IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2000/E-015

BETWEEN	LEON ENGLISH	PLAINTIFF
AND	KIRK CLARKE	1st DEFENDANT
AND	PETER THOMAS	2nd DEFENDANT
AND	NEVILLE SMITH	3rd DEFENDANT

Ainsworth W. Campbell for Plaintiff

Althea Wilkins for the 1st and 2nd Defendants instructed by McGlashan, Robinson and Company.

Heard on May 7, 2002, May 8, 2002, May 9, 2002 and May 10, 2002.

RATTRAY J.

The Plaintiff in the present case is a young man now 21 years of age. However, on the 19th December, 1996, shortly before his 16th birthday, he was hit by a motor vehicle owned by the 1st and 2nd Defendants and sustained personal injuries, suffered pain and incurred loss and expense.

As a result of the injuries sustained, he was admitted to and treated at the Spanish Town Hospital, until he was discharged on February 19th, 1997. He has brought this action against the Defendants to recover damages for negligence and

on the 27th September, 2000, he obtained Interlocutory Judgment in default of Defence against the 1st and 2nd Defendants.

At this stage of the proceedings, liability not being in issue, the Plaintiff has the obligation to prove the losses that he says he has suffered due to the Defendants' negligence. This Court has to decide, on the balance of probabilities, whether, on the evidence that has been placed before it, the Plaintiff is entitled to the sums claimed.

Special Damages

There are certain items of the Plaintiff's claim under this heading in respect of which there is no dispute and I will deal firstly with those items.

(1) **Special Nourishment** - although the claim as pleaded is in the sum of $7,800.00, Counsel for the respective parties have agreed this amount at $2,306.00.

(2) **Prescription** - $649.50 – This is supported by a receipt which was tendered and admitted as Exhibit 11.

(3) **Cost of Crutches** - $700.00 proven by a receipt tendered and admitted as Exhibit 7.

(4) **Special Gown** - $1,800.00.

(5) **Hospital Bill** - $4,735.00 – as evidenced by a receipt tendered and admitted as Exhibit 6.

This is where the consensus between the parties comes to an end.

I find that the Plaintiff has satisfied this Court with respect to the following claims:-

(6) **Transportation Costs** – Counsel for the Plaintiff during his closing address, by virtue of an amendment made has claimed the sum of $39,640.00 under this heading, being made up as follows:-

(a) Expenses paid to Mr. Greene - $5,200.00 as per Exhibit 10.

(b) Travelling costs to Dr. Graham - $1,040.00.

(c) Taxi fare to hospital - $1000.00.

(d) Visits to hospital twice daily by Plaintiff's mother over a 3 month period at $180.00 per visit - $32,400.00.

Counsel for the Defendants challenged only the last item on the basis that the Plaintiff was in hospital for two (2) months and not three (3) as claimed. Her figure therefore with respect to that item amounted to be $21,600.00.

I find myself in agreement with the rate claimed of $180.00 per visit and the period of 60 days suggested by Counsel for the Defendants. This finding is based on the evidence given by the Plaintiff's mother and confirmed by Dr. Barned's Medical Report which stated that the Plaintiff was allowed home on February 19th, 1997.

I therefore award the sum of $28,840.00 as transportation costs.

(7) **Doctors' Bills**

Mr. Campbell when dealing with this item conceded that the evidence before the Court did not amount to the sum claimed of $23,800.00 Instead, he suggested a figure of $13,350.00. I am satisfied on the evidence before me that the Plaintiff and his mother visited Dr. Mossop on six (6) occasions and would have paid fees to the doctor for those visits as indicated by the evidence. I therefore award the sum of $13,350.00 under this heading.

(8) **Loss of Earnings**

The Plaintiff has claimed loss of earnings for a period of 180 weeks at $3000.00 per week and continuing. The evidence before this Court does not support such a claim, neither with respect to the weekly rate nor in relation to the period claimed. Counsel for the Plaintiff no doubt being aware of this difficulty, suggested in his closing address two (2) options:

(a) based on the Plaintiff's evidence that he went back to work after six (6) months, this Court ought to award him a sum for loss of earnings for twenty-six (26) weeks at $2,500.00 per week, in accordance with his testimony. This sum would amount to $65,000.00

(b) Alternatively, the Court was asked to find that in light of the extent of the leg injuries sustained, the Plaintiff could not go back to work before forty (40) weeks. Based on this submission, the Court was asked to award the sum of $100,000.00 for this part of the Plaintiff's claim.

This court is of the view that this alternative submission is advanced soley on conjecture and has no evidential basis. As such, I am not prepared to venture down such a speculative path in respect of a claim where the obligation lies on the Plaintiff to prove his loss.

I am however satisfied on the balance of probabilities and I find on the evidence before me, that the Plaintiff was unable to work for a six (6) month period due to the severe injuries suffered in the accident.

I therefore award the sum of $65,000.00 under this heading of Special Damages.

(9) **Extra Help**

On the issue of extra help, the claim as pleaded is for the sum of $40,000.00, being help for twenty (20) weeks at $2,000.00 per week. The Plaintiff's mother in giving her evidence in chief testified that she had to pay someone to monitor her stall while her son was in the hospital. She further testified that she paid that person $2,000.00 per

week for forty (40) weeks, double the period pleaded in the Statement of Claim.

Under cross examination however, she admitted that a month and a half after the Plaintiff came home from the hospital, she went back to her stall to sell. The medical evidence is clear that the Plaintiff was hospitalised for a two month period.

I do not agree with Counsel for the Defendants that this award should be limited only to the time the Plaintiff was actually in the hospital. Any devoted parent, as this mother appears to be, would not abandon her child immediately on his return from the hospital to go back to work, without taking the time to ensure that he was settled at home and without being actively involved in the follow up visits to the doctor to ascertain that he was on the road to a healthy recovery.

Having said this, I am of the view that the claim for extra help, whether it be for 20 weeks (5 months) or 40 weeks (10 months) is grossly exaggerated and unsupported by the evidence before the court.

There is however sufficient evidence for me to award compensation for extra help for a period of 14 weeks or 3 ½ months at $2,000.00 per week in the sum of $28,000.00 and I so order.

(10) **Loss of shoes** - $2,500.00

(11) **Loss of Pants** - $800.00

I find that these items have been proved and that there is no basis for the suggested reduction advanced by Defendants' Counsel.

(12) **Medication** – The final item claimed under the heading of Special Damages is the sum of $734.00 for medication. This aspect of the claim was not proved and no award is made in that regard.

The sum of $148,680.50 is therefore awarded as Special Damages in this matter.

General Damages –

The particulars of injuries pleaded on behalf of the Plaintiff, as amended are as follows;-

Particulars of Injuries

1. Trauma to the head.
2. Compound fracture of the right femur.
3. Laceration to the forehead and lips.
4. Compound comminuted fracture of the left tibia and fibula in both lower limbs.
5. Shock and concussion.
6. Concussion sufficiently severe to cause dizziness, headaches and blackouts.

7. Permanent partial disability of both lower limbs is 15-20%.
8. Haemothrosis of the right knee.
9. Multiple soft tissue abrasions to forehead, right cheek, right upper side of lip anterior chest wall and upper abdominal wall.
10. Disorientation in time and space.
11. Giddiness and bifrontal headaches that are moderate to severe in intensity and on a daily basis.
12. Scars on the leg that are easily visible.
13. Probable development of epileptic seizures that are post traumatic seizures
14. Post cerebral concussion.
15. Post traumatic headache syndrome.

Let me at this juncture point out that nowhere in any of the three (3) medical reports tendered in this matter is there reference to permanent or partial disability of the lower limbs or at all. Nor is there any indication of any such disability being assessed at 15 – 20% as pleaded in the item 7 of the Particulars of Injuries.

To the contrary, the Medical Report of Dr. Barned, Consultant General Surgeon at the Spanish Town Hospital dated April 4, 2001, in outlining the injuries of the Plaintiff stated:-

> "He was reviewed in the Surgical Outpatient clinic 2 weeks later, all cast were removed with a further four (4) weeks period of partial weight bearing. Radiographs of both lower limbs showed healed fractures.
> On March 25, 1997, full weight bearing was commenced and were reviewed one month later. He was fully ambulant without complaints. Both fractures as described should heal without long term complications in view of both fractures being located away from adjoining joints." (emphasis mine)

I am therefore at a loss to understand, in light of this clear and unambiguous statement, how or why, an allegation as to permanent partial disability was raised in the first place and why it was allowed to remain in the pleadings when there was not a scintilla of evidence in support thereof.

In giving evidence before this Court approximately five and a half (5 ½) years after the accident, the Plaintiff complained of swelling to and pain in his left foot, headaches and dizziness. In none of the medical reports tendered with respect to the Plaintiff's injuries is there any mention of swelling to his legs. Under cross examination, the Plaintiff stated that he told Dr. Mossop about this swelling but the doctor did not give him anything for it and he was not taking any medication for the said swelling. Although the Plaintiff indicated while he was giving evidence in Court that his left leg was swollen, on exposing both legs to the Court, this was not obvious.

The Plaintiff also testified that as a result of his injuries he can no longer climb coconut trees or swim, and further, that he used to play football before being

injured but he does not do that anymore because when he runs his feet swell. Curiously however, he went on to state that he now plays basketball, a sport more likely to vigourously impact on his legs as it involves both running and jumping. I am of the view that the allegation by the Plaintiff of regular swelling of his left leg or either leg for that matter, is a fabrication.

There is evidence that the Plaintiff has been suffering from headaches and dizziness and in this regard has been treated by Dr. Graham, a Consultant Neurologist. In his medical report dated March 14, 2002, Dr Graham stated that since treating the Plaintiff with a drug Inderal LA, the headaches were far less frequent and intense and the dizziness had all but resolved.

He went on to further mention in that report, symptoms of head trauma not suffered by this Plaintiff and concluded with the following paragraph:-

> "As always with head injured patients, especially those who have suffered a concussion injury, there is a risk for the development of epileptic seizures (post traumatic seizures)."

I agree with the submissions of Counsel for the Defendants that the latter part of Dr. Graham's report tends to speak generally as to the symptoms of head trauma and not specifically as to whether the Plaintiff suffers from the symptoms mentioned. Further, he has given no assistance to the court of the likelihood of this Plaintiff developing epileptic seizures or the degree or extent of such a risk.

As is common in this area of the law, it is unlikely that one will find cases with injuries identical to those suffered by the Plaintiff. Those cited by both Counsel in this matter and the figures suggested reflect the two extremes.

Mr. Campbell suggested a figure of $2,700,000.00 for Pain and Suffering and Loss of Amenities, while Miss Wilkins was of the view that $600,000.00 would be adequate compensation in that regard.

Apart from those authorities referred to by Counsel, which included **Henry Carter vs Jamaica Inn Limited et al,** Volume 3, Khan's Recent Personal Injury Awards at page 225, **Jason Edwards (an infant by his mother and next friend Morsen Jackson) vs Phoebe Buchanan,** also reported in Volume 3 at page 69 and **Kenneth Kelly vs Michael Bennett** referred to at page 74 of Volume 3 of Mrs Khan's Book on Damages. I have also had a look at the case **of Arthur Lee and Another vs. Richard Belnavis.** This is a decision of the Court of Appeal delivered on October 22, 1990, excerpts of which can be found in Justice Karl Harrison's "Assessment of Damages for Personal Injuries" at pages 331 – 332.

In that case, the Plaintiff suffered displaced fracture of the midshaft of the left tibia, displaced fracture of the midshaft of the right tibia, displaced fracture of the midshaft of the right fibula, jagged wound on the right leg and residual deformity in both legs in the form of excessive callus formation at the fracture sites. The Plaintiff in that case was totally incapacitated for six (6) months and according to the medical report, he was not expected to have any residual

disability. He was awarded the sum of $90,000.00 as General Damages for Pain and Suffering and Loss of Amenities. That figure at today's rate would convert to approximately $900,000.00.

This Court must bear in mind the fact that in the case before it, the Plaintiff's injuries were more extensive than those suffered in the aforementioned case. Apart from the injuries to his legs, this Plaintiff also suffered cerebral concussion.

In the unreported case of **Grantley Chambers vs Bunny Roy Halstead, Beryl Demetrius and Basil Demetrius,** Suit No. C.L. 1999/C-318, the Plaintiff sustained injuries to both legs, abrasions to the right side of the face, right hand, right palm, lacerations on the occipital scalp, fractures described in one medical report as comminuted fracture of the proximal 1/3 of right tibia and fibula and comminuted fracture of proximal and middle 1/3 of left tibia and fibula, as well as injuries to his right knee. There was permanent partial disability of the right knee of 17% of the lower extremity equivalent to 7% of the whole person. The medical report of Dr. Rose indicated that the chronic soft tissue injuries in each leg has left the Plaintiff with a 10% impairment of the lower extremity which is equivalent to 4% impairment of the person to each leg. His total partial percentage disability was stated to be 15% of the whole person.

Damages were assessed in that matter by Mr Justice Cooke on March 1, 2001, and he awarded the sum of $1,700,000.00 as General Damages. That sum today would amount to $1,830,000.00.

After reviewing all the authorities cited and carefully examining comparable awards, and bearing in mind the injuries suffered by the Plaintiff in the present case, I am of the view that a reasonable sum as compensation for Pain and Suffering and Loss of Amenities would be $1,600,000.00.

Handicap on the Labour Market

The question raised in the case **of Moeliker v A Reyrolle and Co. Ltd.** (1977) 1 ALL ER 9 is whether there is a real or substantial risk that the Plaintiff will lose his present job at sometime before the estimated end of his working life. The burden lies on the Plaintiff to provide evidence indicating such a risk or the likelihood of its occurrence.

The Plaintiff here is a labourer who mixes cement and mortar, who has been working as a labourer for years. His income has increased since the date of the accident. I find that he has failed to adduce any evidence to meet the test laid down in the **Moeliker** case.

Damages are therefore assessed against the First and Second Defendants in the sum of $1,748,680.50 being made up as follows:-

Special Damages	$148,680.50
General Damages	
Pain and Suffering and Loss of Amenities	$1,600,000.00
	$1,748,680.50

Interest is awarded on the Special Damages at six percent (6%) per annum from the 19th December, 1996 to the 10th May, 2002. Interest is awarded on the General Damages at six percent (6%) per annum from the 15th June, 2000 to the 10th May, 2002. Costs to the Plaintiff to be agreed or taxed.