



[2017] JMSC Civ. 83

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2009 HCV 01277**

<b>BETWEEN</b>	<b>JOYCE HAYE</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>VINCENT WILLIAMS</b>	<b>1<sup>st</sup> DEFENDANT</b>
<b>AND</b>	<b>JERMAINE GRIFFITHS</b>	<b>2<sup>nd</sup> DEFENDANT</b>

**IN OPEN COURT**

Mrs. Angele Powell-Hylton instructed by Campbell McDermott for the Claimant

Defendants unrepresented

Heard: 31<sup>st</sup> May 2017 & 9<sup>th</sup> June 2017

**Assessment of Damages - Personal Injury - Road Traffic Accident - Judgment in Default - Application to Amend Particulars of Claim**

**MCDONALD J**

[1] On 9<sup>th</sup> November 2008, the Claimant was a passenger in a motor vehicle licensed 8910EN which was involved in a collision with a motor car licensed 5250 DJ whilst travelling along the Springfield Main Road towards Montego Bay. The 1<sup>st</sup> Defendant was the owner of the motor vehicle licensed 5250DJ, whilst the 2<sup>nd</sup> Defendant was the authorized driver of the vehicle at the material time.

- [2] As a result of the collision, the Claimant, a retired school teacher and craft vendor born 30<sup>th</sup> March 1940, suffered injuries and sought to recover by way of this Claim.
- [3] Both Defendants failed to respond to the Claim, and Default Judgment was entered against the 1st Defendant in default of acknowledgment of service on 17th February 2012 and finalized on 7th March 2012, the Court having been satisfied that the 1st Defendant was duly served. There was no similar Judgment in respect of the 2nd Defendant. Subsequent notices having been sent only to the 1st Defendant, and applications having been sought in respect of only the 1st Defendant, it appears the Claimant was no longer interested in proceeding against the 2nd Defendant.
- [4] The matter is now before the Court for assessment of damages. In the circumstances, the Court will consider the matter in relation to the 1st Defendant only.
- [5] On the day of hearing the Defendants made no appearance and remained unrepresented, as such, the assessment proceeded uncontested.
- [6] It is to be noted that Notice of Proceedings was served on Jamaica International Insurance Company Limited (now GK General Insurance Company), with whom the 1<sup>st</sup> Defendant had a policy of insurance at the material time, on 16th March 2009, however the Insurance Company has not intervened in the matter.

*The Claimant's Evidence*

- [7] The Claimant's evidence is that immediately following the collision she began to feel pain in her right shoulder and knees. She could not raise her right hand. A passing motorist took her to the Cornwall regional hospital, where she was taken to the emergency room. She was hospitalized for (4) days, almost a week. X-Rays were done which confirmed that her shoulder was broken, and her arm was placed in a cast and she was given medication.

- [8] She returned to the Cornwall Regional Hospital for review on 17th November 2008, at which time she was given more medication.
- [9] She had two visits with Dr. Delroy Fray on 28th November 2008 and 8th December 2008, for which she paid a total of \$4500.00.
- [10] Thereafter, she consulted with Orthopaedic Surgeon Dr. Don Gilbert on nine (9) occasions: 11th and 17th of December 2008, 7th January 2009, 4th February 2009, 18th March 2009, 6th May 2009, 2nd September 2009 and 25th November 2009. Her attorney paid a total of \$45,600.00 on her behalf for these visits, and \$20,000.00 for a medical report Dr. Gilbert wrote at the end of her treatment.
- [11] As part of her treatment, Dr. Gilbert referred her to physiotherapy. She asserted that she did twenty-three (23) sessions with Stacy Ridguard, however only nineteen (19) visits were substantiated by receipts at a cost of \$2500 each. She paid for these herself. She obtained a progress report from Ms. Ridguard at a cost of \$3000.00. Her initial physiotherapy session was with Shauna Shelton-Webster for which she paid \$2500.00.
- [12] Dr. Gilbert also requested that she do an MRI, which she did at North Coast Imaging. Of the \$30,000.00 fee, her insurance company paid \$22,800.00 and her attorney paid the remaining \$7,200.00 on her behalf. She also did an X-Ray, at a cost of \$1,800, which her attorney also paid on her behalf, and she purchased medication prescribed by her doctors in the amount of \$2062.87.
- [13] She spent \$1000.00 per trip on transportation for her visits to the hospital, physiotherapy and Dr. Gilbert, and she made a total of twenty-six (26) trips at a total cost of \$26,000.00.
- [14] The Claimant gave evidence that up to the date of her witness statement and the hearing, she had still not fully recovered from her injuries, as her arms hurt badly when she attempts to raise it above her shoulder. It also hurts when it gets cold. The most severe pain she feels is when she attempts to do housework.

- [15] The Claimant gave evidence that she had the cast on her arm for a little more than a week. On her visit to Dr. Fray he cut off the cast because her hand was badly swollen. Thereafter, it was placed in a sling for about two (2) months. Her right hand was the one injured, and she is right-handed.
- [16] She was in a lot of pain and when she laid down she could not get up and had to call out for help to get up. In addition to the pain in her hand, she felt pain in her neck, back and head. At the hearing, the Claimant stated she was still being affected by a lot of pain, and was taking a lot of things for it. She had to do a lot of rubbing. She had a rub in her bag for the pain.
- [17] Since she returned to work she has had to hire someone to assist her because of weakness in her shoulder.

#### APPLICATION TO AMEND PARTICULARS OF CLAIM

- [18] At the hearing, upon the close of evidence, Counsel for the Claimant made an application to the Court to include receipts tendered, on the basis that the Defendants, having been served with the witness statement, as well as a notice of intention to adduce hearsay evidence wherein they were advised that the Claimant intended to rely on these documents at the assessment of damages, would not suffer any undue prejudice.
- [19] The amendments sought, in accordance with receipts tendered and the evidence of the Claimant, were as follows:
- i. That, in respect of physiotherapy, the amount stated in the Particulars of Claim as \$15,000.00 be deleted and \$53,000 be substituted therefor;
  - ii. That, in relation to the cost of consultation with Dr. Gilbert, the stated amount of \$9,500.00 be deleted and the sum of \$46,200.00 be substituted therefor;

- iii. That the cost of transportation stated as \$5000.00 be deleted and the amount of \$26,000.00 substituted therefor;
- iv. That the cost of medication be inserted in the amount of \$3299.51;
- v. That the cost of the X-Ray and MRI be inserted in the amount of \$9000.00; and
- vi. That the cost of visits to Dr. Fray be inserted in the amount of \$4,500.00.

[20] In support of her application, Counsel relied on the decision of my brother Fraser J in **Shaquille Forbes (An infant who sues by his mother and Next Friend, Kadina Lewis) v Ralston Baker and Andrew Bennett** Claim No. HCV 02938 of 2006, delivered 10<sup>th</sup> March 2011.

[21] She highlighted paragraph 5 of the judgment in which the Court noted that where an application was being made after the limitation period the consideration was whether the amendment amounts to a new claim, and in that regard, whether the amendment sought amounted to a new injury.

[22] Counsel submitted that, in the case at hand, the Claimant outlined her expenses, some of which were stated to be continuing, which would have put the Claimant on notice that this sum would have been likely to change and that her treatment would have been continuing. Further, outside of the claim for cost of X-Rays, MRI and Dr. Fray's consultation, the other items of special damages, that require amendment such as transportation, medication and physiotherapy were already mentioned in the Particulars of Claim.

[23] It was submitted that, in paragraph 9 of **Shaquille Forbes**, the Court noted that the Court had a discretion in accordance with the overriding objective of the Civil Procedure Rules, and that the Court should put itself in a position to deal with cases justly.

- [24] Counsel further asserted that, similar to what obtained in **Shaquille's** case, the defendants were not being misled in any way concerning the nature of the evidence to be relied on, as the amendments merely seek to have the Particulars of Claim accurately reflect the sum of special damages as was included in the witness statement, and as evidenced in the receipts included in the notice of intention served on them to which no objection was received in accordance with the provision in the CPR within 21 days of receipt.
- [25] Like **Shaquille Forbes**, the amendment is being sought after the Claimant has given her evidence, as well as before judgment.
- [26] Accordingly, the Claimant submitted that the amendments were fair and reasonable in the circumstances and was within the discretion of the Court, as well as in furtherance of the overriding objective. Further, what the Claimant sought was not in any way adding anything new to her claim, and did not amount to a new claim, but was merely the reasonable sum based on her injuries.
- [27] At the end of these submissions, the Court ruled that the amendments would be granted, the Court having found favour with the submissions of Counsel, and being satisfied that no harm or prejudice would be caused to the Defendant by the granting of the amendments sought.

#### ASSESSMENT OF SPECIAL DAMAGES

- [28] The following items of Special Damages were pleaded (as amended) and proved by way of receipts:

1. Cost of physiotherapy.....\$53,000.00
2. Cost of medical reports.....21,000.00
3. Consultation with Dr. Gilbert.....46,200.00

4. Cost of X-Ray and MRI.....	9,000.00
5. Cost of medication.....	3,299.51
6. Cost of visit with Dr. Fray.....	4,500.00
<b>Total</b>	<b>\$136,999.51</b>

[29] It is to be noted that receipts tendered into evidence indicate that a sum of \$7,800.00, (\$2,500.00 for physiotherapy with Shauna Shelton-Webster; \$3,500.00 of the total cost of visits to Stacey Ridguard; \$3000 for progress report by Stacey Ridguard), was unaccounted for in the pleadings even with the amendments made at trial. Therefore, on the authority of the Jamaican Court of Appeal case of **Michael Thomas v James Arscott** (1986) 23 JLR 144, the Claimant cannot recover those amounts that have not been pleaded. In that case, at page 1511-152A (as cited by Sykes J in *DeSouza v CB Duncan & Associates et al* (2004) JMSC, Suit No. CL D096/1998), Rowe P opined:

*"In my opinion special damages must both be pleaded and proved...When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum."*

[30] The Claimant seeks to recover the sum of \$26,000.00 for transportation she says she expended on taxi to and from her visits to the doctor and physiotherapist. Her evidence is that she spent \$1000.00 per trip and she made a total of 26 trips. It is submitted that this sum is reasonable considering the absence of receipts, the amount of trips she was required to take, the distance she had to travel, and the nature of the Claimant's injuries, which made it difficult for her to commute other than by taxi.

[31] The Court considers that it is widely accepted that the general rule requiring special damages to be specifically pleaded and proved may be relaxed having

regard to what is reasonable in the circumstances, and that the Court may use its experience to arrive at a just award: **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)**, SCCA No. 109/2002; **Desmond Walters v Carlene Mitchell [1992] 29 JLR 173**. These circumstances include a situation, as in the case at hand, where documentary proof is unavailable. The Court recognizes that this is often times the case with public transportation in Jamaica where a receipt is not normally given upon payment therefor.

[32] Therefore, the Court accepts the evidence of the Claimant and finds the sum of \$26,000.00 reasonable in the circumstances.

[33] The Claimant also seeks to recover the sum of \$48,000.00 for what she asserts she had to spend to hire someone to help her with housework for about four (4) months following the accident, at a cost of \$3000.00 per week, as she was unable to do any housework herself due to her injuries. It is noted that her hand was in a cast for about a week and a half, and later, in a sling for about two months. The Claimant also gave evidence that she is right handed and it was her right hand that was injured. In the circumstances, and based on the reasoning and authorities stated above in paragraph 39, the Court finds this sum reasonable and will award the sum prayed.

[34] In relation to loss of earnings, the Claimant seeks to recover the sum of \$160,000.00. Her evidence is that due to her injuries she lost income from her business selling crafts, hats and pastries, to schools, her former co-workers, church family and others. On average, after clearing her expenses, she would make \$10,000.00 per week. She would sell one (1) hat for maybe \$2000. She would also bake cakes for people who would order from her. She would sell the cake for \$1000-\$2000, depending on the size of the cake. On average, she would sell two (2) cakes per week and sometimes she would sell four (4) hats per week. She had to buy material and come into Kingston to buy hats. Buying in Kingston she could make about \$5000 off the hats depending on the amount she sold. She estimates her lost income for the period she was unable to work at

about \$160,000.00. This indicates a four-month period. I accept the Claimant's evidence, and considering the nature of her injury, find this to be a reasonable amount.

[35] Therefore, I will award the Claimant a total of **\$363,528.92** for special damages.

## ASSESSMENT OF GENERAL DAMAGES

### *Medical Evidence*

[36] Particulars of the Claimant's injuries were outlined in the Medical Summary Report from Cornwall Regional Hospital dated 20th February 2009, and the report prepared by Dr. Don Gilbert dated 1st December 2009.

[37] The Summary Report from Cornwall Regional Hospital, prepared by Dr. Don Gilbert, indicates that Mrs. Haye presented with neck, upper back and right shoulder pain following a motor vehicle accident on 9th November 2008. Upon examination and investigation she was found to have swelling and tenderness to the right shoulder and tenderness in the 3rd cervical vertebrae and radiographs showed a fracture of the greater tuberosity of the right humerus. She was diagnosed as having a fracture of the greater tuberosity of the right humerus. Mrs. Fray was treated with a V-slab [sic] and arm sling.

[38] Dr. Gilbert's report of 1st December 2009 indicates that he examined Mrs. Haye on the 10th December 2008 for the purposes of managing her injuries and writing the report. He described the history of Mrs. Haye's impairment as follows:

*"Mrs. Haye reported she was a passenger in a pick-up that was hit head on by another vehicle. Following the accident she began to feel pain in her right shoulder. She was taken to the Cornwall Regional Hospital where she complained of pain in the right shoulder, paresthesiae down the arm and spasms in the back. On examination she was found to have abrasions to both knees and her right shoulder was swollen and tender. Plain radiographs of the shoulder showed a fracture of the greater tuberosity of the humerus for which she was placed in a U-slab and sling. A Ct-scan of the cervical vertebrae was reported to be normal and so she was discharged home on the 13<sup>th</sup> November 2008."*

*Mrs was reviewed in the outpatient department on the 17<sup>th</sup> November 2008 at which time she complained of pain in the right shoulder for which she was given analgesics and maintained in a U-slab and sling.*

Her progress was outlined as follows:

*“Mrs. Haye was reviewed on the 17<sup>th</sup> December 2008 at which time she complained of pain in the right shoulder for which she was given analgesics and replaced in a sling. She was reviewed on the 7<sup>th</sup> January 2009 and 4<sup>th</sup> February 2009 and on the latter occasion she reported that the shoulder was feeling better. On examination there was no tenderness in the arm but flexion of the shoulder was limited 45°. Plain radiographs done at this time showed healing at the fracture site. Mrs. Haye was told to continue her physiotherapy regime and when seen on the 18<sup>th</sup> March 2009 the flexion of the shoulder was now up to 90°.*

*Mrs. Haye was seen again on 6th May 2009 at which time she complained of pain in the right shoulder and neck radiating into the right hand in which she reported numbness. On examination there were no signs of a carpal tunnel syndrome and flexion and abduction of the right shoulder was now 120°.*

*Mrs. Haye was seen again on the 1st July 2009 at which time she again complained of right shoulder pain and weakness in the right upper limb. On examination she had normal power in all the myotomes of the right upper limb and flexion and abduction of the shoulder was now 150 degrees.*

*Mrs. Haye was seen again on the 2nd September 2009 at which time she again complained of right shoulder pain and so she was sent for an MRI of the right shoulder which was done on the 1st October 2009 and reported on by Dr. Konrad Kirlaw, Consultant Radiologist who stated that there was osteoarthritis of the acromioclavicular joint but no abnormality of the rotator cuff.*

*Mrs. Haye was reviewed on the 14th October 2009 and 25th November 2009 and on her last visit was found to have full range of motion in the shoulder with residual pain and occasional swelling and pain in the fingers of the right hand. Plain radiographs of the right shoulder done on this last visit showed a healed fracture of the right humerus.”*

- [39]** The Claimant was diagnosed as having an unhealed fracture of the proximal right humerus with limitation in range of motion in the shoulder. In respect of her prognosis, Dr. Gilbert noted that the fracture of the right humerus had healed and Mrs. Haye had regained the range of motion in the shoulder. She, however, still had persistent right shoulder pain most likely due to the osteoarthritis of the acromioclavicular joint which was exacerbated by the injury sustained in the accident. Further, given that the pain had failed to resolve with analgesic and a year of physiotherapy the Claimant had now reached her maximum medical improvement.

[40] In relation to her impairment, Dr. Gilbert noted that despite the healing of the fracture, the persistent shoulder pain places Mrs. Hays in class 1 of the Shoulder Regional Grid which is assigned 3% upper extremity impairment. A 3% upper extremity impairment is equal 2% whole person impairment.

*Submissions*

[41] Mrs. Powell-Hylton relied on the following two cases in support of the Claim:

- i. **Janet Barclay v Metropolitan Management Transport Holdings Ltd., Claim No. 2007 HCV 05184 (reported at pg. 86, vol. 6 of Khan's Recent Personal Injury Awards)** – The Claimant, who was a passenger on a public bus, was injured when the bus swerved and stopped suddenly. She suffered lesions on left arm and both thighs, and tenderness to left arm, left shoulder, below left axilla, lumbar-sacral spine of lower back and medial aspect of both thighs. She was treated with analgesics and muscular relaxants. On follow-up doctor's visit a month later she complained of pain in lower back, left shoulder, tingling sensation in arm, forearm and fingers intermittently, weakness in the left arm and difficulty in working as a hairdresser. Examination revealed tenderness of left acromioclavicular joint of left shoulder, painful movement of the left arm when flexed, abducted or adducted, tender lower back palpation and pain on forward flexion of the back. She was diagnosed with strain of left acromioclavicular joint of shoulder and lumbosacral strain, and was recommended to do physiotherapy and continue taking analgesics.

Upon review one year later, the Claimant complained of cramping sensation of left upper limb when lifting heavy objects, weakness and heaviness of left upper limb, pain in upper aspects of cervical spine and lumbar spine, discomfort of back during sexual intercourse and inability to do all aspects of housework. She was however able to work as a hairdresser to a limited extent. Examination revealed mildly wasted muscles

of left arm and shoulder, tenderness of left acromioclavicular joint, 4/5 of power in shoulder abduction, flexion, extension, adduction, internal and external rotation, 3/5 of left grip strength, and tenderness over mid thoracic and lower lumbar region. Her final diagnosis was that her injuries were considered serious; both have become chronic and mild to moderately symptomatic; the left shoulder joint strain has caused pain and weakness of the shoulder muscles; her ability to do strenuous or light work was reduced partially; the injury to the back had compounded her problem; she would be required to do further therapy three (3) times weekly; and the need for surgery to the left shoulder remained a remote possibility. She was assessed as having an impairment rating of 8% of the upper extremity or 5% whole person, with a combined rating of 7% whole person. She was awarded a sum of \$1,500,000.00 on 15<sup>th</sup> April 2008 for pain and suffering and loss of amenities. This amount updates to **\$2,876,201.92** using the Consumer Price Index (CPI) for April 2017.

- ii. **Taylor v McLormick, Suit No. C.L. 1990/T075 (reported at pg. 255 of Harrison's Assessment of Damages for Person Injuries)** – The Claimant suffered a compound comminuted fracture of the olecranon of the distal end of the humerus, with a disrupted elbow joint. His disabilities were listed as stiffness of elbow (no motion on flexion or extension), stiffness of the hand (unable to make fist), disrupted left elbow joint with signs of callus, and 90% permanent functional impairment of left upper limb. On 17<sup>th</sup> June 1991, damages were assessed at \$118,550.00 for pain and suffering and loss of amenities. This amount updates to **\$3,275,867.78** using the Consumer Price Index (CPI) for April 2017.

**[42]** Based on the aforementioned cases, Counsel submits that a reasonable sum to award the Claimant for pain and suffering and loss of amenities in the circumstances is \$3,800,000.00.

*Assessment*

[43] Having examined the cases cited, I find them to be useful. I find the injuries in the latter case to be more on par with the case at hand, given that both Claimants suffered a fracture in the humerus of the arm. However, the injuries suffered in **Taylor** appear more serious, as that Claimant was assessed as having a 90% permanent functional impairment, whilst this Claimant suffered a 3% upper extremity impairment which was stated to be equal to a 2% impairment of the whole person. A year following the accident, Mrs. Haye's fracture had healed and she was found to have a full range of motion in her right shoulder, albeit she was still experiencing pain then, and continues to experience pain to date. In respect of **Barclay**, although that Claimant did not suffer a fracture, she experienced similar pain, disability and discomfort as Mrs. Haye, including persistent pain in the lower back and shoulder, weakness, numbness and tingling sensation in arms, and difficulty doing housework. Mrs. Haye was diagnosed with osteoarthritis of the acromioclavicular joint exacerbated by the accident, whilst the Claimant in **Barclay** similarly suffered strain of the left acromioclavicular joint of shoulder. That Claimant's was given an assessment rating of 8% of the upper extremity or 5% whole person, with a combined rating of 7% whole person, whilst Mrs. Haye's assessment was much lower at 3% upper extremity 2% whole person.

[44] I therefore find that an appropriate award for pain and suffering and loss of amenities in all the circumstances is two million eight hundred thousand dollars (\$2,800,000.00).

**ORDER:-**

Damages are assessed as follows:-

Special Damages are awarded as against the 1<sup>st</sup> Defendant in the sum of three hundred sixty-three thousand five hundred and twenty-eight dollars and ninety-two cents (**\$363,528.92**) with interest at the rate of 3% per annum from 9<sup>th</sup> November 2008 to the date of this order.

General Damages are awarded for pain and suffering as against the 1<sup>st</sup> Defendant in the sum of two million eight hundred thousand dollars (**\$2,800,000.00**) with interest at the rate of 3% per annum from 18<sup>th</sup> February 2010 to the date of this order.

Costs to the Claimant to be agreed or taxed.