be the bare cost of the prosthesis plus its maintenance.

[20] He has relied on the medical report of Dr. Dixon. Based on this report, the court has been asked to note:

- i. The cost for prosthesis locally is **US\$1,500.00**
- ii. Maintenance of the prosthesis could cost between JA\$5,000.00 – JA\$15,000.00 per adjustment. It was suggested that Mr Barnes may need at least four adjustments per year. Therefore, in applying the multiplier of 8, the cost for adjustments could range between **JA\$160,000.00 – JA\$480,000.00**.
- iii. Dr Dixon also suggested that Mr Barnes could need two socket changes; each of which cost JA\$40,000.00. Therefore, the sum of **JA\$80,000.00** ought to be considered for socket changes.
- iv. The prosthesis may require replacement every four to six years. As such, if replacement were required twice in his lifetime, the cost to do so would be **US\$3,000.00** over the eight-year period.
- v. The cost for a high activity prosthesis is **US\$20,000.00**. This would allow him to play sports such as football which he did before his injury.

- vi. The activity prosthesis would also require replacement every four to six years. If replacement was done twice in Mr Barnes lifetime, the cost to do so would be **US\$40,000.00**.
- vii. Transportation costs to enable Mr Barnes to complete adjustment of his prosthesis four times a year at a cost of three thousand dollars per visit for eight years would total **JA\$96,000.00**.

[21] As such, the claimant has asked that the court to grant him US\$64,500.00 for installation and possible replacement of his prosthesis plus a maintenance sum of between JA\$240,000.00 - JA\$560,000.00 as well as JA\$96,000.00 for transportation.

(d) *Cost*

[22] In reliance on part 65 of the Civil Procedure Rules, the claimant has submitted that the court ought to award cost in the sum of \$80,000.00. In so doing, the court would save its resources as it would prevent the further continuation of the case in discussing the matter of costs.

ISSUES

[23] The issues for the court's consideration are:

- i. What amount, if any, is to be awarded for pain and suffering and loss of amenities;
- ii. What, if any, award is to be granted for handicap on the labour market;
- iii. What amount of special damages has the claimant proved and if not proven can he still recover these costs; and
- iv. What amount is reasonable for future medical care.

ANALYSIS

A. *Pain and Suffering*

[24] Mr Barnes suffered the following as disclosed in the medical report of Dr. Jithendra Vijayendra dated 28th April, 2014:

“Grade 3B compound fracture of distal 3rd of right femur.

Grade 3C compound fracture of distal 3rd of right femur:

Mangled right ankle and foot.”

[25] After being admitted into the hospital on 3rd January 2014, Mr Barnes spent one month and twenty-four day in the hospital. During this time, he underwent:

“hemodynamic resuscitation and wound care in the emergency department

Below the knee amputation and ORIF of right femur with K nail on 4th January 2014

wound debridement of the right thigh on 14th January 2014

exchanging nailing with fixation nail and bone grafting on 24th February, 2014

he was treated with analgesics and antibiotics.”

Even after being released from the hospital on the 27th February, 2014, Mr Barnes had to continue his medical treatment with follow up appointments in the clinic. Based on Dr. Vijayendra assessment, Mr Barnes had 80% lower extremity impairment and 32% of the whole person as at the 28th April, 2014.

[26] Dr. Rory Dixon saw Mr. Barnes on the 27th January 2016 and found that his amputated stump was not tender to touch and that he was fully ambulant. He also noted that Mr Barnes had normal range of motion of his right hip and knee and a 7-degree valgus deformity. Dr Dixon assessed Mr Barnes as having lower limb impairment of 75% and 25% of the whole person. In assessing Mr Barnes' need for prosthesis, Dr Dixon noted that persons with below the knee prosthesis would require about 25% more effort to use it.

[27] In considering all of the above, I will rely on the following cases to make a determination on a reasonable amount of damages that is to be award in the circumstances:

- a. ***Luna Pitter v Linford Clarke and Marlon Hamilton*** claim number 2006 HCV 02454 (delivered May 20, 2008) – Ms. Pitter suffered a compound fracture to the left leg and a dislocated right sternoclavicular as a result of being involved in a vehicular accident. Doctors attempted to restore use of her foot with the use of skin grafts but her foot would not heal and as such a below the knee amputation was advised and completed. She was assessed as having 70% impairment of the lower extremity, 10% impairment to the upper limb and 32% impairment to the whole person. She received \$5,500,000.00 for pain and suffering which now updates to \$10,474,960.90 using the consumer price index for august 2017. I believe that her injuries are more severe than those of Mr Barnes since she had both lower and upper extremity impairment. Also her recovery time was significantly longer having regard to the fact that her doctors attempted skin grafts which did not heal and later amputated her foot which later healed over time.
- b. ***Gregory Hamilton v Courtney Burnett*** claim number 2001 H 144 (delivered December 1, 2003) – Mr Hamilton sustained trauma to the right lower limb and shoulder. An amputation was performed. He remained in hospital for three weeks. He was assessed as having 70% impairment to his lower extremity and 28% to the whole person. He received \$2,500,000.00 in damages which updates to \$8,228,532.79. In considering the length of time Mr Hamilton spent in hospital and his injuries, I find that his case is slightly less severe than that of Mr Barnes even though this is a disparity of 3% between the impairment to the whole person suffered by the two men. Mr Barnes' recovery time was longer and he spent a longer time in the hospital.

c. **Joseph Frazer v Tyrell Morgan & Trevor Corroll** claim number 1999 F 031 (delivered 2. June. 2000) - In this case, the claimant was involved in an accident in which his left foot was crushed. He was diagnosed with grossly comminute displaced fracture of the left tibia and fibula in the midshaft. He had to undergo a below knee amputation. His disability was assessed as being 80% of the lower extremity and 32% of the whole person. He was awarded \$2,000,000.00 for pain and suffering which would now updates to \$8,930,471.47 using the consumer price index for august 2017. I am of the view that Mr Barnes' injuries were more severe even though his resulting permanent partial disability is slightly lower that of Mr Frazer. This I have found as Mr Barnes had more injuries to his leg than Mr. Frazer.

[28] Having considered the cases, I find that Mr Barnes' injuries and rate of healing were far less severe than that of the claimant in **Luna Pitter**. However, I find that his injuries are slightly more severe than those presented in the cases of **Joseph Frazer** and **Gregory Hamilton**. As such, I believe that Mr Barnes' award ought to be lower than that of Ms Pitter but higher than that of Mr Frazer. I have also had regard to the fact that Mr Barnes is now without the use of his right foot and he is obviously disadvantaged by that. As such, he cannot run or play football as he would before, he has to rely on the help of others and he cannot move as freely as he used to. Therefore, I will award Mr Barnes \$9,500,000.00 as damages for pain and suffering as I find that this is a reasonable sum when placed in the context of the cases.

B. *Handicap on the Labour Market*

[29] In the case of **Andrew Ebanks v Jephther McClymount**, Justice Sykes noted that there were two approved ways of determining an appropriate award for damages for handicap on the labour market/loss of earning capacity. These are the multiplier/multiplicand approach and the lump sum approach. In relation to selecting the appropriate method he noted that:

From the cases, the principles that can be derived in order to determine which method is used are as follows. In setting out these principles I shall also address the third objective which is, the factors that determine the size of the award, particularly if the lump sum method is used:

- a. If the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low (Ashcroft v Curting; Gladys Smith v The Lord Mayor);*
- b. If the claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending, of course, when this loss is seen as likely to occur. The size of the award may be influenced by time at which the risk may materialize. Admittedly, this is a deduction from what Lord Denning said in Cook v Consolidated Fisheries;*
- c. It seems that if the claimant is a high income earner the multiplier/multiplicand method may be more appropriate. This latter point seems to be a principle that is emerging from the Jamaican case of Cambell v Whyllie. This proposition is derived from my attempt to reconcile Campbell and Consolidated Fisheries. Both cases are very close in terms of the actual evidence before the court, the main difference being the earning power of the medical doctor vis a vis a young man working on a trawler and then later a lorry driver.*
- d. The lump sum is not arrived by reference to and comparison with previous cases (Nicholls v National Coal Board);*
- e. If the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found by the job is very likely to be less well paying than the pre-accident job, assuming that the person held a job. The reason is that the financial impact of the loss of earning capacity would have begun already and the likelihood of the financial impact being reduced by the claimant finding employment would be virtually none existent;*
- f. If the person has not held a job but there is evidence showing the person is unlikely to work because of the injuries, then the lump sum method is to be used (Joyce v Yeomans).*

[30] In keeping with my brother's finding in **Ebanks**, I am of the view that the multiplier/multiplicand method is to be used based on the fact that Mr Barnes' circumstances best fit within (e) of Sykes J judgment.

[31] At the time of the accident, Mr Barnes was 39 years of age. It is his evidence that he was self-employed as a mechanic and his salary was not set as he earned

between \$45,000.00 - \$100,000.00 per month. In determining the multiplier, I have considered that:

- a. There is no evidence that Mr Barnes was sickly or suffered from any disease at the time of the accident. All indications are that he was a healthy and active man.
- b. The age of retirement for men in Jamaica is 65 years old. However, I have noted that he works for himself and so I have considered that he could have stopped working before that age or possibly after. Notably, considering that he was a mechanic, I find that 50 years would have been a good point of reference for his age of retirement from self-employment.

Based on these, I find that Mr Barnes would have had about 11yrs left of viable working years. From this figure I have deducted some amount of years from the vicissitudes of life; especially the fact that the court could not realistically predict his life expectancy. As such I find that a multiplier of 6 is appropriate in the circumstances.

[32] In looking at his income, I have noted that Mr Barnes' earnings was not steady. Having regard to the nature of his job and the fluctuation of his income I find that an appropriate multiplicand would be \$45,000.00 monthly. This monthly figure would amount to \$540,000.00 annually.

[33] Therefore, the appropriate award for handicap on the labour market would be multiplier times multiplicand. This would be $6 \times \$540,000.00 = \$3,240,000.00$. As such, I will award Mr Barnes \$3,240,000.00 for handicap on the labour market.

C. *Special Damages*

[34] Special damages must be specifically pleaded and proved. However, the law is lenient where it is clear that certain costs were incurred but cannot be proved for

one reason or another. In the case of *Desmond Walters v Carlene Mitchell* (1992) 29 JLR 173, Wolfe JA (as he then was) said:

“Without attempting to lay down any general principles as to what is strict proof, to expect a side-walk vendor to prove her loss of earning with mathematical precision of a well organized corporation may well be what Bowen, LJ referred to as ‘the vainest pedantry.’”

(i) Proved

[35] Mr Barnes provided receipts to show that he paid \$2,000.00 for the medical report of Dr. Vijayendra at the Spanish Town Public Hospital. It has also been shown that he paid \$45,000.00 for the medical report he received from Dr Rory Dixon. As such, I will grant him these costs.

(ii) Unproved

[36] Mr Barnes has asked that the court to grant him transportation costs of \$10,000.00 even though he cannot prove this sum. He has also asked the court to grant him the cost of \$79,000.00 for pins he purchased but was unable to produce the receipt.

[37] I find that the transportation costs are reasonable in the circumstances and I accept that he would not be able to produce receipts as it is not the nature of these transactions that receipts are given. I also believe that the cost for the pins for his leg were reasonable costs incurred by him and will grant him this amount as on the evidence it was clear that they would have been used in his recovery process.

[38] Therefore, I will award Mr Barnes \$136,000.00 in special damages.

D. *Future Medical Care*

[39] Much of the evidence under this head was provided by Dr. Dixon. He assessed Mr Barnes and found that he is indeed of a prosthesis in order to resume near to normal daily function. As such, he noted that Mr Barnes would need to undergo physiotherapy for gait training but did not indicate what this would cost.

- [40] Dr Dixon said that local prosthesis can cost approximately US\$1,500.00 or US\$8,000.00 if sought overseas. He noted that adjustments to the prosthesis could cost between JA\$5,000.00 – JA\$15,000.00 per adjustment.
- [41] Dr. Dixon said that adjustments could vary having regard to the fluctuation in size of the stump. Where there was a large variation in the stump the entire socket would need to be changed and this could cost approximately JA\$40,000.00. He further noted that while durability of the prosthesis cannot be predicted, usually patients require adjustments about every three months and may require at least two socket changes in the first year.
- [42] Dr Dixon remarked that Mr Barnes could be able to maintain certain activities such as running and playing football if he were able to get a prosthesis which would support these activities. He noted that this advanced prosthesis was not available locally and could cost approximately US\$20,000.00.
- [43] In considering the information provided by Dr Dixon, the court is of the view that it would be fair to grant the claimant an award that would enable him to afford a normal prosthesis and maintain it. There is no evidence that the claimant is an athlete or someone who would benefit from an advance prosthesis as such the costs to fit and maintain the high activity prosthesis was not considered. I have had regard to the fact that Mr Barnes will also need significant amount of physiotherapy in order to learn how to use and maintain the use of a prosthesis.
- [44] Therefore, I find that award \$2,000,000.00 for future medical care is reasonable in the circumstances.

COSTS

- [45] Counsel for the claimant has asked the court to grant cost in the sum of \$80,000.00. I agree that this award would save the court's time and resources. I also agree that the sum is reasonable in the circumstances. Therefore, I will award cost in the sum of \$80,000.00.

CONCLUSION

[46] The court makes the following orders:

1. The Defendant is liable to pay to the Claimant:

a. General Damages as follows:

i. Pain and suffering - \$9,500,000.00

ii. Future Medical Expenses - \$2,000,000.00

iii. Handicap on the labour market - \$3,240,000.00

b. Special Damages - \$ 136,000.00

2. Interest on damages for pain and suffering from the 21st July, 2014 to the 10th October, 2017 at a rate of 3% per annum.

3. Interest on special damages from the 3rd January, 2014 to the 10th October, 2017 at rate of 3% per annum

4. Cost to the claimant in the sum of \$80,000.00.