



[2021] JMSC CIV. 139

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 02682

BETWEEN	ARIEL HERNANDEZ RAMOS	CLAIMANT
AND	CHRISTOPHER AUSTIN	1ST DEFENDANT
AND	AUSTIN HAULAGE COMPANY LIMITED	2ND DEFENDANT

IN OPEN COURT

Sean Kinghorn and Angelique Brown instructed by Messrs. Kinghorn and Kinghorn Attorneys-at-law for the Claimant

Defendant – unrepresented and absent

Heard: May 5, 2021 and June 25, 2021

Assessment of Damages – Soft Tissue injury - Fractured right acetabulum - Right foot drop - 15% lower extremity impairment - 6% whole person impairment – Handicap on the labour market

I. REID J. (AG)

- [1] On June 8, 2017, at about 2:30 pm, the Claimant was driving his motor vehicle towards Ocho Rios along the North Coast Highway in the parish of Trelawny when the Defendant, attempting to overtake a line of traffic, collided into his vehicle.
- [2] The matter came before this court for assessment of damages.

WITNESS STATEMENT

- [3] The Claimant was 41 years old at the time of hearing. He reported that shortly after the accident, he felt pain from his right hip down and suffered bruises on his right and left arms.
- [4] He was taken to the Falmouth Hospital and later the Cornwall Regional Hospital. He was hospitalized for 15 days, underwent surgery and given pain medication and antibiotic. After he left the hospital on June 23, 2017, he continued to feel pain and was confined to his home where he received the assistance of his girlfriend to bathe him. He was confined to bed rest until September 2017.
- [5] Before the accident, his weekly wage was \$200,000.00. He reported however, *“now as a result of the accident I now earn a weekly estimate wage of One Hundred Thousand Dollars (\$100,000.00)”*. He later stated that he was currently unemployed.
- [6] Since the accident, he had difficulty walking fast and also felt pain in his hip when he walks fast. He could not stand nor sit for long periods. After he returned to work as a Sales Representative, he could only manage light work. He had to sleep on his back or left side as his right hip would cramp and hurt otherwise. He felt pain in his right hip whenever the weather was cold. He was an active tennis player but he was now unable to play.

MEDICAL REPORT

- [7] Three medical reports were relied upon by the Claimant.
- [8] The first report was that of Dr. Chit of the Falmouth Hospital dated 17 August 2017. An x-ray uncovered a right acetabular fracture. He also suffered soft tissue injury. He was medicated and transferred to the Cornwall Regional Hospital.
- [9] The medical report summary form of Dr. R. A. Nelson dated 2 October 2017 gives a diagnosis of right acetabular fracture with foot drop. Open reduction and internal

fixation was done on the acetabulum and the posterior column. On the last visit, he still had a foot drop and was undergoing physiotherapy. It was expected 6 months would be required before he would return to regular functioning.

- [10] The third medical was that of Dr. Don Gilbert. This report was done in two parts. The first was dated October 18, 2017 and the updated version was dated May 6, 2020.
- [11] Dr. Gilbert started consultation with the Claimant on June 13, 2017. He diagnosed the Claimant as having fracture dislocation of the right acetabulum and sciatic nerve palsy/injury. At the time of his examination for the first report, it was only 4 months after the accident and the Claimant had not reached full medical improvement. He was, however, expected to make a complete recovery.
- [12] The Claimant was further reviewed by Dr Gilbert on 17th January 2018, 29th September, 2018 and 9th April 2020.
- [13] On January 17, 2018, Dr. Gilbert noted that the Claimant reported that he had no pain in the right hip. There was an unresolved right foot drop but normal sensation of the dorsum of the foot. He was to continue physiotherapy. On September 29, 2018, he had full pain free range of motion in the right hip and normal sensation on the dorsum of the right foot. There was still a foot drop but there was flicker of motion in the toes and no evidence of osteoarthritis.
- [14] Dr. Gilbert noted from examination conducted on 29 April 2020:

Mr. Ramos reported that he had no pain in the right hip but experienced discomfort when the weather changes or on prolonged sitting. He added that he had returned to work and was managing his job but admitted that his job required mainly sitting. He stated that he was now able to dorsiflex the right ankle and toes.

Physical examination

Mr. Ramos had a normal gait and had a surgical scar over the right buttock. He had full range of motion in the right hip with no associated pain. There was grade 3 power in dorsiflexion of the right ankle.

[15] He was diagnosed as having a healed fracture of the right acetabulum with evidence of heterotopic bone formation and an incompletely resolved right foot drop. There was no evidence of osteoarthritis or avascular necrosis which are two of the more common complications of this injury. He was assessed as having a 6% whole person impairment.

[16] The Island Radiology report of Dr. Jeanete Yee dated May 22, 2020 concluded there was-

- absence of normal lumbar curve. This may be secondary to muscular spasm
- degenerative bone and disc disease
- previous ORIF to the right hip

SUBMISSION

[17] Counsel for the Claimant submitted that \$16,500,000 was an appropriate figure for general damages and \$894,370.51 for special damages. There was also a request of \$1,500,000 for loss of earning capacity.

[18] In regard to an award for pain and suffering and loss of amenities, two cases were given as being comparable to the case at bar. The first was **Vincent Schoburgh v Michela Fletcher and Robert Fletcher** Suit No. CL 2001/S0124 (delivered on September 23, 2004) where the sum of \$4,500,000 was awarded for pain and suffering and loss of amenity on September 23, 2004. This upgrades to the current figure of \$16,150,990.09. The second is **Janice Forrest v Mark Todd** found at page 44 of Khan Volume 5 where the sum of \$1,800,000 was awarded for pain and suffering in December 1997. This amounts to the current figure of \$11,185,714.28

[19] **Icilda Osbourne v George Barnes** Claim No. 2005 HCV 00294 (delivered on February 17, 2006) and **Carline Daley v Management Control Systems** Claim

No. .2008 HCV 00291 (delivered on May 4, 2012) were cited as examples of a lump sum figure being awarded for loss of earning capacity.

FINDINGS

General Damages

[20] The court must assess the injuries as a whole and refer to comparable cases in awarding a figure (**Derrick Munroe v Gordon Robertson** [2015] JMCA Civ 38). In assessing the loss suffered by a Claimant, regard must be had to the following (**Cornilliac v St. Louis** (1965) 7 WIR 491):

- “(a) The nature and extent of the injuries sustained;*
- (b) The nature and gravity of the resulting physical disability;*
- (c) The pain and suffering which was endured;*
- (d) The loss of amenities suffered; and*
- (e) The extent to which, consequentially, the Claimant’s pecuniary prospects have been materially affected.”*

[21] The Court will rely on the witness statement and medical reports in consideration of the aforementioned factors.

[22] Upon reviewing the cases cited by counsel, it is clear that they bear little similarity to the case at bar.

[23] The Claimant in **Vincent Schoburgh v Michela Fletcher and Robert Fletcher** shared one similarity with Mr. Ramos, that is, a fracture in the pubic region. The 5 medicals in **Vincent Schoburgh** indicated that the nature of the injuries were of far greater severity. Two medical reports illustrated this-

- Medical Report of March 2001

Reports of unconsciousness; back, side, hand and internal injuries; tenderness to lower abdomen; springing pelvis on moving left hip, sternum

and neck; haematoma in suprapubic area; laceration to leg; bruises; fractured pelvis; soft tissue injury to neck and lower left leg; rectum blood stained and offensive; and intra-abdominal injury.

- Medical Report of June 2001

Reports of 102.4F temperature; distended abdomen with tenderness; large laceration in anal/rectal area; and large retroperitoneal haematoma that filled the whole pelvis and extended up to the anterior abdominal wall. A loop colostomy was done, hallucination, developed severe hypertension, acute pulmonary oedema, heart failure and acute renal failure, clot in left common femoral vein and upper gastrointestinal bleeding.

- [24] Mr. Schoburgh had surgery for his fracture, just as the current Claimant, but he also had a loop colostomy. He was hospitalized for 83 days. His resulting disability included scars, deficit in right thigh circumference and calf with negative Hohman's signs, reduced ability in straight leg raising, fracture of left ischial tuberosity healed with misalignment, diastasis of pubic symphysis, sclerosis and hemi sacralisation.
- [25] The court found that "*The medical evidence is consistent with Mr. Schoburgh receiving very, very severe injuries. He had not only broken limbs but internal injuries as well. This was evidenced by the necessity of having to live with a colostomy for some time*".
- [26] The nature of the injuries, length and type of treatment as well as resulting disability illustrate that the case of **Vincent Schoburgh v Michela Fletcher and Robert Fletcher** has little similarities to the case at bar and will not serve as an appropriate comparison in arriving at a uniform award.
- [27] **Janice Forrest v Mark Todd** is also not an appropriate comparison to the case at bar. It is noted that both **Janice Forrest** and Mr. Ramos suffered fractures in the pubic region. However, in **Janice Forrest** the Claimant underwent a hip

replacement operation; and this I believe is an indication that she suffered injuries of a greater degree than Mr. Ramos.

- [28] Two cases have been found which are comparable to the case at bar. These are **Fitzroy Gordon v Dayton Clarke** CL G 068 of 1997 (Khan volume 5, page 52) and **Eric Buchanan v Elias Blake** SCCA 2 of 1993 (delivered on October 27, 1994)
- [29] The Claimant in **Fitzroy Gordon v Dayton Clarke** was a salesman who suffered pains in his back, dislocation of right hip joint, and fracture of right pelvis. These injuries are not substantially different from Mr. Ramos'.
- [30] Gordon then underwent surgery, received analgesia and antibiotics and was ordered on bed rest. He was hospitalized for 17 days. Again, this is similar to Mr. Ramos with the exception that Mr. Ramos was hospitalized for 15 days.
- [31] Both Claimants also share similar resulting disabilities. Gordon had a slight limp whereas Ramos had a foot drop. Gordon suffered from para articular ossification in the soft tissue around the joint whilst Ramos had heterotrophic bone formation. Both suffered 15% impairment of the lower extremity. Both had the ability to fully move their hips save that Gordon's flexion was limited to 10 degrees. Gordon, however, could develop early degenerative arthritis. There is no such evidence for Ramos.
- [32] General Damages in the sum of \$710,000 with interest at 6% was awarded January 1999 (CPI=19.4). This amounts to \$3,963,556.70 as at March 2021 (CPI of 108.3).
- [33] The Claimant in **Eric Buchanan v Elias Blake** was close in age to that of Ramos. He suffered fracture of right sacro-iliac joint with dislocation (acetabulum was fractured and this allowed for dislocation of the joint). Not much information is provided on his treatment or length of incapacity. His resulting disabilities were, however, more severe than Mr. Ramos. He had a high probability of osteoarthritis,

weakening and flexion deformity, internal hip rotation restricted, 1 cm loss of muscle bulk. On the other hand, his impairment of lower extremity was assessed as 12%.

[34] It is worthy of note that Dr. Gilbert's in his report dated May 6, 2020 he specifically stated "He has no clinical or radiological evidence of osteoarthritis or avascular necrosis which are two of the more common complications of this injury.

[35] General damages was awarded in the sum of \$400,000 in October 1994 (CPI of 10.1). This amounts to \$4,289,108.91 at March 2021 CPI of 108.3

[36] In considering the cases of **Fitzroy Gordon v Dayton Clarke** and **Eric Buchanan v Elias Blake** as well as the fact that the Claimant can no longer enjoy activities such as tennis, it is determined that \$3,900,000 is an appropriate award for pain and suffering and loss of amenities.

Loss of Earning Capacity

[37] The principle concerning loss of earning capacity is incapsulated in the case of **Gravesandy v Moore** [1986] 40 WIR 222:

"A plaintiff who seeks general damages for loss of earning capacity must show that there is a real or substantial risk that he might be disabled from continuing his present occupation and be thrown, handicapped, on to the labour market at some time before the estimated end of his working life. The 'risk' in such a case will depend on the degree, nature or severity of his injury and the prognosis for full recovery; and evidence must be adduced as to these matters, and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location."

[38] The court approaches assessment of this award in 2 stages (**Moeliker v A Reyrolle and Co Ltd** [1977] 1All ER 9):

"1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? and

2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if the risk materializes, having regard to the degree of the risk, the time

when it may materialize, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job."

[39] The authorities have established that an assessment for loss of earning capacity involves some degree of speculation but there must be some evidential support for the excursion into the realms of conjecture (**George Edwards & Moses Morris v Doan Pommells & Fitzritson Gordon** SCCA 38/90 delivered on March 22, 1991). It does not matter whether the Claimant was employed or unemployed at the time of trial (**Cook v Consolidated Fisheries Ltd** 1997 ICR 635 at 640).

[40] There are three recognized approaches in calculating this award as indicated in **Kiskimo Ltd v Deborah Salmon** SCCA 61/89 (unreported) delivered 4th February 1991) :

- *multiplicand/multiplier*
- *increase in award of pain and suffering and loss of amenities, that is the global award for general damages*
- *a lump sum*

[41] In his witness statement filed April 9, 2021, Mr Ramos gave two versions of his employment status. He initially stated at paragraph 8 that "*he now earns a weekly estimate wage of \$100,000.00*". He further added "*that after returning to work, he could only manage light work*" and that as a Sales Representative he was required to sit for long periods and doing so causes pain. However, at the end of that same paragraph, he stated that he was currently unemployed.

[42] Unfortunately, no information was presented on there being any risk, whether substantial or real, of him losing his assumed present employment or how his resulting disabilities would affect the job of a sales representative. There was also no information to say whether there was a decreased chance of him getting a job as a sales representative or any job at all, or an equally well-paid job. His skill set, educational background or work experience has not been detailed to assist the court in making any assessment.

[43] The medical report of Dr. Gilbert was considered in providing some assistance to the court in determining whether an award under this head should be made. The updated report stated:

“Mr. Ramos reported that he had no pain in the right hip but experienced discomfort when the weather changes or on prolonged sitting. He added that he had returned to work and was managing his job but admitted that his job required mainly sitting. He stated that he was now able to dorsiflex the right ankle and toes.”

[44] I note the use of the word ‘discomfort’ not ‘pain’ when referring to prolonged sitting as well as the fact that he reported that he was managing his job. No risk was shown of him losing his job or probability that he would have a disadvantage on the labour market due to the discomfort that he experienced.

[45] I recognise his assessed whole body impairment was 6%. This, without more, does not equate to an automatic right to an award of loss of earning capacity. Counsel relied on **Icilda Osbourne v Barnes** but that case was clearly distinguishable from the current case. In **Icilda Osbourne v Barnes**, the Claimant, a practical nurse, could no longer do her job or in fact any job. Her back pains simply would not allow her the freedom. Justice Sykes noted-

“In light of Mr. Rose’s report, this inability to use her back is not surprising. Daily activities will aggravate the injury. To put it another way, the claimant does not have to engage in any unusual activity before her back is aggravated. If this is so, then future work is well nigh impossible. Who is going to employ a 60 year old woman with chronic back and neck pains which can be brought on by ordinary activity? On this evidence alone her ability to compete on the open labour market with other 60 year olds has diminished to say nothing of competing with able bodied youngsters.”

[46] I have also noted that the submissions of counsel regarding this issue are of little assistance. Reference was made to paragraph 8 of the Witness Statement but as aforementioned that has not provided much information. Paragraph 10 of the submission has only added to the confusion:

There is no question that the Claimant has sustained a Handicap on the Labour Market. It is submitted that the Claimant’s injuries are of such that she has a distinct disadvantage on the labour market. She can no longer work effectively as a Peddler.

[47] I, therefore, find that sufficient evidence has not been presented to allow the court to assess damages under this head and as such no award will be made.

Special Damages

[48] The law is that this area of damage must be specifically pleaded. The Claimant was only able to prove ten thousand dollars of the \$836,600.00 for the amounts paid for the surgery done by Dr. Gilbert. This receipt was in his name. He was also able to prove his expenses for medication, and the medical reports. He was therefore only able to recover the amount of seventy-five thousand one hundred and fifteen dollars and eighteen cents (\$75,115.18) for special damages.

ORDER:

1. General damages in the sum of \$3,900,000 at interest of 3% from August 28, 2018 to June 25, 2021.
2. Special damages in the sum of \$75,115.18 at interest of 3% from June 8, 2017 to June 25, 2021.
3. Cost to the Claimant to be agreed or taxed.
4. Claimant's Attorneys-at-law to prepare file and serve the order.