



[2020] JMSC Civ 220

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION
CLAIM NO. 2013 HCV 02138**

BETWEEN	ABLE EDWARDS	CLAIMANT
AND	MONIQUE ARLENE CAMPBELL	DEFENDANT/ ANCILLARY CLAIMANT
AND	SHIRLETTE WALTERS HALL	ANCILLARY DEFENDANT

HEARD ON PAPER

Khadine Dixon, instructed by Dixon and Associates Legal Practice, for the claimant

Steven Jackson, instructed by Samuda and Johnson, for the defendant/ancillary claimant

Garth Lyttle, of counsel, for the ancillary defendant

September 28, 29, 30, October 1, 2 and November 6, 2020

Assessment of damages – General damages – Special damages – Mitigation of losses – Claim for loss of earning capacity – Claim for future medical expenses

ANDERSON, K.J

INTRODUCTION

- [1] On October 2, 2020, I had, in a trial that was held before me, concluded and assessed, that the defendant was liable to the claimant for damages for personal injuries, which he received, as a consequence of a motor vehicle accident, which occurred on August 2, 2012, when the defendant's vehicle, which was being driven by the defendant, collided into the rear of the vehicle which was then being driven by the claimant, but which is owned by the ancillary defendant. I had then, announced that judgment, orally.
- [2] Upon my having concluded that the defendant was so liable, to the claimant, I ordered that the claimant and the defendant file submissions as regards the damages to be awarded to the claimant. The parties complied with that order.
- [3] The claimant alleges that he has suffered the following injuries as a result of the collision which occurred on August 2, 2012:
- a. *Pains to neck, chest and lower back*
 - b. *Midline cervical spine, lumbosacral spine and chest wall tenderness*
 - c. *Tenderness in the posterior neck muscles on palpation*
 - d. *Pain in movement of neck*
 - e. *Mild tenderness of the lumbar region*
 - f. *Loss of normal curvature of the cervical and lumbar spine in keeping muscle spasm*
 - g. *Neck and back strain*
 - h. *Impingement of the left shoulder*
 - i. *Recurrent neck and back pain*
 - j. *Blunt trauma to the left shoulder with resultant impingement*
 - k. *Tenderness along the C4-C7 spines and bilateral scapular region*

- l. Flexion and extension in the cervical spines restricted by 10% due to pain*
- m. Minimal tenderness along L2- S1 spines and paraspinals*
- n. Flexion and extension in the lumbar spine restricted by 20% due to pain*
- o. Reduced range of movements*
- p. Reduced muscle strengths.* (Italicized for emphasis)

[4] The latest medical report of Dr. Rory Dixon dated August 4, 2020 - Exhibit 6, indicates that in addition to the injuries listed above, the claimant has suffered an upper limb impairment, in respect of which, the maximum quantification amounts to 5%, which then, is 3% of the whole person. He has therefore suffered a permanent partial disability ('ppd') of 3%.

The burden of proof

[5] **Bonham Carter v Hyde Park Hotel Ltd** [1948] WN 89, 92 Sol Jo 154, stated as follows:

'Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and, so to speak, throw themselves at the head of the court saying "This is what I have lost. I ask you to give me these damages." They have to prove it.'

Thus, the burden of proof rests solely on the claimant.

SPECIAL DAMAGES

[6] A damages award is meant to place the claimant, as far as it may be possible to do so, by monetary means only, in the position that the claimant would have been in, had the collision not occurred. Special damages should, as a general rule, be both specially pleaded and specially proven. The special damages as pleaded by the claimant are as follows:

Item	Cost
Dr Romyne Edwards (Medical Report)	\$10,000

Dr. Rory Dixon 1 st Consultation	\$5,000
Dr. Rory Dixon 2 nd Consultation	\$5,000
Dr. Rory Dixon (Medical Reports)	\$135,000
Physiotherapy Report	\$10,000
Gio RX Limited	\$3,661.03
Apex X-Ray and Ultra Sound	\$11,500
Dr. Romaine Edwards	\$15,000
Elite Diagnostic	\$2,900
Parkington Health Care	\$22,000
University Hospital of the West Indies	\$1,300
Physiotherapy sessions	\$12,000
Transportation	\$35,000
Mediation	\$12,500
Loss of Earnings (60,000 *3)	\$180,000

- [7] For the pleaded expense of mediation, that ought to form a part of the costs of the claim and cannot properly be sought as special damages.
- [8] From the evidence presented in this case, the cost of physiotherapy was actually covered in the bill for Parkington Health Care.
- [9] As it relates to the visit to Dr. Edwards, it is apparent that there was a report done which has been admitted as an exhibit in this case. For a report to be done, this court accepts that there must be an examination and for an examination to be done, this court accepts that there ought to be consultation. Though there has been no receipt presented for that consultation, in the circumstances, to require the presentation of same, would be pedantic. This court should not act in that manner. This court finds however, that the amount which has been pleaded is excessive and thus, awards the sum of \$7500 for that visit.

Transportation

- [10] The claimant had specified, in his particulars of claim that, further particulars will be added, as soon as they became available. To that end, the claimant led

evidence at trial, that transportation continued, such that in total, the aggregate sum is higher than that which was claimed for, which makes it, \$83,200.00.

[11] The claimant presented a total of eighteen (18) receipts from a taxi company, to this court, which he seeks to have, accepted as evidence of sums purportedly expended by him, for transportation. Of that total, only five (5) of those receipts, are signed. No explanation was provided to this court, either by the claimant or anyone else, as to why some of these receipts were signed and some were not. The lack of such an explanation, casts significant doubt on his claim for the aggregate sum of \$83,200.00. Of the signed receipts, only four (4) are relevant, as there is one (1) for a date in July of 2012, which this court has noted, was before the collision occurred. Consequently, that which has been strictly proven, is \$11,500.

[12] Being guided by the dictum of Sykes J (as he then was) in **Owen Thomas v Constable Foster and Anor Claim No CL T 095 of 1999**, particularly paragraphs 15 and 16 thereof, this court will exercise its discretion and relax the rules of strict proof and seek to determine a sum, that is reasonable. Based on the evidence presented, this court finds that an overall sum of \$50,000, is reasonable, so as to account for the number of visits that the claimant made, as well as the rate which is suitable for those visits.

Mitigation of transportation expenses

[13] The defendant, in her counsel's written submission, has raised the contention that there was no need for the claimant to have expended as much as he did, on chartered taxi services, given that he was able to move around, unassisted. On that basis, the court is being urged to reduce the sum to be awarded to the claimant, given that he has not mitigated his losses.

[14] The burden of proving that the claimant did not mitigate his losses rests on the defendant. See in that regard, the Privy Council case: **Geest Plc. V Lansiquot**

(2002) 61 WIR212; further, Pearson J in **Darbishire v Warran [1963] 3 All ER 310**, at 315, noted that:

'For the purposes of the present case it is important to appreciate the true nature of the so-called "duty to mitigate the loss" or "duty to minimise the damage". The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss. In short, he is fully entitled to be as extravagant as he pleases, but not at the expense of the defendant.'

[15] Thus, for that contention to be successful, the defendant ought to have led, or caused evidence to be led at trial, as to the claimant's usual mode of transporting himself before the accident. This would be used to show that the claimant's subsequent act of relying on chartered taxi services, instead of travelling via government bus, used for public transportation, or regular taxi, was unreasonable. In the absence of said evidence, unless it is apparent to this court that same was unreasonable, the defendant has failed in discharging her burden of proof, that the sums claimed by the claimant, should be discounted on the basis that he failed to mitigate his losses.

[16] In light of the foregoing, the court will award to the claimant, as against the defendant, special damages in the sum of **\$370, 237.83**. The claimant has been awarded, as part of that award, the sum of \$180,000.00 for loss of earnings.

GENERAL DAMAGES

Pain, Suffering and Loss of Amenities

[17] In making an award, for general damages, the court is required to consider the extent and nature of the injuries suffered, resulting physical disability and thereafter compare the case at bar with decided cases, pertaining to similar injuries. See in that regard: **Louis Brown v Estella Walker (1970) 11 J.L.R.** at page 564. The purpose of an assessment of damages is to arrive at a figure that will provide

adequate compensation to the claimant for the damage, loss or injury suffered.
See: **Cornilliac v St Louis (1965) 7 W.I.R. 491.**

Authorities

- [18] In **Jhamiellah Gordon v Jevon Chevannes [2016] JMSC Civ. 79**, the claimant sustained: mild mechanical lower back pain and a mild dorsal spine strain. Her diagnosis was consistent with sprain/strain type injury. Her pain was aggravated by standing stationary while attending to clients, performing household chores for example: cooking, cleaning, bending to wash clothes and sexual activities. She had a ppd rating of 2%. In May, 2016 an award for general damages in the sum of \$1,400,000 was made to her, by this court. This updates to \$1,693,728.62.
- [19] The mild mechanical lower back pain, mild dorsal spine strain and sprain/strain type injury are comparable to the injury to the claimant's lumbar spine. The aggravation of the pain brought on by conducting his vocation as a mechanic as well as performing household chores, are also comparable with the claimant's. The injuries suffered by the claimant in the case at hand though, supersedes that which was suffered by the claimant - Jhamiellah Gordon. For example, the tenderness in cervical spine, as well as an assessed ppd of 3%, as compared to 2%. Thus, the award to be given to the present claimant should be greater than that which was given to the claimant- Jhamiellah Gordon.
- [20] In **Dalton Barrett v Poncianna Brown & Leroy Bartley 2003 HCV 1358**, the claimant sustained tenderness around the right eye and face, pain and tenderness in the lumbar spine, tenderness in the left hand, pain in the left shoulder and wrist as well as contusions to the lips, lower back and left shoulder. He was diagnosed with mechanic lower back pains and mild cervical strain. Physiotherapy was effective for the claimant and was pain- free, ten months, post-accident. He had a ppd of 0%. The claimant was diagnosed to likely have lumbar pain on resumption

of prolonged driving. In November, 2006, he was awarded \$750,000. This sum updates to \$2,083,115.00.

[21] The diagnosis of Mr. Dalton Barrett's pain in his lumbar, cervical strain and shoulder region as well as the chance of recurring pain when sitting for prolonged periods, is similar to that of the present claimant. Of notable distinction however, is the fact that the instant claimant, in addition to similar injuries also suffered a ppd of 3%. The award to be given to the claimant in the case at hand, may thus be slightly higher, to account for his ppd.

[22] In **Dawnette Walker v Hensley Pink (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 158/2001**, judgment delivered 12 June 2003, the claimant suffered injury to the neck, right shoulder and upper back. She was referred to physiotherapy. She was diagnosed as suffering soft tissue injuries and would experience periods of pain to the neck and shoulder. Eight months after the crash, her injury was classified as a class 2, cervical whiplash injury. She was also diagnosed with a ppd of 5% of the whole body. She was away from work for one year and four months due to her injuries. In December, 2001, she was awarded \$220,000.00 for general damages. In June of 2003, however, on appeal, the Court of Appeal awarded \$650,000.00. This sum updates to \$2,632,252.00.

[23] The injuries suffered by the claimant are similar to those which that appellant suffered. According to Dr. Dixon however, the claimant's injuries are classified as class 1 injuries, with an overall ppd of 3%, which is less than that which was suffered by that appellant. Also, that appellant, as a result of her injuries, was unable to work for over a year, while the present claimant, was out of work for three months. The award to be made in the case at hand, should therefore be less than the updated awarded in the Dawnette Walker case, for the reasons cited.

The defendant's proposed sum

[24] The defendant, in her counsel's written submissions, has suggested that the award to be given to the claimant, should not exceed \$1,200,000.00. In support of this

submission, the defendant has urged this court to give due weight to the medical report of Dr. Romaine Edwards, which was prepared after he examined the claimant on the morning of the accident. In that report, Dr. Edwards did not specifically provide an assessment of any injuries or ppd, suffered by the claimant.

[25] Consequently, the court is being urged to view the subsequent reports admitted in this case, which indicate the nature of the claimant's injuries, with great scrutiny. The defendant, in support of the proposed sum to be offered to the claimant, relies on: **Anthony Gordon v Chris Meikle and Esrick Nathan - Khan's volume 5, page 142** and **Racquel Bailey v Peter Shaw [2014] JMCA Civ 2**.

[26] This court, has found that the submission of the defendant is without merit. That contention, should have been raised and properly brought out, during cross-examination of the relevant witnesses. The defendant had the opportunity and ought to have led evidence at trial, to discredit the medical reports which the claimant obtained, arising from medical examinations which he underwent, after he had been examined by Dr. Edwards. No such discrediting evidence was even attempted to be led by the defendant, at trial.

[27] Also, the authorities which were relied on by the defendant were not helpful. In the case of **Anthony Gordon v Chris Meikle and Esrick** supra, Mr Gordon sustained cervical strain, contusion to the left knee and lumbosacral strain. He had tenderness on palpation of his entire lumbar spine and was assessed as having a ppd of 5%. In **Racquel Bailey v Peter Shaw** supra, the appellant suffered whiplash injuries. Her long term prognosis was that her pain will persist, consequently, restricting her ability to tolerate strenuous work or physically demanding tasks. She was assessed as having a ppd of 5%.

[28] Though those claimants suffered some injuries similar to the claimant at hand, namely: lower back pain and potential reoccurrence of pain, the injuries suffered by the claimant at hand, exceeds those claimants. Consequently, the defence

counsel's submission as regards the amount to be awarded for pain and suffering, is not accepted.

- [29] The court will make an award of **\$2,300,000.00** to the claimant, for pain and suffering. The claimant gave no evidence as regards, 'loss of amenities,' and therefore, is not entitled to recover damages, under that head.

Loss of earning capacity

- [30] For this head of damages to be successfully proven, there must be some medical evidence confirming the likelihood of the risk that a claimant may lose his/her job in the future. See **Moeliker v A Reyrolle and Co Ltd (1977) 1 All ER 9**. It was held in **Dawnette Walker v Hensley Pink** (supra) that where a medical report stated that the injuries would have had a "mild impact" on the claimant's employment, this by itself, only can serve to disqualify the claimant from benefitting from an award under this head.

- [31] The medical report of Dr. Dixon dated November 4, 2015, indicated that the claimant was incapacitated for three months and as a result thereof, he has not been able to perform normally due to the pain in the left shoulder. Though the claimant, in his evidence, has alluded to his difficulty in performing his tasks as a mechanic, there is no evidence that his earning capacity, either has been, or is expected to be, reduced. In the circumstances, the court finds that this is insufficient, so as to cause an award to be properly made, under this head.

Future medical expenses

- [32] The latest medical report of Dr. Dixon indicates the possibility 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 noted that if there is progression of the pain in the left shoulder, it may require an MRI and surgery to decompress the subcrominal region of the shoulder. For a court to make an award under this head, the claimant ought to have led evidence of the

costs of those possible, these future medical expenses. Where said evidence is provided, then the court may make an award, but in the absence of same, no award can properly be made under this head.

[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.

CONCLUSION

[34] In light of the foregoing, the court orders the following:

1. The claimant is awarded, as against the defendant, special damages of \$370, 237.83, with interest at the rate of 3% per annum, from August 2, 2012, to October 2, 2020.
2. The claimant is awarded, as against the defendant, general damages of \$2,300,000.00 with interest at the rate of 3% per annum, from June 19, 2013, to October 2, 2020.

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Hon. K. Anderson, J.