

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2000/B098

BETWEEN	TAZZIO BAUGH	PLAINTIFF
	(by next friend Bobby Gay Samuels)	
A N D	LINCOLN DAVID MUIR	1 ST DEFENDANT
A N D	MINOTT SERVICES LTD.	2 ND DEFENDANT

Mr. Michael Brown for Plaintiff instructed by Michael B.P. Erskine & Co.

Mrs. Ursula Khan for 2nd Defendant instructed by Khan & Khan.

Assessment of Damages on 21st October, 2003.

Brooks, J.

This is a contested assessment of damages, the interlocutory judgment having been entered against the 2nd Defendant in default of defence. The first Defendant was never served with the Writ of Summons.

The action arises out of an incident occurring on the 28th April 1999 when the Plaintiff, then nine years old was struck by the 2nd Defendant's motor vehicle while the Plaintiff sat on a banking at the side of the road. This in the parish of Westmoreland.

The medical reports by Dr. Francis C. Lindo show that the Plaintiff suffered.

2. Lacerated wound 6 cm x 5 cm lower 1/3 right leg with fractured leg bone exposed.

X rays done on the Plaintiff, reported Dr. Lindo, revealed

1. fractured distal 1/3 right femur just above the right knee
2. fractured junction of middle and distal third right tibia and fibula.

Dr. Lindo's diagnoses on that information were

- “1. Closed fracture distal 1/3 right femur.
2. Open (compound) fracture right leg distal 1/3.”

The Plaintiff was treated at the Cornwall Regional Hospital. The day after the injury was sustained the injured limb was tended to under general anaesthesia and the right lower limb fitted with a cast.

According to Dr. Lindo the Plaintiff made an uneventful recovery.

On 14th May, 1999, again under general anaesthesia the right femoral fracture was fixed with a plate and screws and the entire lower limb put in a cast again. Again Dr. Lindo reports that the Plaintiff “had an uneventful recovery and was discharged home 29/5/99.”

The cast was removed on 1st July, 1999 and “the fracture was found to be firmly united.”

On the 28th August 1999 Dr. Lindo found that the Plaintiff walked with a limp, and the doctor then projected that in about a year a further operation would need to have been done to remove “the metalwork” in the right thigh.

That operation was done at the Falmouth Hospital sometime in 2001 but the precise date was not given in evidence.

In November 2002 Dr. Lindo’s examination of the Plaintiff revealed:

1. Limp due to short left lower limb
2. Normal hips, knees, ankles and feet right and left
3. Well healed wounds right leg and left (sic) thigh
4. 2 cm lengthening of the right lower limb

The last mentioned situation was due to the fact that the right femur was longer than the left by 2cm. With respect to the right femur the doctor’s opinion was that this was due to a bony overgrowth as a consequence of the fracture. Dr. Lindo reports that that is a well known condition with growing children.

Dr. Lindo went on to say:

“The condition will stabilize and may correct as the patient will be growing until aged 16-18 years.”

and

“Limb length discrepancies of 2 cm rarely need treatment as most patient (sic) without any training, will spontaneously learn to adjust their gait.”

In so far as impairment is concerned the doctor reported.

“This condition is not permanent or fixed. I will therefore not assign an impairment score.

He will need follow-up until he stops growing at age 16-18 years.”

The Plaintiff when he gave evidence was not asked about his experiences during the period of treatment. He was asked, however, about how he is currently affected by the leg injury and he stated that when he is running sometimes his “foot” hurts him. He went on to say that he doesn’t walk the same way as he did before the injury. He now walks with a limp.

I noticed the unusual gait in the Plaintiff as he walked to and from the witness box.

In cross-examination he says that he still runs, and plays sometimes the football and cricket that he did before the injury.

There was no recent medical report and the Plaintiff testified that he did not remember when last he had gone to the doctor about the leg, certainly it seemed to have been over a year ago.

The court therefore is obliged in the absence of any medical evidence to the contrary to find that the Plaintiff has healed completely with a residual

limp which may improve as he grows older and that certainly he will adjust to the limp length discrepancy without the need for training.

There is no medical assessment of any permanent partial disability and Mrs. Khan for the Defendant stressed the latter parts of Dr. Lindo's report, which are quoted above.

In seeking to assist the court in assessing damages for pain and suffering the Plaintiff's Attorney-at-Law Mr. Brown cited the case of Delmar Gibson (b.n.f.) Olive Maxwell vs The Jamaica Telephone Co. Ltd. SCCA 15 of 1991 cited at p 31 of Harrison's Assessment of Damages in Personal Injury Cases.

This case was very close to the instant case in terms of the age of the Plaintiff and the resultant disability except that the disability in that case was quantified at 15-20% permanent partial disability of the right lower limb. The award made in June 1992 was \$350,000 for Pain & Suffering, which I am informed when updated is now equivalent to \$972,000.

Mr. Brown concluded by saying that an award of \$900,000.00 for Pain & Suffering for the present Plaintiff would be reasonable.

Mrs. Khan for her part cited the cases of

1. Charles Douglas vs Clifford Givans

C.L.1986/D030 – Vol 3 Khan p. 31

2. Floyd Miller (b.n.f.) Henry Miller vs. Fitzroy Hamilton & Anor.
C.L.1987/M349 – Vol 3 Khan P. 63
3. Rolando Christie (b.n.f.) Everton Christie vs. Alok Uppal
C.L.1987/c224 – Vol 3 Khan p. 64
4. Jason Edwards (b.n.f.) Norma Jackson vs. Phoebe Buchanan
C.L.1988/E024 Vol 3 Khan p. 69
5. Carl Harrison vs. Patrick Durrell
C.L.1986/H174 – Vol 3 Khan p. 81
6. Lindel Garibaldi vs. Anthony Nicholson
C.L.1994/G216 – Vol 4 Khan p. 82

Mrs. Khan concluded that an award of \$400,000 would be reasonable in the circumstances. I found the Jason Edwards case to be quite close to that of the instant case in terms of the age of the Plaintiff, the injuries and the absence of disability.

In Edwards' case however the Plaintiff suffered a fracture of the left femur only. He had an internal fixation device inserted and had to have it later removed at the appropriate time. He had no permanent partial disability.

The award of \$45,000 for general damages then made, when updated is now \$598,000.00.

I was also impressed by two other cases namely:

1. Barrington McKenzie vs. Christopher Fletcher & Joseph Taylor

- C.L.1996/M075 Vol. 5 Khan p. 72

and

2. Michael Simpson vs Ivanhoe Baker

C.L.1993/S282 – Vol. 5 Khan p. 86

as being more recent cases with similar injuries.

In the McKenzie case the Plaintiff suffered a comminuted fracture of the middle third of the right tibia and a transverse fracture of the middle of the right fibula. His leg was placed in a cast and when it was removed he was advised to use crutches for a while. He was not expected to have any permanent impairment.

The award in March of 1998 of \$420,000 for General Damages is now worth \$640,595 using the August 2003 CPI of 1702.

In Michael Simpson's case the Plaintiff who suffered a fracture of the right femur involving the knee and was also unconscious for a period was left with a limp. His right leg was shorter than the left and deformed. His permanent partial disability was unassessed.

The award made to him of \$500,000 on 17th February 2000 is worth \$668,447 in today's money. It is to be noted that there is no evidence of deformity in the instant case and that only one of the Simpson's bones was fractured.

Taking all these cases into account and adjusting for the differences, I am of the view that an award of \$650,000 is the appropriate award for Pain and Suffering for the instant Plaintiff.

The other awards were agreed by the attorneys-at-Law for the parties as follows:

(1)	Special Damages	-	\$58,000.00
(2)	Cost of Future Care	-	\$20,000.00

In summary therefore Damages are assessed as follows:

Special Damages	-	\$58,000.00
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with interest thereon at 6%
from 28/4/99 to 21/10/03

General Damages

Pain & Suffering & Loss of Amenities	\$650,000.00
Cost of future medical care	<u>\$ 20,000.00</u>
	\$670,000.00

with interest on \$650,000 at 6% from 15/5/2000 to 21/10/03.

Costs to the Plaintiff against the 2nd Defendant are fixed at \$52,000.00