



[2022] JMSC Civ. 63

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

**CLAIM NO. 2017HCV02743**

<b>BETWEEN</b>	<b>ANDY FRIGINETTE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NOEL SMITH</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>BYRON LEE WILLIAMS</b>	<b>2<sup>ND</sup> DEFENDANT</b>

**Mr. Obika Gordon instructed by Frater Ennis & Gordon for the claimant.**

**The defendants not appearing and not being represented.**

**Heard: April 28, 2022 and May 19, 2022**

***Assessment of damages – Pleading Special Damages – Proof of Special Damages***

**CORAM: JARRETT, J. (Ag).**

**Introduction**

[1] On October 5, 2015, along the Mammee Bay Main Road in the parish of St Ann, the claimant, Andy Friginette, an electrical engineer, was thrown from a bus in which he was travelling as a passenger. This unfortunate incident occurred when the bus collided with an oncoming motor vehicle as the driver, the 1<sup>st</sup> defendant Noel Smith unsuccessfully attempted to negotiate a corner in the vicinity of Old Fort. The claimant was at the time of the accident 27 years of age. He filed a claim in negligence on August 29, 2017, against the 1<sup>st</sup> defendant as well as the 2<sup>nd</sup> defendant Byron Lee Williams, the owner of the bus. The defendants although being served with the claim form and particulars of claim did not file a defence.

Judgment in default of defence was consequently entered in favour of the claimant who now seeks to have damages assessed. At the trial the defendants neither appeared nor were represented by counsel. The sole issue for me to determine is whether damages ought to be awarded to the claimant and if so, how much.

## **The Evidence**

### **Nonpecuniary losses**

- [2] In his witness statement made on May 30, 2020, and relied on at trial as his evidence in chief, the claimant recounts that when he was thrown from the bus, he ended up in a ditch which ran across the road. Blood was all over his face and he felt pain over his entire body. He was rushed to the St. Ann's Bay Hospital where he was treated and released. In amplifying his witness statement, he said that he is currently experiencing excessive pain in his back and numbness of the lower limbs. This pain he says is usually felt when he stands for extended periods of time or whenever he participates in prolonged physical activity.
- [3] In his particulars of claim, the claimant pleaded the following injuries which he says he suffered as a result of the accident:
- a) Soft tissue injury to thorax and upper limbs
  - b) Laceration to head
  - c) Multiple abrasions
  - d) Whiplash
  - e) Soft Tissue injury to the shoulder, chest, elbows, hip and knee
  - f) Joint injuries to the elbows and knee
  - g) Back pain
  - h) Reduced mobility in the upper and lower limbs
  - i) 1-3% whole body impairment
  - j) Disc protrusion at level C3 – C4 (cervical vertebrae (3) and four (4))
  - k) Sock(sic) pain and suffering.

Medical reports from Dr Sandra Nesbeth dated January 31, 2017 and from Dr Rory Dixon dated August 10, 2017 were tendered and admitted into evidence. Dr Nesbeth is the Chief Medical Officer of SMN Medical Centre located in Linstead, St Catherine, and Dr Rory Dixon is a Consultant Orthopaedic Surgeon.

**[4]** Dr Nesbeth saw the claimant on October 6, 2015, the day after the accident, and she gives the following graphic account of her findings on physical examination: -

1. Severe swelling and spasm in the neck – whiplash - equally painful on the right. The patient was in a lot of pain and had to be given a cervical collar to stabilize the injured muscles, joints and ligaments in the neck thus decreasing the spasm and pain.
2. Severe swelling and tenderness in the left and the right shoulders with difficulty elevating, weight bearing, internal and external rotation.
3. Severe swelling and tenderness in the front (anterior) aspect of the chest with difficulty breathing (inhaling and exhaling) and any upper body movement.
4. Severe swelling and tenderness in the left elbow extending to the middle 1/3 of the forearm. There are multiple abrasions (blood clots) and large bruises on the elbow extending also to the distal 1/3 (part nearest the elbow). The patient had difficulty pronating, supinating (upward and downward movement of the elbow), flexing and extending.
5. Severe swelling and tenderness of the right elbow with multiple abrasions (blood clots) and bruises. He had difficulty supinating, pronating (upward and downward movement of the elbow), flexing and extending.
6. Severe spasm and tenderness in the lower back equally painful on the left and right. He could not extend, flex or sit without experiencing severe pain.

7. Severe swelling and tenderness of the left hip on the greater trochanter (the fat part of the hip.) He could not stand on the left lower limb and had to use the right to carry his weight.
8. Severe swelling and tenderness in the left knee with multiple bruises. He could not invert, evert (moving knee to the inside or outside,) flexing and extending. He presented limping.

**[5]** On her account of the claimant's follow up management, Dr Nesbeth says that he visited her office twenty-five times. She describes dressing his wounds daily for four days and thereafter every other day. According to her, he had to be given injections twice daily for the first two weeks and the first seven months represented a period of difficult recovery for him. An MRI revealed disc protrusion at level C3-C4, however Dr Nesbeth was inconclusive as to whether there is a causal connection between this injury and the accident. She candidly states that no MRI or x rays were done prior to the accident which could be used to make the comparisons which are necessary for a conclusive finding

**[6]** Dr Nesbeth's medical report supports the claimant's claim that he suffered a whiplash, soft tissue and joint injuries, as well as back pain and reduced mobility in the upper and lower limbs. She placed the claimant on 3 weeks' sick leave, he was given a cervical collar, chest, elbow and knee wraps, a back brace and his left elbow placed in an arm sling. She describes these devices as aids to stabilize the claimant's injured muscles, joints, tendons and ligaments, thereby reducing his pain. She administered tetanus and penidure injections to stave off infection and referred the claimant for physiotherapy and orthopaedic consultation.

**[7]** On May 4, 2017, the claimant went to see Dr Rory Dixon, Orthopaedic Surgeon, complaining of recurrent neck and back pains. Dr Dixon reports that on his examination of the claimant, there was no tenderness in the posterior neck muscles on palpation, there was no pain on the movement of the neck and no neurological deficit in the upper limbs. There was however tenderness in the L4, L5 region on the left, the "straight leg raise test was positive and the bow string test was negative". Normal power and sensation were in the lower limbs. Dr Dixon

makes reference to an MRI of the spine done on August 4, 2016 which showed loss of normal lumbar lordosis, in keeping with muscle spasm and mild degenerative changes in the lumbar spine at L4, L5. He says that a normal thoracic spine was observed along with disc degeneration at C3, C4 in the neck. Dr Dixon ultimately assessed the claimant as having neck and back strain, with recurrent pain.

- [8] In his assessment of impairment, Dr Dixon describes the claimant as being incapacitated for at least three months with recurrent back and neck pains, which he opines, may require repeated treatment with analgesics. He assessed the claimant's whole person impairment attributed to the recurrent back pain at 3%. As it relates to the neck pain, the Doctor described it as having improved considerably, leading him not attributing any impairment to it.

### **Pecuniary Losses**

- [9] Several receipts were tendered into evidence by the claimant to prove his claim for special damages. These receipts were said to relate to the expenses incurred for the medical reports of Doctors Sandra Nesbeth and Rory Dixon; prescription drugs, an MRI, transportation costs and the cost to repair a cellular phone which the claimant said was damaged when he was thrown from the bus. The claimant also tendered into evidence his fortnightly salary slip from his employer Mystic Mountains to support his claim for loss of income.

- [10] This is how the special damages are pleaded in the particulars of claim: -

a) Police Report	-	\$ 3,000.00
b) Medical Report from St. Ann's Bay Hospital	-	\$ 1,000.00
c) Medical Report from Dr Nesbeth	-	\$ 35,000.00
d) Medical Treatment from Dr Nesbeth	-	\$ 86,400.00
e) Medical MRI Services	-	\$ 78,000.00
f) Damages for Mobile phone	-	\$ 2,000.00
g) Sambell's Discount Pharmacy	-	\$ 11,783.41

h) Dixon's Drug Store	-	\$ 8,793.48
i) Loss of Income	-	\$ 16,000.00
j) Transportation		
(i) To hospital	-	\$ 6,000.00
(ii) To Attorney's office	-	\$ 24,000.00
(iii) To police station	-	\$ 18,000.00
(iv) To Dr Nesbeth	-	\$ 104,000.00
(v) To pharmacy	-	\$ 40,000.00

**Total: \$ 433, 976.00**

[11] The claimant testified that he incurred out of pocket expenses totalling \$478,976.89. There are no pleadings in relation to the cost of Dr Rory Dixon's medical report, which in his evidence the claimant says amounted to \$45,000.00. The claimant also gave evidence at trial of receiving treatment from Dr G. Dundas. He tendered into evidence a receipt from Orthopaedic Associates totalling \$10,000.00. As with Dr Dixon's medical report, this expenditure was also not pleaded. I will return to this issue of the pleadings later on in the judgment.

### **The Claimant's Submissions**

[12] Counsel Mr Obeka Gordon started his submissions by pointing to Dr Rory Dickson's assessment of the claimant's whole person impairment. In doing so, he commented on the fact that the claimant's evidence is that he continues to experience excessive pain in his back and numbness to the lower limbs, and that he feels pain in his legs if he stands for long periods of time or participates in any prolonged work or physical activity. He argued that this pain and numbness have persisted six years after the accident.

[13] Reliance was placed on the following two decisions; which Mr Gordon says are good comparable authorities: -

- a) **Ventrice Brown v Henry Marshall, Patrick Bailey and Charmaine Bailey; Consolidated with Falenso Smith v Henry Marshall, Patrick Bailey and Charmaine Bailey; Consolidated with Andrew Smith v Henry Marshall, Patrick Bailey and Charmaine Bailey; Consolidated with Patrick Bailey v Henry Marshall, Patrick Bailey and Charmaine Bailey; Consolidated with Pandora Richards v Henry Marshall, Patrick Bailey and Charmaine Bailey [2017] JMSC Civ 68; and,**
- b) **Evoni McLean v Pepsi Cola Bottling Co. Ltd and Kirk Anthony King [2014] JMSC Civ.55**

[14] In relation to special damages, Counsel reminded me of what he described as a “*particular approach*” taken by the court to proof of transportation costs. He also urged me to accept the claimant’s pleaded claim for loss of income of \$16,000.00 as it is supported by the evidence and not contradicted.

### **Analysis and Discussion**

[15] [15] It is a truism that the objective of the courts in assessing damages for personal injuries is to put the claimant back in the position he would have been in had the wrong committed against him not occurred. This is the well-known principle of *restitutio in integrum*. In relation to pecuniary losses, no authority need be cited for the principle that these losses must be specifically pleaded and subsequently proven by evidence. Nonpecuniary losses are however, quite different. It is never an easy task for courts to assess the amount of damages in monetary terms that should be awarded to a claimant who has suffered some physical or psychological injury. Thankfully it is now settled that courts strive for consistency in these types of awards by relying on comparable conditions in earlier cases and, doing the best they can, try to arrive at an award that is reasonable, having regard to the nature and extent of the injuries and any resulting disability of the claimant. I embark upon the assessment of damages in this case with these principles in mind.

[16] The claimant's unchallenged evidence is that he was thrown from a moving bus into a ditch that ran across the road as the driver of the bus attempted an ill-fated manoeuvre around a corner. The injuries described by Dr Nesbeth who saw him the day after the accident, seem to me to be entirely consistent with a person who was propelled out of a moving motor vehicle and whose body finds landing in a ditch. I am satisfied based on the evidence, that the claimant has suffered personal injuries as a result of the October 5, 2015, motor vehicular accident in which he was involved. He is entitled to be compensated for his losses.

[17] In his evidence the claimant said that he did an MRI at Medical MRI Services on August 4, 2016. The receipt in proof of this procedure which was tendered and admitted into evidence indicates that the referring doctor was Dr Sandra Nesbeth. Dr Rory Dixon in his medical report refers to the very same MRI findings as disc degeneration at C3 C4 in the neck. Interestingly, he did not opine as Dr Nesbeth did, that a definitive causal connection between the October 5, 2015, accident and the disc protrusion/degeneration could not be made as there was no prior objective imagining done from which comparisons could be made. He does state however that the claimant's neck pain had improved considerably when he last saw him and this led him to attribute no impairment to it. I am impressed with the candour of Dr Nesbeth and I am prepared to accept that in the absence of a prior MRI or x ray, it is not possible to conclusively make a causal connection between the accident and the MRI finding in relation to the disc protrusion at level C3 and C4 . In the result, I will place no reliance on this pleaded injury in my assessment of the claimant's general damages.

[18] The claimant **Ventrice Brown ([2017] JMSC Civ 68)**, who was also in a motor vehicular accident presented with lower back strain and mild soft tissue injury to her right leg. She was ultimately diagnosed with paraspinal muscle strain of the lumbar region, soft tissue injury to the right shoulder and soft tissue injury to the right leg. She too was assessed with a 3% whole person impairment. On May 10, 2017, she was awarded \$2,200,000.00 in general damages. This award updates to \$2,887,799.00 using the most current Consumer Price Index. This decision

is a useful guide. The nature and extent of the injuries suffered by the claimant, appear to be to similar to those suffered by the claimant **Ventrice Brown**. Both were assessed with a 3 % whole person impairment. I however agree with counsel Mr Gordon that the injuries suffered by the claimant at bar were, to some degree, more serious than those suffered by **Ventrice Brown**.

[19] The claimant at bar suffered a whiplash in addition to neck and back strain with recurrent pain. He wore a cervical collar. There is no report of whiplash injury or recurring pain for the claimant **Ventrice Brown**. I accept his evidence that six years hence, he still experiences excessive pain in his back and numbness in his lower limbs whenever he stands for prolonged periods or engages in prolonged physical activity. In 2017 when he consulted with Dr Dixon, he complained of recurrent neck and back pains. At trial he testified that he still has excessive pain in his back and numbness in his legs when he stands for long periods of time and is involved in prolonged physical activity. Dr Nesbeth described his recovery for the first seven months as very difficult. She said that as an electrical engineer he does a lot of climbing and this “took a toll on his injuries and recovery”. The claimant visited with Dr Nesbeth over twenty times for treatment and follow up management. According to Dr Dixon the claimant was incapacitated for at least three months. There is nothing in the **Ventrice Brown** decision that speaks to the length and type recovery that she endured.

[20] I also find the decision in **Evoni McLean v Pepsi Cola Bottling Co. Ltd [2014] JMSC Civ 55**, to be helpful. In that case Dr Rose in his initial medical report stated that the claimant suffered chronic neck pains and chronic mechanical lower back pains. In his final report, his impressions were recorded as mild whiplash, mild soft tissue injury to the right shoulder, mild mechanical lower back pains and resolved triggering of fingers in both hands. These injuries arose from a motor vehicular accident. On the day after the accident she presented with pain in her neck, lower back, hands and knees and she was unable to rotate her neck without pain. After her initial consultation with her doctor, she visited him on three subsequent occasions. Although there was no impairment assessment made in relation to her,

she was awarded \$2,000,000.00 on April 4, 2014, for pain and suffering and loss of amenities. That figure today updates to \$2,946,210.27.

[21] The claimant's initial presentation and that of **Evoni McLean** are in my view comparable. However, although the length of recovery of both individuals was protracted, the claimant's recovery appears to have lasted longer than that of **Evoni McLean**. He needed to wear a cervical collar, she did not. In the result, while the claimant's injuries closely resemble those of **Evoni McLean**, I find that his injuries are more extensive than hers. Moreover, he has a resultant whole person impairment, she did not.

[22] Guided by the abovementioned authorities and mindful of the importance of consistency in the awards for nonpecuniary losses, I award the amount of \$3,000,000.00 for pain and suffering and loss of amenities to the claimant.

[23] I turn now to special damages. Counsel Mr Gordon alluded in his submissions to the flexibility that is shown by courts to the requirement to prove special damages. By and large, I believe the decided cases demonstrate that the court's flexibility in this regard is usually to be found where it is not expected that a claimant will have documentary proof of certain types of transactions. Nevertheless, I agree with the dictum of Sykes J (as he then was) in **Owen Thomas v Constable Foster, Claim No. CL T 095 of 1999, unreported Supreme Court decision decided January 6, 2006**, where he expressed the view that the question in each case ought to be whether it is appropriate for the court to be flexible with the requirement to prove a particular item of special damages, based on the facts and circumstances. In the case before me, the claimant has not provided any documentary proof of his transportation costs. His counsel has asked me to adopt a flexible approach to this expenditure. I am cognisant of the fact that our public passenger operators do not typically provide receipts to the travelling public. I am therefore of the view that this is an appropriate case for flexibility.

[24] The claimant pleaded that his transportation expenses amounted to \$192,000.00. Of this amount he pleaded that \$104,000.00 was incurred in visits to Dr Nesbeth.

He gave evidence that he visited Dr Nesbeth fifty-two times for medical procedures to be done including the dressing of his wounds. He said that each round trip cost him \$4,000.00. While Dr Nesbeth in her medical report says that the claimant visited her twenty-five times, her invoice which was tendered and admitted into evidence reflects twenty-six and not twenty-five visits. I will accept that the claimant visited Dr Nesbeth twenty-six times and that with each round trip costing him \$4,000.00, his transportation expenditure for these visits amounted to \$104,000.00.

**[25]** The claimant said in his witness statement that it cost him \$6,000.00 and \$24,000.00 respectively in transportation costs to visit the hospital and his attorney's office. He said he made eight trips at \$3,000.00 per trip to his attorney's office and four trips at \$1,400.00 per trip to the hospital. I accept that the claimant would have incurred expenses in visiting the St Ann's Bay Hospital. His evidence is that he was rushed to that hospital by a taxi driver on the day of the accident. The claimant is from Linstead in St. Catherine and Mr Gordon's office is in Kingston. I accept that there would be visits by the claimant to Mr Gordon's office for pre action consultations and consultations to review a draft claim and for the ultimate signing and post filing consultations. I therefore accept that the claimant incurred the sum of \$6,000.00 and \$24,000.00 respectively for transportation expenses to the hospital and to his attorney's office.

**[26]** The claimant testified that he made six trips to the police station at a cost of \$3,000.00 per trip. No evidence was given as to why these trips were needed, but I accept that the claimant would have been required to report to the police station because of the accident and that he would have made at least two further trips to request and then to receive a police report. Admitted into evidence was a Government of Jamaica Receipt for the cost of the police report. With no evidence explaining the need for three additional trips to the police station, I am only prepared to award the claimant for three trips at \$3,000.00 per trip making a total cost of \$9,000.00.

- [27]** Transportation costs to the pharmacy were pleaded as amounting to \$40,000.00. Admitted into evidence were eight receipts representing prescription items and other pharmaceutical supplies purchased from Dixon's Drug Store and Sambells Discount Pharmacy, both with addresses in Linstead. These receipts evidenced transactions during the months of October and November 2015 and in February 2016. The claimant said he made a total of twenty trips to the pharmacy at a cost of \$2,000.00 per trip. He said these trips were occasioned by the nature and extent of his injuries. With proof of a total of eight transactions on eight different days at both pharmacies combined, I will award the sum of \$16,000.00 for this expenditure. I believe that in all the circumstances this is reasonable.
- [28]** The cost of Dr Dixon's medical report was not pleaded. While I accept that the claimant consulted with Dr Rory Dixon and his report was tendered into evidence, the cost of this report ought to have been specifically pleaded. I therefore will make no award for it. I treat the receipt from Orthopaedic Associates in the very same way. The cost associated with the visit to Dr Dundas was not pleaded. I will make no award in relation to it. There is no room for accommodation in my view for a failure to specifically plead these items of special damages.
- [29]** Documentary proof was provided for the pleaded expenses incurred for Dr Nesbeth's medical report and the treatment provided by her; the cost of the MRI; the cost of the police report; the cost to effect repairs to the claimant's cellular phone, and costs associated with the prescription drugs and pharmaceuticals purchased from Dixon's Drug Store and Sambell's Discount Pharmacy. These expenditures amount to \$ 221,592.15.
- [30]** The claimant pleaded loss of income of \$16,000.00. Based on his salary slip which was admitted into evidence and his oral evidence of being out of work during a period of approximately 3 weeks due to the fact that he had exhausted all his leave entitlements, I am prepared to award him this sum.

## **Conclusion**

**[31]** The aggregate of the special damages that I award to the claimant is therefore \$ 396,592.15

**[32]** In the circumstances, I make the following orders in favour of the claimant:

- a) General damages in the sum of \$3,000,000.00 with interest at 3% from August 29, 2017 to today's date.
- b) Special damages in the sum of \$396,592.15 with interest at 3% from October 5, 2015 to today's date.
- c) Costs to be taxed if not agreed.