



[2020] JMSC Civ 129

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 03960

BETWEEN	DALKEITH JAMES	CLAIMANT
AND	MARGARET BROWN	1ST DEFENDANT
AND	ERROL SCOTT	2ND DEFENDANT

IN OPEN COURT

Raymond Samuels instructed by Samuels and Samuels Attorneys at Law

Defendants unrepresented

Heard: January 8, 2020 and June 25, 2020

Personal Injury - Negligence- Accident between cyclist and motorist - Claimant hit from behind - Assessment of damages - Quantum of damages - Pain and suffering - Permanent partial disability - Medical expenses - Future medical care - Consequential loss - Loss of earnings

SONIA BERTRAM LINTON, J

BACKGROUND

[1] On the 12th day of September 2008 Mr Dalkeith James was involved in an accident while he was traveling along the Galina Main Road in Saint Mary. While waiting to cross at an intersection in Wilderness he began to fix the chain on his bicycle. A vehicle that was driven by Mr Errol Scott, and owned by Ms Margaret Brown

collided with him from behind. He was thrown in the air, fell on the top of the vehicle then fell to the ground.

- [2] He became unconscious and was taken to the Port Maria Hospital in Saint Mary. The Medical Report by Dr Khin Win Maw, Medical Officer indicates that he was treated for pain to the neck, small lacerations over the scalp and left side of the back, right knee and pain in the right shoulder. He was kept for observation for twenty-four (24) hours and received pain medication, antibiotic and tetanus immunization. X-rays of the skull, chest and left shoulder all revealed a normal study. He was discharged from the hospital on the 13th day of September, 2008 with a soft collar, bed rest and pain killers and antibiotics to last him for a week.
- [3] He visited the Port Maria Medical Centre on the 16th day of September 2008 complaining of pain in the left shoulder, head and neck and was wearing a cervical collar. Medical Report prepared by Dr Lincoln Wright, General Practitioner dated the 22nd of January 2010 indicates a decrease in the range of motion of his left shoulder and left elbow. He also had bruises on his left shoulder, the left side of his upper back, left knee, right arm, right elbow and right foot.
- [4] There was blunt trauma to the head with a laceration to the scalp. He also had discomfort on palpation of the left side of his chest and tenderness over the left scapula. The abdomen was tender over the left upper quadrant. X-rays showed loss of curvature of cervical spine, rib number 12 on the left side was fractured and the left scapula was also fractured. He says he was unable to work for twelve (12) weeks as a result of the injuries as reported in the medical report by Dr Wright.
- [5] On the 26th of January 2010 he was examined at the Saint Ann's Bay Hospital in relation to the accident of September 12, 2008. He complained of intermittent pain in his left wrist which would increase with activity and continuing chest wall pain. He also had pain in his neck and severe headaches. He reported numbness to the medial aspect of his right foot and back pain located in the lumber region of his

back radiating to the right side. He said he had to decrease recreational activities and could not work as he did before the accident.

- [6] In addition, Radiographs of his chest revealed an undisplaced fracture of the 10th rib and a fracture of the blade of the right scapular with no displacements. Radiographs of his lumber spine also revealed loss of normal lordosis. At that time, he was assessed by Dr Denton Barnes, Orthopaedic Resident to have an overall 7% impairment of the whole person from the injuries.
- [7] On the 25th of March 2010 He was examined by Dr Randolph E. Cheeks, Consultant Neurosurgeon. He was diagnosed with closed head injury with concussion, soft tissue injury of the neck and multiple deep abrasions on the left side of his trunk. He also had chronic left lumbar muscular strain and peripheral nerve injury to the right foot. Mr James was diagnosed with 8% disability of the whole person.
- [8] On the 21st of June 2011 he filed a claim against the Defendants claiming
 - (a) Damages for negligence
 - (b) Special damages amounting to \$1,662,750.00
 - (c) Costs
 - (d) Interest at such rate and for such time this Honourable Court deems fit
- [9] The Defendants failed to acknowledge service or file a Defence. Consequently, Default Judgment was entered against them on the 15th of June 2016.
- [10] The matter has now come up for assessment and this will be the sole consideration of the court.

SUBMISSIONS

- i. General Damages

- [11] The Claimant relied on the authorities of ***Devon Higgins v Uriah Campbell, Winston Campbell and Orville Senior (Consolidated Action)*** [2016] JMSC Civ 44 and ***Marie Jackson v Glenroy Charlton and George Harriot*** reported in Ursula Khan Personal Injury Awards Volume 5 at page 167. Counsel submitted that the Honourable Court should use these cases to assess damages by examining the nature and extent of the injuries, the gravity of the resulting physical disability, the pain and suffering and the loss of amenities.
- [12] In the case of ***Devon Higgins v Uriah Campbell, Winston Campbell and Orville Senior (Consolidated Action)*** [2016] JMSC Civ 44 Mr Higgins sustained multiple injuries. These injuries included back pain, lower chest and neck pain, multiple lacerations to the scalp and other lacerations and bruises to his body. He also suffered from blurred vision, neck disability, multiple soft tissue injuries, facial disfigurement, hyper pigmented scars and 7% impairment. He was awarded \$4,800,000 in general damages. The updated award using the CPI of January 2020 is \$5,508,366.00.
- [13] Furthermore, in ***Devon Higgins v Uriah Campbell, Winston Campbell and Orville Senior (Consolidated Action)*** [2016] JMSC Civ 44 the court was asked to be guided by the principles as expressed by Sykes, J in ***Icilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & Another***. Sykes, J said he was guided by the principles of Lord Morris and Lord Devlin in ***H. West & Sons Ltd v Shephard*** [1963] 2 ALL ER 625 at pages 633 D-G and 636E. The principles derived from this case state that assessment of damages in personal injury cases contain objective and subjective elements that must be taken into account. The objective elements refer to the actual injury suffered while the subjective elements refer to the Claimant's knowledge that they will have to live with the injury for a period of time.
- [14] In addition, counsel relied on ***Marie Jackson v Glenroy Charlton and George Harriot*** reported in Ursula Khan Personal Injury Awards Volume 5 at page 167. In this case Ms Jackson suffered pains in the neck, left rib cage and left elbow with

severe pains in the lower back and neck. She was also diagnosed with L4/L5 lumbar disc prolapsed with a permanent impairment of 8% of the whole person. An award of \$1,800,000.00 was made on the 4th day of May 2001. Therefore, the updated award using the CPI of January 2020 is \$8,389,963.40.

- [15] Counsel stated that this case was more serious than the instant case but that it should be used as a guide with respect to the whole person impairment. He says that the award given to Mr James should fall between the award given in ***Devon Higgins v Uriah Campbell, Winston Campbell and Orville Senior (Consolidated Action) [2016] JMSC Civ 44*** and ***Marie Jackson v Glenroy Charlton and George Harriot reported in Ursula Khan Personal Injury Awards Volume 5 at page 167.***
- [16] The Claimant relied on a number of documents that were entered as exhibits to prove his injuries and support his claim for general damages. These documents include:
- a. Medical Report from Dr Khin Win Maw of the Port Maria Hospital dated the 29th of October 2008 entered as exhibit number 1.
 - b. Medical Report from Dr Lincoln J. Wright of the Port Maria Medical Centre dated the 22nd of January 2010 entered as exhibit number 3.
 - c. Medical Report from Dr Denton Barnes of St. Ann's Bay Hospital dated the 1st of February 2010 entered as exhibit number 5.
 - d. Medical Report from Dr Randolph E. Cheeks, Consultant Neurosurgeon dated the 25th of March 2010 entered as exhibit number 7.
 - e. Medical Report from Dr Leighton Logan, Consultant Plastic, Reconstructive and Hand Surgeon dated the 14th of August 2010 entered as exhibit number 9.

- [17] The court has been asked to award Mr James \$6,500,000.00 in general damages for the severe permanent injuries and loss suffered.

ii. Special Damages

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

(a) *Medical Expenses*

- [19] The Claimant relied on a number of documents that were entered as exhibits to prove that he spent a total of \$86,750.00 on medical expenses as set out below:

Exhibit Number 2	Receipt from Port Maria Hospital dated the 7 th of October 2008	\$1,000.00
Exhibit Number 4	Receipt from Medi- Rays Limited dated the 22 nd of September 2008	\$17,500.00
Exhibit Number 6	Receipt from Dr Denton Barnes dated the 1 st of February 2010	\$15,000.00
Exhibit Number 8	Receipt from Dr Randolph E. Cheeks dated the 29 th of March 2010	\$36,000.00
Exhibit Number 10	Receipt from First Caribbean International Bank dated the 19 th of August 2010.	\$12,000.00
Exhibit Number 11	Receipt from Port Maria Medical Centre dated the 20 th of May 2011.	\$5,250.00
Total		\$86,750.00

(b) *Transportation Expenses*

- [20] He says that he ought to be reimbursed for the transportation costs which he incurred for treatment and that the sum of \$16,000.00 is a reasonable amount even though he is unable to provide receipts in this regard.

(c) Cost of Future Medical Care

- [21] The Medical Report from Dr Leighton Logan said that Mr James would need further management which would involve scar revision surgery and a course of superficial irradiation. The surgery would be in relation to the following areas:

- i. Left lateral chest and abdomen
- ii. Posterior region of the right elbow
- iii. Lateral aspect of left thigh
- iv. Dorsum of right foot

- [22] Based on that medical report, it was submitted that the court updates the award with the CPI as at January 2020. The court has been asked to note:

i. Surgeon's fee is	\$120,000.00
ii. Anaesthetic fee is	\$50,000.00
iii. Hospitalization fee is	\$70,000 (approx.)
iv. Follow up fee is	\$20,000.00
Approximate total	\$260,000.00

Loss of Earnings

- [23] The Claimant while unable to substantiate his employment submits that but for his injuries he would have been working and had a chance of earning. He submitted that he should receive \$1,170,000.00 for loss of earning as a Hotel Worker at a rate of \$15,000.00 per week for 78 weeks. In the capacity of a Farmer he stated that he should receive \$390,000.00 at a rate of \$5000.00 per week for 78 weeks.

[24] He also stated that he should get an award for a job he got in the security industry. He claimed \$132,000.00 at a rate of the minimum wage of \$5,500.00 per week for a period of 24 weeks. In the alternative he claimed \$88,800.00 and said that the court could use the minimum wage figure of \$3,700.00 per week for 24 weeks. However, he submitted that under the circumstances the sum of \$132,000.00 is appropriate for the loss of earnings. The only evidence he relied on was that of a Medical Report of Dr Cheeks which stated that "...was seeking employment, and eventually felt sufficiently recovered to commence working in the security industry approximately 6 months following the accident."

ISSUES

- i. What is the amount, if any that is to be awarded for general damages to the Claimant
- ii. What amount of special damages can the Claimant recover under the circumstances

DISCUSSION AND ANALYSIS

Issue 1- What is the amount, if any that is to be awarded for general damages to the Claimant

- i. *Pain and suffering*

[25] The court after examining the evidence of all the respective Medical Reports in relation to Mr Dalkeith James will rely on a number of cases.

[26] In *Janet Barclay v Metropolitan Management Transport Holdings Ltd Claim No. 2007 HCV 05184 reported in Ursula Khan Personal Injury Awards Volume 6 at page 86*, the Claimant suffered injuries and resulting disability. Ms Barclay was examined by Consultant Orthopaedic Surgeon, Dr Melton Douglas on the 14th day of March 2003. The examination revealed tenderness of left acromioclavicular joint of the left shoulder. It also revealed painful movement of the left arm when flexed and tender lower back palpation.

Dr Douglas in the Medical Report dated October 2004 found:

- i. Strain of the left acromioclavicular joint of shoulder
- ii. Lumbosacral strain

Dr Douglas in the Medical Report dated October 2006 found:

- i. Mildly wasted muscles of left arm and shoulder
- ii. Tenderness of left acromioclavicular joint
- iii. 4/5 of power in shoulder abduction, flexion, extension, adduction, internal and external rotation
- iv. Tenderness over mid thoracic and lower lumbar region

[27] Dr Douglas assessed that she was required to do therapy three (3) times weekly and her combined disability rating was 7% of the whole person. The court awarded special damages in the sum of \$84,500.00 with interest. The court also awarded general damages as follows:

Pain and Suffering and Loss of Amenities	\$1,500,000.00 with interest
Future Medical Care	\$78,000.00
Handicap on the Labour Market	\$100,000.00

[28] The injuries of Ms Barclay were more severe than those of Mr James. The Medical Report done by Dr Douglas stated that her injuries required physiotherapy and continued analgesics. It also revealed that her ability to do light or strenuous work was reduced partially and she would need therapy three (3) times weekly. Therefore, the court believes that the award given to him should be less than the award that was made to Ms Barclay.

[29] I also considered ***Devon Higgins v Uriah Campbell, Winston Campbell and Orville Senior (Consolidated Action)***. This case had a few similarities in relation

to the injuries sustained by Mr James. However, it is my view that Mr James' injuries the instant case were more severe. The more severe injuries included the fractured 12th rib, loss of curvature of cervical spine and migraine headaches. In addition, he had collective scar area of 25 cm and permanent disabilities affecting his physical activities and work. In ***Devon Higgins*** the Claimant was awarded \$4,800,000 in general damages which updated by the CPI as at January 2020 is \$5,508,366.00. Therefore, having considered the injuries the award of general damages to Mr James should be more than what was awarded to Mr Higgins but less than what was given to Ms Barclay.

- [30] In the case of ***Iris Edwards v Samuel Owen McDonnough o/c Owen McDonnough*** reported in Ursula Khan Personal Injury Awards Volume 5 at page 159 to 160 the Claimant suffered injuries similar to Mr James. These included loss of consciousness, abrasion of the right cheek, forehead, left shoulder, right knee and right elbow. She also had chest pain, tenderness over the sternum, spondylosis in the cervical spine and her left 7th rib was fractured. Dr John McHardy made the following diagnosis in relation to her:

- i. Cerebral concussion
- ii. Fracture of the rib
- iii. Contusions of her lung
- iv. Soft tissue injuries to her face, left shoulder and left knee

As a result, the court awarded her general damages in the sum of \$1,300,000.00 with interest at 3% and special damages in the sum of \$56,847.00 with interest at 3%.

- [31] I believe the case of ***Iris Edwards v Samuel Owen McDonnough o/c Owen McDonnough*** is on point with guidance for the sum of general damages to be awarded. In addition, the award in this case is between what Mr Higgins received in ***Devon Higgins*** and what Ms Barclay received in ***Janet Barclay***.

[32] Therefore, the court believes that for general damages an award similar to the award in *Iris Edwards v Samuel Owen McDonough o/c Owen McDonough* is reasonable. The court will award Mr James an updated sum of \$7,000,000.00.

ii. Future medical care

[33] Much of the evidence under this head was provided by Dr Leighton Logan in Medical Report dated the 14th of August 2010. He found that Mr James' further care would involve scar revisional surgery for the foregoing areas followed by a course of superficial irradiation. The result of this will result in 70% to 80% improvement but a complete scar eradication is not possible.

[34] Therefore, I find that the award of \$260,000.00 updated to \$431,407.41 using the CPI as at March 2020 for future medical care is reasonable in the circumstances.

Issue 2- What amount of special damages can the Claimant recover under the circumstances

[35] While special damages must be specifically pleaded and proved, the law is lenient in instances where it is clear that certain costs were incurred that cannot be substantiated in the traditional way.

Proved

a. Medical expenses

[36] Mr James provided receipts to show that he spent a total of \$86,000.00 on medical expenses. The breakdown is set out below:

Port Maria Hospital	\$1,000.00
Dr Lincoln J. Wright	\$17,500.00

Dr Denton Barnes	\$15,000.00
Dr Randolph E. Cheeks	\$36,000.00
Dr Leighton Logan	\$12,000.00
X-Rays & Ultrasound	\$5,250.00

As such, the court will grant Mr James the sum of \$86,000.00 that he expended on medical expenses.

Unproved

b. Transportation

[37] Mr Dalkeith James has asked that the court to grant him transportation costs of \$16,000.00 even though he cannot provide receipts. I find that the transportation costs are reasonable in the circumstances and I accept that the nature of these transactions are difficult to prove. Therefore, I will grant him the sum of \$16,000.00 for transportation cost.

c. Loss of earnings

[38] In *Desmond Walters v Carlene Mitchell* (1992) 29 JLR 173, Wolfe JA (as he then was) emphasized that without attempting to lay down any general principles regarding strict proof, it would be “the vainest pedantry” to expect a side-walk vendor to prove her loss of earning with mathematical precision of a well-organized corporation.

[39] According to the principle established in that case, if other evidence is presented the court can make a decision on an appropriate award to give to the claimant. Mr James alleged that he was employed as a Hotel Worker and Farmer. Consequently, he claimed the sum of \$1,170,000.00 for the hotel work at a rate of \$15,000 per week for 78 weeks. He also claimed the sum of \$390,000.00 for his farming at a rate of \$5,000.00 per week for 78 weeks. He also claimed the sum of \$132,000.00 for a security job that he alleges he got and was to commence approximately 6 months after the accident.

- [40] The court has taken into consideration that Mr James has failed to provide pay slips or a letter of employment from his job at the Beaches Hotel, Boscobel in the parish of Saint Mary. He also failed to satisfy the court that he was a Farmer or that he was employed within the security industry 6 months after the incident. In fact, in the Medical Report of Dr Cheeks dated the 25th of March 2010 Mr James reported that “he was unemployed at the time of the accident but was seeking employment and eventually felt sufficiently recovered to begin working in the security industry.”
- [41] As a result, the court will not grant Mr James an award for loss of earnings on the basis that special damages must be strictly proved.

CONCLUSION

The court awards judgment to the Claimant as follows:

- a. General damages
 - i. Pain and suffering in the sum of \$7,000,000.00 at a rate of 3% per annum from the 20th day of June 2012 when the Defendants were served to the 25th day of June 2020 the date of judgment.
 - ii. Future medical care for the corrective surgery in the sum of \$431,407.41.
- b. Special damages in the sum of \$102,750 at a rate of 3% per annum from the 12th day of September 2008 to the 25th day of June 2020 the date of judgment.
- c. Costs to the Claimant to be agreed or taxed.

.....
Hon. Sonia Bertram Linton, J