



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
CLAIM NO. 2007 HCV 04989**

<b>BETWEEN</b>	<b>CLIVE HARRISON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MARVIN O'HARA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>LEON O'HARA</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>CLAUDIA O'HARA</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**Judgment on liability by Consent – Apportioned at 50% -Assessment of Damages – Medical reports agreed – inconsistent findings – observations on duty of Counsel – Damages.**

**Danielle Archer for the Claimant**

**Dorothy Lightbourne, QC for the Defendants**

**Heard: 14<sup>th</sup> November 2014 and 19<sup>th</sup> December 2014**

**COR: Batts J**

1. At the commencement of this matter the parties indicated that a consent judgment on liability was to be entered. I therefore entered judgment on liability in favour of the Claimant against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants with liability apportioned equally between the Claimant on the one part and the Defendants on the other part; with Damages to be assessed.
2. I therefore commenced hearing the assessment of Damages.
3. The parties again rather helpfully indicated that the following documents were agreed:
  - Exhibit 1 – Medical Report of Dr. Roy Dixon dated 30<sup>th</sup> May 2007
  - Exhibit 2 – Medical Report dated 21<sup>st</sup> May 2008
  - Exhibit 3 – Report from Physical Rehab dated 11<sup>th</sup> July 2007
  - Exhibit 4 – Medical Report of Dr. Blake dated 26<sup>th</sup> March 2013

Exhibit 5 – Report from Linstead Hospital

Exhibit 6 – Bundle of 11 Receipts – South East Regional Health Authority

Exhibit 7 – Bundle of 6 Receipts – Angels Health Centre

Exhibit 8 – Receipt from Mediline Medical Centre \$4,500

Exhibit 9 – Receipt from Pharmacy

Exhibit 10 – Bundle of Transportation Receipts

4. The court was advised that the Claimant was not pursuing the Claim for Cost of repairs or cost of Assessor's Report. Further that Special Damages were agreed as:

a) Medical Expenses	\$29,849.59
b) Transportation	\$52,000.00

Essentially therefore the court was being asked to assess general damages only.

5. The Claimant gave evidence and his witness statement dated the 18<sup>th</sup> June 2014 was allowed to stand as his evidence in chief. In that statement he describes himself as a 58 year old taxi operator. On the 23<sup>rd</sup> September 2006 he was driving his motor car along the Crawl Main Road heading towards Bog Walk in St. Catherine. In the vicinity of Berwick Main Road on approaching a bend he observed another motor vehicle coming towards him at a fast speed. The other vehicle swerved from a pothole, lost control and collided with his car. After the accident he was rushed to hospital.
6. He was feeling severe pains to his right hip and was unable to stand or sit. He received an injection for pain. He was transferred to the Spanish Town Hospital. There he did an X-ray and was told by doctors that his hipbone was chipped. He was discharged home with 2 crutches. He had follow up visits to hospital and was advised that the bone was healing. He thereafter did physiotherapy sessions.
7. At the fourth physiotherapy session, he was advised to see a doctor. He did that and was asked to do a CT scan. Dr. Rory Dixon advised him that he had a fractured hip and recommended a hip replacement surgery. However he was unable to afford that. He was thereafter referred for further physiotherapy and after approximately 10 such sessions was advised that nothing more could be done by the physiotherapist to enable him to walk properly again.

8. He now walks with a limp to his right side and feels pain intermittently whenever he sits or walks for long periods.
9. When cross-examined the Claimant admitted that the vehicle he was driving was a "private" vehicle. He was asked whether he had a taxi and he responded "not at that time ma'am". He had a taxi before but he sold it and bought that motor vehicle. He admitted he had no taxi at the time of the accident.
10. The Claimant then closed his case and the Defendant called no evidence. Written submissions were filed by each party and counsel also made oral submissions.
11. Claimant's counsel advocated for an award of \$6million for Pain Suffering and Loss of Amenities and U\$7,750.00 for cost of future care.
12. Defendant's counsel submitted that an award in the range of \$1,900,000 to \$2,200,000 was appropriate for Pain Suffering and Loss of Amenities. Miss Dorothy Lightbourne QC submitted that there had been no claim made for the cost of future surgery and therefore this should be disallowed. Queens Counsel also submitted that the medical reports of Drs. Blake and Dixon were inconsistent and that Dr. Blake's analysis, findings and conclusions were to be preferred. In particular Dr. Blake made no recommendation about future surgery and had assessed his disability at 6%, having seen him more recently than Dr. Dixon.
13. Let me say that where experts differ counsel has options. They may invite the experts to consult with each other, and if necessary, do a joint examination. This is with a view to arriving at an agreed position if possible. Alternatively the attorneys may seek to interrogate the experts before the time as per Rule 32.8 of the Civil Procedure Rules. Finally the experts may be asked to attend for cross-examination. In this way the court can determine which evidence it prefers.
14. In the case before me the parties have done none of the above. It places the court in an unenviable position. I will have to come to a decision, although the experts appear to disagree in some respects. I will bear in mind that the legal burden rests on the Claimant to satisfy me on a balance of probabilities.
15. Exhibit 1 is a report dated 30<sup>th</sup> May 2007 by Dr. Rory A. Dixon MB.BS. DM (Ortho). He is an orthopaedic surgeon who practices General Orthopaedics and Sports Medicine at

Angels Medical Centre, Angels Plaza. He is registered with the Jamaican Medical Council Reg # 9194.

16. Dr. Dixon first saw the Claimant on the 24<sup>th</sup> April 2007. He was consulted for the purpose of preparing the report. His findings were that the Claimant was dependent on crutches for ambulation. There was wasting of the right thigh muscles (quadriceps). There was flexion to 90% and abduction was 20 degrees (normal = 35 degrees) of the left hip. There was 20 degrees external and internal rotation. X-ray showed a healed comminuted fracture of the right acetabulum (hip) as well as displacement of the posterior wall and subluxation of the femoral head. There was 0mm of joint space (normal = 3-4mm). X-ray of right knee was normal. He was assessed as having a healed fracture of the left hip with subluxation of the hip and osteoarthritis.
17. Dr. Dixon's assessment of impairment contained the following opinions. Firstly that one of the major complications of that type of injury was osteoarthritis of the hip. The doctor noted that there was already a loss of joint space, an indication of "progressive osteoarthritis". The movement in the hip is expected to decrease with time, within 5 to 10 years or less. The doctor stated,  

*"The extent of arthritis is directly related to the level of activity of the individual and eventually he may require a joint replacement if the pain progresses to the point where it is unbearable."*
18. The doctor gave the present day cost for such surgery. He assessed his level of impairment at 15% of the whole person. After hip replacement the impairment will remain the same or if the results are poor increase to 20%. "The American Medical Association Guides to Evaluation of Permanent Impairment" was relied upon.
19. By report dated 11<sup>th</sup> July 2007 (Exhibit 3) Shareel Dixon-Anderson gave a physiotherapist's perspective. She initially assessed the Claimant on the 30<sup>th</sup> April 2007. Five treatment sessions were given after which the Claimant said he still experienced occasional stiffness of the right thigh muscles. Climbing stairs was still difficult but less so. Her final findings were (a) Minimal improvement in the pattern of walking and muscle bulk, (b) No improvement in active and passive external rotation of the right hip. In her opinion the "subluxed" state of the right hip has significantly altered the biomechanics of movement. This would remain so unless the subluxation is

corrected. This could not be accomplished by physiotherapy. She too expressed the opinion that pain associated with osteoarthritis may occur some time in the future. She stated that additional physiotherapy treatment will be required in future once weekly for up to 6 weeks per episode of care. She did not say how many episodes of care were required. Her fees for physiotherapy were stated.

20. Dr. Warren Blake's report dated 26<sup>th</sup> March 2013 was Exhibit 4. He stated his qualifications thus:

*"Dr. Warren Blake FRCS is an Orthopaedic Surgeon fully registered with the Jamaica Medical Council since 1977, Reg # 41777 and practicing as a consultant in orthopaedics since 1986".*

He examined the Claimant on the 26<sup>th</sup> July 2011. In recounting the patient history Dr. Blake stated in part,

*"He also told [me] that he may need a hip replacement surgery in the future."*

The doctor makes no comment on that statement nor does he advert to the possible need for a hip replacement in the future.

21. Upon examination of the Claimant, Dr. Blake found no limb length discrepancy. He had an "antalgic" type gait and limp. His hip flexed to 90 degrees and external rotation was 20 degrees. Internal was 10 degrees. Abduction and adduction were to 30 degrees each. There was no foot drop. There was no wasting of quadriceps and calf muscles. X-rays of 2<sup>nd</sup> November, 30<sup>th</sup> November 2006 and 3<sup>rd</sup> March 2007 showed that the fracture had unified. There was no evidence of a vascular necrosis of the femoral head. A CT scan of the hip done 13<sup>th</sup> April 2007 demonstrated "some subluxation of the femoral head along with early degenerative arthritis of the hip joint."
22. Dr. Blake utilized the American Medical Association Guides to the Evaluation of Permanent Impairment and concluded that the Claimant had a 6% whole person impairment (or 16% of the lower extremity).
23. Having reviewed the medical reports I have come to the conclusion that because of the time lapses the doctors are not saying different things. It is clear that by 2011 when the

Claimant was examined by Dr. Blake there was marked improvement. He no longer needed crutches and there was now a reduced Permanent Partial Disability. On the other hand the risk of osteoarthritis remained. The possible need for a future hip replacement remains and Dr. Blake says nothing which casts doubt on the veracity of Dr. Dixon's advice to the Complainant in that regard. This letter is also corroborated by the physiotherapist's conclusions. I therefore find as a fact that degenerative osteoarthritis will lead to such pain as to make necessary hip replacement surgery.

24. Of the authorities cited I find the following of greatest relevance:

1) **Buchanan v Blake** SCCA 27/1993 unreported, decided 27 Oct 1994.

The award was 400,000 when updated it approximates to \$3,181,690.00.

2) **Peterson v Attorney General of Jamaica** CL 1992 p117 reported at Khan Vol 5 page 43. The award was \$500,000 when updated it approximates to \$2,572,892.94.

25. In my view, the injuries and its consequences for the Claimant in **Buchanan v Blake** were marginally greater as in addition to the acetabulum fracture that Claimant had ruptured ligaments. The assessed Permanent Partial Disability to the right lower extremity was 12%, as against 16% in the case before me. Dr. Dundas in Buchanan's case stated there was a "high probability" of osteoarthritis developing. He also recommended total hip replacement. In **Peterson's** case on the other hand the disability of the lower extremity was 10%, or 5% of the whole person. However, Dr. Blake there ruled out early degenerative arthritis in the joint and stated the injury had not increased the risk of that.

26. In the circumstances and when regard is had to all the peculiar circumstances of the Claimant before me I award \$3million for pain suffering and loss of amenities.

27. I award also the estimated costs of future medical treatment being:

Cost of surgery U\$5,000.00

Cost of implants

(Average of U\$1,500-U\$4,000) U\$2,750.00

U\$7,750.00

Miss Lightbourne QC argued that future medical care had not been pleaded. However, the medical reports which had been served (May 2010) clearly advert to it and so does the Claimant's witness statement (Para 16). No injustice flows from the making of the award.

28. There is therefore judgment for the Claimant against the Defendants being 50% of the assessed amounts as follows:

Special Damages

Medical	\$29,849.59
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Transportation	<u>\$52,000.00</u>
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$\$81,849.59 \times 50\% = \$49,247.80$

General Damages

Pain Suffering and Loss of Amenities	$\$3,000,000 \times 50\% = \$1,500,000$
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Future Medical Care	$U\$7,750 \times 50\% = U\$3,875.00$
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Interest will run at 3% on General Damages from the 5<sup>th</sup> January 2008 and at 3% on Special Damages from the 23<sup>rd</sup> September 2006.

Costs to Claimant to be taxed or agreed.

**David Batts**  
**Puisne Judge**