

7/10/06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C. L. 2002/M100

BETWEEN	WINSTON McKENZIE	1 ST CLAIMANT
AND	CALVIN WATSON	2 ND CLAIMANT
AND	CARLOS BROWN	1 ST DEFENDANT
AND	GEORGE MENDEZ	2 ND DEFENDANT

Miss Latoya Stephenson instructed by K.C. Neita for Claimants.

Defendants not appearing or being represented.

2nd and 21st March 2006

BROOKS, J.

ASSESSMENT OF DAMAGES

On 22nd March 2002 Mr. Winston McKenzie and Mr. Calvin Watson were unfortunately knocked, by a truck, from a bicycle for which Mr. McKenzie was the rider and Mr. Watson a passenger. The vehicle was owned and being driven by the First and Second Defendants respectively. The Defendants failed to enter an appearance to the suit filed by the Claimants and a judgment in default, with damages to be assessed, was entered on 12th December 2002. The Claimants now seek that assessment. I shall treat with them in turn.

Re Winston McKenzie

General Damages

The evidence before the court concerning Mr. McKenzie's medical condition came mostly from a report dated 12th December 2002 from a Dr. Sherard Little. It indicated that Mr. McKenzie had suffered multiple trauma, multiple abrasions to the right forearm and right lower limb and soft tissue contusion of the right thigh. Upon admission

to hospital he was not able to urinate on his own and so a urethral catheter had to be employed initially. Mr. McKenzie was treated with analgesics and his condition rapidly improved. He was discharged on the 24th March; two days later.

On April 8, 2002 Mr. McKenzie was again examined at the hospital, he having complained of a swelling of the right leg. He was assessed as having haematoma as a result of the injury but no treatment was prescribed. His condition was reviewed in December 2002 but no further follow up was deemed necessary. From the doctor's report there is no evidence of skeletal abnormality of Mr. McKenzie's spine or right lower limb. He has however testified that since suffering this injury he sometimes feels pain in his back and he cannot now lift any heavy weights.

He testified that he was incapacitated for about two months and after that period he had to take a lighter job than the one he previously had done because of his inability to lift weights. This aspect was an important part of his job as a labourer in the construction industry.

In his context of that background Miss Stephenson referred to the cases of *Garfield Scott v Donovan Cheddisingh and Anor*; reported at Vol. 4 Khan page 214 and *Henry Bryan v Noel Hoshue and Anor*; Volume 5 Khan page 177.

I find that the injuries suffered by the respective plaintiffs in those cases are sufficiently similar in nature for the cases to be a good guide as to the damages to be awarded for general damages. In *Scott*, the claimant suffered excruciating pains, headaches, contusions to the right shoulder and hip, a puncture wound to the left forearm and a swollen, painful and tender knee. He was left with a painful right hip when lifting heavy objects and was reported to have been experiencing difficulty playing sports.

Miss Stephenson submitted that the \$300,000.00 awarded to Mr. Scott in July 1997 was worth \$652,805.68 when updated using the CPI for January 2006 of 2,295.7.

In *Bryan*, the claimant was reported to have suffered shock, excruciating pains, dizzy spells, abrasions of the scalp, pains in the back and severe headaches. The \$350,000.00 awarded to Mr. Bryan on September 1997 is now worth \$740,889.81 in today's money using the index mentioned before.

Miss Stephenson, based on those cases, submitted that the proper award for pain and suffering and loss of amenities suffered by Mr. McKenzie was \$800,000.00.

I find that that figure is too large. It appears to me that both the claimants in *Scott* and *Bryan* continued to suffer from their injuries to a greater extent than does Mr. McKenzie. In that regard a smaller award than both those previously mentioned for the cases cited would be more appropriate. I would award \$550,000.00 under this head.

I now turn to Mr. McKenzie's claim for special damages.

Special Damages.

In his pleadings Mr. McKenzie claimed special damages as follows:

“Costs to Kingston Public Hospital	\$ 2,300.00
Miscellaneous cost to K.P.H.	200.00
Cost to Medical Report	1,750.00
Cost to medication	400.00
Cost to pedal cycle	5,500.00
Loss of Earnings as a Mason at \$10,000.00 per fortnight from 22/03/2002 to present and continuing	40,000.00
Transportation cost from Cookhorn Lane to K.P.H. on 2 occasions at \$400.00 per round trip	<u>800.00</u>
	\$50,950.00”

Mr McKenzie was however unable to produce any documentation in support of these items. Miss Stephenson sought to tender in evidence a photocopy of a bill

produced by the Kingston Public Hospital. She submitted that there would be no prejudice to the defendants because by a notice dated 22nd July 2005 they were alerted that the Claimant intended to tender the document into evidence.

The court refused the application on the basis that no account had been given as to the absence of the original document. Mr. McKenzie's testimony was that he had given the original to his lawyer, but there was no further testimony proffered concerning its whereabouts. The result of this situation is that there is no proof of this expense; especially as Mr. McKenzie did not testify as to the amount of the bill.

He did however testify that he had spent \$400.00 on medication - \$200.00 on two occasions - and that he paid \$400.00 round trip on two occasions from his home to the hospital. He also testified that he never saw his bicycle again after the collision and that it was worth \$6,000.00. Again no documentation was produced. He seemed to have just plucked a figure when asked about the cost of the cycle.

Finally Mr. McKenzie testified that because he was unable to work he lost wages of \$10,000.00 per fortnight. He said that he did not go back to work for the same employer because he was dissatisfied as to the way the employer had treated him after he had received the injury which is the subject of this suit. That could explain the absence of any documentation concerning his earnings, but no testimony was given concerning any attempt to secure it.

It is well established that claimants must not only specifically plead the special damages which they claim but they are also required to strictly prove same. This may not be done by simply "throwing figures at the court". (See *Robinson and Co. Ltd. and anor. v. Lawrence* (1969) 11 JLR 450 at p. 453) Where, however, the absence of

documentation may be excused because of the specific circumstances of the case, the court may accept the *viva voce* testimony, if it is otherwise credible. (See *Desmond Walters v. Carlene Mitchell* (1992) 29 JLR 173.)

Because of the weaknesses pointed out above I shall not award Mr. McKenzie any of the special damages for which he could have produced receipts or some documentation. In the circumstances I shall only award Mr. McKenzie the sum of \$800.00 to cover his transportation costs, since that is an area in which receipts are not usually readily available.

Re Mr. Calvin Watson

Unlike Mr. McKenzie, young Mr. Calvin Watson, who was fourteen years old at the time he was struck from the bicycle, suffered severe injuries and was hospitalized for about seven weeks. His case was also severely hampered by the inadequacy of documentation. Counsel could only locate photocopies of a number of documents and no satisfactory explanation was given for the absence of the originals.

One document was however put into evidence. It was a medical report of a Dr. Milton Douglas dated June 11, 2003. Dr. Douglas reported that he examined Mr. Watson on June 9, 2003. Based on that examination and a review of X-rays which Dr. Douglas caused to be done, he concluded that Mr. Watson had suffered a fracture of the pelvis and of the right femur. Dr. Douglas opined that:

“Calvin has reached maximum medical improvement. He has no permanent disability. He will not require surgery in the future.”

Dr. Douglas did however find that Mr. Watson's right leg was ½ cm. shorter than the left. In light of the fact that Dr. Douglas reviewed Mr. Watson over a year after his

discharge from hospital, his report has to be combined with Mr. Watson's testimony and that of his mother Alvarene Wright. They both testified that while in hospital, he had weights placed on both legs and Plaster of Paris placed about his "waist and (his) foot".

Mr. Watson emphasized the pain he underwent during the time of his incapacity which proved to be in excess of three months.

Concerning his current situation Mr. Watson testified that he walks with a limp and sometimes his "foot" pains him when he walks or runs. He says that he doesn't now play football as well as before because of the pain he experiences.

In assessing the appropriate award for Mr. Watson I have reviewed the cases which Miss Stephenson brought to the attention of the court, namely:

Roger Brown v Cecil Bassaragh C.L. 2002/B092 (28/7/03).

Jason Edwards v Phoebe Buchanan C.L. 1988/E024 (30/11/89).

John Shirley v Jamaica Premix Ltd. & Anor. C.L. 1991/S105 (7/10/92).

The two latter cases were cited in Harrison's *Assessment of Damages for Personal Injuries* at pages 326 and 214 respectively. The major injury in both was the fracture of the femur. Based on the report Mr. Edwards' fracture was displaced and required surgery and the insertion of internal fixation. He however was only 14 years at the time of suffering his injury and had the benefit of youth in his favour. In updating the awards, the sums resulting are \$1,119,307.65 in *Shirley's* case and \$805,886.71 in *Edward's*.

In *Brown v Bassaragh* the Claimant Mr. Brown suffered a minimally displaced fracture of the medial wall of the right acetabulum and an undisplaced fracture of the base of the third metatarsal. The Court of Appeal in reviewing the first instance award

(SCCA 76/2003, delivered on 29/9/2005) was of the view that the appropriate award for general damages for Mr. Brown's injury was \$750,000.00.

It is significant to note that in all of these cases there was no finding of any permanent partial disability. Mr. Watson's injuries are in my view more serious than that of all the other claimants here mentioned, because of the greater number of fractures. The absence of permanent disability however places them on similar footing.

Although Miss Stephenson submitted that \$1,500,000.00 was an appropriate figure for an award I find that in light of the absence of permanent disability and any details of Mr. Watson's medical treatment that \$1,000,000.00 is a more suitable award.

Special Damages

Because of the absence of documentation the only claim which the court is prepared to consider is that of the transportation for Mr. Watson's mother to go to and from the hospital each day to bathe and look after him. She testified that she took a taxi each day for the seven weeks and the round trips cost was \$600.00 per day. The pleadings however disclosed that the cost was \$400.00 round trip. On the same reasoning as outlined in Mr. McKenzie's case I shall allow the claim for transportation as reasonable and proved. The figure of \$16,400.00 as pleaded is awarded even though the correct calculation would have resulted in a higher figure.

Conclusion

For the reasons stated above damages are assessed as follows:

Winston McKenzie

Special Damages: \$ 800.00

With interest thereon at 6% *per annum*
from 22/3/02 to 21/3/06.

General Damages:
Pain & Suffering and loss of amenities \$550,000.00

With interest thereon at 6% *per annum*
from 30/10/02 to 21/3/06.

Calvin Watson

Special Damages \$ 16,400.00

With interest thereon at 6% *per annum* from
22/3/02 to 21/3/06.

General Damages:
Pain & Suffering and loss of amenities \$1,000,000.00

With interest thereon at 6% *per annum* from
30/10/02 to 21/3/06.

Costs to the Claimants in the sum of \$76,000.00.