



[2022] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2019CV00514

BETWEEN	KEEKEE WALTERS	CLAIMANT
AND	KENROY WALLACE	DEFENDANT

IN OPEN COURT

Khadine Dixon instructed by Dixon & Associates Legal Practice for the Claimant

Defendant absent and unrepresented

Heard: May 18, 2022 and June 14, 2022

Assessment of Damages – degloving injury to left foot and fracture to left ankle – do transportation costs have to be specifically proven? – period over which interest is payable on damages.

MOTT TULLOCH-REID J

BACKGROUND

[1] On October 3, 2016, KeeKee Walters who was 15 years old at the time was travelling in a motor vehicle owned by the Kenroy Wallace. She alleges that the driver who was the servant and/or agent of Kenroy Wallace lost control of the motor vehicle, which overturned. The accident occurred because Kenroy Wallace's

servant and/or agent drove in a reckless and careless manner in an attempt to evade the police.

[2] Several Particulars of Negligence were pleaded which I will not go into because the Defendant failed to acknowledge service of the claim form and so default judgment was entered against him. The fact that there is a default judgment means that liability is no longer in issue and I am required only to determine the quantum of damages which is to be paid by the Defendant to the Claimant.

[3] The Claimant is now almost 21 years old, she having been born on July 31, 2001. The particulars of her injuries as set out in her Particulars of Claim are noted as follows:

(1) Degloving injury to the left foot overlaying the lateral malleolus.

(2) Tenderness to the left ankle.

(3) Left ankle medial malleolus fracture.

THE EVIDENCE

[4] Ms Walters relies on a medical report issued by the Kingston Public Hospital to support her contention concerning the injuries she sustained. The medical report was admitted into evidence as Exhibit 1. The medical data reports that Ms Walters denies loss of consciousness, chest pain, abdominal pain, neck pain or ear, nose and throat bleeding but could not walk post event. Examination revealed that the Claimant had a degloving injury to left foot overlying the lateral malleolus and tenderness to left ankle. X-ray revealed that she had a left ankle medial malleolus fracture but there was no abnormality detected on the x-ray of the cervical spine. Ms Walters was diagnosed with left ankle fracture and was treated with plaster of paris, Augmentin and Flagyl. She was referred to Orthopaedics and Plastic Surgery Clinics.

- [5] Ms Walters' evidence is contained in her Witness Statement filed on October 12, 2021. She stated that after the accident she felt pain all over her body and was unable to move her left leg which she later learnt was broken. She was admitted to the Kingston Public Hospital for 2 months and was absent from school during that time. (That would be from October 3 to December 3, 2016). The cast was removed after 6 months (which means she would have worn the cast from about October 3, to April 2017). She says after the cast was removed her injury had to be dressed and she attended Kingston Public Hospital 3 times per week for a further 6 months to have the dressing done (this would be from April 3, 2017 to October 3, 2017). No appointment cards were put forward to be admitted into evidence to substantiate this evidence.
- [6] She also tells the Court that she spent approximately \$345,200 in taxi fare as she had to charter taxi services from On Time Taxi Services to carry her to her various dressing visits. She paid the taxi \$1,600 for each round trip from her home to the hospital which totalled \$115,200. She also used the same taxi to transport her to school for 10 months at \$1,000 daily for an approximate total of \$230,000. She said no receipts were issued when she handed the taxi driver cash for transporting her.
- [7] Ms Walters said she used to play on the netball team at school and playing netball was her favourite activity. She wanted to become a professional netball player. She played for and represented her community of Cassava Piece in inter-community netball competitions. She said international scouts would come to the games but because of her injury she was no longer able to participate in the competitions and was therefore denied the opportunity of being scouted. Again there is no proof to support any of these allegations.
- [8] Ms Walters was permitted to amplify her witness statement, as since its filing, she obtained a job as a Security Guard at Ardenne High School. Her evidence is that

she is required to stand for the entire day from 6am to 6pm as Ardenne has not provided her with a chair to sit on. She stands all day at the gate but because of her injury, her left ankle hurts. Her ankle hurts when she stands on her foot too long. She also now walks with a limp. She said that her injury left her with a scar.

[9] In her witness statement Ms Walters says she continues to have pain. She can no longer run or exercise because of the pain. She seeks to relieve the pain she feels with the use of over-the-counter painkillers but they only provide temporary relief as they are not strong enough to have a lasting effect.

Submissions

[10] Ms Dixon relies on written submissions filed on October 29, 2021. I will deal with the claim for special damages first.

Transportation Costs

[11] An Amended Particulars of Claim filed on October 12, 2021 includes in the Particulars of Special Damages a claim in the sum of \$345,200 for transportation costs incurred. Miss Dixon relies on the case of **Owen Thomas v Constable Foster and Anor CL – T 095 of 1999 judgment delivered January 6, 2006** to point out that transportation claims can be allowed even without strict proof of same. She points out at paragraph 9 of her written submissions that Sykes J (as he then was) said that it is

“well known in Jamaica that many of our transport operators do not provide receipts to passengers and the costs seems reasonable.” (see paragraph 17 of the judgment)

Ms Dixon submits that the cost for transportation from home to Kingston Public Hospital and school are reasonable and that the sum of \$345,000 should be allowed.

[12] I will start at the basic position that special damages must be specifically pleaded and proved. Sykes J in the **Owen Thomas case** agreed with this position. He however stated that there may be appropriate cases in which the rule may be relaxed but agrees with Cooke JA in **Attorney General of Jamaica v Tanya Clarke (Nee Tyrell) SCCA No 109/2002 delivered December 20, 2004** that the relaxation should be carefully done. It can be inferred from the learned Judge's analysis that when receipts can be provided they should be. I draw this conclusion based on the following which he said at paragraph 16 of the judgment.

*"...it is almost inconceivable that a doctor would not have provided receipts to the claimant, or if they were lost, that the sum could not be confirmed by an appropriate request to the doctor. In the **Hawthorne Case**, the claimant was a handyman and security guard. There is nothing in the judgment to indicate whether there was evidence available indicating whether he was an employee or an independent contractor. The significance being that if he were an employee then his employer might have been able to provide evidence of his income..."*

I interpret Sykes J as meaning, where the evidence can be obtained to substantiate an allegation, the evidence should be provided.

[13] It is true that by virtue of the nature of her injuries Ms Walters would have needed to use taxi services as I suspect that going by bus or route taxi could offer some difficulty or challenge because of the nature of her injuries. She chose to use On Time Taxi Service. On Time Taxi Service is a fully recognised and established taxi service. I am of the view that if receipts were requested from On Time Taxi Service, they could have been obtained. Further even if at the time when Ms Walters was travelling, no receipt was given, the position could have changed at the time of the trial where all that would be required is for the Claimant or her Attorneys-at-law to ask On Time Taxi Service to indicate the return rate for transporting a sole passenger from Cassava Piece to Kingston Public Hospital and from Cassava Piece to Mona High during the period November 2016 to October 2017. There is no evidence that that was done and so without proof of the costs of transportation incurred I am not minded to allow the sum pleaded. I will also say

that even though I am of the view that costs were incurred for transportation, I cannot speculate as to the amount that was spent and therefore can make no award at all. I have no substantiated information about the number of trips made (the appointment cards for dressing at Kingston Public Hospital would have been helpful) or of the amount spent per round trip). It is also to be noted that a claim for \$2,500 for transportation (as pleaded in the **Owen Thomas case**) is significantly different from a claim for \$345,000 which is pleaded in the claim before me. Since the latter claim is a significant amount, it is my view that the Claimant should have done all she could to assist in proving that claim. In my opinion, she did not.

[14] I wish to also point out that Ms Walters' evidence is that she was transported for 10 months from home to school. No thought seemed to have been of the fact that school would have been on Christmas break, Easter break and Summer holidays during the 10-month period between December 3, 2016 when she would have been discharged from Kingston Public Hospital according to her evidence and October 3, 2017 when the 10-month period would have expired. This of course on the assumption that she returned to school after she was discharged from the hospital or even when her cast was removed.

[15] Medical expenses representing cost of medical report in the amount of \$1,000 is allowed. Exhibit 2 is the receipt for the said medical report which was admitted into evidence.

General Damages

[16] Ms Dixon is of the view that General Damages in the amount of \$2.5 million (according to written submissions) or \$3 million (according to oral submissions in court) should be awarded based on the evidence. She highlights the fact that Ms Walters was not able to play her favourite sport, realize her dream to become a

professional netball player and was not afforded the opportunity to be scouted by international scouts as bases on which the award should be made.

- [17] There is no evidence to support any of these allegations. If Ms Walters played at school, or for her community, it is reasonable to expect that school or community clubs would provide a letter to say so and would also speak to her prowess as a netball player and the fact that she was being scouted by international scouts. I cannot accept that evidence without more. I will accept though that she did play netball at school as netball is played by girls in high school as a part of the physical education programme. I am sure that given the nature of her injuries Ms Walters would not have been able to participate in that activity during the period of her incapacity.
- [18] Ms. Dixon submits that the claimant continues to feel pain in her foot. That is what the evidence states. There is however no evidence that she has consulted with a doctor since being discharged from Kingston Public Hospital. It is strange to me that even though the over the counter medications did not provide relief because “*they aren’t strong enough*” (see paragraph 19 of witness statement) that Ms Walters has not consulted with any medical practitioner. There is no evidence that she went to any clinics or back to Kingston Public Hospital for stronger medicine or saw a doctor privately. These avenues were available to her but were not utilized.
- [19] Ms Dixon relies in the cases of **Golding v Miller and Rodney v Binnie-Palmers** both of which were reported in Khan’s Volume 6. I have used the CPI of April 2022 which is 120.4, in my calculations. In the **Golding case** the sum awarded for pain and suffering updates to \$1,843,532.98. The Plaintiff had a fractured ankle. The **Rodney** award updates to \$2,393,272. I agree with Ms. Dixon that the Claimant’s degloving injury is of significance and is not an injury sustained by either Golding or Rodney. I note though that Rodney walked with a limp and had a PPD as it

relates to the function of the right lower limb, assessed. He had irregularity of the joint margin even though the fracture had healed and he had early onset osteoarthritis which caused him pain in walking and driving for long periods. This was not so for Ms Walters who even with the degloving was not assigned a PPD. I believe the award given for the Golding case, which was undefended is at the upper end of the scale of awards for ankle injuries, when compared to the Rodney case, which was defended and whose injuries were more serious.

[20] In addition to the cases cited by Ms Dixon, I also considered the case of **Travis Thomas (an infant by mother and next friend M. Stoner) and M Stoner v M. Shaw and Smith and Stewart Distributors Ltd** reported at Khans Vol 5. Page 61.

[21] In that case, Travis, a student aged 11 at the time of accident and 13 at the time of trial was injured in a motor vehicle accident. He had abrasions to both knees, bruising to elbow, damage to foot – large heavily contaminated degloving injury of medial border of left foot with exposed tendons and bone. He had no fracture. He received injections, antibiotics and a skin graft. His wound healed with a small area of oozing but he could not move his big toe. When last seen by doctor, he had obvious cosmetic mal-appearance. He was assessed as having a 2% PPD and was unable to play games and run. The right side of his foot remained tender and he continued to attend orthopaedic clinic. He could not wear shoes and slippers as doing so caused him discomfort. His foot remained scarred and he was not able to walk or run barefooted on uneven ground.

[22] Travis was awarded \$750,000 in July 1999 which updates to \$4,654,639. There is no evidence that Ms Walters' degloving injuring required her to have a skin graft. There is no evidence of a PPD being assigned nor is there medical evidence to substantiate her claim that she walks with a limp or is unable to run and exercise. I observed Ms Walters walking to and from the witness box but did not observe

any obvious limp. Unlike Travis who continued to attend Orthopaedic Clinic, there is no evidence of Ms Walters doing so. The medical evidence is limited but I am bound by that evidence in conjunction with the evidence contained in her examination in chief.

[23] Based on the injuries that Ms Walters sustained, I am of the view that sum of \$1,900,000 would be a reasonable award in the circumstances.

Interest

[24] Interest is to be paid up to November 2021 when the matter came up for hearing but had to be adjourned because the Claimant had not served the Defendants with some of the relevant documents. It is my view that the Defendant should not be penalized in an award of interest if the matter comes up for trial or assessment but the Claimant is not ready to proceed. Interest is therefore awarded on General Damages and Special Damages up to the point at which the claim first came up before the Court for the hearing of the Assessment of Damages but could not proceed because of the Claimant's lack of readiness.

[25] I therefore order follows:

- a. Damages are assessed in favour of the Claimant against the Defendant, Kenroy Wallace, who is to pay the Claimant General Damages in the amount of \$1,900,000 for Pain and Suffering and Loss of Amenities, plus interest at 3% per annum from March 22, 2019 to November 11, 2021, Special Damages in the amount of \$1,000 plus interest at 3% per annum from October 3, 2016 to November 11, 2021 and costs in the claim in the amount of \$130,000.
- b. The Claimant's Attorneys-at-law are to file and serve the Formal Order.