



[2017] JMSC Civ 134

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2013HCV00835**

<b>BETWEEN</b>	<b>COURTNEY LIVERMORE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>EZEKIEL ALEXANDER RUSSELL</b>	<b>DEFENDANT</b>

Mr. Paul Edwards instructed by Bignall Law for the claimant.

Ms. Nicosie Dummett for the defendant

23<sup>rd</sup> & 24<sup>th</sup> March, & 29<sup>th</sup> September, 2017

*Damages – Appropriate award for injuries sustained – Claimant sustained injuries to his cervical spine and lumbar spine resulting from a motor vehicular accident – Pre-existing injury to lumbar spine*

**EVAN BROWN, J**

### **Introduction and background**

[1] Courtney Livermore was involved in a motor vehicular accident along the Central Village leg of the Mandela Highway on 3<sup>rd</sup> day of January, 2012. The accident occurred when a motor vehicle driven by Ezekiel Russell, collided with the rear of the vehicle driven by Mr. Livermore. He suffered injuries and loss resulting from the impact. Mr. Russell admitted liability and judgment was entered on the 26<sup>th</sup> March, 2014. He challenged the claim as to quantum and the matter proceeded to assessment.

## **Case for the claimant**

- [2] Mr. Livermore was en route to Kingston in the right lane of the Mandela Highway. On his approach to a particular section of the roadway, he stopped his vehicle to allow pedestrians to cross the road. Shortly after halting his vehicle, Mr. Livermore said he experienced a “violent impact to the rear of the truck” which pushed his vehicle several feet forward. The impact initially left him shaken and with pains to his neck.
- [3] Two weeks following the accident, he visited the University Hospital of the West Indies for medical attention. However, following that visit, he continued to experience pains in his neck and back. He sought further medical attention on several subsequent occasions, but his pains continued until the time of assessment. He incurred transportation costs for those visits to the medical doctors. He did not receive a receipt for the cost of his transportation, but the total cost of his trips was \$24,000.00.
- [4] He sometimes received a “crick” in his neck, which would cause numbness and increased difficulty to move in that region. He enjoyed playing football prior to the accident. Now, however, he would feel pains in his lower back whenever he played the sport. He further said that since the accident he has been experiencing erectile dysfunction.
- [5] Mr. Livermore said that his earning capacity was affected by his injuries, and further, that he lost a total of \$1,012,000.00 in salary between June, 2012 and May, 2014.

## **The medical examination**

- [6] Mr. Livermore was first examined by Dr. Oral Rose on the 20<sup>th</sup> January, 2012. The results of that examination showed that there was tenderness to his cervical spine and lumbar spine. The power in all four of his limbs was normal, and the other systemic examination was normal.

- [7] Mr. Livermore was treated with parenteral analgesia and gastric protection. He was subsequently sent to have an X-ray done on his neck and lower back. The results showed no abnormality to those areas. In Dr. Rose's opinion, Mr. Livermore sustained soft tissue injuries to the neck and back arising from the motor vehicular accident. He was also given four days sick leave and discharged.
- [8] Mr. Livermore subsequently underwent another medical examination, and he was seen by Dr. Milton Forbes. In his report dated 7<sup>th</sup> September, 2012, the results of Dr. Forbes' examination were: (i) muscle contusion, (ii) trauma to the lower back, (iii) whiplash and (iv) concussion. The X-ray results were normal and Mr. Livermore received treatment of analgesia and antispasmodic, muscle relaxant and physiotherapy.
- [9] Following his examination by Dr. Milton, Mr. Livermore was further examined by Consultant Orthopaedic Surgeon Dr. Philip Waite. In his report, dated 18<sup>th</sup> July 2013, Dr. Waite recorded that Mr. Livermore "developed features of lower back pain with right lumbar radiculopathy after lifting" in 2011. Dr. Waite however noted that this issue was resolved within a month of treatment with analgesics. He received no physiotherapy.
- [10] Dr. Waite noted mild to moderate bony tenderness to his cervical spine, and mild to moderate bony and paravertebral muscular tenderness to his lumbosacral spine. In his assessment, Dr. Waite concluded that the mild neck pain which Mr. Livermore experienced was "secondary" to a cervical whiplash. He also concluded that Mr. Livermore had right lumbar radiculopathy at L5 disc.
- [11] In Dr. Waite's opinion, the injuries were consistent with the mechanism of the accident as described by Mr. Livermore. He also opined that the mild to moderate lower back pain with right lumbar radiculopathy at the L5 disc, was an aggravation or worsening of a pre-existing condition.
- [12] Mr. Livermore was given analgesics and advised to obtain a Magnetic Resonance Imaging, hereafter referred to as MRI, of the lumbosacral spine. He

was examined again by Dr. Waite on 19<sup>th</sup> October, 2012. On this occasion, his complaints were an occasional neck pain, lower back pain, and persisting radicular pains.

**[13]** On the 25<sup>th</sup> March, 2014, Mr. Livermore was again examined by Dr. Waite. Mr. Livermore experienced recurrent low back pain, and an occasional neck pain with lower prolong neck flexion. There was a recurrence of the low back pain when he stood or sat for extended periods. Mr. Livermore also complained of numbness to the right buttock which radiated to the toes of the right foot. Dr. Waite's assessment revealed that Mr. Livermore's cervical spine had mild tenderness to the right trapezius muscle.

**[14]** Examination to the lumbosacral spine showed mild bony and muscular tenderness at L4-SI. The straight leg test was negative as there was full power. Sensation, however, was impaired to L5 and SI on the right, and the right ankle reflex was absent.

**[15]** Dr. Waite examined Mr. Livermore's MRI which was done on the 16<sup>th</sup> April, 2012. He concluded that the vertebral alignment was preserved while broad based disc bulges were noted at L4/5 and L5/SI. He also concluded that, at disc L4/5, the spinal cord was almost completely narrowed. Further, both exit foramina were almost completely narrowed.

**[16]** There was resultant cauda equine and bilateral exit nerve compression. Dr. Waite noted similar changes at L5/ SI but to a lesser degree. He said: "The disc bulge is eccentric to the right causing cauda equina compression and spinal nerve compression". He continued that Mr. Livermore's spinal cord was further narrowed by degenerate facet joints and thickened ligamentum flava at L4/5 and L5/SI.

**[17]** He could not say, however, whether the spinal canal was narrowed by the accident. He said that the narrowing of the spinal canal may be caused by disc bulge, degenerative disease and aging. Dr. Waite however opined that both disc

bulges and facet joint arthritis led to the narrowing of Mr. Livermore's spinal canal.

- [18]** Dr. Waite's report continued with a Nerve Conduction Study done on Mr. Livermore on the 18<sup>th</sup> May, 2014. He concluded that Mr. Livermore had mild chronic S1 radiculopathy. His final assessment of Mr. Livermore was that he was experiencing mild chronic neck pain, and chronic discogenic low back pain with clinical right radiculopathy at L5 and S1 and chronic cauda equine compression.
- [19]** According to Dr. Waite, Mr. Livermore's chronic disc disease at L4/L5 and L5/S1, and mild S1 radiculopathy, were a progression of a pre-existing disease from a previous injury. Dr. Waite opined that a chronic mechanical neck pain has a class 1 impairment with 1% to 3% whole person impairment. Mr. Livermore cervical spine injury, in Dr. Waite's opinion, was equivalent to a grade A Class 1 injury or a 1% whole person impairment.
- [20]** In similar manner he opined that a chronic multilevel discogenic lower back pain, with a clinical right lumbar radiculopathy at L5 and S1, has a class 4 impairment with 25% to 33% whole person impairment. The injury to Mr. Livermore's lumbar spine was equivalent to a grade A Class 1 injury or 25% whole person impairment.
- [21]** On the 21<sup>st</sup> October, 2015, Mr. Livermore was examined by another Consultant Orthopaedic Surgeon, Dr. Melton Douglas. He observed that Mr. Livermore sat comfortably for the consultation which lasted for 35 minutes. He walked with a normal gait and was able to walk on his heels and tip toe. The forward flexion in his lumbar spine was reduced, and he had flexion in his fingertips down to his ankle.
- [22]** He also had full lateral flexion of the spine, while his knee reflexes were normal. There was no tenderness of the lumbar spine. He could stoop, and stand on one leg easily. The cervical spine was normal, except that on a lateral flexion there

was mild pain on both the left and right sides of the neck. There were also neurological deficits in the lower and upper extremities.

[23] These injuries, according to Dr. Douglas, were consistent with the vehicular accident described by Mr. Livermore. The accident resulted in his developing radicular symptoms from a prolapsed disc, which caused the pain that radiated from his lower back to the lower extremities. Dr. Douglas said that this diagnosis was confirmed with MRI scans and Nerve Conduction Studies.

[24] Dr. Douglas' prognosis was that the long term outcome of Mr. Livermore's condition was unpredictable as it may or may not worsen. If it should worsen, it could be severe enough to warrant surgery. Dr. Douglas advised Mr. Livermore that, for the long term, he has to exercise caution in performing strenuous activities. Mr. Livermore was assessed by Dr. Douglas as having permanent whole person impairment of 12%, and the total whole person impairment of 11%.

[25] Dr. Waite on the other hand, disagreed with the percentage impairment arrived at by Dr. Douglas. Dr. Waite said that the MRI scan revealed broad based disc bulges noted at L4/5 and L5/S1, and this indicated disc disease at two levels. Dr. Waite noted further that Mr. Livermore also had two levels of radiculopathy at L5 and S1.

[26] These disc bulges, he opined, would place the impairment rating higher than 11% as they were at two levels. The appropriate impairment rating at that level would be in the realm of 26%.

### **The claimant's submissions**

[27] Mr. Edwards submitted on behalf of Mr. Livermore that it was incumbent on Mr. Russell to set out the facts on which he intended to rely. Mr. Russell made no averment to dispute Mr. Livermore's statement of case. Reliance was placed on rule 10.7 of the Civil Procedure Rules 2002, which stated that a defendant cannot rely on any allegation or factual argument which was not set out in the defence.

[28] Counsel made the argument that, Mr. Russell was not at liberty to advance any argument without first obtaining permission from the court. Additionally, Mr. Russell did not file any witness statement purporting facts which are in contradiction to Mr. Livermore's case. The medical evidence was also uncontested as Mr. Russell did not place any part of it in issue.

[29] In relation to the quantum of damages recoverable by Mr. Livermore, counsel argued that there are certain factors to be considered. These factors were outlined in **Cornilliac v St. Louis** (1965) 7 WIR 491 as: (i) the nature and extent of the injuries sustained, (ii) the nature and gravity of the resulting physical disability, (iii) the pain and suffering which had been endured, (iv) the loss of amenities suffered, and (v) the extent to which consequently the injured person's pecuniary prospects have been affected.

[30] The evidence before the court was that Mr. Livermore suffered a whole person impairment of 26%. This was categorized as 25% whole person impairment of his back, and 1% whole person impairment of his neck. The issue of a pre-existing injury was raised by Dr. Phillip Waite in his report. It was submitted that the law in relation to pre-existing conditions is covered by the "egg shell or thin skull principle".

[31] The principle was stated in the case of **Dulieu v White and Sons** [1901] 2 KB 669, at page 679. There, Lord Kennedy summarized the law as follows:

*If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.*

Mr. Russell, counsel submitted, was still liable for the pre-existing injury which accounted for the 25% impairment to Mr. Livermore's back. A victim must be taken as he was found.

[32] As it relates to the pain and suffering which Mr. Livermore endured, it was his undisputed evidence that he was symptomatic in relation to his neck and back

since 3<sup>rd</sup> January, 2012. The medical evidence was consistent with that testimony and went further to indicate that his symptoms could actually get worse.

[33] Counsel submitted that although Mr. Livermore had no proof to show his loss of earnings between June, 2012 and May, 2014, he should still be allowed to recover this sum. Counsel relied on ***Cecil Bassaragh v Roger Brown***, published in Khan's Volume 6, page 51, that special damages may still be awarded where the court accepts the claimant as a witness of truth, notwithstanding the lack of documentary evidence to support the sums pleaded.

[34] Dr. Douglas' report could not be relied on to the extent of its analysis of the MRI. The report disclosed a prolapse disc, with pain radiating from the lower back to the lower extremities. The doctor opined that Mr. Livermore suffered a whole person impairment of 11%. However, Dr. Phillip Waite highlighted certain critical facts.

[35] Firstly, the MRI revealed that Mr. Livermore suffered multiple disc bulges (L4/5). However, Dr. Douglas' report only accounted for an impairment rating with intervertebral disk herniation at a single level. This, counsel argued, was a clear discrepancy between the findings of the MRI and that of the impairment found by Dr. Douglas.

[36] Secondly, Dr. Douglas erroneously referred to a single level and placed the injury in the category of "Class 2" with a range from 10% to 14% impairment. In contrast, the *American Medical Association Guide to the Evaluation of Permanent Impairment* 6<sup>th</sup> Ed, at page 571, indicated that the lumbar stenosis at multiple level with or without AOMSI, and/or with documented signs of bilateral or multiple-level radiculopathy at the clinically appropriate levels present at the time of examination in a "Class 4" impairment with the range being 25% to 33%.

[37] Further, it was argued that future medical expenses could amount to \$2,000,000.00 to perform the corrective surgery needed to improve the effect of



Mr. Livermore's injuries. Both Dr. Waite and Dr. Douglas were of the opinion that his condition could worsen without treatment.

[38] Counsel submitted that Mr. Livermore had a real risk of losing his employment. He was unable to discharge his work related duties and had to resign in June, 2012. This was illustrated in his evidence as he said that he was not able to climb ladders and scaffoldings, and lift building blocks.

[39] Consequently, his economic prospect would be negatively affected. Counsel submitted that an award of \$1,000,000.00 would be a reasonable amount to compensate him for the risk. It was also submitted that a reasonable award for general damages is \$16,000,000.00.

[40] In support of that amount, counsel relied on three cases. First in that trilogy, was ***Candy Naggie v The Ritz Carlton Hotel Company of Jamaica***, published in Khan's Volume 6, page 198, where the claimant suffered severe back pain across her lower back radiating to the right thigh and protrusion of L4/L5 to the right side. Permanent partial disability was assessed at 10% of the whole person. The award given was \$1,750,000.00, which updates to \$4,432,346.72 using the May, 2017 Consumer Price Index, CPI.

[41] Second, ***Olive Henry v Robert Evans and Greg Evans***, published in the Khan's Volume 6, page 156, where the claimant suffered from whiplash injury. The claimant also suffered from a pre-existing cervical spondylosis at C5/6 discs, injury to ligaments at C4/5, C6 nerve root pains and blunting signifying of C5/6 disc. The claimant was assigned a whole person impairment of 11% and was awarded \$750,000.00 in February 1999. The award updated to \$3,669,743.50 using the said May 2017 CPI.

[42] Third, counsel relied on ***Schaasa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd***, published in Khan's Volume 6, page 200. There, the claimant sustained injuries which included: (i) mechanical low back pains with subjective lumbar radiculopathy, (ii) right sided lumbar radiculopathy secondary to

prolapsed intervertebral disc, (iii) reflex sympathetic dystrophy to right shoulder, and (iv) chronic cervicothoracic pain with subjective cervical radiculopathy.

- [43] That claimant was assessed as having a 10% whole person disability, and was awarded \$3,000,000.00 in June, 2008. This sum updated to \$5,516,500.38 using the May 2017 CPI. Counsel placed heavy reliance on this case, arguing that it was closest in similarity to the case at bar. Counsel argued however that Mr. Livermore's resultant disability exceeded what that claimant suffered, as he was assessed at 25%, and 1% impairment to his neck.
- [44] On this basis, counsel concluded, that any award made to Mr. Livermore must be significantly higher, and double the award given in *Schaasa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd*, *supra*. Counsel made further submitted that the appropriate award for special damages was \$1,210,000.00.

#### **The defendant's submission**

- [45] Counsel argued that the medical report of Dr. Melton Forbes was devoid of information which would assist in making certain causative findings. She argued that it was not open to the court to speculate. There was no mention in that report of the following information: (i) the dates Mr. Livermore was seen and treated, and (ii) whether or not he was examined and treated by Dr. Forbes.
- [46] The court should therefore consider what weight it should place on that report as its evaluation also indicated that Mr. Livermore suffered a "concussion". The most contemporaneous medical report from Dr. Forbes did not mention an injury to the head.
- [47] Counsel argued that Dr. Waite did not provide evidence that he had sight of the x-ray reports. Dr. Waite's finding of "January x-rays as normal", she submitted, was based on the medical report of Dr. Rose and not from his own findings. Additionally, various sections of Dr. Waite's conclusion which dealt with the

examination of Mr. Livermore, were reproductions of portions of his previous report. This offended the rule against hearsay and was wholly unscientific.

- [48]** There was no evidence as to when Mr. Livermore sustained the previous back injury. The relevance of this point was that a tortfeasor must take his victim as he found him. Dr. Waite could not present any evidence of accurate data to substantiate the methodology he used as being scientific.
- [49]** Counsel submitted that it was trite that medicine is a highly specialized science. Where any of the medical reports did not display an objective assessment of Mr. Livermore's complaint, then the conclusions regarding those complaints must be rejected.
- [50]** Dr. Waite's evidence was that disc bulges can be caused by many sources to include facet joint disease or arthritis. He also could not state whether it was the arthritis or trauma that caused Mr. Livermore's disc bulge. Counsel submitted that this appeared to be an attempt by Dr. Waite to obfuscate the issue.
- [51]** Counsel submitted that Dr. Waite ascribed an impairment rating to the disc bulge which did not disaggregate the issue of arthritis. Arthritis could be a cause of disc bulge, and he could not state with certainty whether Mr. Livermore's disc bulge was caused by either trauma or ageing.
- [52]** In relation to the 1% impairment to the cervical spine, Dr. Waite did not show reason for that rating. In essence, all Dr. Waite did was to state that that was the condition of Mr. Livermore's back when he examined him. This was so, counsel continued, as there was no medical report of Mr. Livermore's condition before the accident.
- [53]** Similarly, Dr. Douglas did not have the benefit of medical evidence of Mr. Livermore's condition before the accident. Neither of these two doctors could proffer medical evidence to show on a balance of probabilities that the accident of the 3<sup>rd</sup> January, 2012, caused the present state of Mr. Livermore's back.

- [54] Dr. Douglas' report should also be rejected as it was fraught with difficulties. It contained no indication that he saw the medical investigations or reports done on Mr. Livermore. This was shown in his incorrect finding that the disc bulge was at one level, while the MRI displayed that there were disc bulges at two different levels. His entire report was based on the conclusion of a previous report provided to him and showed no evidence that those conclusions were probed.
- [55] Counsel placed reliance on the case of *Jhamiella Gordon v Jevon Chevannes* [2012] JMCA Civ 41, paragraph 12, where it was said that the expert's evidence must be restricted to the examination she conducted. Upon that authority, counsel argued that Dr. Douglas' wholesale reproduction of the findings of other doctors was inadmissible hearsay.
- [56] Ms. Dummett then made the argument that Mr. Livermore's account of the accident was not credible. The impact to the rear of his vehicle, he said, pushed it several feet forward; yet, it did not hit the vehicle proximate to his, nor was it pushed to the median that separated the roads.
- [57] Mr. Livermore's account that he had a limp, wore cervical collar and affected by erectile dysfunction, were uncorroborated by a urologist. Those complaints were never confirmed by Dr. Waite. He has not demonstrated that he was debilitated by his alleged condition. Since the most contemporaneous report was three weeks after the accident, he has failed to show that his injuries resulted from the accident.
- [58] Alternatively, if the court is minded to make an award to Mr. Livermore, an appropriate sum would be between \$300,000.00 to \$500,000.00. Like Mr. Livermore, Counsel placed reliance on three cases for support of that range. The first was *Derrick Munroe v Gordon Robertson* [2015] JMCA Civ 38, where the claimant sustained: (i) pain in the head, neck and shoulder, and (ii) pain on anterior shoulder. He was awarded \$300,000.00, which updated to \$509,577.46 using the July 2017 CPI.

- [59] Secondly, Ms. Dummett relied on *Horrel Patterson v Econocar Rentals Limited*, published in Khan's volume 4, page 162. There, the claimant sustained the following injuries: (i) shock, (ii) pain and tenderness on flexion and extension of neck, (iii) pain and tenderness on flexion and extension of lumbar sacral spine, (iv) Contusion of chest, pain on palpation of chest, (v) Radiating pains down left leg, and (vi) whiplash injury with involvement of sciatic nerve left leg. The court awarded \$44,000.00 for general damages, which updated to \$356,373.40.
- [60] Finally, Ms. Dummett relied on the case of *Jennifer Anderson v Clipper Transport Ltd, et al*, published in Khan's Volume 4, page 170. The claimant there suffered severe Lumbar Muscular Spasm and was treated with analgesics. She was awarded \$95,000.00, which updated to \$527,291.57 using the June 2017 CPI.

## Findings

- [61] Having considered the evidence, it was accepted that Mr. Livermore experienced pain up to the time of assessment. I also accept the medical evidence as it outlined the nature and extent of Mr. Livermore's injuries. I, however, do not accept the evidence of Dr. Douglas so far as it related to his finding of the whole person impairment of 11%.
- [62] Dr. Waite's evidence that the appropriate whole person impairment of 26% was accepted as the court was persuaded by his explanation of that rating. He explained that the MRI showed that Mr. Livermore had broad based disc bulges at L4/5 and L5/S1, and radiculopathy at both L5 and S1.
- [63] Additionally, Dr. Waite indicated that Mr. Livermore's lumbar spine displayed disc diseases at two levels. The whole person impairment rating of 11% was however reflective of disc disease at one level. This did not accord with Mr. Livermore's injuries.

- [64] Mr. Livermore averred that he suffered from erectile dysfunction arising from his injuries. However, it was not seen from the medical evidence that that condition resulted from the motor vehicle collision. I agree with Ms. Dummett's submission that this averment was unsupported by the evidence and I therefore reject this aspect of his claim.
- [65] Dr. Waite was of the opinion that Mr. Livermore's chronic disc disease at L4/L5 and L5/S1, and mild S1 radiculopathy, were a progression of a pre-existing disease from a previous injury. There was no medical evidence to challenge that opinion, and I accordingly accept that Mr. Livermore suffered from disc disease at L4/L5 and L5/S1 prior to the accident on 3<sup>rd</sup> day of January, 2012.
- [66] Dr. Waite explained that that condition was aggravated or worsened by the injuries Mr. Livermore sustained. I accept Mr. Edwards' submission that Mr. Russell is responsible for Mr. Livermore's injuries, notwithstanding they are an aggravation of his pre-existing disc disease. The learning from ***Dulieu v White and Sons***, *supra*, relied on by Mr. Edwards, is that a defendant cannot escape liability due to a claimant's "unusually thin skull", and that the victim must be taken as he was found.
- [67] I am of the view that Mr. Russell cannot escape liability in these circumstances. The injuries Mr. Livermore sustained to his lumbar spine, were also an aggravation of his pre-existing disc disease. I, however, do not consider the finding of "concussion" by Dr. Milton Forbes as this was not part of the claimant's case, and an award for that injury was not considered.
- [68] Mr. Livermore averred that he suffered loss of earnings amounting to \$1,012,000.00 between June, 2012 and May, 2014. I do not agree with Mr. Edwards' submission that that sum may still be awarded where no proof was provided. In ***Dion Moss v Supt. Reginald Grant, et al*** [2017] JMCA Civ 13, paragraph 79, McDonald-Bishop, JA stated the law as follows:

*It is trite law that a claim for special damages must be strictly pleaded and strictly proved. **Bonham-Carter v Hyde Park Hotel Ltd** still stands as good and applicable law within this jurisdiction. It has been recognised, however, that the circumstances of a case may demand some measure of flexibility in the award of special damages in the interest of justice. Therefore, in determining the nature and degree of proof that should be insisted upon before damages may be awarded, regard must be had to the particular circumstances of each case. See. **Desmond Walters v Carlene Mitchell**.*

[69] The law requires strict proof for claims of special damages. However, where the claimant fails to provide the court with proof, the circumstances of the case may demand some degree of flexibility in the award of special damages in the interest of justice.

[70] Is this one such circumstance where the rule should be relaxed? Mr. Livermore gave no explanation for the absence of proof of his salary. His claim was for a specific sum and he gave no indication as to how he arrived at this sum. There was no evidence that the nature of his earning was informal and proof was impossible to ascertain.

[71] The sum of \$1,012,000.00, in my view, demanded proof to justify. It was insufficient for Mr. Livermore to simply assert that sum as loss of earnings without more. He placed it beyond this court to ascertain the basis for the claim of that sum, and to adjudicate on its fairness. I therefore reject this aspect of Mr. Livermore's claim.

## **Assessment of damages**

### Special Damages

[72] I found medical expenses of \$182,000.00 and transportation expenses of \$16,000.00 proved. Special damages of \$198,000.00 are awarded with interest at 3% from 3<sup>rd</sup> January, 2012 to 29<sup>th</sup> September, 2017.

## General damages

- [73] In assessing this head of damages, the court must consider the principle of *restitutio in integrum*. That is to say, Mr. Livermore must be placed in the position he would have been in had the motor vehicle accident of 3<sup>rd</sup> January, 2012 not occurred. Equally to be considered is that awards must be comparable, reasonable and moderate: ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12<sup>th</sup> June 1989.
- [74] Mr. Livermore, like the claimants in the cases cited above by both Mr. Edwards and Ms. Dummett, also suffered from pains in his neck and lower back, and disease of the spine. Having considered those cases, I agree with Mr. Edwards that ***Schaasa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd***, *supra*, bears the closest in similarity with the case at bar.
- [75] I did not find the other cases to be comparable with that of Mr. Livermore. The claimant in ***Candy Naggie v The Ritz Carlton Hotel Company of Jamaica***, *supra*, did not suffer injuries to the extent of those suffered by Mr. Livermore. Mr. Livermore also bore cervical spine injuries for which rating was 1% whole person impairment, in addition to his lumbar spine ailment.
- [76] Similarly, in the case of ***Olive Henry v Robert Evans and Greg Evans***, *supra*, the claimant there suffered from a pre-existing cervical spondylosis at C5/6 discs, and other injuries of her cervical vertebrae which were far beyond that of Mr. Livermore's cervical spine. She also did not bear any lumbar spine ailment, disc bulging at L4/5 and L5/S1 or mild chronic S1 radiculopathies to the right of the lumbar spine.
- [77] Again, the three cases relied on by Ms. Dummett, were not comparable with Mr. Livermore's injuries. In ***Derrick Munroe v Gordon Robertson***, *supra*, the injuries of the claimant there, did not reach the level of those of Mr. Livermore. That claimant suffered pains in the head, neck, shoulder and anterior shoulder. There was no indication that he suffered any cervical or lumbar spine injury.



- [78] Also, in *Horrel Patterson v Econocar Rentals Limited*, *supra*, though that claimant suffered from pains and tenderness on the flexion and extension of neck and lumbar sacral spine, there was no indication of any bulges in the lumbar spine like Mr. Livermore. The claimant there also suffered from contusion of the chest and pains on palpation of the chest, both of which were not suffered by Mr. Livermore.
- [79] Lastly, the case of *Jennifer Anderson v Clipper Transport Ltd, et al*, *supra*, where the claimant's only injury was Lumbar Muscular Spasm, did not reach the severity of Mr. Livermore's injuries. Therefore, the awards for these cases would not, in my view, be an appropriate award for Mr. Livermore's injuries.
- [80] As stated before, the case of *Schaasa Grant v Salva Dalwood & Jamaica Urban Transit Co. Ltd*, *supra*, is comparable with the case at bar. The claimant there suffered from mechanical low back pains with subjective lumbar radiculopathy. In Dr. Waite's report of Mr. Livermore, the MRI and neurodiagnostics studies showed both chronic disease at L4/L5 and L5/S1 of the lumbar spine, and mild radiculopathy to S1 on the right.
- [81] Also, the claimant in *Schaasa Grant* suffered right sided lumbar radiculopathy secondary to prolapsed intervertebral disc, and chronic cervicothoracic pain with subjective cervical radiculopathy. Both of which are similar to that of Mr. Livermore in that his cervical spine had moderate bony tenderness, paravertebral, scalenus, and trapezius muscle tenderness bilaterally; while Mr. Livermore's lumbar spine displayed mild to moderate bony and paravertebral muscular tenderness.
- [82] The medical evidence of Dr. Waite is that chronic disease at L4/L5 and L5/S1 and mild radiculopathy to S1 on the right, appeared to him to be a progression of pre-existing disease from a previous injury. The broad based disc bulges at those two levels, L4/L5 and L5/S1, accounted for an impairment rating in the realm of 26%.

**[83]** Mr. Edwards submitted that future medical expense of \$2,000,000.00 should be awarded to Mr. Livermore. In my view however, there was insufficient reason to justify that award. Dr. Douglas, who saw Mr. Livermore on 21<sup>st</sup> October, 2015, stated the prognosis that the long term outcome of Mr. Livermore's condition was unpredictable as it may or may not worsen. He advised Mr. Livermore that, for the long term, he has to exercise caution in performing strenuous activities. There was no evidence that Mr. Livermore's condition would worsen if he does not follow that advice.

**[84]** Having considered the matter, the court is of the view that a just award for general damages should be \$6,000,000.00 with interest at 3% from 24<sup>th</sup> January, 2014 to 29<sup>th</sup> September, 2017.

### **Conclusion**

**[85]** From the foregoing, I find that an appropriate award for special damages is \$198,000.00 with interest at 3% from 3<sup>rd</sup> January, 2012 to 29<sup>th</sup> September, 2017, and general damages of \$6,000,000.00 with interest at 3% from 24<sup>th</sup> January, 2014 to 29<sup>th</sup> September, 2017. Costs are awarded to the claimant, to be taxed if not agreed.