



[2023] JMSC Civ. 28

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU 2020 CV 01277

BETWEEN	ALBAN GEORGE LAING	CLAIMANT
AND	VINTON DENNIS	1ST DEFENDANT
AND	THE ATTORNEY GENERAL CHAMBERS	2ND DEFENDANT

IN OPEN COURT

Ms Khadine Dixon instructed by Samuels and Samuels Attorneys-at-law for and on behalf of the Claimant

Mr Robert Clarke instructed by the Director of State Proceedings for and on behalf of the 1st and 2nd Defendants

JANUARY 17, 2023 AND FEBRUARY 21, 2023

Assessment of Damages – Nominal Damages for Loss of Use of Motor Vehicle – Pain and Suffering with whiplash injury with 10% PPD – Whether a claim for handicap on the labour market should be specifically pleaded

MOTT TULLOCH-REID; J

Background

[1] The allegation is that on December 29, 2017, the Claimant was driving his motor vehicle along Trinity Main Road, Port Maria in the parish of Saint Mary when on reaching the vicinity of the Port Maria Hospital, the 1st Defendant being the servant and/or agent and duly authorized driver of motor vehicle bearing registration numbers E008 negligently

collided into the vehicle which the Claimant was driving. As a result of the collision the Claimant was injured and incurred expenses, he having suffered loss and damage.

[2] The Claimant, in order to recover for his loss, filed a claim in this Court against the Defendants. An Acknowledgment of Service was filed and so was a Defence Limited to Quantum. Judgment on Admission of Liability was therefore entered in favour of the Claimant and the matter listed before me for Assessment of Damages. All that I am required to do at this point is to quantify the loss suffered by the Claimant and award reasonable damages that will put him back into the position he would have been had the negligent act not been done to him.

Special Damages

Loss of use of Motor Vehicle and cost of storage

[3] The Claimant has claimed loss of use of motor vehicle for a total of 844 days and continuing from December 29, 2017. When asked why he did not pay the storage and get his motor vehicle he said he had no money to do so. The Defendant's attorney did not question the Claimant on this issue at all. The Defendant did not plead the Claimant's duty to mitigate his loss and did not cross-examine on the issue of mitigation either. It seems strange to me that that course of action was taken by the Defendant, but it is what it is.

[4] At paragraph 32 of his witness statement, the Claimant says the storage facility threatened to sell his motor vehicle. It might have been better that that was done and the value of the motor vehicle reclaimed, because, now there is a claim in excess of \$6M for a motor vehicle which perhaps does not have that value. This is the situation the Defendant finds himself in because the pleadings filed on his behalf were not as carefully crafted as they could have been.

[5] The Defendant admits that his servants and/agents were the negligent parties in the operation of the motor vehicle they were travelling in which led to the accident and the injuries sustained by the Claimant. But for the fact that there was a collision, the

Claimant's vehicle would not have been taken by the police officers and placed into storage. But for the fact that the Claimant's motor vehicle was placed in storage, the Claimant would have had the use of his motor vehicle. It is my view that the accident was the cause for the storage costs and expenses relating to loss of use of motor vehicle being incurred. I go into that detail only because I queried whether the Claimant was prudent in not making a claim for detinue for the taking of his motor vehicle. However, having considered this issue, I am still satisfied that there is sufficient nexus between the claim in negligence and the claim for storage fees and loss of use to warrant awards being made for each claim.

[6] Mr Clarke in his submissions have indicated that no proof was put forward to substantiate the Claimant's claim for loss of use of motor vehicle and so he should not be awarded anything for loss of use. The undisputed evidence is that the motor vehicle is still in storage. The Claimant cannot afford to pay the storage fees and the police refuse to pay same. I am surprised that although the Defendant admitted liability, and did so from as far back as November 2020, and only quantum is in issue, the Defendant did not take a common sense approach to the matter and instruct the servants and/or agents of the Crown to release the motor vehicle to the Claimant. That action would certainly have reduced the amount of time the vehicle was held in storage and by extension the cost of storage and expenses related to loss of use.

[7] The Defendant's attorney-at-law has submitted that an updated storage invoice should have been submitted. I do not believe that is necessary in light of the "and continuing" notification and an invoice in evidence which sets out the daily rate. I accept the Claimant's evidence that there is an error in the date of the storage invoice and am minded to believe that he is entitled to cost of storage from December 29, 2017 to February 21, 2023 at \$500 per day. On my calculation this sum amounts to \$940,000. That sum will have to be paid over to Martin's Auto Repair and Towing Service in order for Mr Laing to get back his car.

[8] As it relates to the claim for loss of use. I agree with Mr Clarke that there is no evidence before the Court as to how the amount claimed came into being. What would

have been useful would be if the Claimant had indicated that he had incurred costs to travel to work, run errands or rent a car during the time he was without his car for example. There was no such evidence before the Court. Mr Samuels relies on the case of **Raphael George Westcar v Constable Mark Tomlinson and the Attorney General for Jamaica [2021] JMSC Civ. 42** to support his claim of \$3,000 per day for loss of use. The case can be distinguished. In **Westcar** there was a seizure of a public passenger vehicle by the police officers. His loss of use was determined by his loss of income for the day. Mr Laing was driving and using his car for his personal enjoyment use and would therefore be required to indicate the cost of doing so in order to recover for his loss of use.

[9] Although there is no evidence substantiating a claim for loss of use, I am of the view that a nominal sum should be awarded as Mr Laing would have lost the convenience of having his motor vehicle. I believe that a nominal award in the sum of \$500,000 for the period December 29, 2017 to February 21, 2023, which is approximately \$100,000 per year, would be reasonable in these circumstances.

[10] Mr Laing also claimed transportation costs. I am not of the view that the Claimant having been awarded a sum for Loss of Use would also be entitled to transportation costs. It would have to be one or the other but not both. The sums claimed for transportation because the Claimant did not have the use of his car could have been useful in calculating Loss of Use. In any event, there is no evidence as to how the sums claimed for transportation costs were arrived at. I am aware of the cases on which Mr Samuels relies to say no strict proof in the form of receipts is necessary. He says he went to doctors and other places but he did not say what were the round trip costs. That information is vital in calculating transportation costs in the absence of documentary evidence. In any event, given that the claim for loss of use has already been awarded, it would not be fair to also award transportation costs, since loss of use is to cover transportation costs incurred during the time Mr Laing was without his motor vehicle.

Loss of income from farming and work as a driver

[11] There was no evidence as to how the \$20,000 per week as a driver and \$15,000 per week as a farmer came about. There could be more detailed explanation as to how these sums were arrived at (see: **Ezekiel Barclay v Clifford Sewell and ors Suit No. C.L.B. 241 of 2000** decision of the Honourable Mr Justice Roy Anderson). While he may have lost income he must show how he arrived at the weekly sum.

General Damages

[12] Back pain with whiplash injury and soft tissue injuries. Whiplash injury with 9% PPD most serious of his injuries. He has possible prolapsed intervertebrae disc and nerve root compression. Two months' post-accident he still had loss of normal cervical lordosis. 1% PPD for back related pains which have now resolved.

Pain and suffering

[13] Evidence sets out how injuries have affected the Claimant in his personal life. He is restrained in the physical and recreational activities he did prior to the accident. These will be taken into account in coming to my decision for General Damages. In the case of **lcilda Osbourne v George Barnes and anor 2005 HCV 294** decision of Sykes J (as he then was) delivered on February 17, 2006, the Claimant had neck and back injury with a 10% PPD (5% back injury and 5% whiplash injury to neck). Her award of \$2.5M updates to \$8.8M. Mr Laing had mostly neck injury. We have to look for cases where the injury was mostly to the neck.

[14] Mr Samuels also relied on the case of **Olive Henry v Robery Evans and Greg Evans reported at page 156 of Khan's Volume 5**. I do not think it is safe to use the **Olive Henry** decision as I cannot be certain that \$1.5M would have been awarded for an 11% PPD because \$750,000 was awarded in circumstances where the PPD was reduced to 5.5% because the Claimant had a pre-existing condition.

[15] Mr Clarke relied on the case of **Merlene Nelson v Edgar Cousins reported in Khans's Volume 5 page 152**. The award for back and neck injury totalling 10% PPD

updates to \$4.2M. The cases where the Claimant had whole person PPD of 10% with 5% ascribed to neck injury and 5% to back injury are not exactly on point. We have to be careful to compare apples with apples. The injury to the neck from whiplash is what is paramount in the case before me.

[16] In commenting further on the **Nelson case**, I believe although Mr Laing has a 10% PPD for whiplash his award has to be greater. He had headaches and dizziness, pain to foot with abrasions, abrasions to scalp and laceration to inner lower lip. He got three (3) weeks sick leave. Had back pain which lasted up to 4 months after the accident. When he saw Dr Barnes 1 year after the accident he was still having headaches intermittently and neck pain. His possible prolapsed intervertebral disc and nerve root compression must be taken into account. There is however no evidence that physiotherapy was done as recommended by the doctor and no evidence why this course of treatment was not embarked on. Perhaps this could have assisted Mr Laing. Mr Clarke however did not question Mr Laing on this issue.

[17] I did not place any reliance on the **Yvonne Scott case** because the PPD rating was vague. The doctor said it was anything less than 10%. 1% is less than 10%. I also saw where the doctor said there was just muscle tenderness and that the pain which the Plaintiff experienced could have been real to her but that there was no scientific way to measure it. I did not find the case useful because of the vagueness of the medical evidence relied instead on two cases which I thought was more on point.

[18] In the case of **Mobrey Lewis v Everod Lewis** Claim No 2006 HCV 02643 the decision of Marsh J on November 19, 2007 Mr. Lewis was injured in a motor vehicle accident. He had neck and back pain and was assessed as having a 7% PPD relating to whiplash injury. He was seen by several doctors, even one overseas. He was awarded \$2M which updates to \$5.9M.

[19] I also considered the case of **Dawn Vernon v Paulnor Sea Port Company Limited reported at Khan's Volume 6 page 110**. In that case the Claimant had whiplash injury with a sub-dislocation of right sterno-clavicular joint. She was assessed as having

a 10% PPD all of which appeared to be related to her whiplash injury, as Dr Christopher Rose, with whom she consulted made it clear that there was a 0% disability rating as it related to the mechanical lower back pains. The Court awarded her the sum of \$1,900,000 which updates to \$7.3M.

[20] Mr Laing had a 9% PPD and 1% back injury for a whole person PPD of 10%. Dr Barnes did however say that the back pain had resolved. I believe that the nerve root compression and other associated injuries would have been taken into account by Dr Barnes when he made his whole person disability assessment for the whiplash injury. I must however take into account the back injury and the evidence of Mr Laing as to how the injuries have affected him in his daily living and in his occupation as a driver of minibuses. Having considered this, I am of the view that the sum of \$8M would be a reasonable amount to compensate him for his pain and suffering and loss of amenities.

Loss of Earning Capacity/Handicap on the Labour Market

[21] The Claimant has submitted for damages under this head. Under the normal course of things, I believe that this award would ordinarily be made given that there is medical evidence that the Claimant would be inhibited in his occupation as a driver. Although it is arguable that Loss of Earning Capacity is a head of General Damages and need not be pleaded specifically, I am mindful of the fact that the Defendant is to as far as possible given notice of all the claims which will be made against him as this is how he will know how best to respond. The Particulars of Claim does not speak to Loss of Earning Capacity, and could have, in light of Dr Barnes' observation. I will again refer counsel to CPR 8.9A which says that evidence cannot be relied on that was not pleaded in the particulars of claim. In light of the above, no award will be made under this head.

[22] My orders are as follows:

- a. Martin's Auto Repair and Towing Service is to release the Claimant's motor vehicle bearing registration number 7529FW, with chassis number JT2AE92E2J0071083 to him on or before February 23, 2023.
- b. Damages are assessed in favour of the Claimant against the 1st and 2nd Defendants who are to pay the Claimant General Damages for his pain and suffering and loss of amenities the sum of \$8M plus interest at 3% per annum from April 23, 2020 to February 21, 2023, Special Damages in the sum of \$2,051,175.80 plus interest at 3% per annum from December 29, 2017 to February 21, 2023 and costs in the claim which are to be taxed if not agreed.
- c. The Claimant's attorneys-at-law are to file and serve the Judgment.

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T. Mott Tulloch-Reid
Puisne Judgment