[2024] JMSC Civ 194

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03103

BETWEEN	**NORMA NELSON**	**CLAIMANT**
AND	**GARY GILBERT LEWIS**	**1ST DEFENDANT**
AND	**MIKE ANTHONY LEWIS**	**2ND DEFENDANT**

IN OPEN COURT

Mr. Richard R. Reitzin, Attorney-at-Law instructed by Messrs. Reitzin & Hernandez, Attorneys-at-Law for the Claimant

Mr. Joerio Scott, Attorney-at-Law instructed by Messrs. Samuda & Johnson, Attorneys-at-Law for the Defendant

Heard: March 13, 2024 and December 20, 2024

Damages – Assessment of damages - Personal Injury - Special Damages - General Damages.

MASON, J (AG.)

INTRODUCTION

[1] The Claimant, Norma Nelson, filed a Claim Form and Particulars of Claim on June 30, 2021. The Claimant claims against the first and second Defendants for

damages for negligence arising out of an accident which took place on or about February 19, 2020, wherein the Claimant was driving along Waltham Park Road near St. Peter Clever Church before Brotherton Avenue when the first defendant's vehicle which the second defendant was driving collided with the rear of the Claimant's vehicle.

[2] The second defendant was not a participant in this trial. The first defendant in his Defence Limited to Quantum, did not dispute liability but disputed the quantum of damages sought by the Claimant.

ISSUE

[3] The sole issue for the Court's determination is the quantum of damages to be awarded to the Claimant for the injuries she suffered as a result of the Second Defendant's negligence.

[4] The Court will therefore consider the medical evidence as well as the Claimant's evidence coupled with relevant case law to determine an appropriate award.

MEDICAL EVIDENCE

[5] The Claimant's injuries were outlined in the medical report prepared by Dr. Christopher Munroe dated March 14, 2021. The Claimant was seen by Dr. Munroe on February 20, 2020, the day after the accident. Dr. Munroe's examination findings were that the Claimant had blurred vision and was complaining of pain to the back of her neck, both thighs and headaches. Dr. Munroe noted decreased range of movement on lifting the Claimant's legs. Both lower limbs, and thighs were tender.

[6] Dr. Munroe treated the Claimant with analgesics and sent her home. The Claimant returned to see Dr. Munroe on April 3, 2020, complaining of severe lower back

pain and that she was not able to sit up. She also had dizziness for two nights before visiting Dr. Munroe. An X-Ray was ordered and the patient returned on May 20, 2020. The X-Ray showed Diffuse osteopenia with associating T11-L1 anterior vertebral wedging, lower thoracic and lumbar spondylosis. The report also indicated that the finding at L3 vertebral level may represent a compression fracture however, CT or MRI scan was required for further evaluation.

[7] Dr. Munroe's diagnosis was possible mild whiplash and spinal cord injury likely secondary to MVA (motor vehicle accident).

THE CLAIMANT'S EVIDENCE

[8] The Claimant's evidence is taken from her Witness Statement filed on June 29, 2023. The Claimant stated that the medication prescribed by Dr. Munroe helped her with the pain but when it wore off the pain returned, sometimes even worse than before. She stated that between February 20 and April 3, 2020, her lower back pain worsened despite the medication. She stated that the pain in her lower back was so severe that she was unable to sit up. She also stated that the first couple of nights in April, she experienced dizziness.

[9] The Claimant further indicated that she is unable to lift her legs straight up and that she has lost power in her legs due to pain. She also stated that for a period, she was unable to sit up due to severe pain in her lower back. She suffered from dizziness for a short period and is unable to sit or stand for extended periods due to pain in her lower back and thighs. She stated that her driving is limited and that she is unable to do so due to pain and discomfort in her neck, lower back and legs. She further stated that she has lost a lot of mobility in her lower back so she is unable to bend.

[10] The Claimant further asserted that prior to the accident, she commenced her duties as a taxi operator at approximately 7:00 AM, worked until approximately 12:00

noon, and subsequently resumed her work at 1:00 PM until 6:30 PM. Since the occurrence of the accident, she has adjusted her schedule, now beginning work at approximately 7:00 AM and concluding at 10:00 AM, then resuming at 3:00 PM until 6:30 PM. As a result, she claims to be experiencing a loss of 4 hours of work per day.

[11] Additionally, she indicated that prior to the incident, she worked 6 days per week, whereas since the collision, her work schedule has been reduced to 5 days per week. Consequently, she estimates a loss of approximately 20.5 working hours per week.

[12] The Claimant reported that her earnings prior to the accident averaged approximately $12,000.00 per day or $72,000.00 per week; however, since the accident, her income has diminished to approximately $7,000.00 per day or $35,000.00 per week. She claims to be incurring a gross loss of approximately $37,000.00 per week, translating to a net loss of approximately $20,000.00 per week. Furthermore, she contends that her injuries have rendered her unable to perform her duties as a taxi operator in the manner customary prior to the accident.

GENERAL DAMAGES

[13] Counsel for the Claimant submitted that an award of **$3,423,579.55** for general damages is appropriate in the circumstances. Counsel relied on the following cases:

I. In **Natasha Richards & Phillip Richards v Judan Brown [2019] JMCA Civ 27** the claimant suffered transient loss of consciousness; severe pains in neck and lower back; back and neck muscle spasm; severe pains in right lower quadrant of abdomen; pains in posterior aspect of right thigh resulting in a temporary limp; rash on forearms likely a reaction to medication; back pain on waist flexion and leg raises; tenderness in lower back; mild tenderness on palpation of midline of lumbar spine; neck pain on left sided rotation; severe pain in neck during flexion and extension; restriction of

movement of neck; tenderness in neck; soft tissue injury; pain in hip; unable to do daily chores: depression: neck and back pains aggravated by sitting, walking, playing football, performing household chores and lifting heavy objects; mechanical lower back pains; mild whiplash.Dr. Rose recommended activity modification and physiotherapy. The diagnosis was discogenic lumbar pains; mild whiplash injury. Mr. Brown was awarded $1.8 million when the CPI was 70.4. The current CPI is 128.2. The updated award is $3,277,840.91.

II. In **Claston Campbell v Omar Lawrence, Dale Mundell & Delroy Officer C.L. C-135 of 2002**, a judgement of the Hon. Miss Justice Christine McDonald, a 19-year-old Correctional Officer was injured on 3 October, 2001. The injuries were a laceration to the chin 2" x 1/6", trauma to chest resulting in severe chest pain and difficulty in breathing and minor obsession (sic) (probably abrasion) to chest wall, trauma to the back resulting in severe pain and swelling and difficulty in walking for 3 weeks, whiplash injury to neck resulting in pain and restriction of movements. The claimant testified that he had to wear a bandage under his chin for a period, that he had difficulty in breathing, severe chest pains and difficulty in walking. He said he was unable to move his neck the way he wanted to due to pain. He said was unable to walk for too long without pain. He returned to work after 2 weeks. At work, he said he had to ask permission to sit down due to back pain. He said couldn't push the gate at work or move chairs, desks and beds. He said he had to employ someone one day a week at home to clean, wash and iron. He said he could not play football or cricket. He said he had to take pills for neck and back pain, sometimes at night. He said that if he turns his head at night he still feels pain. A collar was recommended. He said he sometimes had to take painkillers. He said that sometimes his chest pained him and sometimes he had difficulty in breathing. He said at times he feels heavy pains in his chest and neck. The court rejected his evidence that he felt heavy pains in his chest and neck

since neither was in the medical reports nor in the doctor's oral evidence. He did not need to go to the doctor after a month following the accident. The claimant went to the doctor about a year after the accident complaining of minor pains in the neck, back and chest but the doctor told him it was nothing serious to worry about and that he could manage them with over-the-counter medication. The doctor did not refer the claimant to a specialist nor did he recommend physiotherapy. General damages for pain, suffering and loss of amenities is $650,000.00. The updated award is $3,360.080.65.

[14] Counsel for the 1st Defendant submits that an award for general damages for pain and suffering and loss of amenities should not exceed **$1,100,000.00**. Counsel relied on the following cases:

I. **Melvin Henry v. Neville Gutzmer and David Gutzmer |2023] JMSC Civ 49**, the claimant sustained injuries in a motor vehicle accident. He was diagnosed with: (i) soft tissue injuries; and (ii) hyper extension C-Spine injury with central cord syndrome. He was hospitalized for 5 days and had to wear a cervical collar for 1 week. He was also unable to work for 13 weeks and was treated as an outpatient at the KPH from in or around July 2016 when he was discharged from that hospital, until July 2021. He also had to undergo further physiotherapy treatment after being discharged from KPH. In March 2023 the court awarded this claimant General Damages in the amount of $1,800,000.00. The value of this award using October 2023 CPI would be $1,882,968.75.

II. In **Alvin Cato v. Paul Williams |2020| JMSC Civ 109**, the claimant suffered injuries in a motor vehicle accident and was diagnosed with whiplash, extreme tenderness in his back and pain on flexing his trunk. He also had difficulty rising and sitting. He was awarded $900,000.00 in June 2021. This award would update to $1,097,540.00.

[15] The Defendant submitted that the medical report submitted by the Claimant is grossly vague and unclear and made reference Dr. Munroe's diagnosis of **possible** mild whiplash and spinal cord injury **likely** secondary to MVA. Counsel is of the view that the language used by the expert must be taken at its ordinary meaning and on that basis that it is inconclusive and does not specify the injuries suffered by the Claimant and does not attribute the spinal cord injury to the collision.

[16] Counsel for the Defendant is of the view that this court ought to reject the claims of injuries save for those noted in the diagnosis of the sole medical evidence supplied by the Claimant as well as the claim for disabilities as it is unsupported as the medical report of Dr. Munroe makes no reference thereto. The Defendant relied on the case of **Ronald Edwards v The Attorney General** 2007 HCV 01679.

[17] Counsel for the Claimant however submitted that where Dr. Munroe uses the word "possible" in relation to any diagnosis, it is a matter for the court to determine whether it is reasonably satisfied that the injury said to have been possible was in fact made out. Counsel further submitted that the term "whiplash" denotes soft tissue injury and findings on examination demonstrating soft tissue injury to neck and/or back amounts to whiplash.

[18] As it relates to the Claimants' disabilities, counsel submitted that it is no part of a medical expert's role to give his or her opinion as to a patient's disabilities (as distinct from the patient's injuries/diagnoses). Counsel is of the view that it is for the patient alone to so swear and for the court alone to assess the Claimant's evidence.

[19] At this juncture, I make reference to a quote made in the case of **Garfield Segree v Jamaica Wells and Services Limited and National Irrigation Commission Limited** [2017] JMCA Civ 2 as referenced by Counsel for the Defendant. Lord Goddard stated thus at paragraph 17:

[20] As it relates to the medical evidence, I agree with the submissions made by Counsel for the Defendant that the medical report is vague. I do not find that there is a clear diagnosis of injury since the medical report states: **possible mild whiplash** and **spinal cord injury likely secondary to MVA**. I am of the view that the diagnosis of the whiplash injury was not a conclusive diagnosis.

[21] I am of the view that the diagnosis of Diffuse osteopenia with associating T11-L1 anterior vertebral wedging, lower thoracic and lumbar spondylosis was not as a result of the accident. I am of the view that the diffuse osteopenia was a pre-existing condition. This diagnosis is not one which occurs suddenly. This occurs over a period of time due to ageing. Further, lower thoracic and lumbar spondylosis is also not a condition developed suddenly as it is wear and tear of the spine developed over time due to ageing and degeneration. When this is coupled with the diagnosis of Dr. Munroe as to spinal cord injury likely secondary to MVA, I cannot say on a balance of probabilities that the spinal cord injury was as a result of the accident. I am however of the view that this condition may have been agitated by the accident and may have resulted in the pain that the Claimant described to her lower back.

[22] I am further, not convinced that the Claimant's inability to lift her legs is as a result of the accident. On examination after the accident, the Claimant was noted as having power in both limbs of 4/5 but no wasting of the muscle seen. I also note that when the Claimant visited Dr. Munroe on the 3rd of April 2020, there is no note of any complaint regarding the patient's legs. The medical report indicates that she was suffering from severe lower back pain and was unable to sit up.

[23] I am of the view that the disabilities described by the Claimant are not due to the motor vehicle accident but are a likely effect of aging and wear and tear. I am therefore of the view that the injuries sustained by the Claimant as a result of the motor vehicle accident are lower back pain, temporary blurred vision, temporary dizziness, and tenderness in legs. It was indicated that the Claimant is unable to

engage in pre-accident sporting, domestic and social activities, however, there is no evidence supporting same.

[24] I did not find all the cases submitted by Counsel to be useful. I find that the injuries sustained by the Claimants in the cases submitted on behalf of the Claimant were more severe than those submitted by Ms. Nelson. In the case of **Alvin Cato v. Paul Williams |2020| JMSC Civ 109**, Mr. Cato, on examination was found to have severe pain with significant findings confined to his back and neck. His back had extreme tenderness and pain on flexing his trunk, with difficulty rising and sitting. His neck showed evidence of whiplash injury with difficulty and pain holding his neck upright. Mr Cato was given analgesics and muscle relaxant and placed in a neck collar. Dr. Minott also indicated that it was expected that Mr Cato would require a period of six (6) weeks to recuperate. Mr. Cato was awarded $900,000.00 which updates to $1,151,639.34. I am of the view that though the injuries sustained by the Claimant in the case at bar are similar to those suffered by Mr. Cato, the injuries sustained by Mr. Cato are more extensive than those sustained by Ms. Nelson.

[25] I also looked to the case of **Yanique Hunter v Conrod Clarke & Kirk Beckford** [2014] JMSC Civ.83, 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 $ 2,041,162.23. I am of the view that the injuries sustained by the Claimant in the case at bar are similar to those sustained by the Claimant in the Hunter case. The injuries sustained by the Claimant in the Hunter case are however slightly more severe than those sustained by the Claimant in the case at bar.

[26] I am therefore of the view that an award of $1,100,000.00 is reasonable in the circumstances.

SPECIAL DAMAGES

[27] The Claimant requested special damages in the amount of $50,500.00 as follows:

i. Four receipts for consultation with Dr. Munroe in the amount of $2,500.00 each being $10,00.00 in total;
ii. One receipt from Apex Radiology in the amount of $4,500.00;
iii. Receipt for Medical Report prepared by Dr. Munroe in the amount of $25,000.00;
iv. Receipt for Transportation Expenses in the amount of $6,000.00;
v. Receipt from Tax Administration Jamaica for stamp duty in the amount of $5,000.00

[28] It is trite law that special damages must be specifically pleaded and proven. I find that this condition has been satisfied and will make the award for special damages for $50,500.00.

LOSS OF EARNING CAPACITY

[29] According to the case of **Monex Limited et al v Camille Grimes** Supreme Court Civil Appeal No. 83/96, the terms “loss on labour market, handicap on the labour market, loss of earning capacity” are to be regarded as synonymous terms. Rattray, P (as he then was) stated that these heads of damages arise where the said victim:

> *(a) resumes his employment without any loss of earnings; or*
>
> *(b) resumes his employment, at a higher rate of earnings,*
>
> *but because of the injury he received, he suffered such a disability that there exists the risk that in the event that his present employment ceases and he has to seek alternative employment on the open labour market, he would be less able to vie because of his disability, with an average worker not so affected: (See Moeliker vs A. Reyvolle & Co. Ltd [1977] 1 All ER 9).*

[30] In the case of **United Dairy Farmers Ltd, & Anor v Goulbourne (by next friend Williams)** [unreported] SCCA 65/81 dated 27th January 1984 Carberry J.A. at page 5 of the judgment stated thus in relation to awards:

> *"Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage must offer some evidence directed to that head, however tenuous it may be."*

[31] It is highlighted in the **Halsbury's Laws of England**, 5th Ed. that the award is to compensate the victim for the weakening of his competitive position in the open labour market. The court will take into account:

> *(1) whether there is a real risk that the claimant will be forced onto the labour market before retirement age;*
> *(2) the extent of his injury or disability;*
> *(3) how long it would take him to find alternative employment if forced onto the labour market;*
> *(4) the reduction in salary which he would suffer thereby.*

[32] In determining an appropriate award for the handicap on the labour market, the court employs two methodologies, namely, the multiplier/multiplicand approach and the lump sum approach. In the case of **Andrew Ebanks v. Jephter McClymount** [2017] JMSC Civ. 143, Sykes J (as he then was) elucidated the criteria for selecting the appropriate method to be utilized, stating as follows:

> *From the cases, the principles that can be derived in order to determine which method is used are as follows. In setting out these principles I shall also address the third objective which is, the factors that determine the size of the award, particularly if the lump sum method is used:*
>
> *a. If the claimant is working at the time of the trial and the risk of losing the job is low or remote, then the lump sum method is more appropriate and the award should be low (Ashcroft v Curting; Gladys Smith v The Lord Mayor);*

b. *If the claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending, of course, when this loss is seen as likely to occur. The size of the award may be influenced by time at which the risk may materialize. Admittedly, this is a deduction from what Lord Denning said in Cook v Consolidated Fisheries;*

c. *It seems that if the claimant is a high income earner the multiplier/multiplicand method may be more appropriate. This latter point seems to be a principle that is emerging from the Jamaican case of Cambell v Whylie. This proposition is derived from my attempt to reconcile Campbell and Consolidated Fisheries. Both cases are very close in terms of the actual evidence before the court, the main difference being the earning power of the medical doctor vis a vis a young man working on a trawler and then later a lorry driver.*

d. *The lump sum is not arrived by reference to and comparison with previous cases (Nicholls v National Coal Board);*

e. *If the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind of employment or if employment is found by the job is very likely to be less well paying than the pre-accident job, assuming that the person held a job. The reason is that the financial impact of the loss of earning capacity would have begun already and the likelihood of the financial impact being reduced by the claimant finding employment would be virtually none existent;*

> *f. If the person has not held a job but there is evidence showing the person is unlikely to work because of the injuries, then the lump sum method is to be used (Joyce v Yeomans).*

[33] The Claimant reported that her earnings prior to the accident averaged approximately $12,000.00 per day or $72,000.00 per week; however, since the accident, her income has diminished to approximately $7,000.00 per day or $35,000.00 per week. She claims to be incurring a gross loss of approximately $37,000.00 per week, translating to a net loss of approximately $20,000.00 per week.

[34] Based on the evidence presented, Ms. Nelson did not cease her employment following the accident. Her affidavit indicates a change in her work hours post-accident; however, it fails to specify the exact onset of this change. Furthermore, she attests that in October 2021, she ceased operating her taxi "*due to the pain I was experiencing and because I needed a rest, a break.*" At that juncture, she delegated the operation of her vehicle to another individual. The evidence before the court does not substantiate that Ms. Nelson, in October 2021—over a year after the accident—discontinued her work as a result of pain. Consequently, the court is left to speculate regarding the extent to which her hiatus was attributable to pain as opposed to a need for rest.

[35] There is in fact no medical evidence to substantiate the Claimant's assertion that her capacity to work has been diminished due to pain. Moreover, there is no evidence presented to indicate that, even if such pain were valid, it would be attributable to the accident in question.

[36] Counsel for the Defendant contends that Dr. Munroe did not address whether the injuries diagnosed would have affected the Claimant's employment or work capacity. Counsel further urged the court to refrain from accepting the Claimant's unsupported statements regarding her claim for loss of earnings and diminished earning capacity.

[37] Counsel for the Claimant, however, submitted that given the unchallenged medical evidence and the evidence in the Claimant's unchallenged witness statement, a finding of fact that the Claimant has suffered a diminution in her earning capacity by reason of the limitation in her ability to drive her taxi would be well sufficient to engender reasonable satisfaction on the part of the tribunal of fact.

[38] I am in agreement with the position advanced by the Defendant. In light of the absence of any evidence presented before this court to substantiate the Claimant's assertion regarding her diminished capacity to perform her work as result of the injuries sustained in the accident, I find myself unable to render an award in favour of the Claimant on this basis.

ORDERS

[39] I therefore make the following orders:

1. Special damages in the amount of **FIFTY THOUSAND FIVE HUNDRED DOLLARS [$50,500.00]** with 3% interest from February 19, 2020 to present.
2. General Damages for pain and suffering in the amount of **ONE MILLION ONE HUNDRED THOUSAND DOLLARS [$1,100,000.00]** with interest at 3% from July 21, 2021 to present.
3. Cost to the Claimant to be agreed or taxed.
4. The Claimant's Attorney-at-Law to prepare, file and serve this order.