

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 57/88

BEFORE: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	DEVON McFARLANE (By his next friend VIOLET CURRY)	PLAINTIFF/APPELLANT
AND	FREDERICK BARNETT	1ST DEFENDANT/RESPONDENT
AND	MICHAEL GABBIDAN	2ND DEFENDANT/RESPONDENT
AND	LLOYD NICHOLAS	3RD DEFENDANT/RESPONDENT

A. W. Campbell for Appellant

Miss D. Lightbourne for Respondent

23rd September & 28th October, 1991

GORDON, J.A.

In this appeal the plaintiff sought an increase of the award made by McKain J., on 13th July, 1988 in assessing damages for personal injuries sustained by the appellant in a motor vehicle accident on 24th April, 1987.

Dr. Emran Ali, consultant orthopaedic surgeon at the Kingston Public Hospital attended to the appellant aged 17 years old on his admission and his reports were admitted in evidence by consent. He found -

"On examination he had multiple lacerations on the left upper face and right leg. He had deformity of the left thigh and right leg. X-rays showed comminuted fracture of the proximal third of the left femur and of the right tibia.

"The lacerations were sutured and he was set up on skeletal traction and an above knee plaster of paris cast applied on the right leg. There was a wound on the left thigh extending down to bone which had to be dressed regularly. He was put on antibiotics.

His convalescence was slow but satisfactory. The wound took a long time to heal and he also developed a pin track infection. The plaster of paris cast was removed on June 11, 1987 and the fracture tibia was found to be solid. He remained on traction until July 13, 1987 when it was discontinued.

Check x-rays showed good callus, on August 8, 1987 and he was mobilized out of bed with the aid of crutches and advised physiotherapy. He was discharged from hospital on September 7, 1987 to be followed up in the Fracture Clinic. He was seen on October 26, 1987 at which time both fractures were found to be clinically solid. He was fully weight bearing without any deformity and was discharged from the Clinic."

This report is dated 22nd February, 1988 and despite the last sentence the appellant testified that his right ankle was swollen and pained and he walked with a limp as one foot was taller than the other. He also complained of his inability to lift weighty objects and that he suffered from a swollen right knee when he walked. Dr. Ali gave an "addendum medical report" on the day damages were assessed. It reads:

"I saw this patient on 13.7.88 for the purpose of final certification and assessment. On examination he has 3" x 1" oval scar on the (L) thigh. The fracture femur is solid with slight lateral bowing at the fracture site. The medial collateral ligaments of his (L) knee is lax and the (L) lower limb is about ½" shorter than the (R). He also has 2 linear 10" scars on the medial side of the (R) leg and several smaller scars on the leg with tendency to keloid formation. The fracture of the distal 1/3 of the tibia is solid with slight bony swelling at the fracture site. He walks with a slight limp. He also has multiple superficial scars

"above the (L) eye lid syganatic region of the face. In my opinion this patient suffers a PPD of 15%."

The appellant spent 4½ months in hospital and had physiotheraphy. His injuries left him unable to play his favourite games of football and cricket. He also said he suffered from occasional blurring of vision of the left eye.

The award of \$35,000.00 was challenged by Mr. Campbell thus:

- "1. That the learned trial judge's award under the head of Damages, Pain and Suffering and Loss of Amenities is inordinately low and inconsistent with awards made in similar cases in this Honourable Court.
2. That the learned trial judge wholly misconceived the severity of the Plaintiff/Appellant's injuries, loss and suffering and to the detriment of the Plaintiff/Appellant."

In their submissions counsel referred to reports of awards made in similar cases and Mr. Campbell relied on C.L. 180T 079 Lurline Thompson v. Barrington Hendricks reported at page 1 volume 2 of Recent Personal Injury Awards made in the Supreme Court of Jamaica by Ursulla Khan (Khan's Reports).

The Plaintiff Thompson sustained on 15th August, 1977 -

1. Fracture of the Right clavicle
2. Fracture of Right femur
3. Fracture of left femur
4. Multiple abrasions to both limbs

These injuries resulted in -

1. Pronounced limp of the left lower limb.
2. 3/4" shortening of the left lower limb.
3. 5° - 10° rotation of left lower limb.
4. Permanent ugly scars on both thighs.

5. Permanent Partial Disability of left lower limb assessed at 20%.
6. Permanent Partial Disability of right lower limb assessed at 10%.

This female plaintiff aged 28 was in and out of hospital over the period 15th August, 1977 to 24th April, 1981 on at least five occasions and underwent four operations. At the time of assessment on 21st April, 1982 she was scheduled to return to hospital to have a nail removed from the injured bone. She was awarded \$70,000.00 for pain and suffering and loss of amenities.

It was admitted on both sides that her injuries were more severe than those of the plaintiff in the instant case but Mr. Campbell asserted that her case offered the best guide to what should be an adequate award. Many cases were cited as the submissions of counsel urged that there should be consistency in awards for comparable damage. [This has always been the approach adopted by the courts. With the rapid depreciation in the value of the Jamaican dollar and the increase in the rate of inflation the courts have been hard pressed to arrive at an acceptable method of determining parity of awards. A broken leg in 1970 and one in 1990 are similar but the awards although they may appear to be different, should equate in the money of the day. Jamaican courts have been resorting to using Jamaican cases as a guide to awards and less dependency is placed on Kemp & Kemp Quantum of Damages, for guidance.

In Hepburn Harris v. Carlton Walker S.C.C.A. 40/90 delivered 10th December, 1990, this court per Rowe P, said:

"Cases tried between 1984 and 1987 were cited to support the proposition that general damages awarded in those years should be massively increased to reflect the rapid growth of inflation. Central soya of Jamaica Ltd v. Junior Freeman S.C.C.A. 18/84 suggested that the depreciation of the value of the Jamaican dollar over a given period of time can be used as a measure to preserve the real

"value of the damages to an injured person who receives his money at a future date. It is time that a more precise and sophisticated method be devised to find the quantum of the money of the day, taking into account inflationary trends in the economy. This should now be a matter of evidence and moreso when substantial sums are being claimed." (emphasis supplied)

Mrs. Ursulla Khan in volume 3 of Khan's Report has published two tables:

"Consumer Price index table I" and "Consumer Price indices all Jamaica all items 1975 - 1990 (Base Period January 1988) Table II: These tables were supplied by the Statistical Institute of Jamaica in response to a request for suitable multiplier to determine the present value of earlier awards.

These tables now provide "precise and sophisticated method to find the quantum of the money of the day, taking into account inflationary trends in the economy" (Harris' case supra). By using these tables we find that the award made in Thompson v. Hendricks (supra) of \$70,000.00 would be an award of \$166,000.00 in July of 1988. The injuries Miss Thompson sustained were far more serious than those of the appellant, consequently they attracted far more in damages. That case is therefore not a useful guide.

In Marvin Rutherford v. Esau Dewar & Caleb Barnes C.L. 1976 R019 page 3 volume 2 Khan's Report the plaintiff an ambulance driver aged 31 was injured in a motor vehicle accident on 27th February, 1977. He suffered -

- "1. Fracture of both legs with proximal end of the fracture of the right tibia protruding through the skin.
2. Sole of foot almost separated from underlying bones.
3. 8" laceration on medial aspect of the instep of left leg.
4. Fracture of distal end of proximal phalanx of his second finger.

- "5. Abrasions to face and both legs.
6. Contusion of left rib cage.
7. Severe lacerations involving the right foot - 15" long starting from the medial and extending to the heel circling the ankle.

He was admitted to the Kingston Public Hospital where his wounds were cleaned, sutured and dressed.

Bilateral casts were applied and he remained in Hospital and in cast until the 3rd June 1977 when his casts were removed and both fractures were found to be clinically healed. He was transferred to the Linstead Hospital on 30.6.77. He returned to Kingston Public Hospital for outpatient treatment and when seen on the 31.6.77 he was still not able to get up with his crutches and it was noted that he had quite severe varus deformity of his left ankle. He was put in plaster cast to correct this deformity and this was wedged at 3 to 4 daily intervals until the 30th September 1977 when his cast was removed. Up to 7th December 1977 he was barely able to walk with crutches. By January 1978 he was getting around on both legs in a somewhat crab like style and by 29th March 1978 he was walking with one stick and had a gross limp. His Physiotherapy was stopped and by May 1978 he again walked like a crab. By March 1979 he was able to walk without a stick. Repeat X Rays on 3rd August 1979 showed that the talus and navicular bones on the left were fused and that there was gross traumatic arthrosis. Surgery being debatable the Plaintiff elected to wait and see what happened.

PARTICULARS OF RESULTING DISABILITY

- Severe varus deformity of the left ankle.
- 35% PPD of left lower limb.
- 25% PPD of right lower limb."

The medical evidence disclosed that even with a successful operation he would have a permanent partial disability of 25% of his left lower limb. The award of \$40,000.00 for pain and suffering and loss of amenities made, on 11th November 1981 would, applying the tables supplied, approximate to \$97,000.00 on 13th July, 1988.

The injuries Mr. Barnes sustained and the resulting disability are more serious than Devon McFarlane's.

Miss Lightbourne in supporting the award of \$35,000.00 referred to a number of awards. In C.L. 1982 J. 183

Donald Johnson v. Stafford Evelyn reported at page 75 Khan's Report Volume 2, the plaintiff suffered fractures of the left femur and left tibia and fibula. The resultant disability was 12% of the function of the left lower extremity. On 10th February, 1984 Patterson J, awarded \$22,000.00 for pain and suffering and loss of amenities. With the application of the tables this award would now be \$34,593.00. The injury that plaintiff suffered was to one limb only.

At page 80 in the said report Patterson J., awarded the plaintiff under the same head of damages \$30,000.00 on 13th February, 1985. That plaintiff sustained fracture injury of the upper end of the right femur resulting in a 1" shortening of this limb and an assessed permanent partial disability of 20% (see C.L. 1979 P. 081 Henry Pickett v. George Campbell). That award with the application of the tables would now amount to \$38,500.00.

These cases although not apposite, in that the injury was to one limb only, offer a useful guide to a just award. We consider the award to the appellant of \$35,000.00 to be too low. On the other hand as indicated above an award of \$97,000.00 is excessive.

Having given all the factors due consideration we ordered that the award of \$35,000.00 for pain and suffering and loss of amenities be set aside and substituted an award of \$60,000.00. In other respects the judgment of the Court below was not disturbed. We ordered that costs be the appellant's to be taxed if not agreed.

Before parting with this appeal we wish to say that the third ground of appeal filed claimed that the learned trial judge erred when he failed to make an award under:

- "(a) future loss of earnings
- (b) handicap on the labour market
- (c) disadvantage on the labour market."

However, Mr. Campbell advanced no submissions in support of this ground although he stated that it was not abandoned. It is sufficient to dispose of this ground to say that there was no evidence before the learned trial judge to justify an award under any of these heads.

ROWE, P.

I agree.

FORTE, J.A.

I agree.