[2022] JMSC Civ 130

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018HCV01344

BETWEEN	**MICHAEL SHIELDS**	**CLAIMANT**
AND	**HERDLY STEPHENSON**	**1st DEFENDANT**
A N D	**ORANE HORACE COWARD**	**2nd DEFENDANT**

IN OPEN COURT

Mr Akheme Harris instructed by Kinghorn & Kinghorn for the claimant.

Miss Faith Gordon instructed by Samuda & Johnson for the 2nd defendant.

Heard June 7, 2022 and July 21, 2022

Assessment of damages – long oblique fracture of the lateral malleolus – small fragment fracture of the medial malleolus –pain to the neck – soft tissue injuries to hip and chest

CORAM: JARRETT, J (Ag)

Introduction

[1] The claimant Michael Shields was following the biblical injunction to be a good neighbour when he set out to help a fellow road user on the afternoon of May 9, 2017. While travelling along Ballater Avenue in a water truck owned by his employer, he and the driver of the truck noticed a traffic build up being caused by a disabled motor vehicle at the corner of Ballater Avenue and Balmoral Avenue. Both the claimant and the driver of the truck stopped to assist the motorist with a

push start. After the push start was successfully completed, the claimant was hit down by a speeding taxi being driven by the 1st defendant Herdly Stephenson and owed by the 2nd defendant Orane Horace Coward. The speeding car hit the claimant on his left side causing him to fall. He suffered a fractured left ankle. On April 4, 2018, he filed a claim against the defendants seeking damages in negligence. The claimant pursued the claim against the 2nd defendant and obtained against him, judgment in default of defence on October 26, 2018. It is the assessment of his damages that I now have before me.

The claimant's evidence

Non-pecuniary losses

[2] The claimant's evidence in chief as contained in his witness statement and amplified at trial is that after he was hit by the taxi, he could not stand on his feet and so he used his hands to assist him to crawl to the sidewalk where he sat down. The police who eventually came on the scene, took him to the Kingston Public Hospital (KPH) for medical treatment.

[3] When he arrived at the KPH he was taken to the Accident and Emergency Department and handed over to a porter who placed him in a wheelchair. He was attended to by a doctor to whom he complained that he was in a lot of pain. His left ankle was swollen, and he had pain in his hip and chest and there were bruises on his hand. He was given medication and taken to have an x ray. When the x ray results were received, he was advised that he had a fractured bone in his ankle. Before being discharged home, he was given a full cast, prescription for pain medication, and an appointment to see the orthopaedic surgeon.

[4] On the night of the accident, he had difficulty sleeping as a result of the pains he was experiencing. He lives alone and therefore he had a difficult time doing things for himself. He was placed on two months' sick leave and his boss was kind enough to purchase crutches for him to assist with his mobility. He is a day labourer employed to Talawah Investments Limited. During these two months he stayed with relatives in Mount Rousser as he could not provide for his personal needs

without help. His relatives cared for him and helped to nurse him back to health. Because of constant pains he was feeling he went to see Dr Ijah Thompson who prescribed analgesics and muscle relaxants. He was instructed to return for a "follow up visit" and at that visit, Dr Thompson further prescribed physiotherapy for his ankle. During the two years since the accident, he has had several visits with Dr Thompson and did further physiotherapy at Oasis Health Centre.

[5] The claimant's further evidence is that Dr Thompson diagnosed him with the following injuries: -

a) Distal tibial fracture
b) Soft tissue injuries to hip and chest.

The accident, the claimant says, has changed his life greatly. He used to be an active person but now he has to: "slow down for everything". He cannot play football as he used to, and he has to be careful when running and climbing onto buildings as his job sometimes requires him to do. Whenever the time is cold, he feels pain and this happens when he visits the "cold room" at work. He is "traumatized" by the accident and now thinks twice before helping persons in need on the road. Questioned by his counsel as to how he is currently feeling, the claimant said that he is feeling pain in his leg and suffers discomfort in cold environments.

[6] A medical report dated September 18, 2017, from the KPH was tendered and admitted into evidence. Dr Max - Ann Melissa Prendergast who prepared that report states that the claimant presented at the Accident and Emergency Department (A & E) on May 9, 2017. Thirteen days after the injury, he was seen in the Orthopaedic Outpatient Clinic on referral from the A& E. She reports that the claimant gave a history of being hit over the left ankle by a motor car and falling. He complained of pain in the left ankle and that it was non-weight bearing. Findings on examination were maximal tenderness to the lateral malleolus and minimal tenderness to medial malleolus of the left ankle. X-ray investigations revealed a:

"long oblique fracture of the lateral malleolus, small fragment of the medial malleolus ". He was diagnosed with a lateral malleolus fracture of the left ankle and his treatment was a full cast. There was follow up in the Orthopaedic Clinic four weeks later, at which time, the cast was removed and the claimant given an appointment to return to the Clinic in two weeks.

[7] Also tendered into evidence was a medical report of Dr Ijah Thompson dated January 27, 2019. Dr Thompson reports that he saw the claimant on May 21, 2017. He said he saw him once. He said the claimant presented with pain and swelling to his left ankle, pain to his neck, pain to his chest and back and pain to his right hip. His pain score was reported as 4 out of 10. Dr Thompson's findings on examination were that the claimant's expected activities of daily living would be moderately limited due to what he described as his "persistent pains". He also found that there was tenderness to the left ankle, discomfort with motion to the left hip and discomfort to the chest.

[8] Under the rubric, "Investigations", Dr Thompson has the following narrative in his report: "X –ray –fracture malleolus of left ankle". He assessed the claimant as having a distal tibial fracture and soft tissue injuries to his left hip and chest. In relation what he describes as "Future Medical Care", Dr Thompson says that the claimant will need at least six sessions of rehabilitation physiotherapy and that analgesic support is patient dependent and related to the claimant's subjective perception of his chronic pains.

Pecuniary losses

[9] The claimant gave evidence in his witness statement of spending $84,500.00 in out-of-pocket expenses for the cost of the medical reports from the KPH and Dr Thompson, the cost of physiotherapy, the cost for doctor's visits and the cost for a police report. Documentary evidence in relation to $ 56,000.00 of this sum was tendered and admitted. By way of amplification of the claimant's witness statement, Mr Harris questioned the claimant on his transportation costs. His response was that he paid $500.00 for transportation by a chartered taxi, to take

him from the KPH to his home after he was discharged on May 9, 2017. When asked if he had any receipt to prove that expenditure, he said that:" Taxi drivers don't give receipts". Special damages pleaded amounted to only $11,000.00

[10] Counsel Miss Gordon's cross examination was limited to the claimant's transportation costs. She suggested to him that charter taxi operators do in fact issue receipts. In answer, the claimant insisted that he did not receive one.

Submissions

The claimant

[11] The decision in **Maureen Golding v Conroy Miller & Duane Parsons** decided on July 13, 2006, and reported in **Khan's Recent Personal Injury Awards Volume 6,** was the authority relief on by counsel Mr Harris. He submitted that the injuries suffered by the claimant in that case are equivalent to the injuries suffered by the claimant at bar. Those injuries were an un-displaced fracture of the left fibula, and pain in the left leg. He argued that while the claimant **Maureen Golding** had a longer period of recovery, which was six months; the claimant at bar suffered other injuries that **Maureen Golding** did not have. In identifying what he contended were the "other injuries", counsel said that in addition to the fracture of the left ankle, the claimant also had a distal tibial fracture as well as soft tissue injuries. Counsel argued that in light of these additional injuries, there should not be any discounting of the award in **Maureen Golding** which updates to $ 1,868,716.58.

[12] In relation to special damages counsel said that I should award the sum of $53,500.00 which represents transportation costs of $500.00; the cost for the police report of $3,000.00 and the cost for Dr Thompson's medical report in the amount of $50,000.00. Counsel said that although the cost for Dr Thompson's medical report had not been pleaded, the report was put into evidence and the report itself made reference to the cost.

The defendant

[13] Miss Gordon in her submissions sought to distinguish the decision in **Maureen Golding v Conroy Miller & Duane Parsons.** She argued that the claimant **Maureen Golding** was incapacitated for six months, but the medical evidence from the KPH suggests that the cast was removed from the claimant's leg after five weeks. She also argued that given the timeline, the cast would have been on the claimant's leg when he saw Dr Thompson. Counsel observed that the diagnosis from the KPH is that of a lateral malleolus fracture of the left ankle, while Dr Thompson's diagnosis is that of a distal tibial fracture. "These are two different bones", remarked Miss Gordon. She said there was no evidence that a separate X-ray was done at the instance of Dr Thompson. Counsel concluded this aspect of her submissions by urging me to: "take the medical report of Dr Thompson with a grain of salt".

[14] In relation to the claimant's evidence that his employer's generosity led to him getting crutches to assist with his mobility, counsel said that that meant that the claimant was "never incapacitated". She argued that he was "moving around" and that there is nothing to indicate that he was incapacitated for two months. According to her, the fact that he received two months six leave is not indicative of incapacity. She insisted that the crutches suggest that the claimant was able to "move around."

[15] Miss Gordon submitted that the claimant **Maureen Golding** had on a cast for two weeks longer than the claimant did. Counsel contended that the **Maureen Golding** decision is an extreme case and while that claimant may not have had any soft tissue injuries, she had more than just a fracture. She also had pain due to an injury to the leg and to the ankle. That updated award should therefore be discounted significantly. Miss Gordon however did not offer a suggestion as to what an appropriate discount should be.

[16] The claimant's evidence that he is currently feeling pain in his leg and that he experiences discomfort whenever he is in a cold environment, was queried by Miss

Gordon. She said that as someone who works on a water truck, he is not subject to a cold environment and therefore it cannot be said that he is suffering discomfort on a daily basis. Counsel offered the decisions in **Cecil Gentles v Artwell's Transport Co Ltd and Joslyn Chambers** reported in **Khan's Recent Personal Injury Awards Volume 5;** and **Trevor South v O'Neil Carter , Hopeton Stone , Clive Morgan (t/a Morgan's Trucking Ltd , and Morgan's Trucking Company Limited**, **Consolidated with Dawnalee Morgan v Morgan's Trucking Company Limited, Clive Morgan, Hopeton Stone and O'Neil Cater; and Veronica Kelly v Morgan's Trucking Company Limited, Clive Morgan , Hopeton Stone and O'Neil Carter, [2021]JMSC Civ 158;** as good comparable authorities. She submitted that the injuries in **Cecil Gentles v Artwell's Transport Co Ltd and Joslyn Chambers** are similar to those of the claimant however in the earlier authority, the claimant had two fractures to the left ankle and was in a cast for seven weeks. The doctor's prognosis in that case was that there was a possibility of the onset of arthritis. Counsel posited that in the circumstances, an amount of $700,000.00 is a reasonable sum to award the claimant for pain and suffering and loss of amenities.

[17] It was argued that most of the special damages were not pleaded. Counsel said that the authorities on the point are clear that special damages must be specifically pleaded and proven. For this proposition, Miss Gordon relied in her written submissions on **Murphy v Mills (1976) 14 JLR 119** and on **Attorney General v Tanya Clarke SCCA No 109/2002, delivered December 20, 2004.** She further submitted that while courts make an accommodation in relation to specific proof of transportation costs, times have changed, and the public can now get receipts from chartered taxis operators. Counsel quoted from the dicta of Sykes J (as he then was) in **Owen Thomas v Constable Foster and the Attorney General** in which the learned judge said that: "Defendants should expect and rightly so that judges will only depart from well-established principles if and only if there is a sound and proper basis in law and fact for such a departure. To decide otherwise would be to introduce laxity in this area of the law". The special damages pleaded only amount

to $11,000.00 and according to Miss Gordon, this is the only amount the claimant is entitled to receive. The claimant had ample time to amend his statement of case to specifically plead the out-of-pocket expenses which he now wishes the court to take cognisance of, but he failed to do so. The court of appeal decision in **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson (Court appointed personal representative of the claimant, the late Orinthia Hanson deceased, [2019] JMCA Civ 49** was relied on for the general principle that there needed to have been an amendment to the statement of case in order to include all the special damages being claimed.

Analysis and discussion

[18] In assessing the claimant's damages, I am to be guided by comparable authorities and, must carefully consider the nature and extent of his injuries and any consequential disabilities that he may suffer as a result of those injuries. In analysing the nature of his injuries, I am to have regard to their severity and duration and the impact they may have had on his quality of life and on his activities of daily living. The goal is to compensate the claimant so as to put him, as far as possible, in the position he was in before the occurrence of the accident on May 9, 2017. As elementary as these principles have become, my task is far from simple.

[19] The first medical facility to treat the claimant was the KPH. It is evident from the KPH medical report that on presentation, clinical investigation by way of an x-ray was done and the findings were that there was a long oblique fracture of the lateral malleolus and a small fragment fracture of the medial malleolus. The ankle is a joint where the shin bones (the tibia and the fibula) meet the talus (the foot bone). I take judicial notice of the fact that the lateral malleolus and the medial malleolus are two of the protrusions or bony bumps on the ankle. The medial malleolus is a part of the tibia and the lateral malleolus is a part of the fibula. Dr Thompson's assessment of a distal tibial fracture is therefore not incongruous with the KPH's investigative findings of a small fragment fracture of the medial malleolus. I therefore do not accept Miss Gordon's submission that I should have scant regard for Dr Thompson's report. In fact, it is the case that Dr Thompson omitted to make

any reference in his assessment to the long oblique facture of the lateral malleolus (the fracture of the fibula), which was part of the KPH's findings. Dr Thompson in his medical report does not say that he referred the claimant to have an x-ray done. His reference to the x-ray investigative findings must be taken to be a reference to the findings of KPH's own x-ray images.

[20] I am satisfied, based on his evidence as well as the reports from both the KPH and Dr Thompson, and I therefore find, that the claimant suffered a long oblique fracture of the lateral malleolus and a small fragment fracture of the medial malleolus. These fractures of the left ankle would undoubtedly affect the claimant's mobility. I accept his evidence that the injury affected his ability to provide for his personal needs in the way he normally would. I accept, that his immobility would necessitate the combined two month's sick leave which he was given by the KPH and by Dr Thompson. He is a day labourer. He works on a water truck. It would seem to me that ambulating deftly is critical to his job functions. He must be able to mount and dismount a truck without encumbrance. He also says that his job sometimes requires him to climb onto buildings. While crutches would certainly assist with his ambulation, it is unreasonable to expect that the claimant could perform his job functions while using them. How could he ably mount and dismount a truck or a building with crutches? I simply cannot accept Miss Gordon's submission that because he had crutches, this meant that he was "moving around" and therefore did not suffer any incapacity.

[21] The claimant's evidence is that he was in a lot of pain after the accident. He had pains in his hip and chest and bruises on his hand. He was hit on the left side by a speeding taxi and fell. His ankle was fractured as a consequence. I accept his evidence that he experienced a great deal of pain from the collision and subsequent fall. The claimant said the pain was significant. I recognise that pain is subjective and in assessing damages, the subjective analysis is as important as its objective counterpart. It is also his evidence that he still feels pain in his leg and that he experiences discomfort in cold environments. It is not unusual for persons who suffer fractures to have intermittent pain over an extended period of time after

the fracture heals. Even though the claimant does not work daily in a cold environment, he has said that there is a “cold room” at his work place and whenever he is in such an environment, he feels discomfort. I accept this evidence. I have no reason to doubt him. I also accept and find that the collision and the fall resulted in soft tissue injuries to the claimant’s chest and hip. He said he had bruises to his hand and pain to his hip and chest. I have no basis to question Dr Thompson’s diagnosis of soft tissue injury to these parts of the claimant’s body. I find that he did suffer those injuries. The claimant was in a cast for approximately four weeks. He was placed on two months’ sick leave. I therefore find, based on the evidence that his recovery lasted two months. The claimant does say that the injuries affected his ability to play football. I accept his evidence in relation to this loss of amenity.

[22] Although the claimant says that he visited Dr Thompson several times over the two-year period since the accident, Dr Thompson’s medical report indicates that he saw the claimant only once. That report is dated January 27, 2019. I will therefore not place any weight on this aspect of the claimant’s evidence.

[23] **Maureen Golding v Conroy Miller & Duane Parsons,** is a good comparable authority. In July 2006, the award made for pain and suffering and loss of amenities in that case was $ 580,000.00. That award updates to $1,868,716.58 using the current consumer price index. The main distinguishing feature in that case being the length of the recovery and the incapacity. The claimant **Maureen Golding** was temporarily incapacitated for six months and had no permanent disability. The claimant’s recovery lasted two months. Both had fractures of the left ankle. In the case of the claimant at bar, he had a fracture of the left fibula and a small fragment fracture of the left tibia. There is not much detail in the Khan’s report surrounding the ankle fracture of the claimant **Maureen Golding**, but what is stated is that she had a fracture of the left fibula. She wore a cast for approximately five or six weeks which was one or two weeks longer than the claimant at bar wore his. I agree that there should be some discounting of this award by virtue of the difference in the duration of the injuries and the incapacity.

[24] Miss Gordon argued that the decision in **Cecile Gentles**, which she cited, ought to be significantly discounted. The claimant in that case was 70 years old and suffered a bimalleolar fracture of the left ankle. He was treated with a below knee cast which he wore for seven weeks and although there was the possibility of arthritis, no evidence of this disease was detected on his last clinic visit. In February 2000, he was awarded $ 300,000.00 for pain and suffering and loss of amenities. That figure updates to $ 1,786,699.50. A bimalleolar fracture of the ankle suggests to me that in addition to the fracture of one of the malleoli, there is some other injury to the ankle. In the case of the claimant at bar, both the medial and the lateral malleolus in his left ankle had fractures, albeit one was a small fragment fracture. It is evident that the claimant **Cecile Gentles** wore a cast for two or three weeks longer than the claimant at bar. There is however nothing in the report to indicate that in making the award of general damages, any regard was had to the diagnosis of the possibility of arthritis, which, in any event, was not evident at last presentation. I am of the view that the bimalleolar fracture is comparable to the fractures the claimant suffered of both the medial and the lateral malleolus of his left ankle. As with the **Maureen Golding** decision however I agree that there ought to be some discounting to account for the difference in the length of the recovery and incapacity.

[25] The claimant Veronica Kelly in Trevor South v O'Neil Carter , Hopeton Stone, Clive Morgan (t/a Morgan's Trucking Ltd , and Morgan's Trucking Company Limited, Consolidated with Dawnalee Morgan v Morgan's Trucking Company Limited, Clive Morgan, Hopeton Stone and O'Neil Cater; and Veronica Kelly v Morgan's Trucking Company Limited , Clive Morgan, Hopeton Stone and O'Neil Carter had a fracture of the proximal left little toe , multiple blunt trauma , blunt trauma to the left shoulder , and cervical spondylosis. Her little toe was splinted and on assessment one month after first presentation, she had tenderness over the left lateral malleolus of the toe. The learned judge in awarding damages of $800,000.00 for pain and suffering and loss of amenities, observed that that claimant did not need to be treated with a cast, she did not have a disability rating, but the pains she

experienced in her toes prevented her from participating in her morning exercises and chores. That case was decided on September 21, 2021. The award appears to me to be on the lower end.

[26] In the result, having carefully considered the evidence and all the authorities relied upon by both counsel, I award the claimant the sum of $ 1, 350,000.00 for pain and suffering and loss of amenities.

[27] The claimant pleaded special damages of $ 1000.00 for medical expenses and $10,.000.00 for transportation costs. He provided evidence of only $500.00 for the latter expense. I accept his evidence that he did not receive a receipt for this expenditure. While it may be true that some chartered taxi operators provide receipts, I am not prepared to accept that times have so changed in Jamaica that we are to expect all chartered taxi operators to issue receipts. The claimant said he did not receive one, and I have no basis to disbelieve him. The evidence he gives for his medical expenses exceeds his pleadings for special damages. He has not pleaded that he incurred expenses for a police report, but he gives evidence of paying $3,000.00 for it. All the out-of-pocket expenses ought to have been pleaded. It is a truism that special damages must be specifically pleaded and proven. No explanation was given as to why all those expenses were not pleaded, and no application was made for an amendment to the pleadings. The medical report of Dr Thompson is dated January 27, 2019. There was more than ample time to amend the claim to include this expenditure. So too the expenditure relating to the physiotherapy sessions and the fees for Dr Thompson's consultation. I agree with Miss Gordon on the point. The circumstances in which a court grants an accommodation certainly do not arise in this case. The court of appeal's decision in **Alcoa Minerals of Jamaica Incorporated v Marjorie Yvonne Patterson (Court appointed personal representative of the claimant, the late Orinthia Hanson deceased, [2019] JMCA Civ 49,** is a timely reminder to all counsel who practise in this area, that statements of case ought to be amended to include out of pocket expenses incurred after the claim has been filed, if it is that recovery is being sought for such expenditures. In the circumstances, I award the claimant

special damages in the sum of $1,500 representing medical expenses of $1,000.00 and transportation costs of $500.00.

Conclusion

[28] Having regard to the forgoing, I make the following orders in favour of the claimant:

a) General damages for pain and suffering and loss of amenities in the sum of $1, 350,000.00, with interest at 3% per annum from May 3, 2018 to July 21, 2022.
b) Special damages in the sum of $1,500.00 with interest at 3% per annum from May 9, 2017 to July 21, 2022.
c) Costs to be agreed or taxed.