



[2022] JMSC Civ. 68

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2016HCV04384**

**BETWEEN CALVIN PRENDERGAST CLAIMANT
AND JOLLY WALKER DEFENDANT**

**Mr. Akheem Harris instructed by Kinghorn & Kinghorn for the claimant.
The defendant not appearing and not being represented.**

Heard May 2, 2022 and May 26, 2022

***Quantum of damages - multiple fractures - scaring - 17% whole person impairment
- prolonged recovery - the subjective element in the assessment of damages.***

CORAM: JARRETT, J (Ag.)

INTRODUCTION

[1] Calvin Prendergast is a tour operator. On the afternoon of March 2, 2015, when he set out on his motor cycle from Ocho Rios in St Ann, destined for St. Mary, little did he know that by nightfall he would end up in the St Ann's Bay Hospital suffering from multiple fractures and multiple wounds. His route on that fateful day took him on the Ocho Rios Bypass. At Evelyn Street, he had the right of way, but as he proceeded through that intersection, the defendant Jolly Walker made a right turn in the filter lane and collided with him. The collision flung the claimant from his motorcycle and into the air. He fell some distance away and lost consciousness. Some good Samaritans rushed him to the St Ann's Bay Hospital. Nineteen months and two weeks later on October 21, 2016, he filed a claim in negligence against the defendant. On July 14, 2017, he obtained Judgement in default of

acknowledgement of service. At the time of the accident the claimant was 27 years old. My task is to assess the amount of damages if any, to which he is entitled

The evidence

- [2] The claimant testified that on the day of the accident, he was taken to the emergency ward at the St. Ann's Bay Hospital and later to the operating theatre where his wounds were stitched and dressed. After the accident he was rendered unconscious, but he does not know for how long. He was hospitalised at the St. Ann's Bay Hospital for approximately one month and told that he required surgery. An infection later developed in his leg and as his condition deteriorated, amputation of the leg was considered. He was subsequently admitted to the Annotto Bay Hospital where he came under the care of Dr Denton Barnes.
- [3] Dr Denton Barnes is an orthopaedic surgeon. His medical reports dated June 7, 2016 and November 1, 2021, respectively were tendered and admitted in evidence. The latter report incorporates and expands on the doctor's earlier findings as well as provide additional medical evidence of the claimant's injuries, treatment and prognosis.
- [4] Dr Barnes says that the claimant presented at the Annotto Bay Hospital on March 28, 2015. He records his initial findings on physical examination of the claimant as follows: -
- a). His right arm was splintered.
 - b). There was obvious swelling of the right arm, tenderness to the movement of the right arm.
 - c). No distal neurovascular deficit in the right upper limb.
 - d). His right knee had abrasions over the anterior aspect, extending down to the right leg with a deep laceration to anterior aspect of the right leg
 - e). The lower left limb had a 10cm incision over the left greater trochanter which was oozing purulent material.

- f). There was a 25 cm wound over the lateral aspect of the left thigh which was deep to the muscles and was oozing copious amounts of foul smelling purulent material.
- g). There was no active bleeding from this wound.
- h). There were abrasions to the lateral aspect of the left knee; a 1 by 2 cm wound to the left knee.
- i). There was a 35 cm wound to the anterior aspect of the left leg deep to the tibia with a 5 by 2 cm region of the left proximal tibia exposed.
- j). 5 by 4 cm ulcer over the left heel, the Achilles tendon.
- k). 4 by 4 cm ulcer over the left heel with minimal oozing, two separate wounds.
- l). 2 by 4cm ulcer over the left lateral malleolus with deformity of the left lateral malleolus.
- m). Abrasions to the right knee were healing, abrasions to the lateral aspect of the right leg were healing.
- n). Decrease range of movement of the right knee.

Radiographs revealed a fracture of the right humerus, fracture of the left ankle with displacement in angulation.

[5] On admission to the Annotto Bay Hospital, the claimant's wounds were infected. The infection extended to the left thigh and this led to fasciitis. He had a long course of antibiotics before his wounds were sutured and cleaned under local anaesthetic and sedation in the operating theatre. Thereafter, they were dressed daily. On April 24, 2015 he was reviewed and assessed as having a non – union of his right humerus fracture, a healed mal-united fracture of the left medial malleolus with minimal displacement. At that assessment, his open wounds were improving and were all granulated with no sepsis. He was discharged after being advised that he would need skin grafting, intramedullary nailing and bone grafting of his right humerus. He was readmitted for surgery on May 18, 2015, at which time he had

open reduction and internal fixation of the right humerus fracture with an intramedullary nail. He was discharged from hospital on May 20, 2015.

[6] At a review done on October 23, 2015, the claimant presented with minimal pain but the right upper arm was weak. On physical examination there was a decreased range of movement of the right shoulder, decreased range of movement of the right elbow and a gap non-union of the distal segment of the right humeral fracture. He was advised that he would need bone grafting or bone marrow injections.

[7] The claimant returned for further review on June 19, 2018, at which time he reported right arm weakness, feeling movement at the fracture site, pain in his left ankle along with a limp and difficulty participating in activities. He also reported an unsightly scar to his left thigh and leg, intermittent back pain and decreased range of movement of his right shoulder and right elbow. On physical examination he was assessed as having a healed fracture of the left ankle with osteoarthritis, non-union of the right humerus, mechanical back pain and hypertrophic scarring. He was advised that he would require the removal of the intramedullary nail and bone grafting, followed by analgesia, muscle relaxant and continued physiotherapy.

[8] By October 16, 2020, there was significant movement of the right arm at the fracture site and significant deformity of the right arm. A repeat radiograph revealed that the intramedullary nail had fractured at the site of the non-union. One month later on November 16, 2020, under general anaesthetic, the claimant had open reduction, internal fixation along with the removal of the fractured intramedullary nail and bone grafting of the right humerus. He was discharged with analgesics and antibiotics.

[9] Dr Barnes' assessment of the claimant on November 20, 2020 is of a mal- united fracture of the left ankle, a non-union of the right humeral fracture (post-surgical treatment) and multiple soft tissue injuries which were healed. He advised continued physiotherapy and rehabilitation. On the doctor's final reported assessment on September 17, 2021, the claimant complained of mild pain in his right arm, decreased range of movement of the right elbow, decreased range of

movement of the right shoulder and pain in his right ankle on angulating. Dr Barnes made the following findings on physical examination: -

- (a) His ankle has a 21 cm scar to the right arm laterally.
- (b) No scar tenderness.
- (c) He has a 10cm scar to the shoulder.
- (d) Right elbow range of movement:30° to 115°.
- (e) Right shoulder ranges of movement were as follows: abduction 120°, adduction 50°, flexion 140°, extension 60°, internal rotation 70°, and external rotation 70°.
- (f) He had healed abrasions to his left flank and 10 x 6 cm scar.
- (g) There is a 5 x2 cm scar to his left hip laterally.
- (h) There was a 30x 1.5 cm scar to his left thigh laterally.
- (i) 27cm scar to his left leg anteriorly.
- (j) 17cm scar to his right knee.
- (k) 5x2 cm hypertrophic scar to the left lateral malleolus.
- (l) 6x1cm scar to the left heel.
- (m)4 x1 cm keloid scar to the right heel.
- (n) His left ankle range of movement were 15° to 25° plantar flexion, inversion was 5°, eversion 5°.

Relying on the Medical Association Guides to the Evaluation of Permanent Impairment, he assessed the claimant as having 17% whole body impairment.

- [10]** The claimant gave evidence that after he was released from the Annotto Bay Hospital he was unable to walk and had to use a wheelchair. He was assisted by his father to get from his bed to the wheelchair as well as to use the bathroom. His parents had to help him to bathe. He was heavily depended on them as well as on his spouse and had to learn to walk “all over again”. This took him several months to do. He had physiotherapy lasting six weeks. His right hand is his dominant hand and that was the hand fractured. He required extensive physiotherapy to regain range of movement in the right elbow. He also experienced intermittent pain in his right arm for about four years after the accident. His financial needs were many and he became dependent on his spouse. This dependency caused him “great emotional strain”. He felt less than a man as he could not take care of his responsibilities.
- [11]** He testified at trial that he can feel movement at the site of the fracture in his right humerus. Furthermore, when he wakes up in the mornings and whenever he stands for long periods of time, he has swelling and pain in his ankle.
- [12]** To enable him to visit with his doctor, the claimant said that he incurred transportation expenses of \$10,000. He was not provided with any receipts from the taxis he took. Tendered and admitted into evidence were the following documents which the he relies on to prove his other out of pocket expenses: -
- a) A receipt in the sum of \$50,000.00 issued by Dr Barnes for the cost of his medical report dated June 7, 2016.
 - b) A receipt in the sum of \$75,000.00 issued by Dr Barnes for the cost of his medical report dated November 1, 2021.
 - c) 15 receipts totalling \$24,840.00 issued by Mr Rehab for physiotherapy sessions.
 - d) Receipt in the sum of \$185,000.00 issued by Dr Barnes for the rental of surgical equipment.
 - e) 8 receipts totalling \$8,500.00 issues by Dr Barnes for visits to dress his wounds.

- f) A receipt in the sum of \$35,000.00 for his ambulance transfer from the St. Ann's Bay Hospital to the Annotto Bay Hospital.
- g) A receipt in the sum of \$42,765.00 for prescription items at Andrews Memorial Pharmacy for medication.
- h) A receipt in the sum of \$1,200.00 for lab services at Caledonia Medical Laboratory Ltd.
- i) A receipt in the sum of \$1,600.00 from Central Medical Laboratories Ltd. for lab services.
- j) Three receipts totalling \$ 5,032.46 from Lizmel Pharmacy for pharmaceuticals.
- k) Three receipts from R & J Pharmacy totalling \$2,668.82 for pharmaceuticals.
- l) Two receipts from Great House Pharmacy totalling \$ 3,778.00 for pharmaceuticals.
- m) Two receipts totalling \$8,000.00 for consultation with Dr. Barnes
- n) A Government of Jamaica receipt in the sum of \$3,000.00 for a police report.
- o) 8 receipts totalling \$24,206.63 from Delexis Pharmacy for medication purchased.

The claimant's submissions

[13] Counsel for the claimant argued that the decision in **Marsha Page v Malcom Campbell** C.L. 2002/P-006, is a useful guide for me to consider in making my award of general damages. He said that in that case, the claimant was awarded \$ 1,700,000.00 for pain and suffering and loss of amenities in June 2004. That award updates to \$ 6,967,686.90 using the most current Consumer Price Index. Counsel argued that the injuries in **Marsha Page** were less severe than those of the claimant and therefore the claimant should receive a higher award. He posited that \$10,000,000.00 is a reasonable award in all the circumstances, for pain and suffering and loss of amenities.

Analysis and Discussion

Nonpecuniary losses

[14] I am satisfied, based on the claimant's own evidence and the medical reports of Dr Barnes, which were unchallenged, that the claimant suffered serious injuries from the motor vehicular accident in which he was involved on March 2, 2015. He is therefore entitled to be compensated for his losses.

[15] I embark upon the assessment of damages in this case with the clear recognition that in relation to the claim for general damages, what is of paramount importance is the nature and extent of the claimant's injuries and their impact on him, including any consequential disability that he may have. With guidance from any comparable authority, I am to decide on a reasonable sum of money to award for the claimant's non-pecuniary losses.

[16] The evidence demonstrates that the claimant's recovery was difficult and protracted. His wounds became infected and were sutured under operating theatre conditions twice. Due to the non – union of the fracture to the right humerus, he underwent open reduction and internal fixation with the implantation of an intramedullary nail. He had open reduction performed twice. The second open reduction surgical procedure involved internal fixation, the removal of the intramedullary nail and bone grafting. He has decreased range of movement to his right elbow and right shoulder. Seven years after the accident, he complains of movement at the site of the fracture. As to his left ankle fracture, ultimately it did not heal properly. He is left with a mal-union fracture to that ankle with decreased range of movement. There are scars on his body. The one to his right heel is a keloid scar

[17] In **Marsha Page v Malcom Campbell**, the claimant was struck by a motor vehicle as she attempted to cross the Mandela Highway. She lost consciousness and was admitted to the Spanish Town Hospital. She suffered a left displaced fracture of the neck of the left humerus; pain and tenderness with movement of the left ankle; a 3 cm laceration over the patella of the left knee; numerous abrasions and

lacerations on the extensor aspect of the upper left limb; neck movement was limited by pain; there was a laceration on the right side of the face and neck; numerous soft tissue injuries, but no neurological deficits. She was left unable to lift heavy weights with her left arm and she felt pain when washing clothes. She also suffered severe pain in her ankle. Her neck pains affected her sleep, and the keloid scars from her healed wounds which became swollen and painful in the heat, aroused curiosity and unkind comments from onlookers. Sykes J (as he then was) placed heavy weight on the fact that the claimant **Marsha Page** had lost a “scar free body forever” and, that the uncomplimentary remarks of persons who observe her scars would have caused her worry and anxiety. He considered that based on the nature and extent of her injuries she was entitled to more than a “moderate” award. The award in that case updates to \$6,967, 686.90.

[18] I agree with Mr Harris, that the decision in **Marsha Page v Malcom Campbell** is a helpful guide. Both the claimant in **Marsha Page** and the claimant at bar, were rendered unconscious by the respective motor vehicular accidents in which they were involved. Both of them suffered multiple injuries to include fractures of the humerus, abrasions and lacerations. Both had scarring after their wounds healed. I am prepared to agree with Mr Harris that the injuries suffered by the claimant are more severe than those suffered by the claimant in **Masha Page**. His fracture of the right humerus had a non – union which had to be treated with two open reduction surgical procedures. His recovery was difficult and protracted. His wounds became infected and he had to endure an extensive period of antibiotic treatment. There is no report of the claimant in **Marsha Page** requiring any surgical intervention to assist with the healing of her fractured left humerus. Her wounds did not become infected. She spent only one week in hospital, while the claimant’s hospitalisation was extensive. He suffered a fracture to the left ankle which ended up with a mal-union. The claimant in **Marsha Page** had no such reported injury. There is decreased range of movement in his right elbow, right shoulder and his left ankle. There is no such reported disability in relation to the claimant **Marsha Page**. I do of course recognise that the claimant **Marsha Page** gave evidence of having difficulty lifting heavy weights with her left hand. The claimant has been

accessed with a 17% whole person impairment. There is no reported impairment for the claimant in **Marsha Page**.

[19] While Dr Denton speaks to the fact that the claimant reported that the scars to his left thigh and leg are unsightly, there is no evidence from the claimant himself of any effect that these scars have on him. The individual circumstances of every claimant must be borne in mind in the assessment of damages. This means taking into account the impact of the injury on the particular claimant before me. This is the subjective element of the assessment process that Sykes J (as he then was) made mention of in **Marsha Page**. Based on the lack of evidence of any distress or anxiety faced by the claimant as a result of his scars, I cannot place the same type of weight on them as Sykes J (as he then was) placed on the scars in the case of the claimant in **Marsha Page**.

[20] I place great weight on the claimant's long and difficult recovery, to include the extensive antibiotic treatment he received so as to combat the infections that beset his wounds. I also place great weight on the mal-union of his left ankle and the fact that at the time of trial, he still has pain and swelling in the ankle. Significant weight is also placed on the fact that the claimant underwent two open reduction surgeries to address the protracted healing of his fractured right humerus, as well as the fact that he is now left with a 17% whole person impairment. I take into account, from a largely objective perspective, the claimant's scars, since, as I observed earlier, he did not give any evidence of the effect, if any, they have on him. I also factor into my reckoning, the emotional effect on the claimant of his dependency on his spouse. In the end, using the **Marsha Page** decision as a guide, I award the sum of \$ 8,000,000.00 in general damages for pain and suffering and loss of amenities.

Pecuniary Losses

[21] I accept the claimant's evidence that he was not provided with any receipts from the taxi operators whose services he utilised. It is only reasonable that I do so since typically, our public passenger service providers do not issue receipts. With the out

of pocket expenses referred to in paragraph [12] of this judgement proved, I award the claimant the sum of \$ 480, 590.91 in special damages.

Conclusion

[22] In the circumstances, I make the following orders in favour of the claimant: -

- a) General damages in the sum of \$8,000,000.00 for pain and suffering and loss of amenities with interest at 3% from October 21, 2016 to today's date.
- b) Special damages in the sum of \$ 480,590.91 with interest at 3% from March 2, 2015 to today's date.
- c) Costs to be taxed if not agreed.