



[2018] JMSC Civ 157

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 00670

BETWEEN	NICOLE GAYLE	CLAIMANT
AND	GARRIE COWEN	1ST DEFENDANT
AND	GUARDSMAN ARMoured LIMITED	2ND DEFENDANT

IN OPEN COURT

Mr. Lemar Neale instructed by Bignal Law for the Claimant

Ms. Stacie Pinnock Wright for the Defendants.

Damages – Assessment of - Application for claim to be struck out - Whether minimum wage to be utilised to calculate handicap on the labour market.

28th of September and the 17th of December 2018

Lorna Shelly-Williams J

Background

[1] On the 29th of October 2008 the Claimant was a passenger in a motor vehicle registration number 8536 FJ. That vehicle was in a collision with motor vehicle registration number CF 8551 along Main Street, Ewarton in the parish of St Catherine. The motor vehicle CF 8551 was owned by the 2nd Defendant and was being driven by the 1st Defendant, who was the servant and/or agent of the 2nd Defendant. As a result, the Claimant, who suffered injuries, was taken to the

Linstead Hospital where she remained until the following day. The Claimant filed a claim for special damages and general damages on the 19th of February 2009. The Defendant filed a defence as to Quantum and a default judgement was granted on the 10th of June 2009. The assessment of damages was heard on the 28th day of September 2018.

Preliminary issue

- [2] A preliminary point was raised at the time of closing submission by counsel for the Defendant that the claim should be struck out. The basis for this submission was that the Claimant would have been unable to read the contents of the Particular of Claim and the Claim Form. She argued that if this is the position, there ought to have been a certificate attached to each Form signed by the Claimant. This application flowed from the evidence of the Claimant, who, during the assessment hearing, indicated that she was unable to read all the contents of her witness statement. Counsel for the Defendant argued that this pointed to the Claimant's inability to read the contents of the requisite forms. I note that a similar application had been made by Counsel for the Defendants at the time of the hearing of the Assessment of Damages ie that the witness statement should not be admitted into evidence. That application was later withdrawn.
- [3] I find, that although there was evidence from the Claimant that she was unable to read the entire witness statement by herself, it does not necessarily follow that she would be unable to read the Claim Form and the Particulars of Claim. During the course of the hearing the Claimant was not asked any questions as to whether she had needed assistance in reading the contents of the Claim Form and the Particulars of Claim prior to signing them. No evidence was placed before me that would substantiate the preliminary objection and as such the application for the claim to be struck out is refused.

Agreed Special Damages

- [4] The parties were able to agree to the sums to be awarded as medical costs in the amount of \$232,053.49. The other aspects in relation to special damages such as loss of earnings and transportation costs could not be agreed.

Claimant's submission

- [5] Counsel for the Claimant submitted that the injuries that the Claimant sustained as a result of the accident are still persisting up to today. In support of this submission a number of medical reports were admitted into evidence. The Claimant utilized the services of a number of doctors, the last of whom was Consultant Orthopaedic Surgeon Dr Phillip Waite. The Claimant was also examined by a Dr Melton Douglas who is a Consultant Orthopaedic Surgeon, on behalf of the Defendant. All the doctors recorded their findings in reports that were presented to the court. Counsel for the Claimant submitted that the medical report of Dr Waite should be accepted as he examined the Claimant on four different occasions, after reviewing a MRI that he had ordered. Dr Waite diagnosed the Claimant as having a 17% whole person impairment.
- [6] Counsel for the Claimant submitted that as a result of her injuries the Claimant has been unable to work for the past 10 years and as such she should be awarded loss of income for that period. The Claimant gave evidence that at the time of the accident she was a higgler and a cosmetologist. Although the Claimant pleaded that her income at the time of the accident was \$30,000 per month, she gave evidence at the time of assessment of income of \$320,000.00 per month. Due to the lack of documentary evidence on the Claimant's case Counsel argued that the court should assess her loss of income based on the minimum wage index.
- [7] Counsel argued that although parts of the special damages had been agreed, a large portion remained outstanding. As it relates to the claim for transportation

costs, he argued that although there were no receipts produced, these sums should be awarded as these costs do not lend themselves to receipts.

[8] There is also a claim for handicap on the labour market, where counsel for the Claimant argued that the evidence supported the fact that the Claimant would be unable to pursue any employment. Counsel for the Claimant submitted that the following sums should be awarded to the Claimant:-

a. Special damages	\$3,897,793.49
b. Pain and suffering and loss of amenities	\$9,000,000.00
c. Handicap on the labour market	\$4,389,200.00
Total	\$17,265,953.49

Defendant's submission

[9] Counsel for the Defendants submitted that in relation to loss of income the sum of \$300,000.00 should be awarded. This is the sum that was pleaded in the Particulars of Claim and there was no application for the Particulars of Claim to be amended. In light of that it was submitted that the Claimant is bound by her pleadings.

[10] Mrs Pinnock Wright argued that the Claimant had visited a number of doctors who all provided reports to the court. She further argued that the medical reports show various injuries sustained by the Claimant. She urged the court to accept the reports of the doctors that initially treated the Claimant as these medical reports showed that the Claimant had somewhat recovered from her injuries.

[11] The Claimant it was argued failed to comply with the instructions of the doctors and physiotherapists. Due to this fact, Mrs Pinnock Wright urged the court that whatever sum was awarded for General Damages should be reduced by \$400,000.00 due to the failure of the Claimant to mitigate.

[12] Mrs. Pinnock Wright submitted that the medical reports of the various doctors visited by the Claimant showed that she would be able to pursue employment. She also pointed to the fact that no evidence was placed before the court as to the educational background of the Claimant and that there was nothing to indicate whether she could engage in alternate employment. As such in relation to the claim for handicap on the labour market, she urged the court to adopt the lump sum approach rather than the multiplier/multiplicand method.

[13] Counsel for the Defendant submitted that the following sums were to be awarded

a.	transportation	\$3,5000.00
b.	Loss of earnings	\$300,000.00
c.	Handicap on the labour market	\$500,000.00

In relation to General Damages no specific sum was suggested by counsel for the Defendant, however the cases submitted by her did provide a range.

Analysis Loss of Earnings

[14] The Claimant in her pleadings made a claim for loss of earning. In her Particulars of Claim, the sum of \$300,000.00 was pleaded which covered a ten (10) week period. In her evidence she claimed that she earned the sum of \$320,000.00 per month. The evidence of the Claimant is that at the time of the accident she was a higgler and a cosmetologist. There was no evidence produced to the court to show by what means the Claimant earned the sum of either \$30,000.00 per week or the sum of \$320,000.00 per month.

[15] Counsel for the Claimant submitted that due to her injuries the Claimant was unable to work and as such she should be awarded a sum for loss of income for the ten (10) years. His submission was that her loss of income should be calculated utilizing the minimum rate index which, over a 12 year period, would

amount to \$3,642,000.00. He urged the court to adopt the approach in the case of **Neinah Williams v Island Concrete Company Limited** [2017] JMSC Civ 37. Counsel for the Defendants submitted that the Claimant was bound by her pleadings and as such she should be awarded the \$300,000.00 claimed.

- [16] The Claimant is bound by her pleadings. The usual pleading would be for loss of income and continuing. In the alternative it was open to Counsel for the Claimant, based on the evidence, to apply to the court to amend the pleadings. There was no such request in this case and as such the sum of \$300,000.00 will be awarded for loss of income.

Transportation

- [17] In the pleadings for the Court, the sum of \$3,500.00 was being claimed for transportation. No application was made at any time for the Particulars to be amended and as such, just as in the claim for loss of income, the Claimant is bound by her pleadings. The sum of \$3,500.00 is awarded for transportation cost.

Handicap on the labour market

- [18] The submission by Counsel for the Claimant is that the sum of \$4,389,200.00 should be awarded under this head applying the multiplier/ multiplicand method. Counsel for the Defendant argued that a lump sum payment should be made in the sum of \$500,000.00.

- [19] The multiplier/multiplicand method was defined in the case of **Moeliker v A. Reyrolle & Company Ltd** [1977] 1 WLR 132 CA, where Brown L.J. stated at para 140 that:-

This head of damages generally arises where a claimant is, at the time of the trial, in employment, but there is a risk that he may lose his employment at some time in the future and may then, as a result of his injuries, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages

from an actual loss of future earnings which can readily be proved at the time of the trial.

- [20] For an award to be considered under this heading the Claimant would be required to indicate how she was handicapped on the labour market. This was detailed also in the case of **Moeliker** where Browne L.J. stated at paragraph 141 that:-

The next stage is to consider how far he would be handicapped by his disability if he was thrown unto the labour market that is what would be his chances of getting a job and an equally well paid job. Again all sort of variables will or may be relevant in particular cases for example a claimant's age, his skills, the nature of his disability; whether he is capable of one type of work or whether he is or could be capable of others, whether his is tied to working in one particular area; the general situation in his trade or his area or both.

- [21] This position was applied in a number of cases including the case of **Cranston (Phillip) v Attorney General of Jamaica** (unreported) Claim no. 2013HCV 01680 delivered August 10th 2009. In this case Sykes J (as he then was) stated at paragraph 98:-

The legal position is therefore very clear. The Claimant does not have to be working at the time of the trial to have an award under this head of damages. From the cases, the issue under this head of damages is not whether the claimant might or will lose his job or whether his ability to compete on the open labour market is impaired. If yes, then it matters not if he is working or not.

- [22] The question is when to apply the multiplier/multiplicand method and when to utilize lump sum awards? In the case of **Ebanks(Archer) v Jephther McClymont** (unreported) Supreme Court, Jamaica, Claim No. 2004 HCV 2172 delivered March 8th 2007 Sykes J (as he then was) gives some guidance at paragraph 53 when he stated that: -

- i. *If the Claimant is working at the time of the trial and the risk of losing the job is low or remote then the lump sum method is more appropriate and the award should be low.*
- ii. *If the claimant is working at the time of the trial and if there is a real serious risk of loosing the job and there is evidence that if the current job is lost there is a high probability and the claimant will have difficulty finding an equally paying or better paying job then the lump sum payment may be appropriate depending on when the lost is seen as likely to occur. The size of the award may be influenced by the time at which the risk may materialise.*
- iii. *If the claimant is a high income earner the multiplier/multiplicand method may be more appropriate.*
- iv. *The lump sum is not arrived by reference to any comparison with previous cases.*
- v. *If the Claimant is not working at the time of the trial and unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment.*

[23] The case of **Ebanks (Archer)** was applied in the case of **Jhamiellah Gordon v Jevan Paul Devere Chevannes** 2016 JMSC Civ. 79. In that case after reviewing the law Daye J at paragraph 35 went on to state that:-

The difficulty of assessing loss and earnings due to inadequate and unreliable evidence lends itself to the application of the lump sum method assessment of this head damage.

[24] In this case the medical reports from two doctors about the ability of the Claimant to work is quite helpful. The medical report of Doctor Waite states that: -

There will be periods of remission and exasperation of neck and back pain; the timing and extent of which cannot be predicted. The conditions can also worsen; the timing and extent of which cannot be predicted. These may affect/continue to affect activities of daily living and work especially with activities that involve flexion and loading of the neck and back; such as reading, using computer, sleeping with a pillow, prolonged sitting (including driving), prolong standing, walking, washing, household chores, lifting, bending and sexual intercourse. Due to the persistence of her symptoms, she will require further orthopedic care, and possibly the services of a pain specialist and a neurosurgeon.

The Claimant being a higgler and cosmetologist, would have to engage in some if not all of these activities. The report from Doctor Waite indicates that the injuries she received would have affected her employment.

[25] The medical report of Doctor Douglas states that: -

Nine years post injury, she remains systematic and her capacity to work has been compromised as the nature of her job requires long standing, bending and constant use of her arms. In the circumstances, it is unlikely she will be able to continue this type of work. It is unlikely her condition will improve without major pain specialist intervention, which in an di it self does not guarantee significant change.

This report again shows that the injuries that the Claimant received would affect her ability to continue her work.

[26] There is a contradiction between what the Claimant stated in her pleadings ie that her income prior to the accident was \$30,000.00 per week and her evidence in court was that she earned the sum of \$320,000.00 per month. There was no attempt to reconcile this inconsistency, but instead Counsel for the Claimant, urged the court to rely on the minimum wage index to calculate the handicap on the

labour market. There is no evidence as to what, if any, alternative employment the Claimant may be able to attain. In light of this I will utilise the lump method. I will award a lump sum of \$2,500,000.00 taking into consideration all the findings of the Doctor Waite and Doctor Douglas.

General Damages.

- [27] A number of medical reports were submitted to the court from the various doctors that were visited by the Claimant. This was called into question by counsel for the Defendants. The Claimant indicated that she had changed her doctors after she changed her attorneys on the advice of her new attorneys. The question for the court is which medical report is to be relied upon? Counsel for the Defendant has urged the court to rely on the medical reports of Doctor Shareel Dixon and Doctor Wright.
- [28] The medical report of Doctor Dixon dated the 21st of February 2009, found that there was slight residual tenderness localized to the right of the neck. She also found full and pain free active movement of the neck. In the case of Doctor Wright, who is an Orthopaedic Surgeon, his medical report diagnosed the Claimant with prolapsed intervertebral disc disease in the lumbar spine. He did not find that she had any permanent disability.
- [29] Counsel for the Claimant has urged the court to rely on the evidence of Doctor Waite who is a consultant orthopaedic surgeon, who had examined the Claimant on four occasions. Dr Waite on his first examination, diagnosed the Claimant as having:-
- a) moderate chronic discogenic neck pain,
 - b) moderate to severe, chronic discogenic low back pain with subjective right lumbar radiculopathy.

He recommended pain management, a MRI of the cervical spine and lumbosacral spine.

[25] On the fourth visit of the Claimant to Doctor Waite on the 20th of April 2016, after reviewing the final MRI of the Claimant he diagnosed her as having-

- a. mild chronic discogenic neck pain,
- b. chronic right lumbar radiculopathy at L5 (confirmed by neurodiagnostic studies) and consistent with disc disease (L4/5) (MRI).
- c. disc disease at L5/S1 consistent with an absent right angle reflex.
- d. renal disease for evaluation by a urologist.

He rated the chronic discogenic neck pain as 2% whole person impairment and the chronic discogenic low back pain as 15% whole person impairment with a combined whole person impairment of 17%.

[26] I have reviewed all the medical reports in this matter from all the Doctors. The initial report from Doctor Reddy from the Linstead Hospital would not have captured all the injuries of the Claimant as she had been seen by him immediately after the accident and as such all of her injuries would not have been apparent. I will not rely on the medical report of Doctor Reddy. I have reviewed the medical report of Doctor Dixon who indicated that the Claimant still suffered pain when she turned her head. Doctor Douglas had examined the Claimant on the request of the Defendants. The medical report of Doctor Douglas indicates that the Claimant had a whole person disability of 3%.

[27] I will rely on the medical report of Doctor Waite as he would have examined the Claimant on four occasions and would have had the ability to fully assess her. I will however refer to the medical report of Doctor Douglas in relation to some aspects of the injuries of the Claimant. I note that the Claimant was examined by Doctor Waite some four years after the accident would have occurred, however he prepared his report in conjunction with MRI reports. I will take into consideration the criticism of counsel for the Defendant where she indicated that Doctor Waite

did not fully indicate in his report whether the injuries were from the accident or was a degenerative condition.

- [28] Counsel for the Claimant submitted that the court should award the sum of \$9,000,000.00 for pain and suffering and loss of amenities. He urged the court to rely on the cases of **Norman McBean v Rainford Wade and Rupert Campbell** [2017] JMISC Civ 74, **Courtney Livermore v Ezekiel Russell** [2017] JMISC Civ 134, and the case of **Marie Jackson v Glenroy Charlton and George Harriot Khans** Vol 5 page 167.
- [29] Counsel for the Defendant argued that the Claimant should be awarded a sum similar to that awarded in the case of **Carlos Lincoln vs Glover Forrester** [2014] JMISC Civ.98. In that case the Claimant had been hit on the (R) side of his chest, on the chest wall, and also on the (R) side of his head. He sustained a slight swelling in the (R) parietal area of his scalp. There was evidence of pronounced degenerative changes from C4 to T1 with pronounced narrowing of the foramina bilaterally. An award of \$650,000.00 was made on June 2014 which updates to \$769,522.90. In the case **Carlos Lincoln** the award was reduced due to the Claimant being diagnosed as having a degenerative condition.
- [30] The Claimant in this case is clearly still experiencing the effects of the accident that occurred over 10 years ago. I have reviewed all the cases submitted by counsel for both the Claimant and the Defendant. The case that is most relevant is **Courtney Livermore v Ezekiel Russell**. In the case of **Courtney Livermore**, he suffered injuries to his neck and back. He was diagnosed with chronic neck pain, chronic discogenic low back pain with clinically right radiculopathy at L5 S1 and chronic cauda equine compression. He was assessed as having a 25% whole person impairment. He was awarded the sum of \$6,000,000.00 in September 2017 (CPI-245) which updates to J\$6,191,020.40.
- [31] Although the cases are somewhat similar the injuries of the Claimant in this case seemed to be less severe. For instance, the Claimant in this case was diagnosed

as having mild chronic discogenic neck pain with a 17% whole person disability, whilst **Courtney Livermore** was diagnosed with chronic neck pain with a 25% whole person disability. In light of this the starting point would be the sum of \$6,000,000.00 for general damages. I note however, that Doctor Melton Douglas indicated in his medical report that:-

Although the MRI Scan revealed stenosis of the spinal canal, it is unlikely this would have been caused primarily by the accident as is it expected that there some degenerative disc which is consistent with her age of 39”.

This finding was not refuted in the medical report of Doctor Waite. In light of the finding of degenerative disc the sum awarded would be reduced by \$500,000.00. The sum awarded for the general damages is \$5,500,000.00.

[32] The Defendant had urged the court to reduce the sum awarded for general damages as the Claimant had failed to mitigate. There is evidence that it was recommended by physiotherapists that the Claimant should continue certain exercises. The Claimant whilst giving evidence agreed that she failed to continue these exercises. I note however that in the medical reports of Doctor Waite and Doctor Douglas there is indication that the Claimant would continue to feel the effects from the injuries she received in her accident. There is no medical report to support the submission that if the Claimant had continued these exercises her injuries would have been reduced. I therefore will not further reduce the sum awarded to the Claimant for general damages.

Order

[33] The Claimant is awarded the sum of

1. \$5,500,000.00 for general damages at 3% per annum from the 19th of February 2009 to the 17th of December 2018.

2. \$535,553.49 as special damages at 3% per annum from the 29th of October 2008 to the 17th of December 2018, which is broken down into:-
 - a. \$300,000.00 for loss of income.
 - b. \$3,500.00 for transportation cost.
 - c. \$232,053.49 for medical cost that was agreed
3. The sum of \$2,500,000.00 for handicap on the labour market - no interest to be awarded.
4. Cost to be agreed or taxed