



[2023] JMSC Civ 49

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV00322

BETWEEN	MELVIN HENRY	CLAIMANT
AND	NEVILLE GUTZMER	1ST DEFENDANT
AND	DAVID GUTZMER	2ND DEFENDANT

IN CHAMBERS

Ms. Jodi-Ann Facey instructed by Forsythe and Forsythe for the Claimant

Ms. Antoinette Wynter instructed by K.Churchill Neita & Co. for the Defendant

Heard: February 13th, 2023 and March 20th, 2023

ASSESSMENT OF DAMAGES – Personal Injury – Motor vehicle accident – loss of earnings – proof of specific damages – pre-existing condition - general damages – relevant considerations

HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 4th of July 2016 at about 7:42 am, Mr. Melvin Henry was walking along the Blue Mountain Road in the parish of St Andrew when he was hit by a 2008 Nissan Motor Truck registered at CK 4566. At the time of this collision, the motor truck

was being driven by David Gutzmer, the 2nd Defendant, who it is accepted was acting as the servant and/or agent of the 1st Defendant at the relevant time.

- [2] As a result of the collision, the Claimant had to be taken to the Kingston Public Hospital (KPH) where he was admitted for 5 days. A number of observations were made of the Claimant on examination which included abrasions to his back, chest, right leg and weakness to bilateral upper limbs. An x-ray showed no obvious fractures had been occasioned to his shoulders, back, pelvis and chest. A C-spine X-ray showed degenerative changes, mild posterior listhesis to C4-5 with fracture C4 spinal process. Diagnosis was motor vehicle accident with soft tissue injury and hyper-extension c-spine injury with central cord syndrome. He was prescribed analgesics, a c-collar and physiotherapy. He was also referred for MRI C-Spine as outpatient to the Orthopaedic clinic.
- [3] In the course of his evidence, Mr Henry relied on his witness statement which stood as his evidence in chief. He also relied on a number of documents to include the medical report previously referenced, appointment cards from KPH, three sick leave certificates from the KPH, which stated that he was unable to work for a total of 13 weeks, a police report issued from the St Andrew Northern Division of the JCF, receipts for visits to the doctor and pharmacy and a letter from an employer showing his weekly wages. These documents were all admitted into evidence as Exhibits 1 to 12.
- [4] In his viva voce evidence which was permitted by amplification, Mr Henry explained that he had received physiotherapy at the KPH as well as privately as he was still having pain after the sessions at the hospital came to an end. He also stated that he was seen by a private doctor who treated him for ongoing pain. No reports were presented from the physiotherapist or doctor but receipts in respect of these expenses have been admitted as exhibits.
- [5] Mr Henry was cross-examined and he was asked about an observation by the doctor that he had mild 'prostatomegaly', (which is the medical term for an enlarged

prostate) at the time of his admission to the hospital. Mr Henry denied that anything had been wrong with him prior to the collision. He was asked about the physiotherapy sessions at KPH and it was suggested to him that these ended in 2016. In his response, Mr Henry insisted that they continued until 2022 but accepted, when shown the appointment cards, that the sessions ended in 2021 and not 2022.

[6] He was asked about his visit to the private doctor, specifically the fact that blood, urine and cholesterol tests were conducted. Mr Henry initially denied that these tests were conducted but when shown the receipt he accepted that they appeared to have been done. He maintained however that he went to the doctor for back pain as he was unable to move.

[7] Mr Henry was also cross-examined about his employment, specifically the letter issued by Mr Dartagnan Charles in which it was indicated that the Claimant had worked for him as a gardener/handyman for a period of 3 years earning \$12,500 per week. Mr Henry denied the suggestion that he had not worked with Mr Charles every week and responded that he had in fact been doing so from April 2013.

Special Damages

[8] The Claimant requested an award for special damages under a number of headings which are outlined as follows:

- Transportation – 22 trips to the KPH for outpatient and physiotherapy

- | | |
|-------------------------------|--------------------------------|
| 1. \$3,500 on July 28, 2016 | 12. \$3,500 on May 16, 2017 |
| 2. \$3,500 on August 2, 2016 | 13. \$3,500 on July 4, 2017 |
| 3. \$3,500 on August 18, 2016 | 14. \$3,500 on October 3, 2017 |

- 4. \$3500 on September 8, 2016
- 5. \$3,500 on September 24, 2016
- 6. \$3,500 on October 13, 2016
- 7. \$3,500 on November 3, 2016
- 8. \$3,500 on November 15, 2016
- 9. \$3,500 on November 24, 2016
- 10. \$3,500 on December 15, 2016
- 11. \$3,500 on February 14, 2017
- 15. \$3,500 on April 3, 2018
- 16. \$3,500 on October 9, 2018
- 17. \$3,500 on October 8, 2019
- 18. \$3,500 on April 7, 2020
- 19. \$3,000 on August 11, 2020
- 20. \$3,000 on September , 2020
- 21. \$3,000 on March 9, 2021
- 22. \$3,000 on July 20, 2021

- Police Report - Three Thousand Dollars (\$3,000.00)
- Medical Report from the Kingston Public Hospital - One Thousand Dollars (\$1,000.00)
- Physiotherapy treatment with Doctor Maureen Spence Campbell - twelve Thousand Dollars (\$12,000.00), this figure was broken down as follows:
 - \$4000.00 on April 19, 2021 :
 - \$4000.00 on April 22, 2021; and
 - \$4000.00 on April 26, 2021
- Cost of Medication purchased from the Central Health Pharmacy
 - (July 13, 2016) \$1858.41
 - (August 8, 2016) \$4,660.00

- Doctor's visit at Edgewater Medical Centre
(September 3, 2016) \$2,000.00
- Cost of Medication purchased from the Meadowbrook Pharmacy
(March 29, 2021) \$1088.48
(March 31, 2021) \$2,581.06
(April 12, 2021) \$8,608.05

[9] It has long been established that special damages must be specially pleaded and strictly proven¹. (See also **Lawford Murphy v Luther Mills** (1976) 14 JLR 119) The authorities however show that the courts have exercised some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (**Julius Roy v Audrey Jolly** [2012] JMCA Civ 53). Although Counsel for the Defendant argued that the total amount being sought for transportation was excessive, she did not dispute that the transportation system in this jurisdiction is not one in which receipts are usually generated and an award under this heading is usually for the Court's discretion bearing in mind any cogent evidence presented on the point. In this regard, I take careful note of the decision of **Shaquille Forbes v Ralston Baker Claim No. HCV 02938 of 2006**, in which Fraser J, in holding that the Claimant was entitled to costs for transportation, stated:

"It is not hard to fathom that at the time of taking the claimant to the doctor for treatment and check-ups, the need to obtain receipts to prove that expenditure would not have been uppermost in the mind of the Claimant."

[10] I also considered the pronouncement by Sykes J's (as he then was) at paragraph 17 of **Owen Thomas v Constable Foster and Anor CL – T 095 of 1999** judgment delivered January 6, 2006 wherein he stated that:

¹ Caribbean Cement Company Limited v Freight Company Management Ltd [2016] JMCA Civ 2

“well known in Jamaica that many of our transport operators do not provide receipts to passengers and the costs seems reasonable.”

- [11] On a review of the cost and purpose behind it, I find that an award for this expense is justified. The sole question then is whether the sum of \$75,000 should be awarded. My examination of the appointment cards confirms that on the 22 dates stated in his witness statement, Mr. Henry had an appointment at the KPH for out-patient care and physiotherapy. In cross-examination, he was asked about the current cost of a chartered vehicle to the hospital which he placed at \$6500. There was no suggestion that the sum of \$3500 in 2016 to 2021 was inflated or untrue. While I agree that the sum quoted for a round trip appeared to be somewhat high, I noted that it was for a return journey on a chartered vehicle travelling from Blue Mountain Road to the KPH. In light of the fact that the Claimant’s evidence was unchallenged and there was no evidence presented to the contrary on this sum, I am prepared to make an award for same.
- [12] In respect of the claim for medical related expenses which included the costs of doctors’ visits, physiotherapy and medication, a number of receipts were provided in support of same. My review of the documents revealed that the sum of \$33,796 was spent by the Claimant in association with these expenses. Counsel for the Defendant took issue with the receipts from the physiotherapist, Edgewater Medical Centre and Meadowbrook Pharmacy on the basis that there was no nexus between the incident and these expenses.
- [13] In my consideration of these submissions, I accept that Mr Henry has satisfactorily explained the expenses incurred for physiotherapy as he stated that he sought these services when his sessions at KPH had ended and he was still in pain. In those circumstances, I am satisfied that this expense was incurred as a result of ongoing treatment and this award can properly be made. In respect of the visit to Edgewater Medical Centre, it was the Claimant’s evidence that this occurred in circumstances where he woke up in pain and sought the assistance of a private doctor. This was in September 2016, a few months after the accident and during the period where he was still being seen at the hospital as an outpatient.

- [14] While the record shows that blood, cholesterol and urine tests were done, this did not negate the complaint that Mr. Henry said led him to seek the services of the doctor. I am satisfied that he saw the doctor because of issues with ongoing pain as this was within a short period after the incident. As such, it is my ruling that the sum sought in this regard ought to be awarded. In respect of the receipts from Meadowbrook pharmacy, I agree with counsel that there has not been sufficient nexus established with this incident as while the statement makes reference to expenses associated with a doctor's visit at Medical Associates and an X-ray in 2021, this was not explored in evidence neither were those documents exhibited. In these circumstances, I agree that an appropriate nexus between the incident and the expenses incurred at Meadowbrook Pharmacy has not been established and this sum will not be awarded.
- [15] Mr Henry also asked for an award for the loss of earnings suffered given his inability to work for 13 weeks after this incident. In respect of this loss, the Claimant made it clear that in his employment he did not receive payslips but he sought to prove his earnings by a letter from his employer. In that letter, Mr Charles confirmed that the Claimant had worked for him for 3 years up to 2016. He also confirmed the dual roles held by Mr Henry as well as his weekly earnings. In challenging this award, Ms. Wynter argued that this sum should not be awarded as it was not proved.
- [16] In my consideration of this loss, I took careful note of the principle laid out in ***Desmond Walter v. Carlene Mitchell*** (1992) 29 JLR 173 delivered on June 2, 1992 which concerned a push-cart vendor whose claim for loss of earnings, unsupported by documentary evidence, had been allowed by the Judge at first instance, but was challenged on appeal. In dismissing the appeal Wolfe JA (acting), as he then was, at page 176 C of the judgment stated:

"Without attempting to lay down any general principle as to what strict proof is, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well-organized corporation may well be what Bowen, L.J., referred to as 'the vainest pedantry'."

[17] In this situation, Mr. Henry has done more than that Claimant as he has produced documentary proof from his employer which provides the requisite details of his actual earnings. In the absence of any real challenge to the veracity of this document, I am satisfied that cogent evidence in proof of earnings has been provided and I am prepared to award this sum. In light of the foregoing discussions, special damages are awarded in the sum of \$251,578.41.

General Damages

[18] The Claimant was seen at the Kingston Public Hospital where the following injuries were noted:

- a. Motor vehicle accident with soft tissue injury;
- b. Hyper extension C-Spine injury with central cord syndrome
- c. abrasions to my back, chest and right leg,
- d. weakness to bilateral upper limbs and
- e. non-tender abdomen, mild prostatomegaly.

[19] At the hospital, his wounds were cleaned and dressed, he was treated with painkillers and had to wear a cervical collar for a week. He was treated as an outpatient until 2021 and had to undergo physiotherapy and continue on pain medication for some time. Mr Henry also gave evidence that he still experiences pain as a result of his injury.

Discussion and Analysis

[20] It is settled law that the sum of money that should be awarded as General Damages for personal injury suffered by a Claimant ought to be a sum which as “**nearly as possible**” puts the Claimant in the same position she would have been in if she had not sustained the wrong” (per Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5.A.C. 25 at 39.

- [21] In this regard, a number of authorities were cited by Counsel for the Claimants and have been reviewed accordingly. The first case cited was ***Alvin Cato v Paul Williams*** [2020] JMSC Civ 109. In that matter, the Claimant sustained whiplash injury. He had extreme tenderness in his back and pain on flexing his trunk, with difficulty rising and sitting. He was prescribed analgesics, muscle relaxant and placed in a neck collar. He was given a period of six (6) weeks to recuperate. He had to be away from work for four (4) days. He was awarded \$900,000.00 for general damages in June 2021. This updates to the sum of \$1,048,360.65 using the December 2022 Consumer Price Index (CPI) of 127.9. Ms Facey submitted that an award to the Claimant ought to be increased to take into account the fact that his injuries were more serious than that which was suffered by Mr. Cato.
- [22] The Claimant also relied on the decision of ***Talisha Bryan v. Anthony Simpson & Andre Fletcher*** (2014) JMSC Civ 31 in which Ms Bryan sustained whiplash injury to the neck and lower back strain. She was treated with analgesics and was advised to do physiotherapy exercises. In March 2014, she was awarded the sum of \$1.4 million for general damages and that sum updates to \$2,183,658.53 using the December 2022 Consumer Price Index (CPI) of 127.9.
- [23] Counsel also made reference to the ***Trevor Benjamin v. Henry Ford. Wilburn Palmer, Richard Nicholas & Devertton Meeks*** [2005] HCV 02876. The Claimant sustained soft tissue injury with no PPD. An award of \$700,000.00 was made for general damages on March 23, 2010 which updates to 1,492,166.66 using the December 2022 Consumer Price Index (CPI) of 127.9. Ms Facey submitted that on a review of this case, any award made ought to be increased to take into account the fact that injuries of the Claimant in the instant case were more serious in nature than that which was suffered by Trevor Benjamin as the Claimant had other injuries in addition to soft tissue injuries.

- [24] In initial submissions, Ms Facey submitted that the sum of \$1.5 million dollars would be an appropriate award. In additional submissions however, Counsel argued that that the injuries suffered by Mr. Henry are of the same nature and type as those suffered by ***Dawnette Walker*** in ***Dawnette Walker v Hensley Pink (unreported) Court of Appeal Jamaica, SCCA 158/2001*** and that although Mr. Henry had not been diagnosed as having a whole person impairment, emphasis should be placed on the injuries and not on the impairment rating, as such an appropriate award would in fact be \$2.5 million.
- [25] Ms Wynter for the Defendant relied on two cases as being relevant to the question of an appropriate award for damages. The first is ***Margaret Campbell v Anthony Clarke Suit No. CL C451/1997***. In that matter, prior to the accident, the Claimant suffered from a degenerative condition known as cervical spondylosis. As a result of the accident, the Claimant suffered a fractured rib as well as neck and arm pain. There was also nerve damage. The Claimant was assigned a 5% whole person impairment (WPI). In that matter, the Court had to consider the appropriate quantum of damages that should be awarded taking into account the extent to which the pre-existing condition contributed to the Claimant's condition. An award of \$650,000 was made in June 2004.
- [26] The second decision is that of ***Dawnette Walker (supra)***. In that matter, Ms Walker suffered injury to the neck, right shoulder and upper back. She was referred to physiotherapy. She was diagnosed as suffering soft tissue injuries experienced periods of pain to the neck and shoulder. She was treated with physiotherapy, steroid injections and the support of a cervical collar. Eight months after the crash, her injury was classified as a class 2, cervical whiplash injury. She was also diagnosed with a permanent partial disability of 5% of the whole body. She was away from work for one year and four months as a result of her injuries.
- [27] In submissions on the likely award, Ms Wynter argued that it is evident that Mr Henry at 62 years old was already suffering from a number of issues to include an enlarged prostate and a degenerative condition in respect of the listhesis of his

spine. She argued that the medical report lacked detail and did not assist the Court on whether these injuries were conclusively linked to the accident. Counsel noted that the same was also true of the x-ray report, which I note was not exhibited by Counsel for the Claimant. On the issue of the physiotherapy and ongoing back pain, Ms Wynter asked the Court to find that these were all connected to a pre-existing condition and not occasioned by the collision with the Defendant's vehicle. She invited the Court to adopt the course taken by Sykes J (as he then was), in ***Margaret Campbell (supra)*** and reduce the award to take this condition into account. Ms Wynter submitted that in light of these circumstances, an appropriate award would be \$1 million.

[28] On assessment of the authorities and the evidence before the Court, I note that the injuries sustained in the ***Margaret Campbell*** and ***Dawnette Walker*** decisions were far more serious than those of the instant Claimant as in those cases, a fracture and whiplash with impairment assigned had in fact occurred. The period of incapacity was also more considerable. I have carefully considered the submission of the Defendant on the issue of a pre-existing condition and I note that there does seem to be some foundation for this argument as the report issued from the KPH makes reference to mild listhesis which medical literature also refers to as degenerative spondylolisthesis and which is stated to occur as a result of wear and tear on the spine and is a common cause of back pain. The report does not specifically link this condition to the accident but states it as a secondary observation. The physician noted however that the Claimant suffered abrasions to the back as a result of this collision which would suggest that some trauma was caused to his back as a result of this accident. In these circumstances, while I believe that there is some merit in the submission of Ms Wynter that the Claimant had a pre-existing condition, I am satisfied that the collision may have aggravated or worsened same.

[29] In arriving at this conclusion, I take note of the well-established principle in the case of ***Smith v Leech Brain & Co. Ltd and Anor*** [1962] 2 Q.B. 405 that a tortfeasor must take the victim as he finds him. On the issue of quantum of

damages, I have carefully considered all the cases cited and it is my view that even with adjustments for the pre-existing condition, this matter is most similar to the ***Talisha Bryan***. Although Ms Bryan did not have to be hospitalized for as long as the Claimant her injuries, treatment and loss of amenities were comparable. I am persuaded that an appropriate award for this injury is \$1.8 million.

CONCLUSION

[31] As such, my orders are as follows:

1. Special Damages in the sum of \$251,578.41 at 3 % interest from the 4th of July 2016 to the 20th of March 2023.
2. General Damages in the sum of \$1,800,000 at 3 % interest from the 6th of February 2020 to the 20th of March 2023.
3. Claimant is awarded his costs to be taxed if not agreed,
4. Claimant's Attorneys to prepare, file and serve judgment herein.