



[2021] JMSC Civ 199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015 HCV 01826

BETWEEN	NADINE BOWES	CLAIMANT
AND	HUGH ROY CHAMBERS	DEFENDANT

IN OPEN COURT

Ms Katrina Watson instructed by Nunes Scholefield DeLeon & Co Attorneys-at-law for the Claimant.

Heard: December 2, 2021 and December 13, 2021

Assessment of Damages – degloving injuries to both legs, fracture injury to left tibia and fibula - amputated left leg above knee. PPD 85% of relating to the leg – Handicap on the Labour Market – Future Loss of Earnings – Future Prosthesis

MOTT TULLOCH-REID, J (Ag.)

BACKGROUND

- [1]** The Claimant appeared in this matter by video link as she now resides overseas. Her present circumstances, coupled with her poor finances makes her unable to appear at Court in person.
- [2]** On August 9, 2013, the Claimant was standing behind a stationary motor truck when she and another person were hit down by the Defendant who was alleged to be driving in a negligent manner. As a result of the collision, the Claimant suffered very serious personal injuries. The injuries are set out in the Particulars of Claim

filed on her behalf and in the medical reports issued by the Kingston Public Hospital and the National Chest Hospital on which the Claimant relies. The injuries the Claimant sustained, resulted in her having degloving injuries to both of her legs, a crush injury to her left leg, mangled left leg from knee to ankle, swollen left thigh, fracture of the left fibula and tibia and to the left femur. The substantial injury to the Claimant's left leg had an end result in its amputation above the knee. She had to have debridement of the right leg. She was treated at the Kingston Public Hospital initially and was discharged after eleven days on the ward. She had follow up treatments for the dressing of her wounds both at the Surgery Outpatient Department of the Kingston Public Hospital and at the National Chest Hospital (Plastic Surgery Department).

- [3]** The Claimant was seen first at the National Chest Hospital on September 5, 2013 after being referred there by the Kingston Public Hospital. She underwent surgery on September 9, 2013 wherein she had a split skin grafting of the wound on the right leg. She was sent home on the same day on medication. She had several dressing of the wound from September 11, 2013 to October 16, 2013 for a total of 12 visits. She was assessed as having a 85% disability because of the loss of her left leg. Dr Sandra Bennett did not say what the disability to the Claimant's left leg meant in relation to her whole person permanent partial disability ("PPD") but there are sufficient cases similar to the one at bar, in which disability arising from the loss of a leg was assessed and so I have enough cases to make a comparison.
- [4]** On March 24, 2015, the Claimant filed a claim to recover damages from the Defendant for the pain and suffering she suffered and for the expenses she incurred. The initiating documents were served on the Defendant but he failed to respond in the time allowed by the Civil Procedure Rules, the consequence being that a Default Judgment dated July 3, 2015 was entered against him.
- [5]** The Assessment of Damages having been adjourned on several occasions was finally ready to proceed on December 2, 2021 when it came up before me.

THE EVIDENCE

- [6] The evidence of the Claimant was taken through her Witness Statement which stood as her evidence in chief. Ms Bowes describes her terrible ordeal beginning at paragraph 5 of the statement. She says when she was hit by the car she was in shock and was almost frozen in position for a while. She did not know how much time had passed and only moved when a man lifted her and put her into a vehicle to be transported to the Kingston Public Hospital. It was when the man started to move her that she actually started to feel pain. The pain was in her back and both of her legs. The left leg felt as if it was just dangling and it was bleeding a lot. There was also blood coming from her right leg. She cried because of the pain she was in. She said that when she got to the hospital, the porters had difficulty moving her because of the amount of blood that was on her. Her tights had to be cut off. The doctor asked her to move her legs but she could only move the right leg, not the left leg. Initially it was thought that both legs had to be amputated but in the end it was decided that only the left leg had to be amputated. She did a surgery and when she woke from it, she was in a lot of pain. She came to realise she had stitches on her right leg from the knee down, several bruises on her body, legs and her left leg from her knee down was gone. She had pain in her back, hips and abdomen. The pain in her stomach and hip area resulted in a CT scan being done, but there is no evidence before the Court as to what the scan revealed.
- [7] Ms Bowes explains that her treatment comprised injections for the pain but the injections were unhelpful because the pain only eased a little and so she often cried because of the pain she endured. She says she was in the hospital for eleven days and had to be given sponge baths by the nurses. She also had to wear pampers and use a catheter.
- [8] Upon her discharge she could do nothing for herself and had to be taken care of by her sister and another lady who each agreed to assist her for \$100,000.00 each. She paid her sister but not the other lady. She says she owes the lady but I note that debt was not pleaded in her particulars of claim as an item of special damages

to be recovered. The ladies who helped her had to bathe her for several months, massage her back, lift her and take her to the bathroom for the first month because she could not use her crutches, cooked for her and did her laundry, regular household chores and ran errands for her. Her sister took care of her between January 2014 and December 2016.

[9] The Claimant says she found it difficult to ambulate with crutches initially as her right leg was also injured and had not quite healed. She had to learn to use the crutches and used them until she got a prosthesis in August 2014 and then she had to learn to use the prosthesis. She found the prosthesis uncomfortable and even now experiences discomfort when using it. It causes her a lot of chaffing and she has to use ointments to soothe it and prevent further chaffing. The prosthesis has to be serviced and changed. She sets out the costs of servicing the prosthesis in her witness statement. She said she had to purchase a new prosthesis in Orlando because Sir John Golding Rehabilitation Centre where she purchased the first one did not have any in stock when hers needed to be changed. She does not set out the exact cost of the prosthesis obtained in Orlando in her evidence nor is it pleaded in in her particulars of claim. As it was neither pleaded nor were receipts produced to support her claim, she cannot recover as special damages must be specifically pleaded and proven. I am mindful of the fact that Ms Bowes would need to purchase the prosthesis but as she has lumped the cost in with the cost for accommodation in the United States which amounts to a whopping USD10,000, it is difficult for me to extract a figure to award to her. These expenses were allegedly incurred outside of Jamaica and I am unable to make an assessment of the costs for the hotel stay, travel to Orlando and cost of the prosthesis without the aid of receipts or invoices.

[10] Ms Bowes explains that since the accident she has not been able to work because nobody wants to hire her as they do not believe she is fit for the job as custodian or assistant to elderly people because of her disability. She has taken steps to find alternative employment by enrolling in and completing courses in customer service

and electronics at HEART but those efforts have been of no effect as she has still not been able to find employment.

- [11] She now only wears long dresses, long skirts and pants to cover the prosthesis which is a different colour from her skin. She says people notice her prosthesis and they stare at her a lot or ask her questions which make her uncomfortable so much so that she cries because of her embarrassment. She cannot walk like a normal person, she feels unattractive and undesirable, people call her names – even members of her own family. Her boyfriend left her after the accident because she is of the view that he no longer found her attractive as she could not wear sexy clothes. She complains that he was afraid to have sex with her. They tried on several occasions but it was unpleasant. She has not dated anyone since the accident for various reasons including the fact that most men try to offer her sex for her money. She has been threatened with rape.
- [12] Her left stump still pains her for days on end. Her right leg swells and hurts when she stands too long. Her prosthesis now needs to be changed and as a result she keeps falling. Her back hurts and she says the doctors say it is the prosthesis leg which contributes to that. She liked to exercise and would run 3 to 5 miles each morning before the accident. She cannot dance, stand too long or wear the clothes she likes to wear. She does not like to go out because she walks slower than her friends and cannot keep up with them so she mostly stays in her room by herself. She can only wear sneakers and can no longer wear sandals. She feels unattractive.
- [13] I set out the details of Ms Bowes' pain and suffering and loss of amenities because it is important to understand how I came to my decision. The Defendant, by his negligence, has caused a woman who was in the prime of her life at the time of the accident, to now suffer from low self-esteem because she has lost her leg and has lost it for no good reason but for the careless and negligent acts of a man who did not take the care he ought to have taken when operating his motor vehicle. Every day on the roads people operate their motor vehicles in a reckless manner

without any care or concern for the disruption they bring to people's lives when they cause them harm.

Cases the Claimant relied on for General Damages

[14] The Claimant's attorney-at-law relied on several cases on her behalf to support her claim for General Damages in the amount of \$20M. I will not recite all the cases but Counsel can be assured that they have all been considered. I will only include in my judgment the cases which offered me the most assistance in coming to my decision.

[15] **Kenroy Biggs v Courts Jamaica Limited and Peter Thompson December 10, 15, 18, 2009 and January 22, 2010 the decision of Sykes J** (as he then was). In that case, Mr Biggs was walking along the Cane River Road in St Andrew when the second Defendant while driving a motor truck collided into him and pinned him against a wall from his stomach to his feet. He sustained a crushed left foot from his knee down to his ankle, he had bruises to his side and right arm, he had urological problems which continued up to the time of his trial and according to the medical reports presented by the doctors who treated him in Jamaica and in the USA he would continue to have for the rest of his life. He was hospitalised for 6 months and had several surgeries because of his pelvic fracture which caused his urological problems. He did several surgeries also in an effort to save his left leg from amputation but his leg had to be amputated eventually as the surgeries were unsuccessful and came with their own problems such as significant blood loss (five litres) and infection in the leg. He suffered from sexual dysfunction which was aided with medication. He had to use a urine bag which itself caused him various types of discomfort which were set out in the case. He suffered mental distress and anxiety as reported by his medical team. He also had pain in his back and because of how his amputation was done, was not likely to be able to benefit from the use of a prosthesis. He had to be seen by the doctors in Jamaica and Orlando on several occasions and his experience in Orlando was not pain free to say the least. Even when he returned from Orlando he had to be seen by the doctors at

Kingston Public Hospital and by Dr Wan in his private practice. At the time of the accident Mr Biggs was only 19 years old. He was assessed as having a whole person PPD of 25%. There is no doubt that Mr Biggs' pain and suffering was much more significant than that which was suffered by Ms Bowes.

[16] I must also note that at the time of the accident, Ms Bowes was 40 years old as against Mr Biggs who was only 19 years old and will suffer from his injuries for a longer period than Ms Bowes will likely suffer. I am also mindful of the fact that though both Mr Biggs and Ms Bowes had problems with sex, Mr Biggs was more as a result of a sexual dysfunction resulting from the injuries he sustained while Ms Bowes' lack of sexual desire was because of how she looked. I am not downplaying how she feels but merely trying to show a distinction between both cases. Mr Biggs needed Viagra or other medication to assist him. Ms Bowes did not need any medication.

[17] Sykes J awarded Mr Biggs \$18M in January 2010 which updates to \$35,754,424.66 when the CPI for October 2021 which stands at 116 is used. This sum has to be discounted to take into account the fact that Mr Biggs' injuries were more serious in nature than Ms Bowes'.

[18] In the case of **Trevor Clarke v National Water Commission, Kenneth Hewitt and Vernon Smith reported at page 21 of Khan's Volume 5** the Plaintiff sustained an open fracture of lower third of right tibia bone, had amputation above knee because gangrene had set in and then had to have a further amputation because the infection was spreading. He spent two months in the hospital whereas Ms Bowes spent 11 days. When he was discharged his wound was not healed and only healed 7 months later. He had a 90% impairment of lower extremity as against Ms Bowes' 85%. He could not use the prosthesis because it pained him when he put it on. He had ghost pains and was in constant pain. The injuries had a similar negative impact on his life as did those of Ms Bowes'. Gloria Smith J (now retired), awarded Mr Clarke \$3M for his pain and suffering and loss of amenities, which updates to \$15,064,935. I note however, that Mr Clarke's

injuries were limited to his right leg while Ms Bowes' injuries were to both legs and were not merely a fracture which became gangrenous but involved degloving and crushing of her legs.

[19] Ms Watson also relied on the cases of **Oswald Espeut v K Sons Transport Limited and ors reported at page 39 of Khan's Volume 4, Joseph Frazer v Tyrell Morgan and anor reported at page 19 of Khan's Volume 5 and Leelan Shaw v Coolit Limited and anor reported at page 41 of Khan's Volume 4**. The cases are all similar except for Shaw wherein the Plaintiff also had head injuries. His award when updated amounts to \$14.5M whereas the other two cases the awards when updated amount to \$10.5M and \$11M respectively. I note though that in none of the cases did the plaintiffs sustain injuries to both legs and this must be taken into account.

[20] I find in the circumstances that a reasonable sum which would compensate Ms Bowes for her pain and suffering and loss of amenities is \$17M.

Handicap on the Labour Market/Loss of Earning Capacity

[21] Ms Bowes' evidence is that she has not been able to work since the accident. I have set out the reasons she has given above and will not repeat them here. She said that prior to the accident she worked on the Disney Cruise Line as a custodian from June 2011 to mid-March 2013. She worked 11 months out of each year and earned between US\$425 to US\$545 each week. When asked about the difference in weekly wages she told me that the difference resulted from overtime worked. Her oral evidence in Court based on answers to questions I posed to her is that her last sign off with Disney Cruise Line was in 2012 and that she did not work with the cruise line in 2013 at all. She said they however mailed her two cheques in 2013. She came home in 2012 to go to the doctor and she would have expected to return to work at the end of 2013.

- [22] No explanation was given by the Claimant in her evidence as to why she would be off work for a year. No letter from Disney Cruise Line was tendered for admission into evidence to support Ms Bowes' assertion that she would be back at work with the cruise line at the end of 2013. The payslip dated May 15, 2013 was admitted into evidence as Exhibit 13. The payslip is in the amount of USD538.78. Only one payslip was tendered. I would have expected that at least three payslips would have been tendered for admission so that the Court could have a true idea as what Ms Bowes' fortnightly average was. Unfortunately, this was not done.
- [23] Ms Bowes has lost a leg. It is clear that she has suffered in her ability to work. She is unable to compete with other able bodied persons in the open market. She will not be able to work as a custodian on a ship and is even having difficulty finding work in customer service. She has been unsuccessful in finding work as a helper for the aged because it is felt she will be unable to carry out her duties because of her disability. At the time of the accident, there is no evidence that she was employed. This does not matter as the case law indicates that it does not matter if she was working at the time of the trial (see the case of **Cooke v Consolidated Industries [1977] ICR 635, 640**). What is left to be determined is how the handicap on the labour market will be calculated. Being deprived of some part of his earning capacity is what an award under the head of handicap on labour market compensates the claimant for. In the **Biggs case** the lump sum method was used to do the calculation because counsel for the parties agreed that the multiplier multiplicand method was more useful when seeking to determine loss of future earnings. In the **Biggs case** Sykes J awarded the sum of \$500,000 to Mr Biggs under the head Handicap on the Labour Market. This would amount to \$993,150. I am aware that the lump sum ought not to be arrived at by reference to previously decided cases (see **Andrew Ebanks v Jephther McClymont 2014 HCV 02172 delivered on March 8, 2007**) and I believe that a sum in that amount would be two low in the circumstances. In the case of **Barrington Barnes v Gareth Daley [2017] JMSC Civ 143** Bertram Linton J awarded \$3.2M to the claimant who had a below injury amputation under the head of handicap on the labour market. She

used the multiplier multiplicand approach to come to her decision. I do not believe I should go so high in the circumstances. Ms Watson has suggested that \$2.5M would be reasonable. I am of the view that that sum is indeed reasonable, given that Ms Bowes has not worked since the accident and continues to have difficulty finding employment.

Loss of Future Earnings

[24] This head of damages is seeking to compensate a victim who is earning settled wage but has suffered a diminution in his earnings on resuming his employment or assuming a new employment because of his disability. There must be evidence to prove the diminution of earning (see the case of **Fairly v John Thompson (Design & Contracting Division) Ltd [1973] 2 WLR 40, 42**). At the time of the accident, Ms Bowes was not working. She has not provided any proof that she would have been resuming employment with Disney Cruise Line and so to say she would have, without evidence of same, which could have been easily obtained, would mean I would have to embark on an exercise in speculation.

Special Damages

[25] Special Damages as pleaded and proven are allowed. Total medication (including the cost of medical reports and prosthesis) in the amount of \$273,000.00, Transportation as pleaded amounting to \$55,000.00 is reasonable as is the extra help pleaded in the amount of \$112,000.00. The total special damages awarded is \$440,557.98. I have made no award for loss of earnings for the same reason noted in paragraph 24 above. At the time of the accident, Ms Bowes was not working and she has not put forward anything to substantiate her claim that she would have returned to the Disney Cruise Line having been absent from work for approximately 7.5 months prior to the accident. There is no receipt for the cost of the disability chair. The sum is denominated in United States Dollars. I am not aware of the cost of the chair as it would have been in 2013 when the Claimant would have needed it.

Future Cost of Prosthesis

[26] Ms Bowes has indicated that the prosthesis purchased in Orlando is more comfortable than the one purchased in Jamaica. She has not informed the Court of the cost of that prosthesis with evidence to support same. She has not informed the court of the present cost of a prosthesis in Jamaica. However, I have receipts from Sir John Golding Rehabilitation which add up to \$210,000 for the prosthesis purchased in 2014. I suspect that the price would have increased by now however I do not have that information. It is true that the prosthesis will have to be changed and serviced from time to time. Ms Bowes has indicated that in Jamaica the cost of servicing the prosthesis would be around \$2,500. Again this is something that can be proved with invoices or a letter from Sir John Golding Rehabilitation Centre but unfortunately was not presented to the Court. Given that there will be a need for future prosthesis and based on the evidence, which I accept given the fact that the same evidence is borne out in similar cases that the prosthesis has to be changed every three years, I will make an award to Ms Bowes under this head. If Ms Bowes is to change her prosthesis 7 more times during the course of her life time, then an award of \$1,470,000.00 under this head would be reasonable. This is the capital sum which should be invested to protect against inflation and purchase the prosthesis when replacements are needed. She is now 48 years old, the multiplier of 7 is therefore an appropriate multiplier.

Costs

[27] Ms Watson has asked for costs in the amount of \$500,000.00. I am not minded to allow those costs but will rely on the basic costs as set out in Part 65 of the CPR for an undefended claim heard over a two-day period.

[28] My orders are as follows:

The Defendant is to pay the Claimant:

- a. General Damages in the amount of \$17M for pain and suffering and loss of amenities plus interest at 3% per annum from June 1, 2015 to December 13, 2021.
- b. Handicap on the Labour Market in the amount of \$2.5M
- c. Special Damages in the amount of \$440,557.98 plus interest at 3% per annum from August 9, 2013 to December 13, 2021.
- d. Future cost of prosthesis in the amount of \$1,470,000.00
- e. Costs in the claim in the amount of \$130,000.00.
- f. The Claimant's attorneys-at-law are to file and serve the Formal Order.