[2019] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 121/2012

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**NATASHA RICHARDS**	**1ST APPELLANT**
AND	**PHILLIP RICHARDS**	**2ND APPELLANT**
AND	**JUDAN BROWN**	**RESPONDENT**

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the appellant

Richard Reitzin instructed by Reitzin & Hernandez for the respondent

6 February and 4 October 2019

BROOKS JA

Background to this appeal

[1] This is an appeal by Ms Natasha Richards and Mr Phillip Richards of the award of general damages for pain and suffering granted to Mr Judan Brown following the assessment of damages resulting from a motor vehicle crash on 21 February 2004 along the Bustamante Highway in the parish of Clarendon. Mr Brown was the front seat passenger in a Ford Ranger travelling along the highway. Ms Richards was driving a Honda Accord in the opposite direction. Upon reaching the vicinity of the district of

Osborne Store, she attempted to overtake a motor vehicle when she lost control of the Honda and it collided with the front of the Ford Ranger injuring its occupants. Mr Phillip Richards is the owner of the Honda Accord.

[2] Mr Brown commenced proceedings against Mr Richards and Ms Richards. He served the relevant documents on them pursuant to an order allowing substituted service. Service on Ms Richards was by newspaper advertisement and service on Mr Richards by way of service on his motor vehicle insurer. Ms Richards did not file an acknowledgment of service within the required period. On the other hand, Mr Richards, filed his acknowledgment of service within time but filed his defence and ancillary claim against Mr Errol Brown, the owner and driver of the Ford Ranger, out of time. There will be no further references hereafter to Mr Errol Brown.

[3] As a result of the defaults, Mr Brown entered an interlocutory judgment against Mr and Ms Richards and the matter was set for assessment of damages.

[4] At the assessment of damages, Sykes J, as he was then, on 27 July 2012, awarded the sum of $2,500,000.00 for general damages and special damages of $185,358.77. Mr and Ms Richards, despite being represented at the assessment hearing, were not able to address the learned judge on the issue of damages. They now seek to appeal against the assessment exercise and submit that they ought to have been allowed to participate in it. They also contend that the learned judge's award for general damages is manifestly excessive.

[5] The grounds of appeal are:

"i. The Learned Judge erred in law and/or misdirected himself and/or wrongly exercised his discretion and/or acted on a wrong principle of law when he concluded that the amount of $2,500,000.00 should be awarded for the injuries suffered by the Claimant; the measure of damages was inordinately high and/or grossly excessive as to make it an entirely erroneous estimate of the damages to which the Claimant is entitled and should be reduced to reflect sums awarded for such injuries.

ii. The Learned Judge erred in law and/or misdirected himself and/or wrongly exercised his discretion when he failed to apply awards of damages in cases that depict the same injuries as he is expected to do as a matter of law and even gave an amount far exceeding the sums submitted by the Claimant's Attorney-at-Law with the assistance of cases he submitted as being relevant.

iii. That since the Assessment of Damages was uncontested basic costs should have been awarded.

iv. That Rule 12.13 of the Civil Procedure Rules is unconstitutional in excluding the individual from defending."

Issues

[6] The issues arising from these grounds are:

1. whether rule 12.13 of the Civil Procedure Rules (CPR) is unconstitutional;

2. whether Mr and Ms Richards, who were unable to participate in the assessment of damages in the court below, have the right to appeal the judgment;

3. whether the award of damages was inordinately high; and

4. whether Mr Brown should have been awarded basic costs since the assessment of damages was uncontested.

Whether rule 12.13 is unconstitutional

Submissions

[7] Mr Reitzin, on behalf of Mr Brown, contended that the appeal on quantum should not be entertained by this court. He submits that Mr and Ms Richards are estopped from arguing the issue of quantum as they did not challenge the constitutionality of rule 12.13 at the assessment of damages stage as they did in the related case of **Richards v Brown and the Attorney General** [2016] JMFC Full 05. Alternatively, learned counsel argued that if Mr and Ms Richards considered rule 12.13 to be valid then there can be no appeal on quantum as they made no submissions in the court below. To allow them to make submissions on quantum in this court, he argued, would circumvent the rule.

[8] Additionally, Mr Reitzin submitted that if Mr and Ms Richards are allowed to address the court on quantum, they would be presenting new arguments and issues not raised in the court below. The submissions and the citing of cases, by Mr and Ms Richards, would result in them treating this court as a court of first instance.

Analysis

[9] Rule 12.13 of the CPR provides that in the absence of an order for the default judgment to be set aside, a defendant can only be heard on issues of costs, time of

payment of any judgment debt, enforcement of the judgment or for delivery of goods. The rule states:

> "Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are -
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> (a) costs;
>
> (b) the time of payment of any judgment debt;
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> (c) enforcement of the judgment; and
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> (d) an application under rule 12.10(2).
>
> (Part 13 deals with setting aside or varying default judgments.)"

[10] The rule prevented Mr and Ms Richards from participating in the assessment of damages in the court below. Two courts, however, have since pronounced rule 12.13 to be unconstitutional.

[11] The Full Court of the Supreme Court addressed the constitutionality of this rule in **Richards v Brown**, a claim related to the claim under consideration but involving a different claimant. The Full Court at paragraph [35] declared that rule 12.13 of the CPR is unconstitutional and invalid and ordered that it be struck from the CPR. The Full Court also held that defendants are entitled to actively participate in the assessment of damages.

[12] In arriving at this decision, Batts J noted that there is a distinction between claims for specified sums and unspecified sums. In the former, a defendant may properly be taken to accept the amount of the claim while in the latter, it is not so. The

defendant may reasonably expect that his input will be accepted. He also stated that when damages are assessed, it is a judicial exercise, which requires active consideration and the judicial exercise of a discretion. He opined at paragraph [33] that a defendant at an assessment of damages has a right to be heard and any provision that removes this right is unconstitutional and cannot be demonstrably justified in a free and democratic society. Batts J remarked that a failure to file an acknowledgment of service should not curtail the substantive right to be heard as substantive rights should not be taken away by formalities.

[13] The constitutionality of rule 12.13 was also recently considered by this court in **Al-Tec Inc Limited v James Hogan, Renee Lattibudaire and the Attorney General** [2019] JMCA Civ 9. The Attorney General participated in the appeal, at the invitation of this court, as an interested party.

[14] In that case, the respondents had sued the appellant for breach of contract. They served the claim form and particulars of claim by registered post but the appellant failed to file an acknowledgment of service. Consequently, a default judgment was entered against the appellant. The notice of assessment was not served on the appellant and the assessment proceeded in its absence. A final judgment was entered in favour of the respondents. The appellant applied to set aside the judgment, but was unsuccessful. It appealed the decision. An important issue in the case was whether rule 12.13 infringes the appellant's right to a fair hearing as guaranteed by section 16(2) of the Charter of Fundamental Rights and Freedoms in the Constitution (the Charter) and

is unconstitutional and invalid. The court ruled that the right to be heard is a fundamental one, provided by section 16(2) of the Charter. Section 16(2) states as follows:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[15] In a comprehensive judgment which considered a number of authorities including **George Blaize v Bernard La Mothe (Trading as "Saint Andrews Connection Radio" SAC FM RADIO) and The Attorney General (Intervener)** (unreported), Eastern Caribbean Court of Appeal, Appeal No HCVAP2012/004, judgment delivered 9 October 2012, and Article 6 issued by the European Court of Human Rights, Edwards JA concluded that rule 12.13 is unconstitutional (see paragraph [172]). She went further, at paragraph [179], to say that the appellant had the right to address the court on quantum and to present the authorities that support its arguments that the respondents are not entitled to the sums claimed as damages. This court declared that rule 12.13 is unconstitutional to the extent that it restricts the right of participation by a defendant in an assessment of damages hearing. It also set aside the final judgment and the consequential orders. Rule 16.2(2) of the CPR was also declared unconstitutional, to the extent that it provides notice of the assessment of damages be given to the claimant only.

[16] Based on that analysis, the submissions by Mr Reitzin cannot be accepted. Accordingly, Mr and Ms Richards were entitled to have been heard at the assessment of damages. Having had the right to be heard at the assessment of damages, they have the right to appeal from the award of damages since it was granted in breach of the constitutional right to be heard. The appeal must necessarily be successful in so far as the award of damages, which was granted in breach of their constitutional right to be heard, must be set aside.

Whether Mr and Ms Richards who were unable to participate in the assessment of damages in the court below have the right to appeal the judgment?

[17] It being established that a defendant, with a default judgment against it, has the right to appeal from an assessment of damages on the basis of a breach of a constitutional right, there is a further issue to be decided. It is whether an appellant in that position, should be allowed to address the issue of quantum of damages, for the first time, in this court.

[18] Rule 2.15 of the Court of Appeal Rules (CAR) assists in determining that issue. The rule allows this court to make such orders that could have been made in the court below. It states:

> "In relation to a civil appeal the court has the powers set out in rule 1.7 and in addition -
>
> (a) all the powers and duties of the Supreme Court including in particular the powers set out in CPR Part 26; and
>
> (b) power to -

(a) **affirm, set aside or vary any judgment made or given by the court below**;

(b) **give any judgment or make any order which, in its opinion, ought to have been made by the court below**;

(c) **remit the matter for determination by the court below**;

(d) order a new trial or hearing by the same or a different court or tribunal;

(e) order the payment of interest for any period during which the recovery of money is delayed by the appeal;

(f) make an order for the costs of the appeal and the proceedings in the court below;

(g) make any incidental decision pending the determination of an appeal or an application for permission to appeal; and

(h) make any order or give any direction which is necessary to determine the real question in issue between the parties to the appeal.

(3) The court may reduce or increase the amount of any damages awarded by a jury.

(4) The court may exercise its powers in relation to the whole or any part of an order of the court below." (Emphasis supplied)

It is to be noted that the rule has an editorial defect. It does not have paragraphs numbered (1) and (2).

[19] The court also notes that, in the case of rule 12.13 not being applicable, the court below did have the authority to allow Mr Richards and Ms Richards to participate in the assessment exercise. The question of whether a defendant with a default judgment against it should be able to address the issue of damages for the first time in this court, should depend on the circumstances of each case. There will be cases where

the issues and facts would be so complex, disputed, or dependent on oral evidence, that it would be inappropriate for this court to attempt to assess the damages, without having seen the witnesses or having heard their responses to cross-examination. Other cases may allow this court to make an analysis based on the learned judge's notes of the evidence that was presented at first instance, especially if the evidence was largely comprised of documents. There will, of course, be a variety of circumstances between those extremes.

[20] In this case, the collision was over 15 years ago. The medical evidence is well documented. It would be in the best interests of the parties and of the administration of justice to assess the damages in this court. Remitting it would not be consistent with the overriding objective of ensuring that the case is dealt with justly (see rule 1.1(2) of the CPR).

[21] Having determined that the award of damages must be set aside and that Mr and Ms Richards can address the court on quantum, the medical evidence and the authorities relied on by both parties may now be considered in determining the appropriate award of damages.

The appropriate award of damages

The relevant evidence

[22] On the day of the crash, Mr Brown presented at the Accident and Emergency Department of the May Pen Hospital. He was assessed as having a small laceration to the inner lip. Mr Brown indicated that he lost consciousness, however, the report

indicates that there was no loss of consciousness. He was prescribed medication. The medical report stated that no permanent disability was anticipated.

[23] Mr Brown was assessed by Dr Sheree Simpson, Medical Practitioner of El Shaddai Medical Centre, on 26 February 2004, approximately five days following the crash. He was assessed with soft tissue injuries and muscle spasm to his back and neck. He was prescribed muscle relaxants and analgesics.

[24] He was later assessed by Dr Kedambady R Shetty, General Practitioner of Hope Medical Centre on 31 October 2011, approximately seven years and eight months following the crash. Examinations revealed severe pain in the neck during flexion and extension with restricted movement of the neck, pain in the hip and lower back and tenderness in the lower back. Dr Shetty gave Mr Brown a Voltaren injection and prescribed anti-inflammatory medications. He again examined Mr Brown on 7 November 2011. At that time, the findings were the same except the pain in his neck was no longer described as severe and Mr Brown obtained minimal relief with the medication. He, however, began experiencing tenderness in both knee joints.

[25] Mr Brown was again assessed on 3 January 2012, at which time he complained of inability to complete chores due to neck and back pain and was referred to a consultant orthopaedic surgeon. He was described to be in a state of depression due to the pain and was referred to a psychiatrist for further management. Dr Shetty however is not a specialist equipped to make a diagnosis of depression so this will not be

considered in this assessment. Dr Shetty diagnosed Mr Brown with chronic pain with whiplash injury.

[26] Mr Brown was examined by Dr R E Christopher Rose, Consultant Orthopaedic Surgeon of El Shaddai Medical Centre, on 22 March 2012, approximately eight years following the crash. Mr Brown again reported that he had suffered transient loss of consciousness. He also stated that the pain in his hip caused him to have a limp. He complained of intermittent lower back pains that were aggravated by activities such as prolonged sitting and walking, playing football, among other things. Radiographs revealed marked narrowing at the L5-S1 disc space. Dr Rose diagnosed him with mechanical lower back pain and mild whiplash injury. Dr Rose recommended modification of activities and referred him to supervised physical therapy.

[27] Mr Brown returned for follow up assessment on 25 April 2012. By that time, he had undergone four sessions of physical therapy and there was marked reduction in pain; however, there were intermittent back pains, which were aggravated by certain activities. Examination revealed mild tenderness on palpation of both trapezius muscles. Dr Rose diagnosed Mr Brown with mild lumbar disc protrusion and whiplash injury. He recommended continued physical therapy and MRI scan of the lumbo-sacral spine. An MRI scan was performed on 25 May 2012 by Dr Corey E J Golding, Consultant Neuroradiologist, which revealed disc degeneration at the L4-L5 level with mild diffuse disc bulge with a superimposed small central disc protrusion with accompanying annular tearing. Dr Rose ultimately diagnosed him with discogenic lumbar pains and mild

whiplash and opined that surgery was not required and no further investigations were required. He assessed Mr Brown to have a 2% whole person impairment.

Submissions

[28] In assessing general damages, Mrs Senior-Smith relied on the following authorities, the basic facts of and awards in which are set out below:

(i) **Sasha-Gay Downer (bnf Myrna Buchanan) v Anthony Williams and Dovon Griffiths** Khan's volume 6 pages 124-125. In that case, the claimant suffered head injury with transient loss of consciousness, whiplash injury, lumbar spasms, tender swelling to anterior aspect of left thigh, and tenderness with swelling left hip. She complained of neck pains, intermittent lower back pain. She was diagnosed with cervical strain, mechanical lower back pains and strained abductor muscles of the left thigh. She benefitted from physical therapy sessions. The claimant was assessed with 5% disability of the whole person. She was awarded general damages in the sum of $1,005,150.00 in July 2007, which updates to $1,735,565.32, using the July 2012 CPI of 183.2.

(ii) **Anthony Gordon v Chris Meikle and Esrick Nathan** Khan's volume 5 page 142. The claimant was

diagnosed with cervical strain, contusion to the left knee and lumbosacral strain. He was assessed with a 5% permanent partial disability of the lumbosacral spine. He was awarded the sum of $220,000.00 in July 1998, which in July 2012 would have updated to $833,243.75.

(iii) **Roger McCarthy v Peter Calloo** [2018] JMCA Civ 7. The claimant sustained contusion to the left side of face, acute back strain, post traumatic vertigo with headache and acute whiplash injury with grade 2 whiplash associated disorder. The doctor opined that the claimant required one to three months' rehabilitation. He was assessed with no permanent disability. This court affirmed the sum of $500,000.00 for general damages for negligence, which was awarded at the trial in the parish court in March 2017 and which, when using the earlier CPI of July 2012, yields $383,745.29.

(iv) **Racquel Bailey v Peter Shaw** [2014] JMCA Civ 2. The claimant sustained whiplash injury and backache. She was assessed with a 5% disability of the whole person. An award of damages in the sum of

$800,000.00, made in February 2010, was increased to $1,000,000.00 by this court, the latter of which, in July 2012, would have updated to $1,175,112.25.

(v) **Dawnette Walker v Hensley Pink** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 158/2001, judgment delivered 12 June 2003. The plaintiff suffered injury to the neck, right shoulder and upper back. She was referred to physiotherapy. The plaintiff complained of constant pain and was treated with steroid injection and wore a cervical collar for 6 months. The plaintiff was diagnosed as suffering soft tissue injuries and would experience periods of pain to the neck and shoulder. She was assessed as having 5% whole person impairment and was believed to have reached the point of maximum improvement. The plaintiff was away from work for one year and four months due to her injuries. In December 2001, the plaintiff was awarded $220,000.00 for general damages. However, on appeal in June 2003, this court awarded $650,000.00, which, in July 2012, would have updated to $1,965,016.50.

[29] Learned counsel submitted that the appropriate award for Mr Brown's injuries should be $800,000.00.

[30] Mr Reitzin invited this court to consider that the learned judge's notes of evidence forming part of the record before this court are not a complete record of the evidence which was before the learned judge and that this court will not have the benefit of seeing and hearing Mr Brown. Additionally, learned counsel submitted that the principles of **Flint v Lovell** [1935] 1 KB 354 as well as **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, regarding this court's reluctance to interfere with a trial judge's exercise of discretion, are applicable.

[31] Mr Reitzin further submitted that in the absence of seeing or hearing Mr Brown, a comparison with previously decided cases would be misguided.

[32] Nonetheless, learned counsel relied on a number of cases, which he submitted supported the learned judge's award of general damages. These included:

1. **Elaine Graham v Daniel James & Anor** reported at page 154 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 5, compiled by Ursula Khan. The claimant sustained loss of consciousness for ninety minutes, injuries to the back, left lower limb and neck and complained of memory loss. X-rays revealed mid degenerative changes of the cervical and lumbar spines. She was

diagnosed with whiplash injuries to cervical and lumbar spine with mild lumbar disc prolapse. She suffered complete disability for eight weeks and partial disability for three months and continued to experience intermittent pain. She was prescribed potent analgesics, muscle relaxants and bed rest was advised for two weeks. Her doctor opined that complete resolution was likely to take several years during which time she was required to avoid heavy lifting and any strenuous bending of her back. She was awarded $600,000.00 for general damages for pain and suffering and loss of amenities in September 2000, which, in July 2012, would have updated to $1,959,358.29.

2. **Stacey Ann Mitchell v Carlton Davis & Others** reported at pages 146-147 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 5, compiled by Ursula Khan. The claimant suffered severe tenderness in back of head and neck, laceration to back of head, marked tenderness and stiffness of lower spine, continuous pains to the back of neck and across waist and

swollen and painful left arm with difficulties in lifting weight. Her injuries were assessed as moderate whiplash with the prognosis that severe pains would continue for nine weeks with resultant total disability for that period, after which pains would diminish in severity with accompanying partial disability for five months, followed by intermittent pains for at least a further four months. She was awarded the sum of $550,000.00 for general damages in May 2000, which, in July 2012, would have updated to $1,862,476.89.

3. **Claston Campbell v Omar Lawrence and Others**, (unreported), Supreme Court, Jamaica, Suit No CL C-135 of 2002, judgment delivered 28 February 2003. The claimant suffered a laceration to his chin, trauma to his chest resulting in issues with his chest wall, severe chest pain and difficulty breathing, trauma to his back resulting in severe pain and swelling and difficulty walking properly for three weeks and a whiplash injury to neck resulting in pain and restriction of movements. A collar was recommended. There was no disability rating assessed. The doctor

did not quantify any permanent disability but his enjoyment of life, his quality of life had been affected. The sum of $650,000.00 was awarded for general damages in February 2003, which, in July 2012, would have updated to $1,849,068.32.

4. **Evon Taylor v Eli McDaniel & Others** reported at pages 140-141 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 5, compiled by Ursula Khan. The claimant's injuries included unconsciousness, severe tenderness in back of neck and head, 4 cm laceration to scalp, pain on flexion, extension and rotation of neck, tenderness over lower back, fogginess in sight, difficulty hearing from left ear, bruises to right shoulder and forearm. He was diagnosed with moderate whiplash and a collar recommended. It was opined that he would continue to have severe pains for approximately six weeks and he would continue experiencing pains of diminishing severity for a further period of four months followed by intermittent pain for at least a further two months. He was awarded $495,000.00 for pain and suffering in June

1999, which, in July 2012, would have updated to $1,806,454.18.

5. **Paul Jobson v Peter Singh and Others** Suit No CL 1995 J 172 reported at page 169 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 4, compiled by Ursula Khan. His injuries included unconsciousness, head injuries, bruises to arms and legs, pains to neck, down back and across shoulders. He suffered from recurrent intermittent pains. He was awarded the sum of $430,000.00 for general damages in July 1997, which, in July 2012, would have updated to $1,794,441.91.

6. **Dalton Barrett v Poncianna Brown and Anor** Claim No 2003 HCV 1358 reported at pages 104-105 of Recent Personal Injury Awards made in the Supreme Court of Judicature Jamaica, volume 6, compiled by Ursula Khan. The claimant sustained pain in lower back, left shoulder and wrist, contusion to lip, lower back and left shoulder. He was diagnosed with mechanical lower back pains and mild cervical strain. He was prescribed physical therapy and lifestyle

> modifications. He was awarded the sum of $750,000.00 for general damages in November 2006, which, in July 2012, would have updated to $1,379,518.07. It is to be noted that Mr Brown did not rely on this case at the assessment of damages, however it is included in Mr Reitzin's submissions in this court.

Analysis

[33] It is well established that this court will not interfere with an award of damages unless it is shown that the trial judge "acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage [sic] to which the plaintiff is entitled" (see the judgment of Greer LJ in **Flint v Lovell**).

[34] It is also recognised that pain, suffering, and loss of amenities cannot be measured in money. Nonetheless, the court tries to assess a fair award, which is not to be challenged unless it is wholly erroneous. This principle was stated by Lord Scarman in **Pickett v British Rail Engineering Limited** [1980] AC 136, at page 167-168 as follows:

> "There is no way of measuring in money pain, suffering, loss of amenities, loss of expectation of life. All that the court can do is to make an award of fair compensation. Inevitably this means a flexible judicial tariff, which judges will use as a starting-point in each individual case, but never in itself as decisive of any case. The judge, inheriting the function of the jury, must make an assessment which in the particular

> case he thinks fair: and, if his assessment be based on correct principle and a correct understanding of the facts, it is not to be challenged, unless it can be demonstrated to be wholly erroneous: **Davies v Powell Duffryn Associated Collieries Ltd** [1942] A.C. 601."

[35] In calculating a fair award, compensation is based on comparable awards. This was stated by Campbell JA in **Beverley Dryden v Winston Layne** (unreported), Jamaica Court of Appeal, Appeal No Supreme Court Civil Appeal No 44/1987, judgment delivered 12 June 1989:

> "…personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards."

Lower end cases:

[36] Mr Brown's period of suffering was longer than the equivalent periods in the cases cited by both Mrs Senior-Smith and Mr Reitzin. That distinction effectively distinguishes his case from those cited by Mrs Senior-Smith, with awards at the lower end of the scale.

[37] In **Anthony Gordon**, the injuries sustained by the claimant were similar to those sustained by Mr Brown. It is noted, however, that Mr Gordon had a greater level of permanent disability than does Mr Brown. The award made in **Anthony Gordon** was on the lower end of the range of awards made for similar type injuries. In **Roger McCarthy v Peter Calloo**, Mr McCarthy's injuries were not as serious as those of Mr Brown, nor was he assessed with any disability rating. In the circumstances, the award for general damages in the instant case should be higher than the majority of those

lower end cases. This is despite the higher percentage of permanent partial disability in both **Anthony Gordon** and **Raquel Bailey** due to the longer period of suffering by Mr Brown. It also cannot be ignored that Ms Bailey was not an impressive witness at her assessment hearing as the judge who saw and heard her was of the impression that she was embellishing her case in respect of her injuries.

Higher end cases:

[38] The cases with awards at the higher end of the scale are more appropriate for comparison to this case than those at the lower end. Nonetheless, there are some important differences. In **Sasha Gay Downer**, the minor claimant sustained additional injuries including head injury with transient loss of consciousness not sustained by Mr Brown. In addition, both **Sasha Gay Downer** and **Dawnette Walker** were assessed with a higher rate of permanent disability rating than Mr Brown had.

[39] Additionally, the cases of **Elaine Graham**, **Stacey Ann Mitchell**, **Claston Campbell**, **Evon Taylor** and **Paul Jobson** included dominant injuries, such as unconsciousness, not present in this case. By way of parenthesis, it must be said that Mr Brown did testify as to brief unconsciousness but it was not supported by any of the medical reports, and the learned judge seemed to have disbelieved that testimony. It is noted, however, that in none of the cases cited by Mr Reitzin, did the claimant have a diagnosis of a rating of a permanent partial disability.

[40] **Dalton Barrett** is the most useful guide for this case because of the similarities of the injuries and the disabilities described, including the elimination of participation in

sports. There, however, must be consideration for the prolonged period of suffering by Mr Brown, as well as the 2% permanent partial disability rating present in his case but absent in **Dalton Barrett**.

[41] It is desirable that a trial judge indicate the reasons for awards made (see **McKenzie v Campbell** (1999) 29 JLR 123). However, Sykes J did not give detailed reasons for his award. It does appear that in arriving at his award for general damages, he was guided by **Claston Campbell**, as he ruled all of the other cases that he considered as being dissimilar to Mr Brown's case. He therefore did not use those cases. As noted above, however, the updated figure for the award in **Claston Campbell**, is $1,848,068.32. Mr Campbell also had some ongoing breathing difficulties, which do not form part of Mr Brown's situation. There is no basis for departing from an award approximating that, which Mr Campbell received.

[42] Having considered all the cases mentioned above, the conclusion is that the sum of $1,800,000.00 would be an appropriate award for general damages.

Whether the respondents should have been awarded basic costs since the assessment of damages was uncontested

[43] In light of the decision that the assessment must be set aside, it is not necessary to analyse this ground of appeal. However, Mrs Senior-Smith made a submission that needs to be addressed. Learned counsel submitted that since the assessment of damages was uncontested, basic costs should have been awarded. The submission is absolutely flawed.

[44] Basic costs are addressed at rule 65.10 of the CPR. It states that in the absence of a summary assessment of costs by a judge, the party that is entitled to costs (the receiving party) may instead of seeking to tax its costs, ask for basic costs.

[45] Mrs Senior-Smith, in support of her submissions, however, relied on rule 12.12 of the CPR. That rule does not contemplate basic costs. It speaks, instead, to fixed costs. It states that "a default judgment shall include fixed costs under rules 65.4 and 65.5 unless the court assesses the costs". Apart from the difference between fixed costs and basic costs, rule 12.12 does not apply to this case, as rules 65.4 and 65.5 are only applicable where the claim is for a specified sum of money.

[46] In cases of uncontested assessment of damages, the presiding judge may either summarily assess the costs or order that costs should be agreed or taxed. In the latter case, it is for the receiving party to elect whether it will seek basic costs or proceed to tax or agree its costs. Fixed costs have no relevance in those circumstances. Basic costs cannot be forced upon the receiving party.

Special damages

[47] Although the entire assessment exercise must be set aside, it is noted that there is no appeal from the award of special damages by the learned judge. He heard oral evidence and was provided with some documentary proof of the special damages that were claimed. He found that special damages, in the sum of $185,358.77, were reasonable. There is sufficient evidence to support his finding and it should be adopted for this exercise of assessing damages.

Costs

[48] Mr Brown is entitled to his costs up to the time of the assessment of damages in the court below. The award of costs for the assessment exercise in that court must be set aside, as part of the order setting aside the award of damages. Mr Brown is also entitled to the costs of the assessment exercise in this court. The latter costs must, however be reduced by an amount which reflects that Mr Richards and Ms Richards have been successful in their appeal against the award that was handed down in the court below. A deduction of one-third would be a fair reflection of the time and effort invested in respect of that aspect of the case.

STRAW JA

[49] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing useful to add.

FOSTER-PUSEY JA

[50] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal is allowed.
2. It is declared that rule 12.13 of the Civil Procedure Rules is unconstitutional to the extent that it restricts the right of participation by a defendant in an assessment of damages hearing.

3. The appellants having been excluded from the assessment of damages in the court below, the judgment of that court, handed down on 27 July 2012, is set aside.

4. Damages are awarded as follows:

    a. Special Damages: - $185,358.77.

    b. General Damages for pain and suffering and loss of amenities: - $1,800,000.00.

5. Interest is awarded on special damages at the rate of 6% per annum from 21 February 2004 (the date of the crash) to 21 June 2006 (the date of change of statutory rate) and at the rate of 3% per annum from 22 June 2006 to today's date, and on general damages at the rate of 3% per annum from 11 January 2011 (the presumptive date of service of the claim form) to today's date.

6. The respondent shall have his costs in the court below, up to the hearing of the assessment of damages.

7. The respondent shall have two-thirds of his costs in this court.

8. Costs are to be agreed or taxed.