



[2023] JMSC Civ 47

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV03969

BETWEEN	SASHA-GAY SMITH	CLAIMANT
AND	DANEON SIMPSON	DEFENDANT

Mr Canute Brown instructed by Brown, Godfrey & Morgan for the claimant.

The defendant not appearing and not represented.

Heard June 6, 2022, July 21, 2022 and March 17, 2023

Assessment of damages – multiple facial lacerations - loss of sight in left eye, multiple facial scars, weakness of the buccal branch of the left VI cranial nerve - skin graft to reduce the size of the scars – future medical care- whether evidence sufficient to make an award for handicap on the labour market

CORAM: JARRETT, J

Introduction

[1] Acts of gallantry sometimes lead to misfortune. The claimant discovered this only too well on the night of December 22, 2012, at the Stages Night Club, in Christiana, Manchester, where she was a patron. In her attempt to break up a fight, she was struck on the left side of her face with a bottle by the defendant. She was left with injuries to her face, and eventually lost sight in her left eye. By an amended claim form filed on September 5, 2014, she sued the defendant in negligence. In his acknowledgement of service, the defendant admitted the claim. This admission led to judgment on admissions being entered on February 16, 2017, with damages to

be assessed. It is the assessment of the claimant's damages that is before me. The defendant did not attend the trial.

The evidence

Nonpecuniary expenses

- [2] The claimant's witness statement dated February 10, 2022, stood as her evidence in chief and was amplified at the trial. In that statement, she said that she is a 33-year-old hairdresser, but in her oral evidence at trial she testified that she is now a farmer. She said that on the night she was struck by the defendant, she fell to the ground with blood rushing down her face. It was painful and she felt drowsy. She was rushed to the Percy Junior Hospital where her wounds were cleaned and stitched. She was transferred to the Mandeville Regional Hospital (MRH) where she was admitted. In her witness statement she said she remained at MRH for two weeks, but at trial she said it was for one month. At the MRH she was diagnosed with multiple facial lacerations and left vitreous haemorrhage. She was subsequently referred by Dr Gavin Henry to the University Hospital of the West Indies (UHWI). According to her witness statement, Dr Henry's prognosis was very poor for recovery of sight in her right eye, and she was likely to have multiple facial scars. She obtained a second opinion from Dr Mowatt at the UHWI who confirmed that she had lost sight in her left eye
- [3] On December 23, 2012, plastic surgeon Dr Geoffrey Williams performed surgery on her left eye and on her face to reduce the scars. He had to take skin from behind her left ear to place on her eyelids because her left eye could not close. The claimant said that there was a "big, bulgy scar" beside her left eye that Dr Williams "did surgery on to look better". In her witness statement she said that this surgery cost her \$200,000.00 and was paid for by the defendant. According to her, Dr Williams "still needs to continue" and so he gave her an updated invoice for work to be done. She is still in his care. Plans for further work to be done on her face have been discussed with him and he has outlined what is to be done in a

medical report which he gave to her. The defendant was charged by the police with felonious wounding

- [4] The incident left her with multiple keloid scars under her right eye, one over her left eye, two under her left eye. Her nose and forehead also have scars. She continues to feel a strain and dryness in her right eye and has to rely on eye drops continuously for relief. She has also had to wear prescription eyeglasses. Because of the many scars on her face and the fact that she now only has one eye, she no longer feels pretty. Before her injuries, she was able to drive, but with one eye that is now very challenging for her. On the road she is now very coward and must turn her head to the left in order to see things. When she has any “differences” with others, they call her “one eye” or “cut up face”. This bothers her a lot and consequently her confidence is very low. Prior to her injuries, she attended her children’s Parent Teachers’ meetings. But since the accident, her children no longer wish her to attend those meetings. Her understanding of their position is that other children at times say things about her and this affects them.
- [5] According to her, since her injuries, she has not been able to work as a hairdresser because her clients have lost confidence in her ability to style their hair.
- [6] The claimant relied on the medical reports of Dr Gavin Henry dated August 28, 2013 and January 11, 2020 respectively, and the medical report of Dr Geoffrey Williams dated February 21, 2022. In his medical report dated August 28, 2013, Dr Henry, does not say when the claimant presented at MRH but refers under the rubric “Incident”, to “Penetrating trauma to face from broken bottle on the 23rd December 2012”. He diagnosed her with multiple facial lacerations and left vitreous haemorrhage. In terms of treatment, he said the claimant’s facial lacerations were sutured and he referred her to UHWI for the left vitreous haemorrhage. He gave a very poor prognosis for recovery of sight in the left eye and stated that the claimant would likely have multiple facial scars.

[7] In his further medical report dated January 11, 2020, Dr Henry is a Consultant Ophthalmologist and a member of the American Academy of Ophthalmologists. He says he saw the claimant on January 11, 2020 with a history of previous trauma to the face resulting in poor vision. On examination the claimant had a visual acuity of 20/20 in the right eye and no light perception in the left eye. He reports that:

“The left eye appears phthisical with intraocular pressure of 15 and 40 mmHG, right and left respectively. No view was possible of the retina of the left eye due to severe contraction of the contents of the anterior part of the eye.”

Dr Harvey opines that the claimant has irreversible loss of vision in the left eye secondary to the injuries she suffered on December 23, 2012, and that there is no prospect for visual improvement. He gives her a visual disability rating of 30%.

[8] Dr Geoffrey Williams is a Consultant Plastic and Reconstructive Surgeon. He says he first saw the claimant on February 21, 2013, for injuries to her face. The primary reason for her referral to him was to correct a severe skin shortage to her left upper eye lid. This, he said, was corrected on March 20, 2013 by using a full thickness skin graft taken from behind her left ear. He listed the following major scars which he observed on the claimant:

- a) Two irregular scars of her left forehead measuring 1 and 2cm respectively.
- b) A 5cm vertical scar from the left forehead, passing through the left eyebrow and onto the upper eyelid. In addition, there are two scars measuring 1cm each lateral to this.
- c) A 3cm scar of the left lower eyelid in line with the 5cm scar described in (b) above. There are two irregular 1cm scars lateral to this.

- d) A 5 cm transverse scar extending from the lower nose on to the left cheek.
- e) A 1cm irregular scar on the bridge of the nose just between the eyebrows.
- f) A 0.75cm irregular scar of the right upper eyelid.
- g) A 4cm oblique scar extending from the inner aspect of the right eye and extending on to the right cheek.

[9] Dr Williams also reported that there is a weakness of the Buccal Branch of the left VII cranial nerve which is evidenced by the escape of air from the left angle of the claimant's mouth when she attempts to blow up her cheeks. It is important that I quote extensively from the rest of Dr Williams' report. I do so now: -

“Miss Smith's scars are all very obvious and unsightly but apart from the physical disability she has suffered, there is also an emotional component to her suffering. Miss Smith has been severely affected emotionally by the scars and the loss of vision in her left eye and was tearful today during the duration of the consultation. She reports that she is shunned even by family members and has lost all self-confidence.

Some of her suffering can be relieved by reconstructive plastic surgery to minimize her scarring and to restore a more normal appearance to her face. However, it must be noted that despite what sophisticated plastic surgery techniques have to offer, she will always be left with the tell-tale signs of her unfortunate assault. Unfortunately, nothing can be done about the loss of vision in her left eye or the weakness in the nerve to the left side of her mouth.

The surgery required, would take place in three stages. – at 3-4 month intervals, and involves excision of the scars and realignment of the tissues in an anatomical fashion... “

According to Dr Williams, the aggregate estimate cost of the three stages of the proposed surgery is \$5,100,000.00.

Pecuniary losses

[10] The claimant said she incurred medical and transportation expenses. At trial she testified that Dr Williams had provided her with two updated invoices for the continued work he needed to do. The updated invoices include surgeon's fees, hospital charges and fees for an Anaesthetist and an Assistant Surgeon. The first updated invoice is dated February 21, 2013 and the second updated one is dated August 7, 2013 and amount to \$670,000.00. She provided documentary evidence of the following expenditures: -

- a) Medical consultations with Dr Gavin Henry - \$12,000.00
- b) Medical consultation with Dr Mowatt - \$ 8,500.00
- c) Taxi services of Wesley Brown - \$ 48,000.00
- d) Taxi services of Jerome Lee - \$ 18,000.00
- e) Prescription eye drops - \$ 50,415.62
- f) Medical report of Dr Williams - \$ 15,000.00
- g) Cost of surgery done by Dr Williams - \$200,000.00

In her witness statement, the claimant also said that she lost income as a hairdresser for a period of twelve days and that her daily income from hairdressing was \$ 3,500.00, making her total loss of income \$42,000.00.

Submissions

[11] In his oral submissions, Mr Canute Brown, counsel for the claimant submitted that the claimant was seeking general damages in the total sum of \$12,000,000.00 representing pain and suffering, loss of amenities, and the cost of future medical care. In relation to pain and suffering and loss of amenities, counsel relied on the decision of **Audley Gilbert v The Attorney General [2017] JMSC Civ 165** in which the claimant lost sight in his right eye due to an assault. On November 3, 2017, he was awarded \$5,000,000.00 in general damages. Mr Brown also relied on the decision in **Lavern Anderson v Marksman Limited and Kaiser Bauxite**

Company and Jamaica Bauxite Mining Limited t/a Kaiser Jamaica Bauxite Co. Ltd [2012] JMSC Civil 59, to argue for the inclusion in the award of a component for psychological injury. On May 25, 2012, Daye J awarded the claimant (who had lost sight in the left eye secondary to gunshot injuries to the left side of her face, neck and jaw), \$5,000,000.00 for pain and suffering and loss of amenities. Mr Brown argued that the authorities relied on by the court in both these cases suggest that the appropriate award in this case for damages for pain and suffering and loss of amenities ought to fall within the range of \$ 6,000,000.00 to \$ 8,000,000.00. In arriving at my award for general damages, counsel said that I should take into account the emotional and psychological effect the injuries suffered by the claimant have had on her, even in spite of the absence of any expert evidence from a psychologist. According to him, the evidence of Dr Williams adequately describes the “emotional component of her suffering”.

[12] I granted counsel’s application for an amendment to the particulars of claim to include a claim for future medical care and loss of earnings, since the claimant gave evidence in respect of both heads, even though they were not pleaded. My decision to grant the amendment was informed by the fact that the claimant had served a Notice of Intention to Tender Hearsay Documents which included Dr Williams’ report in which he indicated the projected costs associated with the three staged reconstructive plastic surgery. The defendant would therefore have been aware of those costs. In relation to the loss of earnings, the claimant’s witness statement which was served, spoke to this loss and hence the defendant would also have been aware, from the time of service, that the claimant was seeking to recover it. In the further written submissions of the claimant filed on July 20, 2022, Mr Brown argued for an award for handicap on the labour market on the basis that the claimant’s sight has been considerably impaired and her clients have abandoned her as they consider that her eyesight is not good enough for her to treat and style their hair. He posited that the multiplier /multiplicand approach is the appropriate approach in this case using the claimant’s pre-injury earnings,

discounted by one half due to unexpected illnesses and the vicissitudes of life, with a multiplier of 29.

Analysis and discussion

[13] In assessing the claimant's general damages or her non-pecuniary losses, I am to look at the nature and extent of her injuries; the pain and suffering she endured; any resultant incapacities she suffers as a result of her injuries; the loss of any amenities suffered; and the effects, if any, of the injuries on her pecuniary prospects. Using earlier decided cases as guides, I am to arrive at a reasonable figure to put her, as far as is possible, in the position she was in prior to the accident. There is no question that this is a difficult undertaking. As to the assessment of her pecuniary losses or her special damages, these must be specifically pleaded and proven. A far easier task.

[14] The claimant consistently referred to the date of the incident as December 22, 2012, but all the medical reports refer to December 23, 2012. I harbour no doubts that the incident occurred and will accept the date of December 23, 2012, as this date is consistent throughout all the medical evidence. There is also an error in the claimant's witness statement as to the date of the surgery performed by Dr Williams. It clearly could not have been on December 23, 2012, the date of the accident and Dr Williams himself clears up any doubts in relation to that when he states that it was on March 20, 2013, that he performed the skin graft to correct the skin shortage to her left upper eye lid. I also accept as a typographical error, the statement in the claimant's witness statement, that Dr Henry's prognosis was for very poor recovery of sight in her right eye. All the other evidence in this case clearly refer to the loss of vision being in the claimant's left eye.

General damages
Pain and suffering

[15] Based on the claimant's unchallenged evidence, I am satisfied that the injuries sustained by her were caused by the actions of the defendant on the night of December 23, 2012. She has sadly lost sight in her left eye and is now left with unsightly scars on her face. She gave evidence that when the defendant hit her with the bottle, it was so painful that she fell to the ground with blood flowing from her face and she felt drowsy. I am satisfied and find that the pain she endured was considerable. Appearing before me at trial was a young woman who was clearly still emotionally upset because of her injuries. She was soft spoken and cried openly in court when giving evidence about the loss of sight in her left eye and Dr Williams' report on the need for further plastic surgery.

[16] The subjective element or the individual circumstance of a particular claimant is significant in the assessment of damages. The impact of the injury on the claimant before the court and his or her consequential disability is of utmost importance. In this case, the claimant was approximately 24 years old at the time of the incident. A young woman in the prime of her life. She was diagnosed with multiple facial lacerations which left her with multiple facial scars. She had to endure a skin graft to reduce the size of the scars and to help with closing the eyelid over her left eye. One scar she described as big and bulgy. She has multiple keloid scars on her face and in her words, she no longer feels pretty. She at times suffers the derision of persons who call her "one eye" and "cut up face". There was a time when even her own children appeared embarrassed by the scars on her face and the loss of vision in her left eye. In this regard I accept her evidence. I have no reason to doubt it. From an objective standpoint, Dr Williams says the scars are obvious and unsightly. I accept his evidence. There is no doubt in my mind and I therefore find that these facial scars are a source of serious worry to the claimant.

[17] I find it significant that Dr Williams has said that while reconstructive plastic surgery will help to reduce the scarring and restore the claimant's face to a more normal appearance, there will be residual signs of her injuries. He also said that there is

nothing that can be done to correct the weakness in the nerve to the left side of her mouth. I accept his evidence. While he is not a psychiatrist or a psychologist, in my view Dr Williams is competent to determine as he has done, based on his observations and interactions with the claimant, that in his opinion, she is emotionally upset by the scarring to her face and the loss of vision in her left eye. Although as a matter of law, emotional upset is not a known psychiatric illness for purposes of compensation in the absence of a physical injury, I am entitled to consider it when assessing general damages under the pain and suffering head, where there has been a physical injury. I will therefore take into account the claimant's own emotional response to her injuries which she openly demonstrated while giving evidence (a response which I accept as genuine and not contrived), as well as Dr Williams' own observations.

[18] I find the decision in **Audley Gilbert v The Attorney General of Jamaica** to be a helpful guide. In that case, the claimant who was a welder, lost vision in his left eye due to a blow to the eye from a baton. He received stitches to the left eye, and suffered burning and pain to the right eye, which persisted for 9 years. In assessing general damages, Daye J did not include a component for psychological trauma as he found that there was no evidence to support it. On November 3, 2017, he awarded the claimant \$5,000,000.00 for pain and suffering and loss of amenities. That figure updates to \$6,715,945.00 using the current consumer price index. In arriving at his decision, Daye J examined a number of earlier awards of the court in which there was a loss of vision in one or both eyes. Included in the learned judge's examination was his earlier decision in **Lavern Anderson v Marksman Limited, Kaiser Bauxite Co and Jamaica Mining Ltd [2012] JMSC Civ 59**.

[19] The claimant Lavern **Anderson** suffered gunshot injuries to the left side of her face, neck and jaw. As a consequence, she lost sight in her left eye. On May 25, 2012, she was awarded \$5,000,000.00 for pain and suffering and \$1,000,000.00 for post-traumatic stress disorder and major depression. The award for pain and suffering updates to \$ 9,085,714.00. It appears that Daye J considered that the

nature and extent of the injuries and their impact on the claimant **Lavern Anderson** were more serious than was the case of **Audley Gilbert**. The decision in **Pat Bellinfanti v National Housing Trust and George Rainford and The Attorney General reported in Khan's Vol 5** was one of the decisions relied on by Daye J in arriving at his award for general damages. In February 1997, **Pat Bellinfanti** who lost sight in his right eye at 47 years of age, was awarded \$1,000,000.00 for pain and suffering. That figure today updates to \$7,803,680.90.

[20] Using all these previous awards as a guide, and having regard to the extensive scarring of the claimant's face and the emotional effect they have had on her and continue to have, nearly 10 years later; the 30% visual disability rating of Dr Henry; her current need for prescription eyeglasses and the challenges she now faces while driving, I believe that an award of \$8,000,000.00 for pain and suffering and loss of amenities' is a reasonable sum in all the circumstances.

Handicap on the labour market

[21] Distinguishable from loss of actual earnings, which is an identifiable pecuniary loss and therefore part of special damages; handicap on the labour market is a separate head under general damages. It seeks to compensate a claimant for the diminution in his or her capacity to earn in the future due to physical incapacities caused by injuries sustained. The two risks that require assessment is that a claimant will be out of work sometime in the future due to the injuries, and if so, will either not be able to find employment at an equivalent pay or will be less likely to secure employment at all. The evidence of the claimant given in her witness statement is that at the time of making the statement, she was not working, but at the time of the accident she was a hairdresser. She also said in her witness statement that she has not been able to work as a hairdresser since the accident because her clients have lost confidence in her abilities. But at trial, she says she is a farmer.

[22] In arguing for an award under this head, counsel focused on the claimant's inability to work as a hairdresser because of the confidence her clients have lost in her. But

he made no mention of the fact that her own evidence is that she is now a farmer. There was also no evidence from the claimant that she can no longer perform the functions of a hairdresser. Her evidence is that her clients no longer have confidence in her abilities. None of the doctors have said that the loss of sight in her left eye will make it impossible or difficult for her to function as a hairdresser. Ten years have passed since the accident, but there was no evidence whether the claimant had made any efforts to regain the confidence of her clients or to attract new clients during that period. Furthermore, she has not given any evidence of the lucrativeness or otherwise of her current occupation of farming. She has not said for example, whether she now earns more or less from farming, than she did from hairdressing. Given the state of the evidence, I am unable to make an award in favour of the claimant under this head.

Future medical care

[23] I accept the evidence of Dr Williams, that reconstructive plastic surgery will provide the claimant more normalcy to her facial appearance. I have no reason to doubt his projected costs of the three staged surgical procedure and therefore will award the claimant the sum of \$5,100,000.00 for future medical care.

Special damages

[24] The pleadings do not fully reflect the documentary evidence adduced in relation to special damages. Only the sum \$1,600.00 was pleaded for the cost of medication. No application was made by counsel to amend the pleadings to reflect the evidence led in relation to the cost of prescription eye drops. In addition to that, both the pleaded costs of the plastic surgery performed by Dr Williams as well as the transportation costs, are higher than the documentary evidence provided to support these expenditures. It was also not clear to me, what surgical procedure the updated invoices from Dr Williams related to. In his medical report, he said that he first saw the claimant on February 21, 2013 and that he performed the skin graft on March 20, 2013. This is consistent with a receipt issued by his office dated March 20, 2013, in the sum of \$200,000.00, which amount is said to be for

“surgery”. He then says that he saw the claimant on the day of the report, that is, February 21, 2022. He goes on in his report to speak to the projected cost of reconstructive plastic surgery, but makes no mention of any other procedure that would attract the cost of \$670,000.00 referred to in the second updated invoice dated August 7, 2014. Based on the claimant’s evidence, the only inference I can make in relation to this updated invoice (which I take to supersede the earlier one), is that it is for future medical care to be performed by Dr Williams. His evidence however is that the surgical procedure to be done in the future, is the reconstructive plastic surgery, which cost I have accepted. That is the only amount I will award for future medical care. It means therefore, that the total special damages of which evidence was given and which can be matched to the pleadings, amount to \$345,100.00 After deducting the amount of \$200,000.00, which the claimant has said the defendant paid to her, I will award the sum of \$145,100.00 in special damages.

[25] In the result I make the following orders in favour of the claimant: -

- a) General damages for pain and suffering and loss of amenities of \$8,000,000.00, with interest at 3% per annum from September 17, 2014 to March 17, 2023.
- b) Future medical care of \$ 5,100,000.00 (without interest)
- c) Special damages of \$ 145,100.00 with interest at 3% per annum from December 23, 2012, to March 17, 2023
- d) Costs to be agreed or taxed.

A Jarrett
Puisne Judge