

SUIT NO. C.L.1991/P146

PLAINTIFF

DEFENDANT

Mrs. Ingrid Mangatal instructed by Dunn, Cox, Orrett and Ashenheim
for Defendant.

Heard: February 22nd, 27th, and March 3rd, 1995.

JUDGMENT

HARRISON J. Ag.

ASSESSMENT OF DAMAGES

The relevant pleadings in the Statement of Claim which now arise for

consideration, are those set out hereunder:

4 PARTICULARS OF INJURY

1. Shock
2. Pain and tenderness on flexion and extension of neck.
3. Pain and tenderness on flexion and extension of lumbar sacral spine.
4. Contusion of chest, pain on palpation of chest.
5. Radiating pains down left leg.
6. Whiplash injury with involvement of sciatic nerve left leg.

PARTICULARS OF SPECIAL DAMAGE

1.	To repair vehicle	\$1,282.00
2.	Assessor's fee	240.00
3.	Medication	246.70
4.	Medical examinations and report	930.00
5.	Transportation	100.00

AND THE PLAINTIFF CLAIMS:-

1. Damages
2. Interest on such damages at such rate and for such period as this Honourable Court shall think fit.
3."

On the 3rd November, 1990 the plaintiff was driving his Sunbeam Hunter motor car. He was stationary in a line of traffic when he felt a sudden impact in the rear of his car. He felt his head "flick back" and next found himself on the steering wheel. He has stated that he was in a state of shock and on attempting to alight from the motor car he felt excruciating pain in his lower back. He eventually "crawled out" and further experienced excruciating pain in his neck and left leg.

Some two (2) days later he went to Dr. Martin, who examined and treated him. He was given painkillers and had done physiotherapy.

On the 18th February, 1994 he was examined by Dr. Clive Thomas, Consultant Surgeon. He was seeing him for the first time. This examination revealed:

1. Decreased range of movement of neck with pain exhibited at extreme of rotation (whether to left or right)
2. Discomfort on examining left lower limb which the Doctor says could be attributed to some sciatic nerve disfunction.

X-rays were done which revealed that the plaintiff's cervical vertebra showed marked degeneration and narrowing between cervical vertebrae 6 and 7 and to a lesser extent between cervical vertebrae 5 and 6. X-ray also revealed loss of normal lorditic curve of the lumbar spine with degeneration and spondylosis of lumbar vertebra 5 and sacral vertebra 1. As a result of these findings, history and physical examination he concluded that although the plaintiff described some mild arthritic changes, it was evident that, his symptoms and signs had worsened since he allegedly was involved in accident in 1990.

Dr. Thomas' evidence further revealed that:

1. Cervical and lumbar changes are not very common in the plaintiff's age group.
2. He cannot say other than from history given by plaintiff what was his condition prior to accident in 1990.
3. The degeneration and spondylosis he saw, may be, age related.
4. It was likely but not necessarily common for degenerative disease and spondylosis in patient of plaintiff's age to be age related.
5. It was possible that the plaintiff could have had symptoms of degenerative disease and spondylosis prior to accident.
6. It was possible for worsening to occur due to ongoing problem.

... degenerative disease. The ... significant
trauma to cause worsening. One trauma could cause this. It all depended on

7. Trauma could also accelerate disease. It was not necessary for significant trauma to cause worsening. One trauma could cause this. It all depended on the pre-existing condition when one thinks of trauma. (Emphasis mine)
8. Degeneration and spondylosis can affect root of sciatic nerve and therefore cause pain related symptoms attributable to sciatic nerve.
9. Degeneration and spondylosis cannot by themselves cause pain in the lower limb.
10. Arthritic problem could cause pain in lower joint. From his examination however, he did not find any arthritic involvement in joints of the lower limb.

The defence called Dr. Daniel Graham. He is a Neurologist and Consultant in Clinical Neurology. It was agreed that he should examine the plaintiff. This was done on November 17, 1994. The plaintiff told Dr. Graham of a shooting pain along the lateral aspect of left lower extremity; lower back pain; ^{and} pain when turning his head.

In his examination of the plaintiff, Dr. Graham carried out inter alia, a straight leg test. A negative leg raise was achieved which meant that sciatic disfunction was ruled out. From his point of view, if one were thinking of a disc that was ruptured and impinging on the nerve root that forms the sciatic nerve, the patient would have had a positive leg raise. He further found that there was mild limitation on lateral rotation of the neck to right side and that there were no abnormal neurological findings.

It was further his view that the findings by Dr. Thomas as to degenerative disease and spondylosis in the cervical and lumbar spine were very common in persons over age 60 years. They were non-specific findings he says, which, could not relate any cause and effect. They were also due to normal wear and tear phenomena. It was further his view that it would not be possible for him on the 17th November, 1994 to make any definitive comment about the effect of the accident on the plaintiff and neither could Dr. Thomas make a definitive comment on the cause and effect four (4) years after the accident.

Under cross-examination Dr. Graham pointed out that it was possible that a single trauma of sufficient force could cause acceleration of spondylosis and degenerative diseases. He could form an opinion although not conclusive, from the description given by plaintiff as to how the impact occurred and what he experienced thereafter, that the plaintiff had suffered some trauma as a result of impact.

GENERAL DAMAGES

Spondylosis and degenerative diseases constituted the major aspect of the medical evidence presented on behalf of the plaintiff. They were never particularised in the Statement of Claim but no objection was raised by the defendant when this evidence was presented. There was extensive cross-examination however on these issues yet no attempt was made by the plaintiff at the end of the day to amend his pleadings. The question then, is whether or not they should be given any consideration in the assessment of damages. I shall deal with this at a later stage.

Mrs. Mangatal submitted that the plaintiff had not proved on a balance of probabilities that he suffered injury, loss or damages as a result of this accident. She argued that the only medical evidence the Court should be concerned with was that of the plaintiff's limitation of movement of his neck and which could possibly have manifested itself from age related diseases. She further submitted that not attempt was made to show that the accident had caused degeneration and spondylosis and that at the highest, the evidence presented by Dr. Thomas was that trauma could accelerate a pre-existing age related condition or worsen it. It was also her view that any complaint about the sciatic nerve disfunction should be ruled out in light of Dr. Graham's finding. She did argue that Dr. Graham would have been more competent in the field of neurology since it was his area of specialty.

In his address to the Court Mr. Green stated inter alia,

".....at the outset it was not the plaintiff's case that if he is suffering from spondylosis and degenerative disease that that would be part of his case. It was obvious that at the time of bringing of this case that the plaintiff could not have known or at least was not aware of that condition. These two (2) factors arose as late as February, 1994 when the plaintiff saw Dr. Thomas. It is only because of opinion proffered by Dr. Thomas himself, that is, "in his opinion it is very likely that trauma sustained by the plaintiff in this accident did contribute significantly to the patient's signs and symptoms....."

Mr. Green further submitted that there was ample evidence however on which the Court could base a finding that the plaintiff is entitled to some general damages. He pointed out that the evidence had revealed that the plaintiff felt excruciating pain in the neck, back and leg at the time of the accident and had remained under Doctor's treatment for eight (8) months. He admitted that the plaintiff had only been able to prove shock and pain as alleged in the particulars of injuries. In so far as proving contusion of the chest and whiplash injury he conceded that they were not proven. He argued that he would have needed to call Dr. Martin but this was no longer possible due to the Doctor's demise.

There is no dispute that at the time of the accident the plaintiff was sixty-five (65) years old. Some four (4) years later he was examined for the first time by Dr. Thomas. X-rays were done which revealed that the plaintiff had marked degeneration of the cervical vertebra and degeneration and spondylosis of the lumbar vertebra.

But, it is quite evident from the medical evidence presented that age is a factor to take into consideration when one thinks of degenerative disc diseases and spondylosis. According to Dr. Graham, "they are normal wear and tear phenomena, people over sixty (60) years will have a moderate degree of spondylosis in both cervical and lumbar spine."

The evidence has revealed that the plaintiff was involved in two (2) other accidents. The first occurred in the late eighties when a truck had crashed also in the rear of his motor car. He had said under cross-examination that this accident happened whilst he was driving but later he somehow sought to explain that the impact occurred whilst he was out of the car. The other incident had occurred in 1992 when a bag fell from a rack in a bus in which he was travelling and had hit him in the head. As a result of pain he felt from the latter incident he went and saw a Dr. Arthurs who ordered an X-ray to be done. He had failed however to mention these two (2) incidents to Dr. Thomas and Dr. Graham.

I am in complete agreement with the submission made by Mrs. Mangat~~al~~ that at the highest the evidence presented by Dr. Thomas is that trauma could accelerate a pre-existing age related condition or worsen it. There is no evidence before me which show that the impact on the 3rd November, 1990 caused or accelerated the existing problems. Although the Court can draw reasonable inferences from proven facts, it ought not to be left to speculate where proof is required.

It is my view therefore that Dr. Graham's evidence should be accepted.

His evidence:

".....It would not be possible for me on the 17th November, 1994 to make any definitive comment about the effect of the accident.
.....I would also think that Dr. Thomas could not make a definitive comment on the cause and effect four (4) years after the accident."

is indeed a profound statement.

For the above reasons, as well as the apparent concession by Mr. Green, it is my considered opinion that the occurrence of degeneration and spondylosis ought not to be taken into consideration in the assessment of general damages.

I accept the evidence of the plaintiff that on the 3rd November, 1990 that as a result of this impact to the rear of his motor car his head had "flicked back", that he was in a state of shock and the he felt excruciating pain in his neck, lower back and left leg. I further accept that he had been attended to by Dr. Martin, treated with pain killers, had physiotherapy and finally, that he was under doctor's treatment for about eight (8) months.

The plaintiff has stated that he was a very athletic person and has been unable since this accident to do a range of things. He can no longer play his cricket, jog, nor use his "gut buster" to exercise. The "gut buster" he says was his favourite mode of exercising. He also stated that he can no longer dance. Dr. Graham on the other hand, has expressed surprise at the plaintiff's statement that he can no longer dance having regard to the examination which was carried out on the plaintiff. It is my view that the plaintiff has exaggerated in this regard. It is also his evidence that he can no longer use an agricultural fork in his garden. I am of the view and do hold that his inability to do the things he once did are probably due to age (he is now seventy (70) years old) and age related diseases. The defendant ought not to be blamed for his present inactivity.

What then is a reasonable award in respect of pain and suffering and loss of amenities? There is no medical evidence as to the period of disability and whether or not there is any permanent disability. It would be reasonable in my view however, to limit his period of disability to the eight (8) months period of treatment by Dr. Martin. This evidence has remained unchallenged by the defence.

No two (2) cases are identical but there are comparable cases which are useful guides when it comes to quantify damages. Of those cited and referred to by both Counsel, the case of Francine Francis v Karel Nicholson C.L. 1985/F126A is quite relevant. In that case the plaintiff who experienced pain and stiffness in the neck and shoulders and headaches was awarded Eight Thousand Six Hundred Dollars (\$8,600.00) on May 30, 1991 by W.A. Jones J. Ag. in respect of pain and suffering and loss of amenities. I would in all the circumstances of this case use a multiplicand of Twelve Thousand Dollars (\$12,000.00). By using the current consumer price index of Six Hundred and Ninety-two (692), this Twelve Thousand Dollars (\$12,000.00) would represent a sum of approximately Forty-four Thousand Dollars (\$44,000.00) today.

An award of Forty-four Thousand Dollars (\$44,00.00) for pain and suffering and loss of amenities would therefore be appropriate in all the circumstances.

SPECIAL DAMAGES

It has been agreed that there would be no contest in respect of the items and amounts for medication, medical examination and report respectively. The respective amounts of Two Hundred and Forty-six Dollars and Seventy cents (\$246.70) and Nine Hundred and Thirty Dollars (\$930.00) are hereby approved.

Mrs. Mangatal has, however, submitted that the other items of special damages have not been sufficiently proved. Mr. Green for his part told the Court that he had no comments on those items.

The cases are quite settled where proof of this head of damage is concerned - See Hepburn Harris v Carlton Walker SCCA 40/90 delivered 10th December, 1990 and Murphy v Mills 14 JLR 119. Strict proof is required and nothing less than this is accepted. The plaintiff's evidence is that he cannot remember the figure for repairing his motor car. He thinks it is about One Thousand Three Hundred Dollars (\$1,300.00). He cannot recall the number of trips he made to the doctor. It was pleaded that it had cost him One Hundred Dollars (\$100.00) for transportation yet his evidence is that it was in the region of Two Thousand Five Hundred Dollars (\$2,500.00). This is certainly unacceptable. A plaintiff cannot throw figures at the Court and expect that some part of it will be accepted. In my view he has failed to prove these expenses. He had also failed to prove the cost of the assessor's report. That expense remains unrecovered also against the defendant. Special damages therefore amount to One Thousand One Hundred and Seventy-six Dollars and Seventy cents (\$1,176.70) as agreed between the parties.

Damages are therefore assessed as follows:

1. **GENERAL DAMAGES:**

Pain and suffering and loss of amenities.....\$44,000.00

2. **SPECIAL DAMAGES**

a. Medication\$246.70

b. Medical examination and report.....\$930.00

In fine, damages are assessed for the plaintiff in the sum of Forty-four Thousand Dollars (\$44,000.00) for general damages with interest thereon at the rate of 3% from the date of service of the writ of summons to today and in the sum of One Thousand One Hundred and Seventy-six Dollars and Seventy cents (\$1,176.70) for special damages with interest thereon at the rate of 3% from the 3rd November, 1990 to today. Costs to the plaintiff to be taxed if not agreed.