

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO: HCV 5108 of 2005

BETWEEN	ANDRE CLARKE	CLAIMANT
AND	ALEXANDER ATKINSON	1 ST DEFENDANT
AND	LINSON GEORGE ATKINSON	2 ND DEFENDANT

Mr Charles Campbell for Claimant.

Defendants unrepresented, not present.

Heard April 21 and 25, 2006

McDonald J (Ag.)

Assessment of Damages

On March 4, 2004 Andre Clarke was a passenger in a motor vehicle which was being driven at a fast speed along the Smithfield Main Road in the parish of Westmoreland. It got out of control and collided into a bank and overturned.

He was pulled out of the car and initially taken to the Savanna-la-mar Hospital and later transferred to the Cornwall Regional Hospital. He was there for 14 days and diagnosed with a fracture to his right femur.

On March 12, 2004, the claimant underwent surgery and a blade plate was introduced and bone graft performed. After his release from hospital on March 17, 2004 he remained at home in bed for several weeks. He attended Cornwall Regional Hospital from March 30, 2004 to January 2005 as an outpatient.

As a result of the accident there are certain activities which he can only partially perform and with restrictions. He cannot run or jump and can no longer play football. He has difficulty walking upstairs buildings because raising his right knee causes pain and the shortening affects his balance.

He told the Court that he is unable to bend or squat. He is unable to work manually without severe discomfort and pain because the metal blade in his hip is out of place and is protruding. He now walks with a limp and his right leg is about one inch shorter than the left.

Judgment in default of Appearance was entered against the 1st Defendant only; and the assessment of damages to be awarded now falls for consideration.

Permission to amend the Claim Form and Particulars of Claim was sought and obtained by the Claimant. The proposed amendment having been duly served on the 1st Defendant.

The Particulars of Injuries, Sequelae and Prognosis as outlined in the amended particulars of Claim are as follows:-

- (a) Fracture of the upper end of the right femur.
- (b) Bone grafting.
- (c) 9 inch scar to the right thigh keloid formation.
- (d) Limitation of 10 degrees of movements at the hip.
- (e) 1 inch shortening of right lower limb.
- (f) 15% Permanent Partial Disability of the right lower limb.
- (g) Limitation in external rotation of hip.
- (h) Limb length discrepancy causing disturbance of gait.
- (i) Severe pain in hip and lower back.
- (j) Malunited distal femur
- (k) Healed subtrochanteric fracture of the femur
- (l) Protruding blade plate at the neck of the femur
- (m) Malpositioned implant abutting the acetabulum
- (n) 8% whole person impairment.

The medical report of Dr. Don Gilbert dated March 13, 2006 Exhibit 4 confirmed the injuries pleaded:-

The diagnosis contained in Dr. Gilbert's medical report reads:-

“Mr. Clarke has a healed subtrochanteric fracture of the right femur with a malpositioned implant that is abutting

the acetabulum and causing him pain. He also has a 3.5 cm limb length discrepancy.”

The prognosis reads:-

“Mr. Clarke will continue to experience pain and limitation in external rotation of the right hip until he has the implant removed. His limb length discrepancy however will remain and may be partially alleviated by wearing a shoe raise. A limb length discrepancy causes a disturbance in gait that will lead to increase stresses on the knee and lower back and is considered significant when greater than 2.5 cm Mr Clarke can only regain his limb length by undergoing extensive surgery otherwise the limb length discrepancy is permanent.”

Medical reports of Dr. R. Ueker dated February 2, 2005 Exhibit II and that of Dr Emran Ali dated August 3, 2005 Exhibit III were also given due consideration by the Court.

Mr. Campbell placed reliance on the case of Beverley Francis v Donovan Pagon and Maurice Smith 4 Khan's Report page 52

The claimant in that case suffered from comminuted supra condylar fracture of the left femur; swollen tender left lower thigh with movements diminished due to pain. Disability – knee joint was restricted in flexion (90 degrees) and she walked with a limp.

Permanent Partial Disability was 20% of lower limb which equals – 10% whole person disability. Her complaints included pain, cramp and stiffness in the leg in rainy and cold weather, problems with

bending, going down steps and walking on uneven ground and that she had to drag her leg and had difficulty working as a domestic.

Dr Adolf Mena gave evidence at the hearing. He said that the claimant had a slight limp and 20 degrees loss of flexion in the knee. He opined that osteoarthritis was almost certain to occur – 90% - 95% certainty.

The General Damages assessed on June 15, 1994 were \$350,000 for pain and suffering and loss of amenities. The current value of that award is \$1,276,571.9 (Using CPI of 2297.1 for March 2006)

I find that the above-mentioned case is a useful guide in the computation of an award in the instant case. Taking into account the injuries suffered by the Claimant in the present case and the fact that he now has 8% whole person impairment, I find that an award of \$1.3 million is an appropriate sum for pain and suffering and loss of amenities.

Handicap on the Labour market / Loss of Earning Capacity

The court relies on the principles set out in Moeliker v A. Reyrolle and Co. Ltd (1977) 1 ALL ER page 10 in considering whether or not to make an award under this head.

Lord Browne LJ in Moeliker v A. Reyrolle and Co. Ltd. (supra) at page 176 said.

“..... The consideration of this head of damages should be made in two stages ... Is there a substantial or real risk that a plaintiff will lose his present job at sometime before the estimated end of his working life? ... 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 that 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.”

The first consideration is whether there is a substantial or real and not merely financial risk that the claimant will lose his present job at sometime before the estimated end of his working life.

I am of the view that the principles stated in *Moeliker v A. Reyrolle and Co. Ltd.* apply equally to this claimant who is self-employed at the date of assessment.

The claimant is 21 years old. He testified that he has been doing masonry work for over 4 years and plumbing for about 7 years. At present he cannot bend and squat and this presents difficulty in performing these occupations. Bending causes him a lot of pain and he cannot lift the load he used to carry as he is not balanced, one foot being shorter than the other.

In his witness Statement he said that he does various jobs in masonry and plumbing especially for residents in the Shewsbury

Housing Scheme where he lives. His earnings vary from time to time and most times it is between \$5,000 and \$7,000 per week.

The use of all the Claimants limbs play an integral part in the performance of his trade. His evidence is that he cannot perform work manually without significant pain and discomfort. He has suffered some permanent partial disability, but is still able to work.

Dr. Gilbert's report states that the Claimant will continue to experience pain and limitation in external rotation of the right hip until he has the implant removed. The report also makes mention that when the claimant was last seen at outpatient clinic on January 4, 2005 a decision was made to remove the implant from the right femur.

However there is no evidence that the claimant proposes to undertake surgery and there is no claim for future surgery. The Claimants present condition is therefore operative and his condition is likely to remain the same.

The court is of the view that although the Claimant has resumed his employment, his injury is of such a nature that a real risk exists that he may lose his job in the future.

The Court now has to determine the method of computing the award. The choice being between using the earnings at the date of

injury and applying the multiplier / multiplicand approach or the lump sum / global approach for the loss of earning capacity.

Using the global approach I am of the view that an award of \$130,000 would be appropriate in the circumstances.

Special Damages

The particulars of Special Damages pleaded are as follows:-

(a)	Cost of Medical Reports	\$14,000.00
(b)	Costs of Hospital Fees	16,410 .00
(c)	Costs of X-ray	2,000.00
(d)	Costs of Consultation	3,000.00
(e)	Loss of Earnings as a labourer For 16 weeks @ \$7,000 per week	<u>112,000.00</u> \$ 147,410.00

Costs of Medical Report

Receipts for medical reports from Dr. Ueker in the sum of \$1,000 and from Dr. Gilbert in the sum of \$8,000 was tendered and marked Exhibit V in proof of payment.

The Claimant testified that he paid Dr. Ali \$5,000 for a medical certificate which was tendered in evidence as Exhibit III, however he had no documentary proof of same. I accept the claimant as a witness of truth and allow the expenditure of \$5,000.

I award \$14,000 for costs of medical reports.

Costs of Hospital Fees, X-ray and Consultation

Receipts covering hospital expenses together totalling \$16,410 were tendered and marked Exhibit VI.

Receipt for x-ray in the sum of \$2,000 was admitted as Exhibit VI. and receipt for \$3,000 was admitted as Exhibit VIII.

The Court finds those amounts have been proved and allows the sums claimed as pleaded.

Loss of Earnings

The claimant has pleaded loss of earnings as a labourer for 16 weeks at \$7,000 per week totalling \$112,000.

There is no documentary evidence before the Court substantiating his income. Strict proof of income is required by law.

This principle is expounded in *Bonham Carter v Hyde Park Hotel* (1948) 64 TLR 177 and *Murphy v Mills* (1976) 14 JLR 119.

However judicial authorities have nonetheless shown that there can be some relaxation of this principle. I find that this Claimant's situation can properly fall into this departure.

The court taking into account the claimants lifestyle, the fact that he is self-employed as a plumber and mason, finds that it is unlikely that he would be expected to keep accounts of his income nor would he have received a salary slip to indicate his earnings.

In the circumstances I award him \$112,000 for loss of earnings as claimed.

Judgment for the Claimant in the sum of \$1,577,410.00 being

General Damages

Pain and Suffering and Loss of Amenities - \$1.3 Million

With interest at 6% p.a from January 16, 2006 to April 25, 2006

Handicap on the labour market - \$130,000 – no interest

Special Damages - \$47,410 with interest at 6% per annum from March 4, 2004 to April 25, 2006.

Costs to the claimant as against the 1st Defendant in the sum of \$40,000 pursuant to Part 65 Appendix B, Table 1 of the CPR 2002.