[2017] **JMSC Civ.19**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 04192

BETWEEN	**GEORGE SWABY**	**CLAIMANT**
AND	**ANDY GRAY**	**DEFENDANT**

Mr. Raymond Samuels for the Claimant

Defendant unrepresented and absent

HEARD: February 3, 2017 and February 13, 2017

WINT-BLAIR, J (AG.)

ASSESSMENT OF DAMAGES:

FACTS

[1] In a claim filed on July 19, 2013, the claimant, George Swaby claimed damages for negligence arising out of an accident in which unsecured goods fell onto his shoulder while he was a passenger in the defendant's vehicle. The claimant alleged that his injuries were caused due to the negligent operation of the motor vehicle driven by the defendant and accordingly makes this claim for compensation against him.

[2] The claimant sustained injuries as a consequence and attended upon Dr. Lincoln Wright at the Port Maria Medical Centre, 2 Rivers Lane, Port Maria, St. Mary, on the 8th day of December, 2009. He relied upon a medical report which was dated February 19, 2010. This report became Exhibit 1. In that report Mr.

Swaby presented as having a decreased range of motion in his left arm and tenderness. He was seen on four occasions and the diagnosis was blunt trauma to the left shoulder with possible neuropraxia. He was prescribed analgesics, x-ray ordered was normal and a sling was ordered to be worn. The doctor indicated that the claimant should take fourteen days of sick leave.

[3] The claimant tendered only Exhibit 1, there were no receipts to support his payment for that report nor for any of his visits to the doctor. The claimant was not asked how much he had paid for any of these visits, nor could he recall how much he had paid for the medical report. There were no receipts filed with a notice of intention to tender in evidence hearsay statements made in a document. Nonetheless, counsel pursued a claim for special damages as particularized in the claim. There was evidence in the claimant's witness statement that he had spent two sums of $7,000 apiece at the Port Maria Medical Centre and Port Maria Hospital, he did not say what these sums were spent for. He also said in evidence that he had spent $8,500 on medication, he did not indicate what medication this was and there were no receipts in support.

[4] As there were no receipts filed or exhibited there was no documentary proof of the claimant's expenses on the medical report or medication. Counsel submitted that his office had mislaid the receipts brought in by the claimant, it seems that they also mislaid a second medical report from the Port Maria Hospital. The claimant gave no evidence of this. The fact that the expense may have been incurred is probable. I accept that the claimant has suffered loss, it is the proper proof of the extent of the loss which is wanting.

[5] In the **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** SCCA 109 of 2002 Cooke, J.A reviewed the authorities below and therefrom extracted the following principles:

1.) Special damages must be strictly proved: ***Murphy v Mills*** *(1976) 14 JLR 119;* ***Bonham-Carter v Hyde Park Hotel Ltd.*** *(1948) 64 TLR 177;*

2.) *The court should be very wary to relax this principle:* ***Ratcliffe v Evans*** *(1892) 2 Q.B. 524;*

3.) *What amounts to strict proof is to be determined by the court in the particular circumstances of each case:* ***Walters v Mitchell (1992) 29 JLR 173; Grant v Motilal Moonan Ltd. and Another (1988) 43 WIR 372****;*

In consideration of (3) there is the concept of reasonableness.

a. *What is reasonable to ask of the plaintiff in strict proof in the particular circumstances:* ***Walters v Mitchell*** *(supra)****; Grant v Motilal Moonan Ltd. and Another****(supra)****,*** *and*

b. *What is reasonable as an award as determined by the experience of the court:* ***Central Soya of Jamaica Ltd. v Junior Freeman*** *(1985) 22 JLR 152.* ***See also Hepburn Harris v Carlton Walker*** *SCCA No. 40/90 (unreported) to which there will be reference subsequently.*

4.) *Although not ususally specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation. See specifically* ***Ashcroft v Curtin*** *(supra);* ***Bonham-Carter v Hyde Park Hotel Ltd*** *(supra).”*

[6] In **Bonham-Carter v Hyde Park Hotel Ltd.** (1948) 64 TLR 177 at 178, Lord Goddard, C.J. set out the principle as follows:

> *“Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: ‘This is what I have lost; I ask you to give me these damages. ’They have to prove it.”*

[7] In **Ratcliffe v Evans** (1892) 2 Q.B. 524, Bowen, L.J. who delivered the judgment of the English Court of Appeal said at p. 532:

> *"As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

[8] In **Central Soya of Jamaica Ltd, v Junior Freeman** (1985) 22 JLR 152 at 158G, Rowe, P on behalf of the Court of Appeal, said:

> *"In casual work cases it it always difficult for legal advisers to obtain and present an exact figure for loss of earnings and although the loss falls to be dealt with under special damages the court has to use its own experience in these matters to arrive at what is proved on the evidence."*

[9] In respect of loss of earnings. The claimant's witness simply throws up figures without any detail to substantiate them. As a farmer selling goods to vendors, he is obliged by law to hold a receipt book pursuant to the Agricultural Produce Act and to issue receipts for produce sold. He should also be registered with RADA. There is no evidence of this. In respect of the building of a pit which was partially completed by the claimant at the time of the accident, there is no evidence of the total cost of the job, its location or even for whom the pit was being dug. As regards the building of a wall, again, there is no specificity, no details as to the other party to the contract, the location of the wall, when he had started the job or at what stage of completion he had had to abandon the job. The evidence is woefully inadequate. While I do not expect the claimant to provide documentary proof of these transactions, facts peculiarly within his own knowledge are relevant, material and should be placed before the court.

[10] The doctor had given the claimant 14 days of sick leave, there was no evidence as to why he returned 4 times, what transpired on those visits, and what treatment was prescribed. However, I will award the minimum wage of $6,200 per week for 14 days as I accept that he was engaged in farming and that he is a mason.

[11] The claimant's claim and his written and oral evidence therefore have not satisfied the conditions precedent for an award of special damages in every material particular, that is to say the special damages which are capable of quantification, have not been specifically pleaded. In the interest of justice, I have accepted the evidence of how they were occasioned, accordingly special damages are granted as follows:

• Transportation	$ 3,200.00
• Medical report	$ 7,000.00
• Loss of earnings: 14 days	$12,400.00
TOTAL	$22,600.00

GENERAL DAMAGES

[12] The claimant is seeking to obtain satisfaction against the defendant for his injury. A non-pecuniary award is supposed to compensate the claimant for enduring the negative experience and symptoms attendant upon the receipt of such an injury such as shock, pain and the loss of amenities and the expectation of enjoyment of life.

[13] In arriving at an assessment of damages both the objective and subjective elements of an actual injury suffered must be taken into account as enunciated in the judgment of Sykes, J in the case of **Icilda Osbourne v George Barned, Metropolitan Management, Transport Holdings Ltd and Owen Clarke** Claim No. 2005 HCV 294 delivered on February 17, 2006. At paragraph 3 of the judgment Sykes, J held:

> "… there are broad principles that must be taken into account when assessing personal injury claims. One is that while there ought to be consistency in personal injury awards in a particular jurisdiction, this must not outweigh the fact that the court is not compensating an abstract claimant but the one before the court. I

fear that some of the submissions of Mr. Nicholson [Mr. Samuels, in the instant case] have not paid sufficient regard to this principle. This is not to say that compensating the particular claimant means that the court ignores similar awards. I am guided by this statement of principle enunciated by Lord Morris **in H. West & Sons Ltd v Shepard** [1963] 2 All E.R.625 at page 633 D-G:

"The first of these questions may be largely answered if it is remembered that damages are designed to compensate for such results as have actually been caused. If someone has been caused pain then damages to compensate for the enduring of it may be awarded…Apart from actual physical pain it may often be that some physical injury causes distress fear or anxiety. If, for example, injuries include the loss of a leg there may be much physical suffering, there will be the actual loss of the leg (a loss the gravity of which will depend upon the particular circumstances of the case) and there may be (depending upon particular circumstances) elements of consequential worry and anxiety. One part of the affliction (again depending upon particular circumstances) may be an inevitable and constant awareness of the deprivations which the loss of the leg entails. These are all matters which the judges take into account. In this connection also the length of the period of life during which the deprivations will continue will be a relevant factor. (See Rose v Ford).

Lord Devlin spoke *in a similar vein at page 636 E:*

> *"[T]here is compensation for pain and suffering both physical and mental. This is at large. It is compensation for pain and suffering actually experienced."*

[14] In **Rose v Ford** [1937] A.C. 826, Lord Roche held:

> *"I regard impaired health and vitality not merely as a cause of pain and suffering but as a loss of a good thing in itself."*

Some of the factors I have considered in making this assessment for non-pecuniary damage are:

1. age of the plaintiff;
2. nature and extent of the injury;
3. severity and duration of pain;
4. emotional suffering; and

5. impairment of physical abilities and loss of lifestyle

[15] The claimant was a 74 year old farmer and mason at the time of the accident. All of the above factors must have impacted and resulted in the deprivation of the vigour he had enjoyed up until the accident and which he might have expected to enjoy for some long years. I have nothing before me to indicate any resultant disability as the claimant though returning to his physician for follow up visits, did not submit any further medical reports. There has been no evidence of any particular emotional suffering or the impact on daily living or whether the claimant required assistance.

[16] The medical report of Dr. Wright referred to above does not give a prognosis.

[17] Counsel has relied upon the case of **Hugh Douglas v Morris Warp et** al Suit No. C.L. 1984 D 130 delivered on April 6, 1994. In that case the claimant suffered bruises to the right upper limb, weals over the right shoulder, bruises of left upper limb with swelling to the left arm, tenderness over humerus and swollen and tender left forearm. Swollen and tender left thigh.

[18] That case is of some assistance in respect of the case at bar however, significantly more evidence was placed before James, J than in the instant case. The award of $195,000 in that case updates to $1,321,166.

[19] Counsel also cited **Barrington Walford v National Water Commission and Dunn** Suit No. CL. 1996 W 073 a decision of Reckord, J delivered on April 12, 1999. In that case the claimant suffered a dislocated left shoulder, trauma to back, abrasion to left posterior shoulder and scapula and pain up left side of neck to left side of head. There is some trauma in the instant case but this claimant did not suffer from the other injuries. The award of $325,000 updates to $1,564,103.86. Taking both cases into account. The case of is similar only in terms of the trauma suffered by both claimants. The instant claimant has suffered decreased range of motion in his left arm and tenderness. He was diagnosed with blunt trauma to the left shoulder with possible neuropraxia.

There has been no evidence of any permanent partial disability or resultant effects from the accident.

[20] Based on the state of the evidence, I would discount the other injuries not suffered by the instant claimant by $664,103.88.

The court hereby makes the following award:

1. General damages: $900,000.00.with interest at 3% from July 19, 2013.
2. Special damages: $22,600.00 with interest at 3% from November 30, 2009.
3. Costs of $60,000 awarded to the claimant.