



[2014] JMSC Civ. 98

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 03635

BETWEEN	CARLOS LINCOLN	CLAIMANT
AND	GLOVER FORRESTER	DEFENDANT

Miss Marion Rose-Green instructed by Marion Rose-Green & Co.
for the Claimant.

Miss Nicosie Dummitt for the Defendant.

Heard on 7th November 2013 and 12th June, 2014

*Damages - Assessment of damages – Defendant’s defence limited to quantum –
Whether Claimant’s arthritis/spondylolysis asymptomatic – Whether accident
worsened his condition*

MORRISON, J

[1] The Claimant, a septuagenarian retired businessman, was on or about the 4th day of September 2007, whilst driving his motor vehicle along Hatfield main road, Manchester, involved in a collision with a motor vehicle owned and driven by the Defendant.

[2] As liability is not in issue I now turn to the measure of damages. However, in engaging this issue, I need to set the medical evidence in its proper perspective.

Medical Evidence

[3] The first medical professional to render medical assistance to the hapless Claimant was Dr. Janice Glean M.B.B.S. D.A. who saw him on September 6, 2007, a day after the accident. From her report (which bears an obscure date), the Claimant reports that his car was hit by the wheel of a moving truck. During the accident, the report continues, “he has been hit on the (R) side of his chest, on the chest wall, and also on the (R) side of his head. He never lost consciousness (sic)”. However, apart from a slight swelling in the (R) parietal area of his scalp, the doctor notes, “there were no injuries to find”.

[4] Significantly, the Claimant returned to her office on September 17, 2004 at which time he complained of pain in his foot and shoulder, “that was getting worse”. Consequently, the Claimant was sent by Doctor Glean to do a M.R.I. to his shoulder. He never reported back to her. Dr. Glean opined that “... he should recover completely from his shoulder pain ... He should develop no complications from his shoulder injury ... general prognosis excellent.”

[5] In July 2008, the Claimant attended on Dr. Adolfo Mena, Orthopaedic Surgeon who, having made his medical assessment of the Claimant reported on cervical spondylosis and post traumatic tendonitis to the Claimant’s right shoulder. The Claimant was again seen by Dr. Mena on February 10, 2010 where he complained of shoulder and neck pain. Dr. Mena gave the Claimant a whole person impairment rating of 1%.

[6] The Defendant’s physician, Dr. Warren Blake, F.R.C.S., an Orthopaedic Surgeon, saw the Claimant on May 13, 2011. The Claimant, according to Dr. Blake complained, inter alia that, “the pain to his shoulder has however continued.” The pains are said to run from the right side of his neck out to his right shoulder. The pain also goes out to the ulnar two digits of his right hand.

[7] However, notes Dr. Blake, “Examination of his right shoulder revealed normal contours. Motion was full and comparable to that of the left shoulder. He had mild crepitations with shoulder motion.” Having seen copies of the Claimant’s M.R.I. it was

particularly noted by Dr. Blake from the report that there were degenerative changes but no evidence of a tear. "Signs of subacromial bursitis and tenosynovitis of the long head of the biceps tendon are also present." Then follows this significant paragraph: "The x-rays of his neck was not seen by me but was reported to have shown pronounced degenerative changes from C4 to T1 with pronounced narrowing of the foramina bilaterally."

[8] Under the rubric, "Assessment and Comments", Dr. Blake opines that, "based on his x-ray report a diagnosis of cervical spondylosis is most likely. This can cause neck pain with radiation to his right shoulder." In using the shoulder regional grid Dr. Blake concluded that the Claimant suffered, "tendinitis with 'no significant abnormal objective findings at MM1 (maximal medical improvement)' he is assessed as impairment class O". Total impairment for this class, continues Dr. Blake, equates to zero percent whole person impairment. This figure was obtained by using the American Medical Association Guides to the Evaluation of Permanent Impairment. "The cervical spine complaints have not been rated as I am of the opinion that his findings are age related and as such are not rateable." (Emphasis mine)

[9] In his subsequent report of September 30, 2011 Dr. Blake identified the source of his comments on the x-rays of the neck of the Claimant to be comments he got from Dr. Mena to wit: "Radiograph number 1516-10 of his cervical spine done on February 10, 2010 which showed, "pronounced degenerative changes from C4 to T1 with pronounced narrowing of the foramina bilaterally."

Interestingly, Dr. Blake notes that the Claimant's zero percent whole person impairment was obtained by using the American Medical Association Guides to the Evaluation of Permanent Impairment and Dr. Mena has also stated the exact source of his rating of 1%. However, what Dr. Mena's assessment says is this: "Mr. Lincoln was classified with shoulder grid upper extremity impairments, rotator cuff injury, and history of painful injury with residual symptom which has a measurable rating of 2% of his right upper extremity. This represents 1% of the whole person in relation to the road traffic accident he had on September 4, 2007".

[10] Let me at once make these observations.

First, neither Dr. Mena nor Dr. Clarke appear to have been certified by the Court as experts to Part 52 of the Civil Procedure Rules.

Second, though both Orthopaedic Surgeons were required to attend the Assessment of Damages hearing, neither of them did.

Third, the Claimant appears to have sought the services of Dr. Mena on July 15, 2008 whereas the motor vehicle accident occurred on September 4, 2007.

Fourth, Dr. Blake first saw the Claimant on May 13, 2011.

Fifth, whereas Dr. Mena appears to have related the Claimant's shoulder regional grid upper extremity impairments, rotator cuff injury, and history of painful injury with residual symptom" to the road accident, Dr. Blake says that the cervical complaints have not been rated as he is of the opinion that they are age related.

[11] It seems then that the poignant and central issue is that given the Claimant's arthritis/spondylosis condition relative to the accident, can it be said that the accident caused or worsened the Claimant's condition or, is his condition the natural result of the aging process?

[12] Since there was no order from the court which constituted either Dr. Mena or Dr. Blake as an expert, I shall treat with their reports as a part of the overall evidence of the party's side on which they fall, that is, Dr. Mena for the Claimant and Dr. Blake for the Defendant.

[13] Taking Dr. Mena's report into consideration the Claimant has asked for an award of general damages of \$1,500,000.00 whereas Ms Dummitt for the Defendants points to Dr. Blake's report and has asked that general damages be assessed in the region of between \$300,000.00 and \$600,000.00. The Claimant recruited the assistance of the following cases:

- a) **Hugh Douglas v Morris Warp, Vincent McPherson, Sgt. Boreland And The Attorney General for Jamaica**, reported in Khan's Recent Personal

Injury Awards made in the Supreme Court of Judicature of Jamaica
(Khan's) Volume 4;

- b) **St. Helen Gordon and Another v Royland McKenzie**, Khan's Volume 5;
- c) **Enid Haughton v Michael Wallace and Suzan Thompson**, Khan's Volume 6.

[14] The Defendant sought to place reliance on:

- i) **Horrel Patterson v Econocar Rentals**, Khan's Volume 4;
- ii) **Gilbert McLeod v Keith Lemard**, Khan's Volume 4;
- iii) **Clive Cunningham v Marvin White And Another**, Khan's Volume 3;
- iv) **Laureen Bell v Robert Taylor And Another**, Khan's Volume 3

[15] In **Horrell Patterson v. Econocar Rentals Limited**, Suit No. C.L. 1991/P.146, delivered on March 3, 1995, K. Harrison J. (Ag.), as he then was, had to contend with at least one issue akin to the one raised at bar. The facts may be tersely put.

In that case the plaintiff having met in a motor vehicle accident went to see one Dr. Martin who gave him painkillers. The plaintiff also did physiotherapy.

[16] Subsequently, the plaintiff went to see a Dr. Thomas, consultant surgeon, who after examining the plaintiff found that he suffered from a decreased range of movement of the neck with pain and discomfort of the left lower limb which could be attributed to sciatic nerve dysfunction. After x-rays were done it revealed that the plaintiff's cervical vertebra displayed marked degeneration and narrowing between vertebra 6 and 7 and to vertebra 5 and 6. Further, the x-rays showed normal lordotic curve of the lumbar spine with degeneration and spondylosis of lumbar vertebra 5 and sacral vertebra 1. The doctor opined that it was evident that the plaintiff's symptoms and signs had worsened since he allegedly was involved in the accident.

[17] The evidence of Dr. Thomas revealed that cervical and lumbar changes are not very common in the plaintiff's age group. Significantly, he could not say what was the

condition of the plaintiff prior to the accident other than from the history which the plaintiff gave.

In the doctor's opinion the degeneration and spondylosis which he saw maybe age related. Further, he opined that it was likely but not necessarily common for degenerative disease and spondylosis to be age related in patients the age of the plaintiff. However, the doctor conceded that it was possible that the plaintiff could have had symptoms of degenerative disease and spondylosis prior to the accident. Furthermore, it was possible for worsening to occur due to ongoing problems and that trauma could accelerate the disease.

[18] The defence relied on the evidence of one Dr. Graham, Neurologist and Consultant. He opined that Dr. Thomas' findings of degenerative disease and spondylosis in the cervical and lumbar spine were very common in persons over the age of 60 years. They were non-specific findings, which could not relate any cause and effect. He made bold to assert that neither he nor Dr. Thomas could make any definitive comment about the effect of the accident on the plaintiff.

[19] K. Harrison, J. (Ag.) in delivering his judgment refused to take into consideration the occurrence of degeneration and spondylosis not only because there was no evidence before him which linked it to the accident but primarily because "age is a factor to take into consideration when one thinks of degenerative disc diseases and spondylosis."

[20] In the instant case there is not a shred of evidence to say what was the condition of the Plaintiff before the accident. The closest chronological date relative to the date of the accident is the report of Dr. Janice Glean. The Claimant did not return to her on the latter's instructions to him to do a M.R.I. Instead the Claimant went to Dr. Mena at some 10 month's remove from the date of the accident. It seems then that Dr. Mena's ascribing of the Claimant's post accident-condition to the accident itself, without more is highly speculative. He offered no demonstrable nexus between them. Further, there is not even a scintilla of evidence which remotely suggests that the degenerative disc

disease and spondylosis was in any way accelerated by the accident or for that matter, was caused by it.

Given that degenerative disc disease and spondylosis are age related conditions, I too, in following the **Patterson** case, am of the view that these particular conditions are not to be countenanced in the assessment of general damages. Viewed as such I now return to Dr. Janice Glean's report: "... [I] cannot comment on any permanent irreparable deformity ... but I would be surprised if there was any; he complained of pain in his (R) shoulder only; if I had seen him again I would have sent him for physiotherapy but I did not see him again; he should recover completely from his shoulder pain; he should develop no complication from his shoulder injury; general (prognosis) is excellent."

[21] It is more than apparent that the Claimant's failure to return to see Dr. Glean and of his going to see Dr. Mena ten months after is a significant omission to tend to his injury. Absolutely no reason was proffered for his inaction. Was the Claimant's inaction reasonable in the circumstances? The principle of law is that "No person aggrieved by an injury is by common law entitled to increase his claim for damage by any voluntary act; on the contrary, it is his duty, if he reasonably can, to abstain from any act by which the damage could be in any way increased" – per Lord Parker in **Admiralty Commissioners. v S.S. Amerika** [1917] A.C. 38, at p. 42.

The Claimant's insinuation that he did physiotherapy "after the accident" may yet well be an attempt to forestall the principle that he had a duty to mitigate. Whereas the Claimant has produced receipts from the physiotherapist subsequent to his visit to Dr. Mena, none were forthcoming pursuant to his visit to Dr. Glean who said, be it remembered, "I would have sent him for physiotherapy but he did not return." I conclude, therefore, that the Claimant failed in his duty to mitigate. I absolutely do not mean to devalue any of the cases cited by the Claimant in proof of general damages. I find them to be distinguishable. Of the cases cited by the Defendant I find the **Cunningham** case to be more analogous and as such the sum of \$650,000.00 is awarded for general damages.

[22] In the final analysis judgment is entered for the Claimant in these terms:

Special damages, as agreed, in the sum of \$91,400.00 with interest thereon at 3% from September 4, 2007 to the date of judgment; general damages in the sum of \$650,00000 with interest thereon at 3% from the date of service of the Claim Form to the date of judgment.

Costs of \$40,000.00 is to go to the Claimant.