



[2023] JMCS Civ 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV0330

BETWEEN

KARL BERNARD

CLAIMANT

AND

PETER WHYTE

DEFENDANT

IN OPEN COURT

Ms. Oksana Kennedy instructed by Jacobs Law for the Claimant

Mr. Glenroy Mellish for the Defendant

Heard: May 4th 2023 and June 19th, 2023

ASSESSMENT OF DAMAGES – Motor vehicle collision – negligence — absence of initial medical report - Expert Evidence – damages

HUTCHINSON SHELLY, J

BACKGROUND

[1] This claim arose out of a motor vehicle collision that occurred on the 16th of March 2018 along the Bustamante Highway in the vicinity of Four Paths in the parish of Clarendon. The vehicles involved were a 2007 Honda Accord motor car with registration number 9030HL and a 2007 Nissan Dualis motor car with registration number 7752GP. The Defendant, Peter Whyte, is the registered owner and driver of the 2007 Nissan Dualis motor car with registration number 7752GP.

[2] On August 30, 2018, Mr Karl Bernard filed a Claim and Particulars of Claim alleging that he sustained personal injuries, suffered loss, damage and expenses on account of the Defendant's negligent operation of the motor vehicle. He is seeking to recover special and general damages for these losses.

[3] In the Particulars of Negligence, the Claimant listed the following:

- a. Driving at excessive speed;
- b. Driving without due care and attention of other road users to include the driver of the 2007 Honda Accord motor car registered 9030 HL;
- c. Failing to brake, slowdown, stop, swerve or otherwise control the motor vehicle to avoid colliding into the 2007 Honda Accord motor car registered 9030 HL;
- d. Failing to keep a proper look out;
- e. Driving carelessly/recklessly without any or sufficient regard for other motorist and;
- f. Failing to brake, slowdown or take measures to control the motor vehicle he was operating.

[4] The Defendant failed to file his Acknowledgment of Service, and as such Judgment in Default of Acknowledgment of Service was entered against him on the 6th day of September 2018.

[5] An acknowledgment of service was filed on behalf of Mr. Whyte on the 1st of June 2020. On the 4th of December 2020, the Defendant filed an application to set aside the Default Judgment on the basis that he had a good defence. This application was refused on the 30th of June 2022 and the matter proceeded to assessment of damages.

ISSUES

[6] The default judgment having been entered, the question of the Defendant's liability for the motor vehicle accident and loss sustained has been resolved as such, the sole issue for the Court is:

- Whether the expenses claimed and pain and suffering alleged were attributable to the accident and what quantum of damages, if any is the Claimant entitled to?

The case for Karl Bernard

[7] The evidence in chief of Mr. Bernard was outlined in his witness statement, which was amplified with permission to a limited extent, after which he was cross-examined. It was his evidence that about 8: 00pm, he was travelling along the Bustamante Highway heading towards Mandeville. He was travelling behind a taxi when he observed car lights heading in his direction on his side of the road. He stated that the taxi that was travelling behind swerved to the other side of the road. He then observed the 2007 Nissan Dualis motor car registered 7752 GP driving directly towards him on his side of the road.

[8] In order to avoid the collision, he tried to swerve to the right side of the road, but the motor car also swerved to the same side. Mr. Bernard stated that as a result, the motor car collided into the centre of the car that he was driving. Thereafter, he alighted from his vehicle, checked himself and then checked the other driver. He observed that the driver appeared intoxicated.

[9] Mr Bernard recounted that they were transported to the Four Paths Police Station where he gave a statement. While he was on his way home, his right foot began to ache. He did not seek immediate medical attention as he wanted to obtain treatment at his workplace, the Jamaica Defence Force (JDF). The morning after the accident, he visited the JDF medical centre and was examined by a doctor who

referred him to do an X-ray at the Precision Imaging Centre. The X-ray revealed that he had fractured the metatarsal bone in his right foot.

[10] As a result of the injury to his right foot, he was sent to the University Hospital of the West Indies (UHWI), where a cast was placed on his foot. He said that he wore the cast for a period of 3 months and took prescribed medication over a period of 6 months. He also said that he visited Oasis Health Care Limited for follow-up treatment and during his recuperation, he had to utilize a crutch. The report prepared by Dr Sangappa was exhibited as were the receipts produced by him for costs associated with transportation and the medical report. He indicated that although a report had been requested from JDF it was never received. He also stated that a report was never obtained from UHWI.

[11] He said that he incurred expenses in the sum of **\$144,000.00** which represents taxis for medical visits and court attendance in respect of the accident. He was assisted with the medical expenses that he incurred by his employer. Mr Bernard complained that the injury he suffered hindered him from receiving a promotion for a year as he was unable to take the fitness test. He also stated that the injury still affects him as he now walks with a limp and experiences pain occasionally.

[12] Mr. Bernard was cross-examined and stated that he saw the Doctor at JDF more than ten times as whenever he had to replenish his medication, he would see the Doctor. He also stated that his cast was removed after a period of ten weeks. He acknowledged that he did not receive a medical report for his treatment at UHWI and stated that all arrangements were made through the JDF.

MEDICAL REPORT

[13] Dr Ravi Prakash Sangappa treated Mr. Bernard at the Oasis Health Centre in Spanish Town in the parish of St Catherine. On the 21st of March 2018, he presented with the following complaints:

- i. intermittent pain to the neck;

- ii. intermittent pain to the right knee which was aggravated when climbing the stairs;
- iii. constant pain to the chest;
- iv. constant pain to the lower back which had worsened since the accident;
- v. constant pain to the right hip which was aggravated when walking and while taking a shower and;
- vi. pain to right foot with associated numbness after walking for prolonged periods.

[14] His findings on examination of Mr. Bernard were as follows:

Cervical spine

1. Had paraspinal muscle tenderness over both sides of the neck.
2. Range of movements was painful.
3. Right lateral rotation was normal.
4. Left lateral rotation was 60 degrees.
5. Flexion and extension was normal.
6. Right and left lateral flexion was 30 degrees.

Lumbar spine

1. He had bilateral paraspinal muscle tenderness over both sides of the back.
2. His range of movements was painful.
3. His straight leg raising test was negative.

Right hip

1. He had tenderness over the right hip joint region.

Right knee

1. He had tenderness over the right knee antero-laterally.
2. His range of movement in this area was painful.

Right foot

1. He had POP cast to his right foot.

[15] His diagnosis was a whiplash injury to neck, lower back strain, blunt trauma to the right knee, right hip strain and avulsion fracture of 1st metatarsal bone of right foot. In terms of treatment, Dr. Sangappa advised him to take analgesics, muscle relaxants and to come for follow-ups. He was also referred for physiotherapy of the neck, lower back, right knee and right hip. The prognosis indicated that Mr Bernard was expected to experience occasional episodes of pain to his neck, lower back, right knee, right hip and foot for about six months from his last review.

[16] Mr. Bernard visited Dr. Sangappa on two further occasions for review on the 13th day of April 2018 and on the 6th day of June 2018.

SPECIAL DAMAGES

[17] It is an established principle that special damages, which are generally capable of exact calculation, must be specially pleaded and proved and therefore in any action in which a claimant seeks to recover special damages, he has a duty to prove his loss strictly. (See **Lawford Murphy v Luther Mills** (1976) 14 JLR 119). The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, depending on the particular circumstances of the case. (See **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 63).

[18] The Claimant has pleaded and particularized special damages, being Police Report **\$3,000**, transportation costs **\$34,000**, medical consultation **\$14,000**, medication **\$6000** and medical report **\$25,000**. At the start of the hearing, it was indicated that special damages had been agreed in the sum of **\$64,000**. This amount was reflected in the 8 receipts for transportation expenses which amounted to **\$34,000** and the sum of **\$30,000** which had been paid for the responses provided by Dr Sangappa to questions posed on behalf of the Defendant. Although there was reference in the pleadings to the other expenses outlined above, there was no documentation provided in respect of same, neither was any explanation provided for their absence. In the circumstances, I am unable to make any other award outside of the **\$64,000** agreed.

GENERAL DAMAGES

CLAIMANT'S SUBMISSIONS ON DAMAGES

[19] Ms Kennedy has relied on the following four authorities in support of the Claimant's request for damages in the sum of Two Million dollars (**\$2,000,000**):

- i. **Williams v Gill and Forrest Suit No CL 1999 W 169 cited at Khan 5 pg 148** – The Claimant therein was assessed as having suffered whiplash injury and was awarded **\$350,000.00** for General Damages with interest. Using the CPI of 120.9 for May 2022, this award updates to **One Million Nine Hundred and Sixty-Eight Thousand One Hundred and Forty Dollars (\$1,968,000.00)**.
- ii. **Archer v Jamaica Infrastructure Operator Limited [2013] Trevor Benjamin v Henry Ford and others Claim No. 2005 HCV 02876 (unreported)** – The Claimant suffered soft tissue injuries and whiplash injury. He was awarded **\$850,000.00** for pain and suffering and loss of amenities which updates to **One Million Two Hundred and Sixty-Four Thousand Three Hundred and Fourteen Dollars (\$1,264,314.00)** using the CPI of 120.9 for May 2022.

- iii. **Bryan v Simpson and Fletcher [2014] JMSC Civ. 31** – The Claimant suffered a whiplash injury to the neck and lower back strain. She was treated with analgesics and muscle relaxants and was advised to do physiotherapy exercises at home. The Claimant was awarded General Damages in the sum of **\$1,400,000.00** with interest at 3% from the date of service of the claim form. The award currently updates to **\$2,187,073.17** using the CPI of 128 for March 2023.

- iv. **Mccorkell v Jamaica Urban Transit Co. Ltd and Beersingh [2018] JMSC Civ. 17** – The Claimant was diagnosed with capsulitis to the metacarpo-phalangeal joints of the right foot, ununited non-displaced avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the toe, healed avulsion fracture of the medial collateral ligament of the head of the proximal phalanx of the third toe and subjective anterior knee pains. The Claimant was awarded the sum of **\$1,400,000.00** for General Damages for the physical injuries sustained. This award now updates to **\$1,885,804.42** using the CPI of 128.1 for March 2023.

[20] Counsel asked the Court to take note of the evidence of the Claimant in respect of the severity of his injury. She highlighted that even though there was no documentary evidence of the physiotherapy, there was cogent evidence from him in respect of same and the report of the doctor made reference to same. She acknowledged that the first instance medical reports would have assisted the Court and argued that while these were not obtained it was not for lack of trying. Ms Kennedy asked the Court to accept the diagnosis given by the Doctor, given his examination and expertise in the area. She also asked the court to accept his comments in respect of the nexus between the collision and injuries sustained by the Claimant.

[21] Ms Kennedy submitted that the case of ***James Cowan v New Era Homes Jamaica Ltd etal C.L. 2000 C34***, which is relied on by the Defendant, is not

comparable in terms of injuries and the Claimant's injuries were different in several respects. In addressing the relevance of the cases cited by her, Counsel submitted that while all were similar to the case at bar, the injuries in the **Bryan's** case were more comparable and the award made now updates to **\$2,187,073.17** using the CPI of 128 for March 2023. The **McCorkell** case was also highlighted by Ms Kennedy and she submitted that while it was not on all fours with the instant case, there are some similarities, the award updates to **\$1,885,804.42** using the March CPI.

DEFENDANT'S SUBMISSIONS ON DAMAGES

- [22] Counsel for the Defendant commenced his submissions by discussing two issues. Firstly, he submitted that there is no evidence before the Court that the Claimant received physiotherapy treatment as neither receipt for payment bills nor a letter from a physiotherapist was provided to the Court for scrutiny. Mr Mellish asserted that this evidence is vital to assist the Court to find that the Claimant had done what was necessary to alleviate his pain and suffering. Learned Counsel also contended that it is wholly insufficient for the doctor to mention visits made by the Claimant for physiotherapy treatment.
- [23] Mr Mellish also took issue with the absence of medical evidence from the doctors who had attended to Mr Bernard immediately after the accident. Counsel lamented that this evidence would have been crucial in assisting the Court to determine whether the accident is the proximate cause of the suffering that was experienced by the Claimant. He described the report provided by Dr. Ravi Sangappa as inadequate as outside of the history provided by the Claimant, it does not refer to any prior medical history concerning the accident.
- [24] Counsel further submitted that the diagnoses of whiplash injury to the neck and lower back strain are not supported by the radiology report which only explained that the cervical spine and lumbar spine produced normal study and no evidence of acute bony injury.

- [25] On the subject of the quantum of damages which should be awarded for pain and suffering, Mr Mellish provided one authority, **James Cowan v New Era Homes Jamaica Limited** *supra*. In that matter, the Claimant suffered fractures of the tibia and fibula, lower back pains and shortening of the limb. He was assessed with a 5% whole person disability (WPD). The award for general damages was assessed at **\$550,000.00** in November 2004 at a CPI of 32. This award currently updates to **\$2,200,000.00** at a CPI of 128 for March 2023.
- [26] Counsel urged this Court that a reasonable award would be between **40%** which would be approximately **\$880,000.00** or **50%** which would be approximately **\$1,100,000.00** on the basis that the medical evidence which is crucial to confirm the nexus between the injuries pleaded by the Claimant and the collision is lacking and no whole person disability was suffered.

DISCUSSION

- [27] It is settled law that in assessing the appropriate award for compensation for pain and suffering and loss of amenities, the court must be mindful of the fact that the purpose of the award of damages is to place the Claimant in the position that he would have been in had the accident not occurred. The court must also consider that awards should be comparable, reasonable and moderate¹.
- [28] In the instant case, although the issue of liability for the collision and resulting injury has been determined, Mr Mellish has asked the Court to give careful consideration to the question as to whether the Claimant really sustained the injuries outlined in the report of Dr. Sangappa who saw Mr Bernard five days after the motor vehicle accident. In my analysis of this argument, I note that it is not the Defendant's case that the collision did not occur. I also noted the fact that on the 17th of March, the

¹ **Beverley Dryden v Winston Layne** SCCA No. 44/87 delivered 12 June 1989)

day following the accident, the Claimant was referred by Dr Notice (Capt Notice according to his account) to have an x-ray conducted. The report which was placed into evidence confirms the name of the referring physician and the date on which the x-ray was conducted.

[29] The x-ray was specific in its scope in examining the cervical spine, lumbar spine chest, pelvis and feet. These are all areas which the Court takes note are a part of the skeletal (bony) frame. There is no reference made to examination of the muscles and as such no findings in respect of same were noted. It is instructive however that in the **Clinical History** noted, the following words are found, 'history of MVA, complains of chest, hip and right foot pain, R/O Fracture'. In the area denoted as **Additional History** it is stated, 'Pain noted within the right hip and proximal to right great toe.'

[30] These observations are of great significance in addressing the concerns raised by Mr Mellish as it is evident that from the very outset, the Claimant had complained of injuries in the region of his chest, hip and right foot. A comparison of these complaints with the injuries later identified by Dr Sangappa shows that there is marked consistency between same. In my review of the answers provided by Dr Sangappa on this point, I was struck by the fact that even through he conceded that the earlier reports could have assisted in his examination and provision of a report for this Claimant, he did not agree that it was necessary to confirm and make a proper assessment of the injuries caused by the accident. In rebutting this argument, the Doctor noted that while such a report would have been useful in respect of injuries that may have healed in the intervening period, soft tissue injuries may take 3 to 6 months to heal and some strain and sprain may take months to heal completely.

[31] In light of the foregoing evidence and observations made thereof, I was satisfied that there was sufficient nexus between the injuries pleaded and the motor vehicle accident and any award made could properly be guided by same. I have carefully examined the authorities cited by the parties and agree that the case of **James**

Cowan is markedly different from the instant case. The injuries were certainly more severe in nature and Mr Cowan was left with a whole person disability of 5%. There were several similarities noted to the **Bryan** case as both individuals suffered whiplash injury and back pain. The suffering of the instant Claimant however was more severe as he also sustained a broken bone in his right foot which has brought about a life changing effect as he now walks with a limp. While the Claimant sustained a fracture as in the **McCorkell** case, that Claimant suffered more fractures and his injuries seemed to have been largely confined to the region of his lower extremities. While the nature and severity of his injuries were certainly greater than in the **Bryan** case, I formed the view that the award in this matter was quite conservative in comparison. In light of the foregoing discussion, I am satisfied that an appropriate award for pain and suffering and loss of amenities would be marginally higher than the sum awarded in the **Bryan** case considering the number of injuries, the nature of same and the residual effect on the Claimant. Accordingly, I make an award in the sum of two million two hundred thousand dollars, **\$2,200,000.00**.

ORDER

[32] Damages are assessed as follows:

1. Special Damages are awarded in the sum of Sixty-Four Thousand Dollars (**\$64,000.00**) with interest at the rate of 3% from March 16, 2018 to June 19, 2023.
2. General Damages are awarded for pain and suffering in the sum of Two Million Two Hundred Thousand Dollars (**\$2,200,000.00**) with interest at the rate of 3% from September 13th, 2018 to June 19, 2023.
3. Costs to the Claimant to be agreed or taxed.
4. Claimant's Attorney to prepare, file and serve the Judgment herein.