



[2017] JMSC Civ. 89

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 00082

BETWEEN	KEVIN GILBERT	1st CLAIMANT
AND	ROMAINE GRANT	2nd CLAIMANT
AND	ADANI DIXON	DEFENDANT

IN OPEN COURT

Mr. Garfield Haisley instructed by Page and Haisley for the 1st Claimant

Ms. Graham instructed by Samuda & Johnson for the Defendant

Heard: 2nd June and 16th June 2017

Assessment Damages – Personal Injury – Road Traffic Accident – General Damages

McDONALD J

[1] On June 20, 2014, at about 8:20 a.m., a collision occurred along the Rock Hall Main Road in the parish of St. Catherine between a Toyota Corolla motor car bearing registration number 1937EH and a Mitsubishi Canter motor truck bearing registration CF5305, when the truck which was heading in the opposite direction of the motorcar, swerved onto the motor car's side of the road to avoid a pothole. At all material times the 1st Claimant was the driver and owner of the Toyota motor car, and at all material times the driver of the motortruck was the agent

and/servant of the Defendant who at all material times was owner of the said motortruck.

- [2] The Defendant not having filed an acknowledgment of Service or Defence, Judgment in Default was entered in favour of the Claimants on March 11, 2016. It is to be noted that the Defendant was represented at the hearing for assessment of damages.
- [3] At the commencement of the assessment hearing on June 2, 2017, damages were settled by way of consent in relation to the 2nd Claimant. The matter now falls for assessment solely in respect of the 1st Claimant. Mr. Gilbert (hereinafter referred to as the "Claimant").
- [4] Special damages have been agreed in the sum of \$33,415.20.

The Claimant's Evidence

- [5] Mr. Gilbert stated that immediately after the collision he started to feel dizzy and felt pain in his head, neck, shoulders and back. He attended Dr. P. X's office on the said day and was given a prescription for painkillers and sent to do an X-ray. He attended the University Hospital of the West Indies where he was examined by a doctor and had X-rays on his neck and back. He attended the Orthopaedic Department on June 2, 2014 where he was again examined by a doctor who referred him to do physiotherapy. He said that the pain in his back started immediately after the accident on June 20, 2014 and remained constant for over a year, though it varied in terms of its severity. Despite the fact that he was discharged from the said Orthopaedic Department in October 2015, he continued to experience severe back pain and cramping in his right hip and right leg. The pain comes and goes and is aggravated by bending or stretching or if he stands for long periods of time or lifts anything heavy.

- [6] As a consequence of the pain, he has to take painkillers frequently and it also affects his ability to do his work as a carpenter and causes him to have to stay home some days when he should be working, or to take breaks he never used to.
- [7] The pain also gets worse whenever he has sex, and as a consequence has negatively impacted upon his relationship with his spouse. He is no longer able to have sex in certain positions that he used to, and he is generally no longer able to satisfy his spouse the way he used to, which has caused a strain on their relationship.
- [8] The Claimant's particulars of injuries were described in medical reported dated November 13, 2015 (Exhibit "I") prepared by Dr. Charlene Chin See who noted in her report that she consulted with Mr. Gilbert on November 11, 2015 for evaluation of his injuries sustained in the accident as well as for the purposes of writing the medico-legal report. Dr. Chin See also stated that at the time of preparation of the report she had available to her Mr. Gilbert's University Hospital of the West Indies file. She recounted that the Claimant was seen in the Orthopaedic Out-patient Department on June 23, 2014.
- [9] Dr. Chin See stated in her report that documentation from 2005 – 2011 noted that the Claimant had suffered back pain previously, but that had resolved in 2011. However, since the accident, he has experienced an aggravation of the back pain whilst working (eg. Stretching to reach objects) bending over, coughing, sneezing and having sexual intercourse. This pain, she noted, was relieved by analgesia (usually Panadol) but only for short instances.
- [10] He attended about twelve (12) physiotherapy sessions but defaulted due to financial constraints and was thereafter discharged on October 26, 2015. When the Claimant consulted with Dr. Chin See on November 11, 2015, his complaints were that he had intermittent pain that was severe when present and that

worsened by work and sexual intercourse. The particulars of injuries noted are reflected in the pleadings, set out in the Particulars of Claim, as follows:

- i. Discogenic back with radiculopathy;
- ii. Tenderness over lower lumbar spine, midline and right lateral region;
- iii. Intermittent severe back pain;
- iv. Cramping to right hip and thigh;
- v. Permanent partial disability of five percent (5%) of the whole person.

[11] It is to be noted that Counsel for the Defendant took issue with Dr. Chin See's report in two respects. Firstly, it was brought to the Court's attention that the Dr. Chin See was not the doctor who initially examined the Claimant following the accident, and that when she examined him on November 11, 2015, that was the first and only occasion on which she had seen him. Secondly, Ms. Graham noted that the report of Dr. Chin See spoke to previous back pain suffered by the Claimant, and intimated that in light of his current back pain, it was unclear how much that previous injury had to do with the current injury for which he now claimed damages. She pointed out that Dr. Chin See would not have been in a position to properly speak to his previous injuries, as she had not been the one to examine him.

[12] Counsel for the Claimant, on the other hand, argued that it was not uncommon, where one is being treated at a hospital over a protracted period, that that person would be seen by several doctors, and that the doctor who may have seen him first, might not even still be working at the hospital when the report is requested. Further, it would be unreasonable to take the position that some other doctor who would have seen the patient later, would not be qualified or in a position to

assess that patient's condition, having regard to the fact that that doctor would have full access to the medical records. Thus, Mr. Haisley submitted that, the fact that Dr. Chin See examined the Claimant for the first time in November of 2015, should have no bearing whatsoever on the weight that the Court places on the medical report. Moreover, he noted that Dr. Chin See specifically states in the beginning of her report, that she relied on the medical records of the Claimant in preparation of the report.

[13] I must say that I accept fully the submissions of Counsel for the Defendant, and in relation to the issue of the previous back pain, note that the Court recognizes the well-established principle in these types of matters, that a tortfeasor must take his victim as he finds him (**Smith v Leech Brain & Co. Ltd. and Anor** [1962] 2 Q.B. 405). The fact is that the report clearly indicates that Mr. Gilbert's medical documentation reveals that his previous back pain had been resolved prior to the accident and was aggravated thereafter. This Court is of the view, therefore, that the back pain for which the Claimant now seeks damages, was, on a balance of probabilities, consequent on the relevant accident.

[14] The question that now arises is what would be a reasonable figure to compensate the Claimant in respect of his pain and suffering and loss of amenities. Mr. Haisley submitted that the Court should award \$3.3 million for general damages, and Ms. Graham, one (1) million dollars.

[15] The Claimant has placed reliance on the following three (3) cases in support of this head of damages:

- i. **Yvonne Scott v Everal o/c Everal Webley and June Patricia Webley** (Suit No. C.L.S 310 of 1991) reported at page 163 of Khan's Recent Personal Injury Awards, Volume

- ii. **Ellie Kean v Bridgette Officer and Leroy Stewart** (Suit No. C.L. 1999 K 018) reported at page 172 Khans, Volume 5 –
- iii. **Christopher Russell and Shirley Russell v Patrick Martin and Sheldon Ferguson** (Claim No. 2006 HCV 03322, reported at page 118 of Khan's, Volume 6

[16] On the other hand, Ms. Graham relied on:

- i. **Racquel Bailey v Peter Shaw** (SCCA No. 46/2010, delivered on January 30, 2014);
- ii. **Yanique Hunter v Conrod Clarke & Kirk Beckford** [2014] JMSC Civ.83
- iii. **Anthony Gordon v Chris Meikle et al** (Suit No. CL 1997 G047), reported at page 142 of Khan's Volume 5

[17] I do not find **Yvonne Scott v Webley** (*supra*) to be helpful. The injuries and resultant disabilities are different and there is no permanent partial disability rating.

[18] In **Keane** (*supra*), the Claimant suffered pain in the neck, cramps in right upper limb extending to hand, and in-coordination of right hand. He was treated with anti-inflammatory and anti-spasmodic medication, physical therapy and a cervical collar, and thereafter was sent to Orthopaedic Surgeon Dr. Chuktan for further treatment. A tentative diagnosis of cervical disc herniation was made. By April 20, 1998 he was having mid back pain aggravated by movement. On May 18, 1998, he saw Consultant Neurologist Dr. Graham who performed nerve conduction studies and upper extremity somatosensory. Dr. Graham recommended a short trial of non-steroidal anti-inflammatory drug to counter the trapezii muscular spasm. His symptoms worsened and he was referred for neurological consultation. He was unable to walk. He received further treatment

in Florida and made gradual improvement until he was involved in a second accident and his neck pain etcetera recurred. His permanent partial disability was assessed at 5% of the whole person. On May 17, 2001, he was awarded general damages of \$850,000, which, using consumer price index (CPI) 239.30 for April 2017, updates to \$3,544,258.58. I find that these injuries are far more serious than those suffered by the instant Claimant.

[19] In ***Russell (supra)***, the Claimant suffered pain in the neck, pain in right wrist, tenderness of trapezius muscle on lateral flexion and rotation of the neck, and marked tenderness of the dorsal aspect of the right wrist. Physical examination revealed: mild tenderness on palpation of the trapezius muscle, full range of motion of the cervical spine with onset of mild pains, intact neurovascular status in both upper extremities. The doctor's impression was that of chronic cervical strain (chronic whiplash injury). He assessed permanent partial disability as it related to the cervical spine as 5% of the whole person. On February 9, 2008, he was awarded \$1,655,805.17 for general damages, which updates to \$2,890,110.70. This case is of very limited assistance as the significant injury is whiplash and the instant Claimant was not diagnosed with whiplash injury.

[20] In ***Bailey v Shaw (supra)***, the Claimant suffered whiplash injuries. Twenty-two (22) days after the accident she was suffering from backache and sought medical attention. Three months after filing the counter claim, she consulted Dr. Milton Douglas, Orthopaedic Surgeon. In his report, he stated in part:

"Her gait was normal and her posture relaxed. Her movement was smooth and (sic) was able to get on the examination bed unaided. Tenderness was elicited in the lower lumbar region and the muscles were in mild spasm. She complained of pain on forward flexion, right lateral flexion, rotation of the spine. Her ranges of movement were normal in spite [of] the pain she experienced. There was an absence of neurological deficit."

[21] She was assessed as having a whole person disability rating of 5%. She was awarded \$800,000.00 on January 19, 2010. On appeal, the Court, on January 30, 2014, awarded \$1 million for general damages. Updated, this amounts to \$1,129,839.49.

- [22] In ***Hunter v Clarke (supra)***, the Claimant suffered chronic sprain or strain to the lower back with non-specific lower back pain, soft tissue injury and spasm to the middle back. She was assessed with 2% whole person impairment. On May 20, 2014, the Claimant was awarded \$1,200,000.00 for pain and suffering and loss of amenities. Updated, this amounts to \$1,343,124.44.
- [23] In ***Gordon v Meikle***, the Claimant was injured in a motor vehicle accident on June 15, 1994. He was treated at the Mandeville Hospital. He was examined by Dr. Rose on December 11, 1997 and diagnosed as having cervical strain, contusion to the left hip and lumbar sacral strain. Dr. Rose assessed his permanent partial disability regarding the lumbar sacral spine to be 5% of the whole person. General damages were awarded in the sum of \$220,000.00 on July 7, 1998, which updates to \$1,880,424.40.
- [24] Having gone through the cases, I am of the view that the latter three cases are useful, with ***Gordon v Meikle*** being the most comparable. In that case, the injuries suffered by the Claimant were very similar to the instant Claimant, in that, they both suffered injury and disability in the lumbar spine, and both were assessed as having a 5% permanent partial disability of the whole person. The Claimant in ***Hunter v Clarke***, similar to the instant Claimant, suffered injury and experienced pain in the lower back, as well as soft tissue injury and spasm to the middle back. This Claimant suffered, inter-alia, tenderness in the midline region of the back. Unlike in this case however, that Claimant was assessed with a considerably lower impairment rating of 2% of the whole person. Finally, in ***Bailey v Shaw (supra)***, although the Claimant was diagnosed with whiplash, unlike the instant Claimant, she also experienced pain in the lower back in the lower lumbar region that was aggravated on forward flexion, right lateral flexion and rotation of the spine. Like this Claimant, she was assessed as having a whole person disability rating of 5%.
- [25] I also take into consideration that the Claimant in this case has, as a result of his injuries, experienced disruption to his sex life, and as a consequence his

marriage has suffered. He has also experienced an inability to work as a carpenter and farmer in the manner and for the length of time that he used to be able to.

[26] In the premises, I find an award of **\$2,300,000.00** to be reasonable.

ORDER:-

Special damages are awarded in the sum of **\$33,415.20** as agreed, inclusive of interest.

General damages are assessed in the sum of **\$2,300,000.00**, with interest of 3% from 16th January 2016 to the date of this order.

Costs are awarded to the 1st Claimant to be agreed or taxed.