



[2021] JMSC CIV.147

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 02334

BETWEEN	ROHAN COOPER	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	MICHAEL MASTERS	2ND DEFENDANT

IN OPEN COURT

Ms. Christine Mae Hudson instructed by K. Churchill Neita & Co. for the Claimant

Ms. Shaniel Hunter instructed by The Director of State Proceedings for the Defendants

May 6 and July 2, 2021

Assessment of Damages - Whiplash – Hyper-extension injury to neck – Soft tissue injury to right shoulder – Strain to ligaments of lower back - Chronic cervical strain and chronic lumbar strain – 2% whole person impairment – Handicap on the labour market

I. REID J (AG)

BACKGROUND

[1] This is an assessment of damages. It arose out of a claim filed by Mr. Rohan Cooper against the Attorney General of Jamaica and Mr. Michael Masters (the Defendants) for injuries, loss and damage sustained as a result of a motor vehicle accident. That accident occurred on October 3, 2017, along the Winston Jones

Highway in the parish of Manchester in the vicinity of Porus Road, when an ambulance being driven by Mr. Masters collided into the rear of Mr. Cooper's motor vehicle. Mr. Masters was at all material times the driver of the Ministry of Health Ambulance Fleet # 1783 and the duly authorised agent and/or servant of the Attorney General. The Attorney General was sued by virtue of the Crown Proceedings Act.

- [2] The Defendants acknowledged service of Mr. Cooper's claim and on 7 February 2019, filed a defence limited to quantum. On 8 February 2019, Mr. Cooper obtained judgment on admission against the Defendants.

WITNESS STATEMENT

- [3] At the hearing, Mr. Cooper was sworn, and his witness statement dated March 29, 2021, was allowed to stand as his evidence-in-chief. He described the pain he suffered as a result of the accident. He said that he was bedridden for a few weeks after the accident and required the assistance of his family. He felt pain to his neck, chest, arm and lower back. He had difficulties turning his neck, sleeping due to the pain in his neck and standing or sitting for too long. He also felt pain in his neck and back when he woke in the mornings and his lower back was tender. He underwent eight sessions of physiotherapy but stopped as he could no longer afford it. He still feels pain when bending or lifting anything heavy. It got worse during the day after he did any strenuous activity.

- [4] Some months after the accident, he had to stop working and was unable to go back to work and function fully because of pain in his back and shoulders. He did not work for four months and lost \$780,000.00. He had to hire an assistant. He normally earned approximately \$48,800.00 per week after deducting expenses such as fuel and his assistant's pay.

- [5] He stated that he pays his assistant \$2000.00 per day for out of town deliveries and \$1000.00 per load for around town deliveries. He further pointed out that he usually has eight to ten loads per week, and this would include both around town

and out of town. He said that some days he would have more than one around town delivery, which would mean that he would load the truck, deliver the goods, return to base to have the truck loaded again and do another delivery.

- [6] He also reported loss of amenities such as the inability to do domestic chores, lift his son and play football or any sports.

MEDICAL REPORTS

- [7] Dr. Donald Gordon and Dr. Melton Douglas were accepted as expert witnesses and their reports dated May 2, 2018 and February 15, 2020, respectively, were tendered into evidence.

- [8] Dr. Donald Gordon first saw Mr. Cooper on October 6, 2017. He was diagnosed as having:

- 1) whiplash and hyper-extension injury to neck
- 2) soft tissue injury to right shoulder with injuries to the rotator cuff muscles
- 3) strain to ligaments of lower back

- [9] Mr. Cooper was treated with painkilling injection, muscle relaxant and pain-relieving tablet. He was later seen on October 24, 2017. He reported no pains in the right arm. Further examination revealed tenderness over the sixth cervical to the second thoracic vertebrae; tenderness of the lower back over the first to fourth lumbar vertebrae; and pain to lower back exacerbated by flexion and extension of trunk with pain estimated at 7/10.

- [10] On May 2, 2018, Mr. Cooper had a telephone consultation with Dr. Gordon and reportedly complained of severe pain to his right shoulder and lower back. He also complained of being unable to use his right shoulder to perform any employment, social or domestic related activity. He had been engaged in physiotherapy for his lower back only. Dr. Gordon recommended physical therapy for both lower back and shoulder.

[11] Dr. Melton G. Douglas, Consultant Orthopaedic Surgeon, saw Mr. Cooper on November 22, 2019. Mr. Cooper continued to complain of pain in his lower back; soreness in lower neck; and inability to lift heavy objects, play football, participate in sex, work around the yard or drive for longer than 20 minutes. MRI of the cervical and lumbar spine showed early degenerative changes, non-specific marrow signal loss and patchy marrow signal (non-specific). He was diagnosed as having chronic cervical strain and chronic lumbar strain. He was also assessed as having 2% whole person impairment. Dr. Douglas believed that there would be intermittent flare-ups for which he may need pain medication and consultations with a doctor and physiotherapist.

SUBMISSIONS

Claimant

[12] Counsel for Mr. Cooper submitted two cases for the court's consideration: **Pete Russell v Patroy Steve Whitely and others** [Consolidated] [2019] JMSC Civ 246 and **Natasha Richards and Phillip Richards v Judan Brown** [2019] JMCA Civ 27. A sum within the range of \$2,700,000.00 - \$3,000,000.00 was recommended for general damages. Counsel also requested a lump sum of \$500,000.00 for handicap on the labour market.

[13] Loss of income was stated in the particulars to be in the sum of \$877,538.24. It was later reduced to \$330,000.00. In her submissions, counsel stated that:

“What is however, not clear from the evidence is the claimant's net bi-week income, given his expenses being the cost for petrol and salary to sideman. It is also conceded that the evidence as to the period the claimant was off work is not clear. In the end it is for the court to find whether the claimant has satisfied the evidential burden to support the claim for loss of earnings.”

[14] The following were also claimed:

Medical Expenses	\$212,500.00
Cost of wrecking services	\$68, 500.00

Travelling expenses	\$3, 600.00
Future medical care	\$630,000.00

Other claims such as repair to motor vehicle and extra help to cut lawn seemed to have been abandoned as there was no evidence to prove these.

Defendants

- [15] Counsel for the Defendants submitted that **Yanique Hunter v Conrod George Clarke and another** [2014] JMSC Civ. 8 is a comparable case for consideration and as such the sum of \$1,555,932.00 is sufficient compensation for pain and suffering and loss of amenities.
- [16] Regarding loss of earnings, counsel submitted that the inconsistencies on Mr. Cooper's case are too numerous for an award under this head to be seriously considered by the court. The original pleadings referred to Mr. Cooper being absent from work for 16 weeks, the amended pleadings reduced it to four weeks but in cross-examination, Mr. Cooper referred to three months.
- [17] Counsel also refuted the claim for handicap on the labour market. Counsel relied on the cases of **Andrew Ebanks v Jephther McClymont** (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 2172, judgment delivered on March 8, 2007, and the **Attorney General of Jamaica v Ann Davis** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 114/2004, judgment delivered on November 9, 2009, for support that Mr. Cooper was not entitled to an award under this heading. There was no medical evidence to support the claim as the pain was not consistent and could be managed with pain killers and physiotherapy whenever there was a 'flare-up'. Mr. Cooper's competitiveness on the job market was not affected, there was no loss of his ability 'to compete in the open labour market', and there was no substantial or real and not merely fanciful risk that he would lose his present employment at some time before the estimated end of his working life.
- [18] Counsel also opposed claims for the following:

1. Motor vehicle repair costs: there was no receipt to support this claim.
2. Costs for extra help: in cross-examination, Mr. Cooper agreed that his hands were not impaired.
3. Cost of future medical care: Mr. Cooper has not specifically proven the potential costs and frequency of flare-ups for a sum to be awarded.

ANALYSIS

Damages for Pain and Suffering and Loss of Amenities

[19] The court must assess the injuries as a whole and refer to comparable cases in awarding a figure (see **Derrick Munroe v Gordon Robertson** [2015] JMCA Civ 38). In assessing the loss suffered by a Claimant, regard must be had to the following (see **Cornilliac v St. Louis** (1965) 7 WIR 491, at 492):

- “(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 to be endured;*
- (iv) the loss of amenities suffered, and*
- (v) the extent to which, consequentially, the appellant's pecuniary prospects have been materially affected.”*

[20] The Court will rely on the witness statement and medical reports in consideration of the aforementioned factors.

[21] The injuries suffered by the Claimant in **Pete Russell** are similar to those of Mr. Cooper. Both suffered injuries to the neck and back. Mr. Russell was diagnosed with whiplash injury and soft tissue injury to his skeletal ligaments and the para-vertebral muscles in the thoracic and lumbar region. Both Mr. Russell and Mr. Cooper complained of pain in the neck and lower back up to the signing of their witness statements. Mr. Russell had suffered pain two years post-injury.

- [22] On the other hand, Mr. Russell spent three days in the hospital due to his severe muscular spasm and there was no disability rating. Mr. Russell was awarded \$1,770,000.00 on December 20, 2019 (CPI of 103.6). This upgrades to \$1,862,258.69 as at May 2021 (CPI of 109).
- [23] The Claimant in **Natasha Richards** also suffered injuries similar to Mr. Cooper: soft tissue injury and muscle spasm to back and neck. Unlike Mr. Cooper, Mr. Brown also suffered lacerations. Eight years after the accident, he still suffered pain. He was diagnosed with discogenic lumbar pains and mild whiplash. He was treated with Voltaren injection, anti-inflammatory medications and physical therapy. Similar to Mr. Cooper, Mr. Brown had intermittent back pain and was assessed as having 2% whole person impairment.
- [24] The Claimant in **Natasha Richards** was awarded \$1,800,000.00 by the Court of Appeal in October 2019. The initial date of assessment was July 2012 (CPI of 70.2). This upgrades to \$2,794,871.79 as at May 2021 (CPI of 109).
- [25] The Claimant in **Yanique Hunter** was assessed on October 10, 2009, as having a soft tissue injury/spasm to her middle back. Later, she was diagnosed as having musculoskeletal spasm to the lumbar spine. A second doctor diagnosed her in March 2011 with chronic sprain or strain to the lower back with non-specific lower back pain, and soft tissue injury/spasm to the middle back. She was treated with analgesics and muscle relaxants and physiotherapy. She was assessed with 2% whole person impairment.
- [26] Counsel Ms. Christine Mae Hudson for Mr. Cooper argued that **Yanique Hunter** can be distinguished from the present case as the nature of Mr. Cooper's injuries extended further to the lower back, shoulder and chest. She also submitted that Mr. Cooper was incapacitated for a far more protracted period when compared to **Yanique Hunter** as the doctor herein indicated that Mr. Cooper complained of pain for a period of 24 months which was indicative of the chronicity of his condition. She submitted that this was not a feature in **Yanique Hunter**. She argued that

although both Claimants suffered similar whole person impairment of 2%, it does not follow that the experience of pain was the same.

[27] **Yanique Hunter** was awarded \$1,200,000.00 on May 20, 2014 (CPI of 82.6). This upgrades to \$1,583,535.11 as at May 2021 (CPI of 109).

[28] The cases cited are comparable with the case at bar, but **Yanique Hunter** has two notable exceptions. First, the claimant in **Yanique Hunter** did not suffer neck injuries similar to that of Mr. Cooper. Second, the period of pain and suffering in **Yanique Hunter** was less than the case at bar. I find that it would not be appropriate to rely on Yanique Hunter in assessing the award for Mr. Cooper.

[29] In an attempt to arrive at a uniform award, I have also considered the case of **Jhamiellah Gordon v Jevon Paul Devere Chevannes** [2016] JMSC Civ. 79. Miss Gordon suffered whiplash and mid and lower back pain. On the day of the accident in October 2010, she experienced pain to her head, neck and back. The pain subsequently increased and continued to her neck, back and shoulders some four days after the accident. She was treated with oral pain killers, ointment and later physiotherapy. The pain affected her daily chores, taking care of her child and sexual activity with her partner. It would be aggravated by long sitting, standing, bending, lifting objects and strenuous physical activity. She attended 14 physiotherapy sessions. . The doctor assessed her at 2% whole person impairment but found that the extent or permanence of her injuries was difficult to predict.

[30] She was awarded \$1,400,000.00 on May 12, 2016 (CPI of 87.7). This equates to \$1,740,022.81 at present.

[31] In assessing the general damages, I am guided by the cases cited and have considered the nature and extent of the injuries sustained by Mr. Cooper, the nature and gravity of the resulting disability, the loss of amenities and the extent to which Mr. Cooper has been affected by the accident. I also considered that the

whole person impairment is a guide for making comparisons and arriving at a reasonable award.

- [32] I find that the cases of **Pete Russell** and **Jhamiellah Gordon** are useful in assisting the court in coming to a determination of a reasonable award. I believe that Mr. Cooper has similar injuries to that of Mr. Russell and had suffered pain for a similar period. On the other hand, Mr. Russell did not have a disability rating; thus, Mr. Cooper would be entitled to a greater award.
- [33] In the case of **Natasha Richards**, the Claimant endured a much longer period of severe pain and suffering even though she had a 2% whole person impairment. As such, the award for the case at bar has to be at a lower scale.
- [34] I find that **Peter Russel**, though closer to the case at bar, should be upgraded to make adjustments for the 2% disability rating in Mr. Cooper's case.
- [35] **Jhamiellah Gordon** should also be upgraded to accommodate the fact that Mr. Cooper lost the ability to play sports and suffered for a longer period.
- [36] In assessing the aforementioned cases, I believe the sum of \$1,950,000.00 is an appropriate award for general damages.

Handicap on the Labour Market

- [37] The medical report of Dr. Douglas makes it clear that Mr. Cooper will continue to have challenges with work. His condition will remain for the long term and he must adjust his lifestyle to reduce the impact of the condition on his normal activities. Dr. Douglas has also stated that Mr. Cooper reported that;

“Since the accident he has had to cut down from 2 trips per day to 1 trip per day. At times he has to force himself to work through the pain due to the accumulation of work. He has had to take a few sick days intermittently when the pain is unbearable”.

- [38] Mr. Cooper has admitted to having employed an assistant to help him load and unload the truck with goods. He had to pay an additional assistant to do the work

that he would normally perform before the accident. In re-examination, he explained that before the accident his sideman would help him load the trolley with the goods and then he would take them into the stores but since the accident, he has had to employ an assistant because he is not able to lift the bags and boxes of goods off the truck. His evidence is that the bags of rice weigh 110 pounds.

[39] In **Moeliker v A. Reyrolle and Co. Ltd.** [1977] 1 All E.R. 9, when considering the principles governing an award for loss of earning capacity or handicap on the labour market, it was stated in the headnote that:

“In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate”

[40] Thus, K. Harrison J.A. in **Attorney General v Ann Davis** declared that:

“In matters concerning damages for handicap on the labour market, the court is asked to assess the plaintiff's reduced eligibility for employment or the risk of future financial loss”. Evidence must therefore be adduced in order to prove the loss even though in arriving at an award under this head of damages there has to be some amount of speculation.”

[41] Counsel for the Defendants has argued that there is no medical evidence that the Claimant cannot work. Ms. Hunter pointed out that the highest the medical evidence reached was that Mr. Cooper would need to continue taking painkillers in the future and do physiotherapy when there is a “flare-up” of the pain. Counsel stated that the pain was not consistent and as such, Mr. Cooper is not entitled to an award under this heading.

[42] Interestingly, Counsel Ms. Hunter quoted from **Andrew Ebanks v Jephther McClymont**, where Sykes J (as he then was) declared that where:

“the claimant’s competitive position is reduced because of the injuries suffered arising from the negligence of the tortfeasor, the claimant must be compensated even if the financial impact of the loss is delayed or eliminated. The remoteness or immediacy of the risk of losing the job affects only the quantum of the award but not the award itself”.

[43] Dr. Douglas’ report indicated that Mr. Cooper’s job was affected by his injuries because he could no longer do two trips per day but was now reduced to one trip per day. He also highlighted the fact that Mr. Cooper had to take sick days intermittently when his pain was unbearable. Mr. Cooper’s evidence was that he had to take four months off work and when he returned, he had to hire an assistant to help him load and unload the vehicle. I find that the injuries have affected his competitive position as he is unable to carry out as many tasks as he could before and he has to now have assistance which may affect his standing at his job in the long run. In addition to the foregoing, I also bear in mind the 2% whole person impairment assigned and his diagnosis of chronic cervical and lumbar strain. I find that he has, in fact, been made handicapped on the labour market.

[44] Sykes J (as he then was) in **Andrew Ebanks v Jephther McClymont** outlined at paragraph [53] the principles that guide the court in deciding whether a lump sum is to be awarded or the multiplier/multiplicand method is to be used.

[45] Mr. Cooper’s counsel sought the award of a lump sum of \$500,000.00. I take into consideration that Mr. Cooper has not lost his job but his capacity to earn has been reduced because of his injuries.

[46] In light of the foregoing, the court awards the sum of \$200,000.00 for handicap on the labour market.

Special Damages

[47] Special damages must be pleaded and specifically proven. The parties agreed to the following:

a. Medical Expenses	\$212,500.00
b. Travelling Expenses	\$ 3,600.00
c. Wrecker fee	<u>\$ 52,000.00</u>
Total	\$268,100.00

There was no proof of the cost of repairs to the vehicle and so this was not allowed.

Loss of earnings

[48] Loss of earnings, being an item of special damages, is required to be strictly proven; however, the court has accepted that it may be difficult in certain cases for an exact figure to be presented. Rowe P in **Central Soya Jamaica Ltd. v Junior Freeman** (1985) 22 JLR 152 explained that in such instances, the court will use its experience to calculate what is proved on the evidence and what is reasonable in the particular circumstances.

[49] Mr. Cooper has produced delivery invoices showing sums averaging \$100,000.00. Each accounted for an average of seven to ten days.

[50] Despite the delivery invoices presented, the court faces two problems:

1. Mr. Cooper's net earnings per fortnight is uncertain; and
2. The period which Mr. Cooper claims to have lost his earnings is inconsistent.

[51] Counsel Ms. Hudson accepted that the evidence regarding net income was not clear and stated that it was up to the court to find whether "the Claimant has satisfied the evidential burden to support the claim for loss of earnings". This court finds that the evidential burden has not been satisfied. There is too much speculation in the amount that Mr. Cooper was earning at the time to reasonably calculate a figure. The invoices show that Mr. Cooper earned an income, but it does not assist with arriving at his net income. Three figures (excluding the invoices) were presented purportedly being Mr. Cooper's net salary: the particulars stated \$54,846.14 per week, the submissions stated an average sum of \$110,000

per fortnight and the witness statement claimed \$48,800 per week. The witness statement spoke of \$1000.00 and \$2000.00 being paid to his assistant depending on whether the trip was around town or in the country. Later, Mr. Cooper spoke of \$1000.00 being paid to an assistant and that there would be eight to ten loads in a week. In cross-examination, Mr. Cooper mentioned \$2000.00 for his assistant. No mention was made in the witness statement of the average sum spent on fuel. In cross-examination, he spoke of \$6200.00 or \$7000.00. There was also the indication that Mr. Cooper had both a sideman and an assistant which was not specifically pleaded. The court, in effect, was being asked to pluck a figure from thin air.

- [52] Three periods of incapacity were presented to the court: six weeks, three months, 16 weeks. These inconsistent periods made it impractical for the court to calculate the earnings Mr. Cooper claims to have lost. As such the court will not make an award for loss of earnings.

Future Medical Expenses

- [53] The circumstances of this case and the claim for future medical expenses are comparable to that of **Able Edwards v Monique Campbell and Shirlette Walters Hall** [2020] JMSC Civ 220.
- [54] The latest medical report of Dr. Dixon in **Able Edwards** stated that due to the recurring nature of the Claimant's injuries, he may require treatment with analgesics, which may require future visits to the doctor for treatment. He may also require a MRI and surgery.
- [55] This is similar to the case at bar where Dr. Douglas states that Mr. Cooper's condition is chronic, and he may experience intermittent flare-ups requiring him to consult his doctor and a physiotherapist. He may also require the intermittent use of pain medication.
- [56] I will adopt the dicta of Anderson K. J. at paragraph 33:

“In any event though, this court cannot and ought not to award damages, based on a mere possibility, of future medical care being required as distinct from evidence that there is a high likelihood of same. The claimant must prove his entitlement to aspects of damages that he seeks to claim for, on a balance of probabilities.”

[57] There will be no award for the claim of future medical expenses.

ORDERS

General Damages

1. Pain and suffering and loss of amenities - \$1,950,000.00 at an interest rate of 3% per annum from June 22, 2018 to July 2, 2021
2. Special Damages - \$268,100.00 at an interest rate of 3% per annum from October 3, 2017 to July 2, 2021
3. Handicap on the labour market in the sum of \$200,000.00
4. Costs to the Claimant be taxed or agreed
5. Claimant's Attorneys-at-law to prepare file and serve the order.