



[2017] JMSC Civ. 109

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV07128

BETWEEN	CARL JACKSON	1 <sup>ST</sup> CLAIMANT
AND	ANOUSH HARRISON-JACKSON	2 <sup>ND</sup> CLAIMANT
AND	MILLICENT BAILEY DENNIS	1 <sup>ST</sup> DEFENDANT
AND	HARVEY DENNIS	2 <sup>ND</sup> DEFENDANT

IN CHAMBERS

Crislyn Beecher-Bravo for the Claimant.

Stacia Pinnock Wright for the Defendant.

June 13<sup>th</sup> and July 14<sup>th</sup> 2017

*Damages - Personal Injury - Motor Vehicle Collision - Soft-tissue injury*

**CORAM: BROWN, Y.J., (Ag.)**

- [1] At approximately 9:50 in the morning of July 24, 2009, the Claimants and their infant child were seated in their toyota corolla car which was parked on the side walk of Rousseau Road, Kingston 5. The 1<sup>st</sup> Claimant had occupied the driver's seat while the second and the child were seated in the back.
- [2] While there, the 1<sup>st</sup> Claimant said he felt the first impact of a vehicle slamming into the back of his parked car and then another in the region of the driver's door.

He discovered that his vehicle was hit by a toyota corolla motor car registered 6265 DN which was driven by the 2<sup>nd</sup> Defendant but owned by the first. Consequently, he suffered injury, loss and damage and incurred expense.

[3] On the 11<sup>th</sup> and 13<sup>th</sup> February 2015 and May 27, 2015, the Claimants' claim was heard before Mrs. Justice Dunbar-Green. She entered judgment for 2<sup>nd</sup> Claimant and ordered that damages for the 1<sup>st</sup> Claimant be assessed on a date to be fixed by the registrar.

[4] Thus this assessment was heard on June 13, 2017 and was contested.

### **The Assessment**

#### **The Medical Evidence:**

[5] No disagreement surrounded the 1<sup>st</sup> Claimant's averment that he was examined and treated by Professor Winston Davidson, a public health specialist and family doctor.

[6] In his testimony the doctor said that he saw the 1<sup>st</sup> Claimant for the first time on the 30<sup>th</sup> July 2009. On examination of this Claimant, he said his findings in relation to the musculoskeleton system were:

- Muscle power of upper and lower limbs were normal (grade 5) expect the trapezius muscle belly between the right and left scapulae which was painful when put in action.
- There was also pain in the lower back when standing from the sitting position and limitation of flexion and extension of the lower back.
- There was full range of movement of the cervical vertebrae expect whenever there was full flexion of the neck, a mild discomfort was felt across the shoulder involving the trapezius muscle.
- All joints of lower and upper limbs exhibited full range of movement.

- [7]** The clinical findings were that the patient was suffering from the effects of two distinct injuries:
- (1) Lumbar sacral pain discomfort and limitation of movement
  - (2) Pain in the upper back extending across the shoulder involving the trapezius muscle.
- [8]** According to Professor Davidson; the findings were consistent with a past history of trauma and were directly related in time and clinical correlation to the motor vehicle accident which occurred while the 1<sup>st</sup> Claimant was sitting in his car as he reported.
- [9]** The doctor stated that a diagnosis of a soft tissue injury to both the lower back (lumbar sacral area) and the shoulder muscles was made and the patient was treated with Voltaren 3 mls 1m statim (injection); Etobay 2mls 1m statim (injection); and Mobie 15 mgs OD x 1/12 (oral therapy for one month.)
- [10]** Following his treatment, the doctor said that the 1<sup>st</sup> Claimant (the patient) was sent for x-ray lumbar sacral vertebrae. He returned on September 22<sup>nd</sup>, 2009 complaining of pains in the lower back. He also produced x-ray results which was taken on the 21<sup>st</sup> September, 2009.
- [11]** This x-ray result confirmed the clinical diagnosis with the radiological finding of moderate muscle spasm being present in the lower back. The doctor noted that there was no evidence of vertebral injury according to the radiologist.
- [12]** Professor Davidson testified that the 1<sup>st</sup> Claimant returned to see him on September 22, 2009 complaining of recurring pain in the lower back.
- [13]** He indicated that the positive clinical finding was tenderness to deep palpation in the lower back at the level of the 4<sup>th</sup> and 5<sup>th</sup> lumbar vertebrae.

- [14] In light of the x-ray findings which confirmed the existence of a premorbid condition of lumbar muscle spasm, the diagnosis of recurring episode of lumbar sacral strain was consistent with past history of trauma to the lower back, the doctor added.
- [15] Hence, the patient, he said, was treated conservatively with (1) Mobic 15 mgs x od and Mydocalm 150 mgs x bid.
- [16] Noting that the 1<sup>st</sup> Claimant (the patient) was lost to the follow-up, the doctor said he returned on June 21, 2011, and at that time, complained again of the recurring episodes of lower back pain, sometimes worse when rising from a sitting position. He also continued to have tenderness located in the lumbar sacral area.

“These features suggest a further deterioration in this patient’s condition which therefore required further investigation. I requested a Magnetic Resonance Imaging of his lower back to ascertain the extent of the progression of the injury,” Professor Davidson testified.

- [17] He pointed out that it was also important for an orthopaedic consultation to be done as soon as possible after the MRI in order to obtain a second opinion in keeping with standard medio-legal practice.

### **The 1<sup>st</sup> Claimant’s Evidence**

- [18] The Claimant’s evidence as to the number of times he was involved in a motor vehicle accident and the injuries he sustained was the ‘bone of contention’ in this case.
- [19] In cross-examination, Counsel for the defendants Mrs. Stacia Pinnock Wright insisted that the 1<sup>st</sup> Claimant was involved in a total of 4 accidents. Besides the incident at bar, she named the others as having occurred on June 27, 2009 on Cargill Avenue; September 30, 2010 on East Great House Road; and March 5,

2012 on Molynes Road. The Claimant denied knowledge of all except the one pertaining to March 5, 2012.

- [20]** In her written submissions she stated that this Claimant's claim to not recalling being involved in any accident except for that on March 5, 2012, should reduce him to an untruthful and elusive witness.
- [21]** She advanced that "his untruthfulness unravels when he denied being in a motor vehicle accident in June 2009, but later admitted to seeing a Dr. Osbourne in Newport Medical Centre for an accident in June 2009. This we submit is an obvious confirmation by the Claimant that he has been in an accident in June 2009."
- [22]** It is worth mentioning that the 1<sup>st</sup> Claimant did in fact state three positions in relation to his visit to Dr. Osbourne. In the first instance, he said if he saw this doctor it would have been for x-ray. Then he disclosed that he saw Dr. Osbourne in relation to "the June 2009 accident"; and lastly he stated, "I visit Dr. Osbourne in 2009, but if I did visit the doctor it must be for something else," not the accident.
- [23]** Clearly, Mr. Jackson had failed to give a settled view on that issue. Nonetheless, regarding the number of accidents that Mrs. Pinnock Wright insisted the 1<sup>st</sup> Claimant had been featured in, the duty fell on her to present the evidence. The basic principle that he who alleges must prove, cannot be ignored.
- [24]** Furthermore, if it were to be accepted that the 1<sup>st</sup> Claimant was involved in an accident in June 2009, there is nothing to suggest that he had sustained any injury. For instance, not even an iota of evidence has been presented to indicate that he had sought to recover damages through the Court or an insurance company.
- [25]** In fact, his evidence that he had received no compensation in the March 2009 accident as he had sustained no injury, remained unchallenged.

- [26]** Mrs. Pinnock Wright argued that the Claimant's pain were limited to his lower back and discomfort in his lower back and across the shoulder. She relegated his claim of pain in his neck to a fabrication, noting that this was never mentioned to Dr. Davidson, but only surfaced during his testimony at assessment.
- [27]** While admitting that the 1<sup>st</sup> Claimant never complained of a neck pain when he visited in 2009 and 2011, Professor Davidson went on to offer an explanation. He stated that the location of this Claimant's injury and the group of muscles involved which extended from the lower back across the shoulder and down to the lower back, could reflect as pain in the neck.
- [28]** He added: "if he complains of pain in the shoulder he may get up and complain of pain in the neck. The fact that he complained of pain in the shoulder does not mean he does not have a pain in the neck subsequently."
- [29]** Notwithstanding the doctor's view, Mrs. Pinnock Wright urged the Court to disregard the Claimant's evidence regarding the neck pains. She stated: "...according to the evidence of Dr. Davidson he did not prescribe a collar or physiotherapy. The fact that no collar was prescribed and no x-rays of the cervical spine done, we submit that no neck injury existed."
- [30]** That argument may be quite plausible but without another medical position to counter that of Professor Davidson's, how could the court determine that for a complaint of neck pain arising from a motor vehicle accident, a collar is required in all circumstances; or that an x-ray of cervical spine is always required?
- [31]** The Court would be ushered into the realm of speculation.
- [32]** Although the Claimant maintained that the pains he still suffers resulted from the accident of July 24, 2009, the Defendants' counsel threw skepticism on this claim.

- [33]** She questioned whether the 1<sup>st</sup> Claimant's pain stemmed from an accident in June 2009 as opposed to July 2009; or those pains in 2011 were caused from an accident between July 2009 and June 2011.
- [34]** In giving credence to the 1<sup>st</sup> Claimant's assertion, his Counsel highlighted Professor Davidson's evidence that the most likely source of the 1<sup>st</sup> Claimant's pain was the accident of July 24, 2009, as the pain he continued to feel as at June 21, 2011 was still in the original location of the injury. Based on the clinical diagnosis, the doctor stated that he was confident that it was the same injury.
- [35]** On the subject of the 1<sup>st</sup> Claimant's complaints of recurring episodes of lower back pains, Mrs. Pinnock Wright suggested that this could be associated with occupational or social hazards. However the doctor viewed this differently. He stated that it was a question of scientific possibility and indicated that it takes a long time for a scar to heal and a pulled muscle can persist for a life time. The doctor added that the particular pain is "still derived from the original location, that is why I am positive... it is the location of the same injury."
- [36]** When asked if the patient (1<sup>st</sup> Claimant) could have aggravated his injury unintentionally if he was involved in another motor vehicle accident between 2009 to 2011, the doctor responded in the affirmative.
- [37]** However, he stated that when the 1<sup>st</sup> Claimant visited in June 2011, the findings were consistent with the extended history of a condition that had gotten progressively worse over a period of time. There was no history of any injury intervening.
- [38]** The doctor added that the healing process would have exacerbated the injuries. He stated that the failure of the 1<sup>st</sup> Claimant to observe the follow-up visit until 2011, was not indicative of an intervening cause as that type of injury had a tendency to return. This he said was a natural result of scarring.

- [39] It was the expressed view of the Defendant's Counsel that the Claimant was exaggerating his injuries. However, the doctor posited that it would have been impossible for Mr. Jackson to fake his injuries as the "clinical evidence was overwhelming."
- [40] To that, Mrs. Pinnock Wright retorted; "if the clinical evidence was overwhelming why Dr. Davidson would state his need for the Claimant to be evaluated by an orthopaedic specialist to establish the Claimant's clinical prognosis if he thought the clinical evidence was overwhelming?"
- [41] This is a question that would be best answered by an individual schooled in the field of medicine, and should have been further probed by the Defendants' Counsel in her cross-examination of Professor Davidson.
- [42] Defendants' Counsel submitted that Professor Davidson's assessment of the 1<sup>st</sup> Claimant's injuries were flawed and urged the court to "attach little weight" to his evidence. Notwithstanding this assertion though, she provided no medical evidence to counter the doctor's testimony.

### **Cases Relied on by the Parties**

- [43] Mrs. Beecher-Bravo submitted three cases as useful guides in arriving at the award to be made for general damages in the case at bar. They are *Stephanie Bennett v Metropolitan Management Transport Holding Limited and Jamaica Urban Transit Limited* (2006HCV00678); and *Schaasa Grant v Salva Dalwood and Jamaica Urban Transit Limited* (2005HCV03081).
- [44] In the former, the Claimant sustained tenderness of the abdomen and back; tenderness in lower regions especially in iliac and lumbar area; probable soft tissue injuries; and subcapsular haematoma of spleen. She was admitted for a few weeks and her prognosis was good although the orthopaedic condition was less favourable.

- [45]** Her accident occurred in April 2003 and in 2005 when she returned to the doctor for an evaluation, her diagnosis then was compression of lumbar nerve roots; degenerative disc disease; and acute chondromalacia of the left patella. She also required the use of a walker constantly and it was recommended that she had total bed rest; physical therapy and certain medication daily.
- [46]** After nine sessions of physical therapy, an MRI of the lumbar sacral spine was recommended. That having been done, the consultant orthopaedic surgeon opined she required surgical decompression as her symptoms were unlikely to be resolved without surgery. He assessed her whole person disability at 13%. The sum of \$3,000,000 was awarded for general damages in December 2006 and this figure updates to \$7, 188,000 using May 2017, CPI.
- [47]** In the case of Schaasa Grant, the Claimant a JUTC Conductress, was flung from her seat when the bus driver suddenly applied brakes on February 3, 2005.
- [48]** Her injuries included serious back pains; marked swelling; spasm and tenderness to the paravertebral muscles bilaterally. She was assessed as having mechanical thoraco-lumbar spine.
- [49]** After physiotherapy she was assessed as having right sided lumbar radiculopathy secondary to prolapsed intervertebral disc, severe mechanical low back pain and mid back pain. She also had muscular spasms in her right shoulder and neck which was assessed in January 2006 as reflex sympathetic dystrophy to the shoulder.
- [50]** This Claimant was also diagnosed as having permanent partial disability assessed at 10% of the whole person. Her problem was expected to continue and she was advised to change her career. In June 2008, general damages was awarded in the sum of \$3,000,000 which updates to \$5, 516,000 using CPI for May 2017.

- [51] Mrs. Pinnock Wright relied on the cases of Jennifer Anderson v Clipper Transport Ltd and Leslie Eastwood (Khan's Report, Volume 4); Deon Thomas and Mibsam Hill v Osbourne Nembhard, Marcia Hulton-Nembhard and Collin Tucker 2011HCV07865; Derrick Munroe v Gordon Robertson, SCCA No. 108/2009.
- [52] In the case of Jennifer Anderson, the Claimant sustained served lumbar muscular spasm. She was left with total loss of lordotic curve and recurrent intermittent pain. She was treated with analgesics and muscle relaxants.
- [53] An award for general damages was made in the sum of \$95,000 in June of 1997 and this updates to \$524,228.46.
- [54] As regards the Deon Thomas matter, the 2<sup>nd</sup> Claimant's injuries were stated as muscle spasm and tenderness on the left side of the neck (para-vertebral muscles); tenderness over the anterior chest at the level of the 3<sup>rd</sup> and 4<sup>th</sup> ribs on both sides of the breast bone (sternum); tenderness over the lower back on both sides (para-vertebral muscles); and tenderness over the inner part aspect (medial) of the right ankle with normal range of motion.
- [55] The "working diagnosis" was whiplash injury of the neck and lower back with soft tissue injuries to the ankles.
- [56] An award of \$500,000 was made for general damages in June 2015 and this updates to \$531,735.54.
- [57] In Derrick Munroe v Gordon Robertson, the Claimant suffered the following injuries:
- Tenderness in the region of the left costochondral joints with increased tenderness during respiration and all chest movements
  - Tenderness in the lumbar region in all ranges of motion
  - No permanent irreparable deformity or disability

- 14 day period of partial disability

Diagnosis : pain in sternal region of the chest'

: lower back pain

**[58]** General damages was awarded in the sum of \$300,000 in June 2009, which updates to \$506, 197, 18¢.

### **Review of Cases**

**[59]** Counsel Mrs. Pinnock Wright submitted that Derrick Munroe had similar injuries to the Claimant in the instant case, in that both had tenderness to the lumbar region and lower back.

**[60]** She added that unlike Derrick Munroe, the Claimant at bar had pains to the shoulders and so his award should be increased to \$550,000. She stated that it should not exceed \$1,000,000.

**[61]** On the converse, Mrs. Beecher-Bravo suggested a significantly more generous award of \$4, 200,000 for the 1<sup>st</sup> Claimant.

**[62]** While maintaining that the injuries sustained by the Claimants in the cases she cited, appeared to be more serious than Mr. Jackson's, she posited that there was no assessment made for permanent partial disability in relation to him because he did not seek medical attention from an orthopaedic surgeon. This, despite the referral from Professor Davidson for him to do so.

**[63]** I cannot resist Mrs. Beecher-Bravo stance that the Claimants in the cases she relied on had more severe injuries than those suffered by Mr. Jackson. I note that the gravity of those injuries far exceeded Mr. Jackson's because those Claimants were diagnosed with whole person disability. In one case it was 13% and in the other 10%, and no such diagnosis has been forwarded in relation to this Claimant at bar. It would therefore be speculative to accept the submission of

Counsel Mrs. Beecher –Bravo that the 1<sup>st</sup> Claimant would have been diagnosed with a whole person disability had he been examined by the orthopaedic specialist.

- [64]** In assessing the award to be made in respect of Mr. Jackson, his delay in going for ‘follow –up visit’ until 2011 cannot be disregarded. Of relevance too is the fact that after he was treated in July 2009, he did not do the x-ray until September 2009 and neither did he return for physiotherapy, Professor Davidson stated.
- [65]** Those coupled with the fact that Mr. Jackson did not seek the intervention of the orthopaedic surgeon would strongly suggest that he had made no efforts at mitigation.
- [66]** As regards the follow-up visit, I note that the doctor sought to provide a general explanation that, “this is common with patients who do not have the money to do follow-up.”
- [67]** Nevertheless, the Claimant in the instant case, offered no clues as to why he delayed his follow-up visit for about 2 years and his non-attendance upon an orthopaedic surgeon.
- [68]** The cases relied on by Mrs. Pinnock Wright provided some guidance but in the instant matter, the Claimant’s injuries were more serious and persistent. For instance, the radiological investigation confirmed the existence of a lumbar sacral strain. This, according to the doctor, had continued to deteriorate over a three year period.
- [69]** Mr. Jackson’s situation required further investigation (MRI) to ascertain the present state of his lower back.
- [70]** So based on the foregoing, I consider \$1, 200,000 an appropriate award for general damages.

### **Special Damages**

In relation to special damages, the following have been agreed:

1. X-ray	- \$ 3,500.00
2. Medication	- \$ 1,364.20
3. Doctor's fees	- \$ 33,800.00
Total	- \$ 38,664.20

### **The Award**

1. General Damages in the sum of \$1,200,000 with interest at 3% from the date of service of the Claim Form to the date of Judgment.
2. Special Damages in the sum of \$38,664.20 with interest of 3% from the date of the accident to the date of the judgment.
3. Cost to the 1<sup>st</sup> Claimant in the sum of \$80,000 as agreed.