

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2006 HCV 1560

BETWEEN LEROY WILLIAMS CLAIMANT
AND KENNETH ENYI DEFENDANT

Ms. Debbie-Ann Samuels for Claimant; Mr. John Graham and Ms. Khara East instructed by John G. Graham & Co for the Defendant

Heard: February 24 and 26 and April 3, 2009

Medical Negligence; Administering Injection to buttock; Damage to Sciatic Nerve; Whether injection administered to proper area of buttock; whether injuries suffered by Claimant result from damage to sciatic nerve. Whether special damages proven by Claimant; No documentary evidence to support damages. No amendment to pleadings sought where some evidence of special damages led by Claimant.

ANDERSON: J

Little did Leroy Williams (hereinafter the Claimant) know when, on the 28th July 2005, he visited the offices of Dr. Kenneth Enyi (hereinafter the Defendant) at 86 Market Street, Falmouth in the Parish of Trelawny, that, as a result of that visit, his life would be changed forever. The visit to the doctor on that fateful day has set in train events culminating in this trial with allegations of negligence and damages. The Claimant said that he had made the doctor's visit because he had been experiencing some pain in his left ear and neck. The pain was severe enough to motivate him to visit a doctor. There is no dispute about the fact of the visit or the essentials of what took place at the visit, which circumstances has brought us to this point.

Both the Claimant and the Defendant agree that the visit took place as well as to the pain in the neck which was being complained of. According to the Defendant, he diagnosed the Claimant with a complaint of spasmodic torticollis (spasm of the neck muscles) of

undetermined origin. (It should be noted that “spasmodic torticollis” is the medical term for what is commonly known here in Jamaica as “crick neck”). As a consequence of his diagnosis, the Defendant administered a voltaren injection to the left buttock of the Claimant. It is the Claimant’s evidence that immediately upon receiving the injection, “I could not move, my knee down became swollen and extremely weak. The nurse had to assist me from where I was sitting to a bed. I didn’t know myself for hours. My girlfriend came for me and took me home”.

Dr. Enyi in his witness statement also confirms that “immediately after receiving the injection, Mr. Williams complained of numbness to his left leg and foot”. According to his account, however, the Claimant left the treatment room for twenty (20) to forty (40) minutes and later returned and stated that he was still experiencing numbness in the leg and foot. In so far as the evidence of the events on that day is concerned, I accept that of the Claimant as being credible, that is that the Claimant remained in the doctor’s office for some time after the administering of the injection, until he was taken home by his girlfriend. It is common ground that on the day following the injection, that is, on Friday, July 29, 2005, the Claimant returned to the doctor’s office, according to the Defendant, “with the aid of a walking stick.” He was still complaining of numbness in his left leg as well as to the left foot. He was given certain tablets to be taken orally. There was a further visit to the Defendant’s office on Saturday, July 30, 2005 and again it is common ground that he was still having pain and numbness of which he had complained on the day of the injection. It was the evidence of the Defendant that the Claimant again visited his offices on Monday, the 8th August and at that time demanded compensation for what he clearly perceived to be, an injury arising from the injection he had received. The demands for compensation according to the Defendant had

commenced as early as two (2) days after the administering of the injection. This is denied by the Claimant. The Defendant claims that he had advised the Claimant when he visited him at his home at about 7 o'clock on the evening of Monday, August 8, that he was trying to make an appointment for the Claimant to see a neurosurgeon or neurologist in Kingston. There is no indication that that was ever done.

According to the Claimant, when his condition worsened he attended the Falmouth Hospital where he was seen by a Dr. Malcolm. Dr. Malcolm in turn gave the him a letter to the Cornwall Region Hospital where he was seen by Dr. Francis Lindo, a consultant orthopedic surgeon. This latter doctor has provided two (2) reports for the court and was also called by the Claimant to give evidence on his behalf at the trial. Dr. Lindo in turn gave the Claimant a letter for him to be tested at the surgery of Dr. Daniel Graham, consultant neurologist, on Hope Road in St. Andrew. Dr. Graham has also provided an expert report and the Defendant also called Dr. Graham to give evidence on his behalf.

It was the evidence of the Claimant that the injection was given around the middle of the left buttock while the Defendant maintained that he administered the injection to the upper outer quadrant of the buttock. The issues as to liability raised on the facts are:

- (1) Whether the injection was administered where the Defendant alleged or where the Claimant alleges he received it; and
- (2) Whether the damage to the nerve was caused by the injection and if so what damages flow from that injury.

In one sense, the matter of liability may be simply resolved by this court deciding, on a balance of probabilities, which of the Claimant or the Defendant is to be believed as to the

site of the injection. In this regard, the court took the opportunity to have the Claimant show where he says the injection was administered. He pointed to a spot to the right of the centre of the left buttock. The site of that spot identified by the Claimant, I would characterize as just inside the right lower quadrant of that buttock. He said he was able to show this because there had been a swelling (“a bump”) at the site of the injection ever since the time of the injection, which he could still feel.

The Defendant on the other hand indicated that where he had placed the injection was in the upper outer quadrant. It is my view that based on the evidence given and the fact that the Claimant is able to identify the spot at which the injection was given by what appeared to be a slight subcutaneous swelling, that on a balance of probabilities, the court should accept that the injection was administered at the place where the Claimant said it was. It is accordingly the view of the Court that the injection was not administered where the Defendant said it was but rather where the Claimant alleges.

There is another reason for believing that the injection was administered where the Claimant alleged. There was some acknowledgement that even when given in the upper outer quadrant it may still be possible to have trauma to the sciatic nerve. However, I believe that, based upon the available evidence, the odds on this occurring, are statistically very low. Dr. Graham’s report states:

“Injections to the buttock used to be a frequent cause of sciatic neuropathy; fortunately, these incidents are now uncommon.” Dr. Lindo, in the course of his testifying, also indicated that his insurers now recommend that in administering injections, it was preferable to do so on the inside of the thigh rather than the buttock for precisely the reason that there was the

danger of neuropathy. Given this recognition and the reduction in sciatic nerve injuries related to injections on the buttocks, it seems a fair inference to draw that it is unlikely that an injection, properly administered to the right area, will give rise to neuropathy.

Before going on to consider the reports by the respective medical experts in any detail, it should be noted that, as a result of the various examinations subsequently undertaken by the Claimant, there were clear indications that there had been some damage to the Claimant's sciatic nerve. This nerve controls the muscles of the back of the knee and lower leg and provides sensation to the back of the thigh, part of the lower leg and the sole of the foot. This damage had likely been occasioned by trauma to the nerve and could have been the result of the injection which was given to the Claimant by the Defendant.

As noted above, Dr. Francis Lindo provided two (2) reports. The first one was dated December 30, 2005 and the second, December 16, 2008. According to his first report his findings were that the patient had a left-foot drop gait:

- Complete loss of movement left ankle and toes
- Loss of sensation left leg and foot below the knee

Those findings were made on an examination of the 4th August 2005. On a subsequent examination on the 24th November 2005, the doctor's findings were that the Claimant "walked well using a left-foot drop splint and that he suffered stocking distribution anaesthesia left lower limb below the groin".

According to Dr. Lindo's first report, the Claimant was referred to neurologist, Dr. Daniel Graham and he was seen by Dr. Graham on December 12, 2005. Neurological tests were

done and Dr. Lindo stated that “the consultation and tests indicated damage to the left sciatic nerve with greater damage to the common peroneal component.

The report of Dr. Graham’s examination which was sent to Dr. Lindo was not before the court but Dr. Graham’s report, provided for the Defendant and dated June 30, 2006, was one of the expert reports provided herein. Dr. Graham’s report stated in part the following:

“Significant neurological examination findings were confined to the patient’s left lower extremity. There was moderate wasting of the anterior compartment of the leg. There was apparent total loss of power in all muscles below the (left) knee – including tibialis anterior/posterior, gastrocnemius and extensor digitorum brevis – muscles innervated by the peroneal and tibial nerves of the leg. Additionally, there appeared to be mild weakness of the left knee flexors”.

It continues:

“On the basis of the patient’s history, the nerves that could have been damaged by a (misplaced) injection needle were the sciatic nerve or the superior gluteal nerve.

Some of the neurological findings (weakness of the left quadriceps and loss of sensation to practically the entire lower extremity) were unexpected findings that could not result from injury to the sciatic nerve”.

Dr. Graham not only examined the Claimant but, as a neurologist, performed neurological tests to determine the nature and the extent of the injury. Perhaps, it is most telling that the report states the following:

Nerve conduction and needle electro-myographic studies provided unequivocal evidence of a severe injury to the peroneal component of the left sciatic nerve. (Emphasis mine)

He also states, as noted above, that

“Injections to the buttock used to be a frequent cause of sciatic neuropathy; fortunately, these incidents are now uncommon. Symptoms or signs usually

develop immediately, with or without pain, although a few patients develop an insidious and delayed neuropathy, presumably due to scar formation. The degree of nerve damage is highly variable and unfortunately causalgia frequently occurs with even mild injuries. Unfortunately also, most adult patients recover poorly and are left with significant deficits". (Emphasis mine)

It will be recalled that the Claimant has insisted that he has had a "bump" at the injection site. Development of a "bump" was not something that Dr. Graham said he could rule out when he was questioned. Scar tissue can develop either on the surface of the skin or subcutaneously. Dr. Graham, in responding to a question as to whether, if a patient were given an injection that could give rise to a bump at the site, Dr. Graham said that it could give rise to a "keloid on the surface or in the muscle if the injection is such that it led to some idiosyncratic response which could be felt below the surface but not seen". I am prepared to hold that the "bump" referred to by the Claimant is, in fact, the below skin scar tissue, the "idiosyncratic response" to which Dr. Graham referred

Submissions by the Defendant - Liability

Mr. Graham for the Defendant in his closing submissions asked the court hold that the Claimant had not established his case on a balance of probabilities. He submitted that the court should reject the evidence of the Claimant as to the site of the injection and the existence of a "bump" He urged to court to accept the evidence of Dr. Enyi as to the site of the injection. He also reminded the court that Dr. Lindo had conceded in cross examination that it was theoretically possible to have had trauma notwithstanding the injection having been sited in the upper outer quadrant of the buttock. He further submitted that this is not a case where the court was dealing with probabilities and likelihood. It was for the Claimant to prove that the Defendant had done what he, the Claimant, said he had. For the purposes of determining liability, Defendant's counsel cited *Bolam v Friern Hospital Management Committee [1957] 2 All ER 118*. That case was cited as authority for the proposition that a

doctor is not negligent if he is acting in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular art. According to this argument, if Dr. Enyi was delivering the injection in the manner accepted as proper by a responsible body of medical men skilled in the particular. I would however, be prepared to hold that there was common knowledge, acknowledged by both experts, that injections to the buttocks are a likely cause of trauma to the sciatic nerve. In those circumstances, the burden on the Defendant to be even more careful in administering the injection is even greater.

He also cited *Mark Gerber v Juneau Bartlett Memorial Hospital, 2 P. 3rd 74*, a case from the State of Alaska, United States of America. In that case the Supreme Court of the State of Alaska upheld a decision for summary judgment in favour of the hospital on the basis that, although an injection in the ventrogluteal muscle had caused injury to the sciatic nerve, a committee of experts had concluded that: “The injury is a known potential, although rare, complication of a properly administered injection”. It is noteworthy that in that case the claimant did not provide evidence as to where he had received the injection. He did not appear before the expert panel nor did he provide any affidavit evidence. In fact, his appeal against the grant of summary judgment was on the basis that he had not been given an opportunity to be heard by the panel.

Counsel further cited *Wilshire v Essex Area Health Authority, [1988]1 A.C.1074* as authority for the proposition that the Claimant must prove causation. In this regard, I think it is instructive that the Defendant’s own witness Dr. Graham said:

“On the basis of the patient’s history, the nerves that could have been damaged by the misplaced injection needle were the sciatic nerve or the superior gluteal nerve”. (My emphasis)

He goes on to say that the tests he did provided “unequivocal evidence of severe injury to the peroneal component of the left sciatic nerve”. It seems to me that that is a clear statement that the damage to the sciatic nerve was established and that the damage was caused by the “misplaced injection” which he had said had damaged *either* the sciatic nerve or the gluteal nerve. It was a conclusion at which Dr. Lindo also arrived. Mr. Graham also cited *Mander v Evans, [2001] 1 W.L.R.* but since that case had to do with the Insolvency Act 1986, of the United Kingdom, I am not at all clear how it can be of assistance to this court.

Damages

In so far as Special Damages were concerned, Mr. Graham submitted that in the event that the court should find liability on the part of the Defendant, the Claimant had failed to present the court with sufficient evidence to substantiate his claims for special damages. In particular, he felt that the Claimant had failed to prove his loss of earnings. He submitted that the Claimant was merely “throwing figures at the head of the court”. Accordingly, the Claimant ought not to be awarded his claim for special damages even if the court were of the view that liability had been established.

It was also submitted by counsel for the Defendant that in the claim for general damages, there had been no evidence of any attempt on the part of the claimant to mitigate his damages. In his view therefore, the claimant ought not to recover the full extent of his damages. In addition, he submitted that there was no evidence of any handicap on the labour Market or of any loss of future earnings.

In considering what should be an appropriate award for general damages, by way of comparable cases, Mr. Graham cited the case of *Donald Grey v The Attorney General of Jamaica Volume 3 of Khan’s Personal Injuries Awards, page 150* and suggested that this

might be an appropriate precedent for the court. In that case, the plaintiff was shot by the police. There was a bullet entry wound to the right side of the chest and damage to the spinal cord with resulting paraplegia between 12 thoracic and first lumbar segments. The plaintiff also suffered complete and permanent paralysis and lack of sensation over the lower part of his body below the middle of his abdomen. He was assessed as having a 60% ppd. The award in that case for pain and suffering and loss of amenities updated to the January 2009 CPI of 136 would amount to ten million three hundred seventeen thousand one hundred and twenty dollars (\$10,317,120.00).

He also cited the case of **Trevor Clarke v National Water Commission Khan's Volume 5, page 121.** The claimant in that case, a 63 year old married fisherman was injured in an accident when he was fifty-four (54). He suffered an open fracture of the lower third of the right tibia bone. Because he developed gas gangrene, he had surgery to amputate his leg above the knee and had a subsequent further amputation because of spreading infection. He was assessed as having Permanent Partial Disability of 36 percent of the whole person and he was awarded damages for pain and suffering and loss of amenities of three million dollars (\$3,000,000.00) which when updated to January 2009, amounts six million, seven hundred and fifty thousand dollars (\$6,750,000.00).

Finally Mr. Graham referred the case of **Frazier v Morgan and Corroll Khan's Volume 5, page 19.** In that case the claimant suffered a severe crush injury to the left lower extremity from the middle third of leg to dorsem of foot. He suffered a below knee amputation and he was awarded two million dollars (\$2,000,000.00) in June 2000, a figure which when updated would give rise to an award four million, nine hundred and eighty thousand dollars (\$4,980,000.00).

Submissions for Claimant

Miss Samuels on behalf of the defendant submitted that the Claimant had made out the case pleaded against the defendant. It was her submission that the evidence of the Claimant that he was injected at a site which was not in the upper out quadrant of the buttock but rather near to the middle in the area which he had pointed out to the court, was credible and should be accepted. It was her further submission that there was no essential difference in the reports of the two experts, both being in agreement that the Claimant had had his sciatic nerve damaged by the injection received from the defendant; nor was there any evidence that the Claimant was in any way previously afflicted by any of the symptoms, similar in any way to what appears to be the consequences of his injury. The impairment of the Claimant was obvious.

She also submitted that the claimant is to be believed when he says that he can no longer do building work which is all that he knows and has ever done, although he has tried to do such work but found himself physically unable to perform. She also submitted that the court ought to find that the Defendant was not a witness of truth while the Claimant was, in their evidence as to the site where the injection was administered. The injection was administered at the point pointed out by the Claimant..

With respect to the claim for special damages, she conceded that the claimant had not provided all the documentary evidence which would have supported the specific items, save for evidence of his previous earnings. However, she submitted that the claimant's evidence should be believed when he said that all the documents had been at his mother's home and that after her death they had been removed and misplaced by his sister, before he had had a

chance to retrieve them. She submitted that in the circumstances, the claimant ought to be awarded reasonable sums in relation to those items of expenditure for which he had not provided documentary evidence.

Miss Samuels also cited the case of **Travis Thomas (An Infant by mother and next friend, M. Stoner) & M. Stoner v Shaw and Smith & Stewart Distributors Ltd. Khan's Vol 5 p 61**. In that case a student age 11 years old, suffered damages to both knees, his elbow as well as a large heavily contaminated de-gloving injury of the medial border of the left foot with exposed tendons and bone. Beckford J, assessed damages in July 1999 at seven hundred and fifty thousand dollars which would now convert to two million dollars. She further submitted that since the plaintiff in that case only had a 2% PPD as compared to the Claimant's 35% PPD in the instant case, that should give rise to general damages of thirty million dollars (\$30,000,000.00)

She also claimed that the loss of future earnings should be an award of twelve million dollars (\$12,000,000.00) based on the letter tendered into evidence from a former employer, that the claimant earned up to fifteen thousand dollars (\$15,000.00) per week. In that regard she cited the case of **Jamaica Omnibus Services Ltd. and McCain v Caldarola and Lopez [1966] 10 W.I.R. 117**, a decision of the Jamaican Court of Appeal which was authority for the proposition that the court will reduce an award for loss of future earnings under the head of general damages by a sum for prospective income tax liability, contingencies of life and prompt payment. I do not believe that this case provides any special assistance to the court.

Court's Ruling

The sciatic nerve is the largest nerve in the body and the most important nerve of the lower extremities. As it traverses the gluteal region, it is susceptible to injury by a misplaced intramuscular injection. The court finds that the Claimant has established on a balance of probabilities, that his injuries are a result of the injection wrongly placed and which has caused damage to the peroneal component of his sciatic nerve. The Defendant owed a duty of care to the Claimant, which duty has been breached, resulting in injury to the Claimant. He is accordingly entitled to an appropriate award of damages. The overwhelming evidence is that the Claimant suffered damage to the sciatic nerve. It is a clear inference from the medical reports that this was as a result of the injection. There is no defence pleaded of inevitable accident and, even if it were, it could not succeed here. The closest that the Defendant comes to articulating a defence to the Claimant's claim is to put forward the answer of Dr. Graham to a question, that even where the injection is given in the upper outer quadrant of the buttock, injury may still result.

I have already said why I accept the Claimant's evidence as to the evidence of the site of the injection. I should add that Dr. Graham's evidence of the possibility of a bump below the surface of the skin is particularly instructive. The site pointed out by the Claimant could not be seen by him except with the aid of a mirror. The fact that he could point out an exact spot which was consistent with his oral testimony, could only be on the basis that he could "feel" something. I accept that the injection was administered to that position. Accordingly, it is open to the court to find that on a balance of probabilities the defendant was negligent in administering the injection.

The Claimant has been assessed at having a 35% disability of the whole person. It is trite law however that in assessing damages the court does not only look at the PPD but must seek

to assess the pain and suffering suffered by a claimant as well as the value of the loss of amenities. The Claimant complains of persistent pain and even now he suffers pain and is unable to work. He has what appears to be permanent foot drop and the medical evidence indicates that recovery, particularly among adults, is very limited. Indeed, Dr. Lindo suggests that the Claimant has reached maximum medical recovery.

It is true that the Claimant has not substantiated all the items claimed as special damages and so the court must to the extent that it can, work with what has been provided.

Special Damages

In the Claimant's particulars of claim, his attorney-at-law has claimed for doctors' visits in the sum of \$60,000.00; medication for \$5,000.00; costs of medical reports 15,000.00; transportation of \$50,000.00 and attorney's costs of \$100,000.00. There is no claim for loss of earnings and although the Claimant did give some evidence of his inability to work. There was a letter from Allen's Construction tendered into evidence for the Claimant but that letter creates as many problems as it solves. It states that the Claimant "has been employed to Allen's Construction for the past five years, where he serves in the capacity of a mason". It does say that "since July 28th 2005 Mr. Williams has been unable to work. He earns fifteen thousand dollars (\$15,000.00) per week or more due to his job title". There was no evidence as to whether this was the figure being earned from 2005 or whether that is the current rate of pay and if so when it started. In any event, no amendment to the pleadings was sought to plead any specific loss so as to allow me to award any figure for that head of special damages. This would seem to be a glaring oversight in the presentation of the case.

Indeed, as noted above, the Claimant has provided the court with little or no help in its task of determining the extent of special damages. The figures set out above did not even benefit from being in the witness statement or the oral evidence of the Claimant and in those

circumstances, I regret that the only special damages that can be awarded is in relation to the cost of doctor's reports. I do this because I believe the court can take judicial notice of the fact that there is invariably a substantial charge for the provision of such medical reports. I can therefore award as special damages the sum of fifteen thousand dollars (\$15,000.00) for the medical reports with interest at 6% from the date of the injury, July 28, 2005 to June 21, 2006 and at 3% from June 22, 2006 to the date of Judgment.

General Damages

I was not greatly helped by the authorities cited by counsel on both sides in so far as they concerned pain & suffering and loss of amenities. I have rehearsed the facts of those cases to the extent that they are relevant above. The cases cited by counsel for the Defendant in respect of general damages were far more serious injuries and that cited by the Claimant was perhaps less serious given the fact that the plaintiff there was an infant. The Claimant does not provide any evidence of loss of any amenities although his particulars of injury speak of a "temporary loss of ability to gain penile erection" No evidence of this was provided and so no damages are to be awarded for this.

Given the evidence of earnings from his job with Allen's, I do believe that it is possible to make an award for future loss of income. In the Trevor Clarke case above, the judge used a multiplier of four years. Given the age of the Claimant here, forty years, I believe that a multiplier of seven years is appropriate and I shall use a multiplicand of \$11,500.00 per week, reducing the \$15,000.00 per week by a factor of 30% to account for taxes and other deductions. I also believe that the Claimant is entitled to an amount for handicap on the labour market as his ability to compete in any market is clearly compromised.

Upon a consideration of the severity and duration of the Claimant's injection-related injuries and symptoms, and upon a review of the authorities cited for general damages submitted by

the parties, I find that an award of \$5,000,000 is a fair and appropriate sum to compensate the plaintiff for his pain and suffering. This sum will bear interest at 3% from July 28, 2006, (the date of the filing of the defence) to the date of Judgment. In addition, he is entitled a sum for loss of future earnings in the sum of \$4,186,000.00. I also award a nominal sum of \$50,000.00 for Handicap on the labour market.

The Claimant is also to have his costs to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
APRIL 3, 2009