



[2023] JMSC Civ. 154

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV04116

BETWEEN	EVON MESSAM	CLAIMANT
AND	TREVOR DUNKLEY JNR. HAULAGE AND EQUIPMENT LIMITED	DEFENDANT

Mr. Aon Stewart for the Claimant instructed by Knight Junor & Samuels

Mrs. Kaysian Kennedy-Sherman and Ms. Simone Gooden for the Defendant instructed by Townsend Whyte and Porter

IN OPEN COURT

Personal Injury – Assessment of Damages – Pain and Suffering - Handicap on the Labour Market – Future medical expenses – Claimant amputee from motor truck vehicle accident – Whole Person Impairment

HEARD: June 13th, 2023 and July 31st 2023

T. HUTCHINSON SHELLY.J

INTRODUCTION

[1] The matter concerns an assessment of damages against the Defendant arising out of a motor vehicle accident which occurred on the 16th day of June 2018. The facts in brief are that the Claimant, was driving a 2009 Mac Motor Truck bearing registration plate CF0722. This vehicle was owned by the Defendant, a company registered under the laws of Jamaica with its registered offices situated at 23

Trenton Road, May Pen in the parish of Clarendon. At the time of the incident, the Defendant was the Claimant's employer.

- [2] On the relevant day and time, the Claimant was at a property owned, managed and occupied by UC Rusal Windalco Ewarton in the parish of St. Catherine. He was using the Defendant's motor truck to haul bauxite up a hill when it developed mechanical difficulties, shut down on the incline of the hill and started to run backwards. The Claimant was unable to stop it as the truck had no brakes, neither foot nor emergency. The truck collided with a pile of dirt before overturning thereby causing the Claimant to suffer severe injuries and damages.
- [3] The Claim Form and Particulars of Claim initiating this suit were filed on October 24, 2018. An amended Particulars of Claim was filed on the 18th of November 2022. The Defendant failed to respond to the Claim and Default Judgment was entered against him in default of acknowledgment of service on the 20th of March 2019 and entered in Judgment Binder 773 Folio 395.
- [4] The matter was scheduled for an Assessment of Damages Hearing on the 13th of June 2023.
- [5] It is to be noted that a Notice of Proceedings dated the 24th of October 2018 was served on General Accident Insurance Company Jamaica Limited, with whom the Defendant had a policy of insurance at the material time.

ISSUES

- [6] The default judgment having been entered, the question of the Defendant's liability for the motor vehicle accident and loss sustained has been resolved, as such, the issues for the determination of the Court are as follows:
- what award should be made to the Claimant as compensation for Pain and Suffering and Loss of amenities?
 - What award, if any, is to be given for Handicap on the Labour Market?

- What award, if any, should be given for Future Medical Expenses?
and
- What sum should be awarded for Special damages?

THE CASE FOR EVON MESSAM

[7] At the commencement of the assessment, the parties were able to agree on a number of documents and these were admitted into evidence as follows:

- a. *Pay Advice for Evon Messam from Trevor Dunkley Jnr. Haulage & Equipment Limited for fortnight ending 8 February 2018 in the sum of \$64,901.93 – Exhibit 1a*
- b. *Pay Advice for Evon Messam from Trevor Dunkley Jnr. Haulage & Equipment Limited for fortnight ending 22 March 2018 in the sum of \$56,571.86 – Exhibit 1b*
- c. *Pay Advice for Evon Messam from Trevor Dunkley Jnr. Haulage & Equipment Limited for fortnight ending 8 February 2018 in the sum of \$66,950.35 – Exhibit 1c*
- d. *Receipt from BJ's Pharmacy dated 31st of August 2018 in the sum of \$1,740.00 – Exhibit 2a*
- e. *Receipt from Cornerstone Pharmacy dated 26th of June 2018 in the sum of \$3,604.00 – Exhibit 2b*
- f. *Receipt from Health First Pharmacy dated 9th of June 2018 in the sum of \$1,258.20 – Exhibit 2c*
- g. *Receipt from Health First Pharmacy dated 10th of June 2018 in the sum of \$1,258.20 – Exhibit 2d*
- h. *Prescription from Drug-Serv Pharmacy dated 30th of July 2018 – Exhibit 3*
- i. *Medical Report of Dr J Nibbs dated March 12th, 2019 – Exhibit 4*
- j. *Letter dated March 4th, 2021 from Orthopaedic Associates to Knight Junor & Samuels – Exhibit 5*
- k. *Copy of National Commercial Bank Cheque No 9254291 in the sum of \$75,000.00 – Exhibit 6*

- l. Receipt from Dr Patricia Mclean dated 19th of October 2021 – Exhibit 7*
- m. Copy of National Commercial Bank Cheque No 9254291 in the sum of \$18,000.00 – Exhibit 8*
- n. Evaluation Letter dated 18th of August, 2022 signed by Winfield Boban – Exhibit 9*
- o. Medical Report of Dr Grantel Dundas dated 21st of April 2021– Exhibit 10*
- p. Medical Report from Jamaica Orthotics Pedorthics & Prosthesis dated 6th of January 2023 signed by Hope Julal-Dundas – Exhibit 11*

[8] The Claimant’s Witness Statement dated and filed on the 22nd of October 2021 and Supplemental Witness Statement dated and filed on the 28th of March 2023 were allowed to stand as his evidence in chief. The Court also granted permission for amplification of specific paragraphs of these documents pursuant to **Rule 29.9** of the CPR.

[9] The Claimant’s evidence is that immediately following the accident, he began to feel severe pain in his right foot. He stated that “*I began to see blood spraying from my foot. I felt dehydrated, exhausted. I was in excruciating pain.*” He also stated that he could see his bones crushed out in his right foot and scattered on the ground. He said that this caused him to think that he was on the verge of death.

[10] He indicated that he had to be assisted by three (3) individuals who placed him in the plant’s ambulance and he was taken to the Linstead Hospital. At the hospital, he was given injections to ease the pain, his right leg was placed in a bag strapped with two (2) pieces of board following which he was transported to the Spanish Town Hospital. He observed that his crushed and mangled leg was barely hanging on to his body.

[11] At the Spanish Town Hospital, he was taken to the x-ray area where his upper body was checked and he was given an amputation form to sign. He then underwent surgery which lasted for 4-6 hours. Mr Messam was hospitalized for over 6 weeks following his surgery as he was not discharged until the 31st of July 2018. He recounted experiencing feelings of depression, sadness and disbelief as

he thought about living with only one leg. He lamented being unable to drive in circumstances where he had worked as a truck driver, driving heavy duty trucks for ten (10) years prior to the accident.

[12] Following his discharge, Mr Messam had to seek assistance from his mother, Winsome Messam who assisted him with cleaning, cooking, laundry and other domestic chores at a cost of **\$15,000.00** per week. For these services, he was provided with receipts evidencing payment and these were admitted as follows:

- a. Receipt dated 5th of August 2018 in the sum of \$15,000.00 – Exhibit 12a
- b. Receipt dated 12th of August 2018 in the sum of \$15,000.00 – Exhibit 12b
- c. Receipt dated 19th of August 2018 in the sum of \$15,000.00 – Exhibit 12c
- d. Receipt dated 26th of August 2018 in the sum of \$15,000.00 – Exhibit 12d
- e. Receipt dated 2nd of September 2018 in the sum of \$15,000.00 – Exhibit 12e
- f. Receipt dated 9th of September 2018 in the sum of \$15,000.00 – Exhibit 12f
- g. Receipt dated 16th of September 2018 in the sum of \$15,000.00 – Exhibit 12g
- h. Receipt dated 23rd of September 2018 in the sum of \$15,000.00 – Exhibit 12h
- i. Receipt dated 30th of September 2018 in the sum of \$15,000.00 – Exhibit 12i
- j. Receipt dated 7th of October 2018 in the sum of \$15,000.00 – Exhibit 12j

[13] In or about 2019, the Claimant visited the Spanish Town clinic for his final check-up on the progress of the healing of the stump on his right leg. He was provided with a Medical Report prepared by Dr. J. Nibbs dated 19th of June 2018 for which he paid the sum of **\$18,000.00**.

[14] Mr Messam was subsequently examined by Dr. Grantel Dundas, an Orthopaedic Consultant Surgeon, who provided a detailed assessment of his medical condition and prepared a Medical Report. He was charged **\$30,000.00** for the consultation and **\$45,000.00** for the Medical Report.

[15] Mr Messam stated that prior to sustaining this injury he earned about **\$69,000.00** per fortnight. Since the accident, he has tried to earn an income by selling alcoholic beverages and natural juices but this business was short-lived as he was unable

to make any profit and attract customers and the customers who purchased the items did so on credit and have not paid. He gave evidence of ongoing physical challenges which included the fact that he can no longer play football with his friends. He also suffers from embarrassment when people look at his leg and make remarks about it. Mr. Messam expressed frustration at the reluctance of females to become involved with him because of his condition and stated that he experiences distracting numbness and tenderness at the end of his amputated limb.

[16] Mr Messam indicated that having lost a significant portion of his leg, he has become dependent on crutches for mobility purposes and has experienced challenges ambulating for long periods due to blisters on his hands and pain under his arm. His quality of life has deteriorated as he is now dependent on persons to assist him because of his inability to obtain other employment. This situation is impacted by the fact that he was always a skilled labourer and did not possess any academic qualifications. He also complained that his inability to work has impacted his ability to manage his hypertension as he is not in a position to purchase the required medication.

[17] Mr Messam was assessed by medical personnel at Surgix Jamaica Limited for rehabilitation measures as well as the associated costs of improving his mobility as an amputee. He was provided with an Evaluation Report dated the 18th of August 2022 which was prepared by Winfield Boban. The report indicates that he will need an above the knee prosthesis to be mobile again and the cost of the prosthesis was stated as **\$770,000.00**. This price includes fitting, components and five physiotherapy sessions.

[18] On the 21st of October 2022, Mr Messam was evaluated at Jamaica Orthotics Pedorthics and Prosthetics. A report dated the 6th of January 2023 was provided which stated that as a result of how short the amputation of his right leg had been done, it would pose a challenge to provide a prosthesis to fit the remaining portion of his leg or stump.

[19] In cross-examination, the Claimant agreed that his fortnightly earnings were dependent on the number of trips that he would make on a daily basis. He conceded that the number of trips could be impacted by weather conditions as rainy conditions would result in fewer trips. He acknowledged that as a result of these factors he could earn less than the **\$69,500.00** stated on his payslip marked Exhibit 1a. Mr Messam accepted that the payslips exhibited did not indicate that he earned **69,500.00** consistently per fortnight as depending on the number of trips he could earn as little as **\$30,000.00**. He agreed further that if he did not work for a fortnight, then he would not be paid and admitted that there were some fortnights that he was not able to work. In respect of the Add Incentive of **\$25,000.00** noted on that payslip, Mr Messam acknowledged that this was not a regular payment.

[20] He was questioned about his other attempts at earning an income and acknowledged that since the accident, he had been operating a taxi. This taxi he later indicated had been bought in 2018. He explained that it had been seized by the Bank (in 2019) and sometime after, he was able to purchase another (in July 2022). When asked by the Court, if this other taxi was still being operated, he replied in the affirmative.

[21] He denied that he earned in excess of **\$30,000.00** per day from the operation of his taxi. He also disagreed with the suggestion that he earned at least **\$20,000.00** per day. He explained to Counsel that on a daily basis after fuel expenses were deducted, he earns **\$5,000.00** per day. He also indicated that the taxi was operated 6 days per week and not 7.

SPECIAL DAMAGES

[22] It is an established legal principle that special damages must be specifically pleaded and strictly proven. There are instances however in which Courts have found that the failure to do so is not necessarily fatal to a claim. The Tribunal is expected to consider all the evidence offered to substantiate the claim, however

tenuous each aspect may be (*Dalton Wilson v Raymond Reid SC Civ. App. no 14/2005 per Smith J.A. at p.12*).

[23] Under this head of damages, Counsel for the Claimant provided this court with documents in proof of sums expended or otherwise lost as a result of this incident. These have been broken down under a number of headings and are dealt with accordingly.

Medical Expenses

[24] In his efforts to persuade the Court that there is a proper basis upon which to make an award for this expense, the Claimant relied on the receipts exhibited for medication purchased as well as the medical treatment received. The sum total of these documents is **\$100,860.40**. In submissions on this point, Counsel for the Claimant arrived at a similar sum, whereas Mrs Kennedy-Sherman has argued that a global award of **\$250,000.00** ought to be given for this head of damages. Having carefully reviewed the relevant documents, I was satisfied that the abovementioned sum had been expended as a result of this injury and there is ample justification for this sum to be awarded.

Domestic Care

[25] It is not in dispute that the amputation would have had an adverse impact on the lifestyle of the Claimant specifically his ability to care for himself and to attend to his household chores. It was in light of this reality that the Court ruled that he would be entitled to seek compensation for the sums paid to his mother for assisting him in this regard. Accordingly, the sum of **\$150,000.00** is also awarded to this Claimant.

Loss of Earnings

[26] In respect of this award, it is the Claimant's position that the average of his three payslips should be used as the appropriate guide in order to calculate the sum that should be viewed as Mr Messam's fortnightly income. The Court was also asked

to make the award up to the 13th of June 2023. This calculation, if accepted, would then result in an award of **\$8,839,522.20**. It is the Defendant's position that the Claimant has failed to show precisely the amount that he actually earned per fortnight. They have also argued that Mr Messam was required to mitigate this loss and the tenous efforts to which he has pointed do not go far enough in this regard.

[27] In my assessment of these arguments as well as the evidence, I note that it was accepted by Mr Messam that there were actually fortnights when his earnings fell below the amounts stated in the payslips which were placed into evidence. He even agreed that the earnings could be as low as **\$30,000.00** per fortnight depending on a number of factors which included the weather. Mr Messam also acknowledged that there were times when he did not work and as such would not have earned anything. The incentive payment was also not a regular feature of his fortnightly income.

[28] Applying all these factors to the issue for consideration, I am persuaded that the better approach would be to further reduce this average to include the sum of **\$30,000.00** as well as one fortnight without an income. The average would then be **\$43,684.82**. The relevant period for calculation would be June 14th, 2018 to December 2018 and December 2019 to July 2022. These periods have been identified to take account of any earnings that Mr Messam would have made from both taxis. I have not considered the juice making enterprise as I accept that while he engaged in this venture it was a loss and earned no income for him.

[29] Given his limitations which were physical and academic, I do not agree with the Defendant's submission that sufficient efforts were not made by him to mitigate his loss. As such, I am satisfied that an award in the sum of **\$3,494,785.60** would be appropriate for this loss.

[30] Accordingly, the global award for special damages for this Claimant is **\$3,745,646**.

GENERAL DAMAGES

Medical Evidence

- [31] The particulars of the Claimant's injuries were outlined in the Medical Reports prepared by Dr. Nibbs and Dr Grantel Dundas. The Summary Report of Dr. J. Nibbs dated the 19th of June 2018 indicated that upon examination and investigation, Mr Messam was found to have extensive soft tissue injury to mid-thigh with partial amputation of his leg. He was diagnosed as having a mangled right leg secondary to severe crush injury. He was treated with IVF, IV antibiotics and right above knee amputation. The prognosis stated that the Claimant had a significant swelling from the crush injury which would cause impaired healing of his stump. The Claimant also had a long-term hospital stay due to post-operative wound dehiscence and subsequent delayed healing. The Doctor noted that the Claimant was assigned to the Surgical Outpatient Department and the plastic surgery clinic for follow up.
- [32] The report of Dr Dundas dated March 23, 2021 outlined the following diagnosis of the Claimant:
- Status post above knee amputation right lower limb.
- [33] Dr. Dundas stated that based upon investigations, the radiographs done on the Claimant at Medical X-Ray Institute revealed that the end of the femoral shaft is in close proximity to skin with no significant soft tissue padding over the bone end. He further stated that the bone end was irregular and contour.
- [35] Based on Dr. Dundas' assessment, Mr. Messam's above mid-thigh amputation amounts to one hundred percent (100%) lower extremity impairment and forty percent (40%) of the whole person as at the 21st April 2021.
- [36] In assessing Mr. Messam's need for prosthesis, Dr. Dundas noted that the amputation will need to be revised with the shortening of the femoral shaft and a Myodesis of the quadriceps and hamstring components.

CLAIMANT'S SUBMISSIONS

[37] In his examination of the relevant considerations for the Court tasked with assessing general damages for pain and suffering and loss of amenities, Mr. Stewart highlighted several factors to be taken into account which include:

- Nature and extent of the injuries
- Treatment undergone
- Period of incapacity
- Impairment of physical abilities and loss of lifestyle
- Effects of the injury on the Claimant
- Severity and duration of the pain
- Age of the Claimant
- Emotional Suffering

PAIN AND SUFFERING AND LOSS OF AMENITIES

[38] In submissions on the appropriate award under this heading, Learned Counsel highlighted the clinical observations of the doctors as well as the evidence of the Claimant on the physical and mental trauma which had been suffered by him as a result of this injury. He commended to the Court the observations of Dr Dundas that this impairment was at least 100% lower extremity impairment which amounted to 40% whole person impairment. He also made reference to the emotional impact on the Claimant, which included his loss of confidence and loss of enjoyment in life as his social activities have been severely curtailed.

[39] Mr Stewart submitted that in light of all the circumstances, the appropriate award would be **Nineteen Million Dollars (\$19,000,000.00)** and he relied on the decision of **Nadine Bowes v Hugh Roy Chambers** [2021] JMSC 199 in support of this assertion. In that matter, the Claimant had an above-knee amputation of her leg and was diagnosed as sustaining an 85% disability as a result of the loss of her left leg. No statement was made as to the whole person impairment. The award for General Damages in December 2021 was **\$17,000,000.00** which updates to **\$18,511,111.00** when the CPI for April 2023 of 127.4 is utilized.

HANDICAP ON THE LABOUR MARKET/LOSS OF FUTURE EARNINGS

[40] On the question of an appropriate award for Handicap on the Labour Market/Loss of Earnings, Counsel directed the Court's attention to the Court of Appeal decision of **Channus Block and Marl Quarry Limited v Curlon Orlando Lawrence** [2019] JMCA Civ 3 where Morrison P. at 41 referred to the dicta of Lord Denning MR in **Fairley v John Thompson (Design and Contracting Division) Ltd** [1973] which stated:

".....there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages."

[41] Reference was also made to the decision of **Andrew Ebanks v Jepther McClymont** Claim No. 2004 HCV 2172 (unreported) delivered 8 March 2007, where Sykes J (as he then was) spoke on the applicable principles to be used in the determination of whether to use the "*lump sum*" or the "*multiplier/multiplicand approach*."

[42] Counsel submitted that the multiplier of 12 should be used as in the case of **Curlon Orlando Lawrence v Channus Block and Marl & Ors** [2013] JMCA Civ 6. where the Claimant in that case was 28 years old at the time of the accident. He stated that there are 26 fortnights in a year and using the average salary per fortnight of **\$62,808.00 x 26 = \$1,633,008**. Mr Stewart calculated that when that sum is adjusted using a multiplier of 14, the sum arrived at is **\$19,596,096.00** and he asked the Court to make this award.

COST OF FUTURE CARE

[43] Counsel submitted that based on the evaluation report prepared by Winfield Boban of Surgix Jamaica Limited, the appropriate award under this head of damages is **\$6,930,000.00**. This sum is justified based on the evaluation report that would have stated the cost for the type of prosthesis for the Claimant would be **\$770,000.00** which includes fittings, components and five physiotherapy sessions. Counsel

further expressed that the Claimant will need to replace the device nine (9) times during his lifetime. Mr Stewart also asked for an award in the sum of **\$475,000.00** which is the estimated cost of further surgical intervention given the observations made by Dr Dundas as to the likely corrective measures which would have to be taken.

DEFENDANT'S SUBMISSIONS ON DAMAGES

[44] On the issue of the quantification of the award for general damages for pain and suffering and loss of amenities, Mrs Kennedy-Sherman submitted that the appropriate award is within the region of **\$7,000,000.00** to **\$12,000,000.00**. Learned Counsel also cited a number of cases as justifying an award in this sum. These authorities are outlined below:

1. **Simone Moore v Tulsie Grant** (Suit No. C.L.M 109 of 1988 reported at page 37 Khans, Volume 4. The Claimant underwent a below knee amputation. Her permanent disability was assessed at 40% of the function of the lower limb. Her total whole person disability was assessed at 10-12%. The Judgment was delivered in October 1996 and updates today to a total of **\$8,813,750.00**.
2. **Oswald Espeut v Sons Transport et al**, (Suit No. C.L.1992 E 043) reported at page 39 Khans, Volume 4. The Claimant suffered compound comminuted fracture of the right leg. He underwent an amputation of the right leg above the knee. His disability was assessed as 80% of the lower extremity. The Judgment was delivered in June 1997 and the award now updates to **\$11,567,678.53**.
3. **Willard Morgan v Valley Fruit** (Claim No. HCV 0805 of 2003) reported at page 31 Khans, Volume 6. The Claimant's leg was amputated below the knee and this was assessed as 80% permanent partial disability of the right leg and 28% whole person disability. The judgment was delivered on June 2, 2000. The award now updates to **\$11,203,703.00**.

4. **Joseph Frazer v Tyrell Morgan & Trevor Coroll** (Suit No. C.L. 1999 F-031) reported at page 19 Khans, Volume 5. The Claimant had a high below knee amputation. His disability was assessed at 80% of the affected extremity or 32% of the whole person. The judgment was delivered on June 2, 2000. The award now updates to **\$12,191,200.00**.

HANDICAP ON THE LABOUR MARKET/LOSS OF EARNINGS

[45] Mrs. Kennedy-Sherman took issue with this head of damage. She argued that the Claimant has not provided the Court with any medical proof to suggest that he is unable to work. Learned Counsel contended that in his Further Amended Particulars of Claim and his witness statement, the Claimant merely asserts that he cannot work. Mrs Kennedy-Sherman submitted that in a claim for handicap on the labour market, the Claimant needs to provide evidence, however tenuous it may be, for the Court to make an award as the Court is being asked to assess his reduced eligibility for employment or the risk of financial loss. The case of **Norma McBean v Rainford Wade and Rupert Campbell** [2017] JMSC Civ.74 was cited in which the Court examined the relevant considerations for such an award to be made.

[46] Learned Counsel placed reliance on the authority of **Robert Minott v South East Regional Authorities** [2017] JMSC Civ 218 delivered on the 20th October 2017 where the Court enunciated the following principles:

- a. compensation for loss of future earnings is awarded for real assessable loss proved by evidence and;
- b. if the Claimant is earning as much as he was earning before the accident and injury, or more, he has no claim.

[47] She also commended to the Court, the decision in **Kenroy Biggs v Courts Jamaica Limited and Peter Thomson**, unreported judgment delivered on the 22nd of January 2010, where the multiplier/multiplicand method was used.

[48] Mrs. Kennedy-Sherman asked the Court to note that the Claimant has placed no evidence before the Court, whether by medical report or corroborating witnesses that he could not cope with any kind of work whatsoever. Counsel submitted that the Claimant has failed to show any attempts at any other work, save and except for trying his hand at earning income by selling alcohol, beverages and natural juices, which in any event, she submits, demonstrates that he is able to work if so motivated.

[49] Mrs. Kennedy-Sherman insisted that the Claimant cannot be rewarded for his deliberate choice not to engage in or attempt to work and ought to place on record his reasonable attempt at re-entering the work force in some other way.

FUTURE MEDICAL CARE

[50] In relation to cost of medical care, Learned Counsel for the Defendant insisted that the Claimant has not presented any evidence or medical evidence to support the view that he will require an above knee prosthesis which will cost approximately **\$770,000.00** and have to be replaced approximately nine times during his lifetime. Counsel urged the Court not to make an award under this head of damage. Reliance was placed on the authority of **Kenroy Biggs v Courts Jamaica Limited and Peter Thomson (supra)**.

DISCUSSION AND ANALYSIS

GENERAL DAMAGES – PAIN AND SUFFERING AND LOSS OF AMENITIES

[51] The aim of an assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the damage, loss or injury suffered as was enunciated by Lord Blackburn in **Livingstone v Rawyards Coal Co.** [1880] Appeal CAS.25. Thus, it is trite law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as “**nearly as possible**” puts the Claimant in the same position she would have been in if she had not sustained the wrong. (per Lord Blackburn in **Livingstone supra**)

[52] In seeking to arrive at an appropriate award for pain and suffering and loss of amenities, the Court adopts the dicta of Lord Hope of Craighead at page 507 of the case of **Wells v Wells** [1998] 3 All ER 481: -

“The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the claimant’s general damages.”

[53] In assessing a suitable award under this heading, I find useful guidance in all the cases which have been cited. Although none is on all fours with the instant case, they provide guidance as to the quantification of the award. I am also mindful of the principle enunciated by Campbell J. in **Beverly Dryden v Winston Layne SCCA 44/87** (unreported) delivered 12th June 1989 that personal injury awards should be reasonable and assessed with moderation.

[54] While all the cases cited were similar in the type of amputation suffered by the Claimant, the cases of **Nadine Bowes** and **Joseph Frazer** were among the closest in comparison. The distinctions which were noted are that that while both individuals suffered 85% and 80% impairment to the lower limb respectively, Mr Messam suffered 100% lower extremity impairment. An impairment which it is pellucid was far more significant than in either situation. Additionally, his whole person impairment is assessed as 40% which is significantly greater than that of **Joseph Frazer, Willard Morgan** and **Simone Moore**. These are factors which likely had a more deleterious effect on his physical abilities and prospects of returning to a state of normalcy.

[55] In my examination of all the authorities relied upon, I noted that the decisions cited by the Defendant were largely decided between the period 1996 to 2000. The **Nadine Bowes** decision on the other hand is of more recent vintage and perhaps better reflective of the current rate of inflation and price index. Having made this

observation however, I also noted that while **Ms Bowes** had to undergo an amputation of her left leg, she also suffered extensive injuries to her right leg and had to undergo a skin graft and surgery to that limb. It is in these circumstances that I note that the award for this Claimant would be marginally lower given those significant factors. As such, I am satisfied that an appropriate award would be in the sum of **\$15,500,000.00**.

HANDICAP ON THE LABOUR MARKET

[56] To succeed in obtaining an award under the head of Handicap on the Labour Market, there must be evidence of the following:

- a. the claimant's earnings at the time of the trial,
- b. evidence of loss of these earnings,
- c. evidence of difficulty finding alternative employment and
- d. evidence that any subsequent employment would result in diminution of earnings.

(Dovan Pommells v George Edwards et al Khans Vol 3, pp.138-144)

[57] It is not in dispute between the parties that the medical evidence provided makes no comment on the Claimant's ability to work. Whilst there was no independent evidence to assist the Court in determining what efforts were made by Mr Messam to find stable employment, the Court accepts that he was an unskilled and unschooled labourer who had previously survived on his ability to drive and he was now unable to do so. I am satisfied that he has sought to mitigate his loss by venturing into the selling of beverages and operating a taxi, neither of which placed him back in his pre-injury earning capacity. These efforts provide cogent evidence that any employment that Mr Messam would now be able to obtain would place him lower on the salary scale than he had previously been.

[58] The aim of an award of damages under this heading is to restore the claimant's pre-accident status by providing a sum which, as far as possible, equates to the income which he would have earned during the period he is unable to earn as a consequence of the injuries that have been caused by the defendant's negligence. Based on the requirements outlined in the authorities and having considered that there exists credible evidence that the claimant's injury will affect his ability to earn a living in his usual socio-economic environment, there is ample justification for this award.

[59] In my review of the appropriate salary range, I had identified the sum of **\$43,684.32** per fortnight. In respect of the appropriate multiplier, Counsel for the Claimant had relied on **Curl Orlando Lawrence** where a multiplier of 12 was identified for a Claimant who was 1 year younger than Mr Messam but in his calculations, Mr Stewart utilized a multiplier of 14. Having considered the respective ages of this Claimant and Mr Lawrence, I am persuaded that a multiplier of 12 would be appropriate in this situation. Having done the relevant calculations, the award for this head of damages is **\$13,629,507.84**.

COST OF FUTURE MEDICAL CARE

[60] Mr Stewart submitted that **\$7,405,000.00** should be awarded under this heading. This sum includes the sum of **\$475,000.00** for future surgeries and **\$6,930,000.00** for 9 replacements of the prosthetic leg, treatment and physiotherapy. On the other hand, it is the Defendant's position that no award should be made under this heading as no evidence justifying same has been placed before the Court.

[61] In relation to future medical care, I am mindful of the relevant legal principles which were affirmed by the Court in **Orlando Adams v Desnoes & Geddes Limited t/a Red Stripe** [2016] JMSC Civ. 21 where the Honourable Mrs. Justice Sonia Bertram Linton (Ag) (as she then was) stated at paragraph 64: -

"Future medical expenses are reasonable and necessary health care expenses required for the treatment of injuries sustained as a result of the negligent act at issue. To recover future medical expenses, the claimant must show a "reasonable

probability” his injuries will require him to incur medical expenses in the future. The claimant may recover future medical expenses if he shows the existence of an injury, that medical care was rendered for the treatment of that injury prior to the time of trial, the cost of that past medical care, and that he is still injured to some degree at the time of trial. At a bare minimum, the claimant must show the reasonable value of his past medical treatment and the probable necessity of future medical treatment. AG v Tanya Clarke Supreme Court Appeal No.109/2002.”

[62] I do not agree with the Defendant that the Claimant has failed to place evidence before the Court to show that future medical care will be required. In fact, there is conclusive evidence that the Claimant will require the above knee prosthesis referred to in the letter from Surgix Jamaica in order to improve his chances at mobility and a better quality of life. The documentation also states that the prosthetic leg has to be replaced every 9 years. In light of the overwhelming evidence justifying this award, I am satisfied that the sum sought by the Claimant should be awarded.

CONCLUSION

[63] The assessment of damages for injury and loss incurred by the Claimants are as follows:

1. Special Damages in the sum of **\$3,745,646.00** at 3 % interest from the 16th of June 2018 to the 31st of July 2023.
2. General Damages for Pain and Suffering and Loss of Amenities in the sum of **\$15,500,000.00** at 3% interest from the 8th of January 2019 to the 31st of July 2023.
3. Handicap on the Labour Market in the sum of **\$13,629.507.84**.
4. Cost of Future Medical Care in the sum of **\$7,405,000.00**.
5. Claimant is awarded his costs to be taxed if not agreed.
6. Claimant's Attorney to prepare, file and serve Judgment herein.