



[2014] JMSC Civ. 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010 HCV 05699

BETWEEN	MICHAEL BAUGH	CLAIMANT
AND	JULIET OSTEMEYER	1 ST DEFENDANT
AND	AUTON SELVARAJ	2 ND DEFENDANT
AND	KATHERINE RAJPAUL	3 RD DEFENDANT

Mr. Kent Gammon instructed by Kent Gammon and Co., for Claimant.
Mr. Maurice Manning and Ms. M. Phillips instructed by Nunes,
Scholefield, DeLeon and Co., for the Defendants.

Heard on: May 17, 2013 and 4th February 2014

*Personal Injury – Special Damages – Whether expenditure by Claimant
reasonably required to aid recovery – General Damages*

Coram: Morrison, J.

[1] The matter at hand has come about as a result of a motor vehicle accident on the 27th 2009 whereby the second Defendant driver of the first Defendant's motor car so negligently drove the said car causing it to come into abrupt contact with the rear of the

Claimant's motor car as he was driving along Gloucester Avenue, Montego Bay, Saint James.

[2] At a Case Management Conference held on the 30th November 2012, The Honourable Sinclair- Haynes, J ordered, *inter alia* that:-

- i. By consent judgement in favour of the Claimant
- ii. Damages to be assessed...

[3] According to the particulars of Claim as filed on 19th November 2010, the medical injuries inflicted on the Claimant were:

- a) Cervical strain
- b) Permanent lumbar spondylosis
- c) Mildly desiccated and a mild posterior disc bulge at disc L2-3
- d) Posterior annular tear at disc L3-4
- e) At L4-5 disc narrowed and desiccated and a diffuse posterior disc protrusion with associated mild facet hypertrophy.
- f) At L5-S1 a central posterior disc protrusion
- g) Permanent partial disability of the whole person of 4%

[4] From the medical report of Delroy A. Fray, M.B.B.S., F.R.C., F.A.C.S., dated May 4, 2010, it was revealed on examination that the Claimant's injuries were confined to the musculo-skeletal system. Spinal mobility in both his neck and lumbar spinal were restricted. As regards treatment the Claimant was referred for physical therapy. However, the report continues, "little improvement was seen and so he was referred to a pain specialist".

[5] It is against this sketched background that a hearing of an assessment of damages took place.

CLAIMANT'S CASE

[6] By way of a witness statement from the Claimant a few salient and noteworthy facts emerged. Acting on the advice of Dr. Fray he caused an X-ray to be done on his back and after examining his back Dr. Fray recommended that he obtain the services of an orthopaedic specialist. The next action of the Claimant was a visit to Dr. Paula Dawson “who upon examining my lower back told me I would have to change my life style or the back pain would get worse. By changing my life style I understood her to mean that I would not be able to play sports... She recommended injections to my spine to alleviate the pain but I did not do these because I was afraid of the risk of permanent back damage”.

(my emphasis)

The next step in the action was a visit by a Ms. Stacy Ridguard, physiotherapist, to the Claimant's home as “I was unable to walk”, he proclaims.

[7] In consequence Ms. Ridguard recommended physiotherapy sessions which he pursued over the period September 2, 2009 through to September 28, 2009.

[8] Seemingly, on the inefficaciousness of the therapeutic intervention, he engaged the services of Dr. Wayne Bruce who recommended that a Magnetic Resonance Imaging procedure be done. Dutifully, Dr. Konrad Kirlaw, a Consultant Neuroradiologist, obliged. Here we now come to the nub of the contest: “It was

recommended to me by my physiotherapist, Ms. Stacy Ridguard, and Dr. Delroy Fray, to get a sleep number mattress and a massage chair as to offer good postural support in lying and to help ease pain discomfort.”

Acting in the earnest pursuit of his therapeutic salvation he searched unavailingly throughout Jamaica for a sleep number mattress and a massage chair. However, he managed to locate the items by a search on the internet which he ordered through Douglas Gore/DND Export business. To facilitate the acquisition of the said items he took out a bank loan from the National Commercial Bank in the sum of \$809,908.00 which he then paid over to Douglas Gore/DND Export. To augment his delivery from concomitant pain in his neck he acquired a special pillow at a cost of \$2,212.34.

[9] Since the accident, he bewails, he has suffered diminishment in that his well-being in he now wear has to wear a back brace to relieve the pain in his back when driving as part of his job; he no longer enjoys the playing of outdoor games with his son; and he no longer enjoys “mundane things that I took for granted before the accident”.

[10] Upon his being cross-examined a few salient points emerged. He understood the importance of presenting receipts and other documents in support of expenditure claims; he did not all together acquit himself of the recommended physical exercises; he bought a wireless remote sleep lumber bed; he bought a music therapy function massage chair; and, he drove his father’s car, without incurring any additional transportation expense, while his car was undergoing repairs.

THE ISSUE

[11] The main issue here concerns what constitutes a fair and reasonable award by way of compensation for the Claimant's injuries and his losses. More particularly, can it be said that the items acquired by the Claimant were reasonably required for his rehabilitation.

THE MEDICAL EVIDENCE

[12] I now call attention to the medical reports that have been generated in this matter. The first expert to see the Claimant was Dr. Delroy Fray whose medical report is dated May 4, 2010. In respect of the complainant of neck pain radiating to the hands and low back pain radiating to both legs and on his examining the Claimant, Dr. Fray noted that, "This was confined to his muscular skeletal system. Spinal mobility in both his neck and lumbar spinal was restricted".

However, he continued, "Power, tone, sensation and reflexes in both upper and lower limbs were normal". He assessed the Claimant as having a cervical and lumbar strain secondary to the injury. Significantly, then follows this pronouncement; "The cervical strain will settle with time, however, the lumbar spondylosis is permanent".

[13] Ostensibly, in reference to the feedback from physiotherapist, he notes that, "Little improvement was seen and so he was referred to a pain specialist".

[14] Enter the records Dr. Paula Dawson. According to her medical opinion as is

contained in her report, "Mr. Baugh is being seen by me for low back pain secondary to multiple level lumbar degenerative discs and facet joint anthropaty. Prolonged sitting and standing are known to exacerbate his pain... He is currently being treated and may require Fluoroscopic Spine Injection".

[15] The above reflects the expert medical opinions of the two who saw the Claimant. It is to be observed that the Claimant was also seen by Ms. Stacey Ridguard, MSc, registered physiotherapist of eleven (11) years standing. The Claimant was apparently referred to her by Dr. Fray. From her report dated December 15, 2009, she states that, "He has been having on going physiotherapy sessions twice weekly". Further, "although the patient has shown some improvement in his neck pain; his mid and lower back pain persists with very negligible relief, for a short period. He has also been to the pain consultant...which has not helped much. He still has not attained his optimal functional and pain free status. He will therefore need to continue physiotherapy and be further discharged, when he is deemed to have reached his optimal rehab capacity".

[16] It is against this sketched medical and physiotherapy background that the controversial therapeutic items must be viewed to determine the reasonableness of their acquisition.

[17] It has to be borne in mind that Dr. Dawson's recommendation of Fluoroscopic Spine Injection was not acted upon by the Claimant as he was "afraid of the risk of permanent back damage". That latter stance of the Claimant was, I observe, made without medical support or validity.

[18] In any event, setting aside for the moment the unsupported and unconfirmed visits to Dr. Wayne Bruce and to Dr. Konrad Kirlaw by the Claimant, the Claimant's witness statement elides to this paragraph: "It was recommended to me by my physiotherapist, Ms. Stacy Ridguard, and Dr. Delroy Fray, to get a sleep lumber bed and a massage chair to offer good postural support in lying and to help ease pain discomfort". With supposed celerity he scoured unfruitfully throughout Jamaica to locate the said items. Failing to find them was not an option. The Internet beckoned with promising results: he located a sleep number p.7 bed and massage chair and he proceeded to order the items through Douglas Gore/DND Enterprise.

[19] No doubt actuated by self-interest, he took out a loan from the National Commercial Bank in the sum of \$809,908.00, "which was the cost to import the said sleep number bed and massage chair and I paid this \$809,908.00 to Douglas Gore/DND Export business on the 7th October 2009..."

ANALYSIS OF EVIDENCE

[20] A careful appraisal of the facts cannot but yield enforced misgivings, if not, uncomfortable concern about the following observations. First, the therapeutic items were recommended by an undeclared and unratified expert, the Claimant's physiotherapist, in September 2009.

[21] No support medical report antedates her recommendation. Be it noted that the person who is ultimately responsible for the Claimant's medial condition is Dr. Fray, yet he makes no pronouncement that his patient would benefit from the acquisition and use of the challenged therapeutic items.

[22] Significantly, the pain specialist, Dr. Dawson did not make any such recommendation. Rather, she made a distinct recommendation which the Claimant opted to spurn.

[23] In any event, it would have been pertinent to the thread of proof had there been evidence of even a hint that Dr. Fray was even appraised by Ms. Ridguard of her opinion that the Claimant would or could benefit from the use of the said items.

[24] Second, there is an absence of proof that the Claimant incurred the expenses he claims in relation to the said individual items. Exhibits 1 and 2, the Proforma invoice for the items that were tendered in evidence, do not go beyond their mere signification or purpose as they not only do not bear any signature on them but also fail to record important price information such as shipping, insurance and duty.

[25] Third, no documentary evidence was received in evidence as regards the Claimant's application for the loan from National Commercial Bank and its disbursement to him.

[26] Fourth, in view of the fact that the Claimant does a lot of desk work it is curious that the massage chair that was acquired was not kept at his work place, rather, it was kept at his house.

Fifth, Ms. Ridguard testified that she recommended that sleep number bed on the basis that the Claimant was only able to sleep for two hours yet after the acquisition of the bed the Claimant was only able to sleep for one and one half hours or so.

Sixth, it ought not to be overlooked that Ms. S. Ridguard's role as the Claimant's physiotherapist, though she was recommended to the Claimant by Dr. Fray, does not thereby fit her into the category of an Expert to be so regarded by the Civil Procedure Rules.

THE LAW

[27] The governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. Its object is to put the Claimant in the position he would have been in if the tort had not been committed. However, the principle of compensation is qualified by a number of doctrines which operate to limit the amount payable.

To restore a person to the self-same mental and physical condition immediately prior to the accident is a virtual impossibility. Nevertheless, as far as recovery or, indeed, cure will ameliorate the Claimant's condition, the law will order the defendant to pay a sum which it regards as reasonable and necessary for that purpose. In the seminal authority of **Phillips v London and South Western Co.**, (1879), 4 QBD 406, Cockburn, J instructed the jury to take into account, "the expenses incidental to attempts to effect a cure, or to lessen the amount of the injury".

Thus, the item claimed must be reasonably necessary in that it must comport to the amelioration of the Claimant's condition.

[28] In the instant case it is for the Claimant to justify the acquisition of the therapeutic items under review. However, a necessary link in this proposed justification must be the expert medical opinion on the matter as opposed to any other consideration.

I now turn attention to case law authority.

[29] In **Cunningham v Harrison And Another** (1973), 3 ALL E.R., 463, the Plaintiff was severely injured in a road accident caused by the Defendant's negligence. His injuries resulted in tetraplegia in consequence of which he would have to spend the rest of his life in bed or in a wheelchair. Though his mental faculties were unimpaired he was entirely dependent on others for emunctory functions. He was a self opinionated, autocratic man who was unsuited for a home for the disabled. The Judge found that he would require the assistance of two nurses. However, the Judge rejected the cost of building a specially constructed bungalow as there was no medical evidence that the house he was occupying then was unsuitable accommodation for him though it was accepted that a ground floor would have to be installed.

[30] It was held on appeal, inter alia, that the claim for the cost of a specially constructed bungalow would not be allowed on the basis that there was no medical evidence that it was desirable for the Plaintiff to move to specially constructed bungalow and it was impossible to justify an award for such a bungalow, or alternatively, for the cost of acquiring the house in fact bought by the Plaintiff. Apropos, the remarks of Lord Denning at p469 at letter (f) through to (h).

[31] In **Reubens v Walker**, 1946 S.C. 215 at p216 Lord Patrick said: "In a former and similar case - **Buntine v Caledonia Stevedoring Co.**, June 15, 1944, unreported I followed the dictum of Lord Collins in **Clippens Oil Co.**, 1907 S.C. (H.L) 9 at p.14 where he said: "The wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts. even though it should appear by the light of

after events that another course might have saved loss. The loss he has to pay for is that which has actually followed under such circumstances upon his wrong”: See also per Lord Dunedin in **S.S. Baron Vernon**, 1928 S.C. (H.L.) 21 at p.28. I said then, and see no reason to modify the statement, that this passage must surely apply where a pursuer is reduced by a defender’s fault to a state in which medical diagnosis of his condition is difficult and fraught with the chance of error. The pursuer is entitled to act on the advice of his experts, and the defender must pay the cost of that acting...” (my emphasis)

He continues’ “In my opinion it is a reasonable and probable consequence of a wrongdoer’s breach of duty that a person hurt will incur expense in following the treatment prescribed by reputable experts employed by him to cure him. Each case must be decided on its own merits. The result might be very different if the injured person acted on the advice of a quack, or if, considering all the advice he had received, no reasonable person would have taken the course he did”. (Emphasis mine).

[32] Clearly then, the evidence must comport with the principles which the law demands.

[33] In the instant case the Claimant has failed to show that he incurred the expenses of \$522,852.00 and \$287,056.00 as claimed for the sleep number bed and massage chair, respectively. He has also failed to show that the expenditure on the above items were reasonably required for his recovery. Also, it has to be demonstrated that the reasonableness of the expenditure was influenced by the type of injury. In other words, there has to be evidence which point to, for example, that the Claimant had to stop

working, or that it was medically necessary for his recovery. I, however, bear in mind that no medical opinion was advanced by his principal caregiver so as to justify the acquisition of the disputed items. The Claimant, seemingly, relied on the non-expert opinion of his physiotherapist in acquiring the disputed items.

SPECIAL DAMAGES

[34] It is of course trite law that a claim for special damages must be strictly proven.

The parties are in agreement limited only to medical expenses including physiotherapy sessions and the cost of repair to the Claimant's damaged motor vehicle.

Insofar as the claim for the costs of the sleep number bed and the massage chair are concerned, on principle, these claims fail for the reasons which I have indicated.

[35] Accordingly, I say that in respect of special damages that the award is as follows:

- a) Medical expenses including physiotherapy sessions \$213,766.62; and
- b) Cost of repairs to motor car per invoice from MSC McKay \$208,233.60.

GENERAL DAMAGES

[36] From the medical report of Dr. Fray the Claimant suffered or sustained permanent lumbar spondylosis, cervical and lumbar strain and a 4% whole person disability. The parties are poles apart in their submissions on general damages. Mr. Gammon has asked for \$3,500,000.00 whereas Mr. Manning has suggested an award of \$1,000,000.00.

[37] The medical report of Dr Fray dated May 4, 2010 revealed that the Claimant sustained the following injuries as a result of the accident on June 27, 2009:

- a) permanent lumbar spondylosis
- b) cervical and lumbar strain; and
- c) 4% whole person disability

[38] The Claimant relied on the cases of **Olga James-Reid v Stephen Clarke & David Davis, Dalton Barrett** *supra* and **Candie Naggie v The Ritz Carlton_Hotel Company Jamaica** in support of his claim for General Damages.

[39] I am of the view that the cases of **Olga James and Candie Naggie** are distinguishable from the injuries sustained by the instant Claimant and ought not be relied on.

In the **Olga James** case the injuries were to her right buttock and hip region which required her hospitalization for five days. She experienced severe pain in the right buttock area, itching and burning over the hip and buttock area and there was some wasting of the right lower limb. Additionally, the Claimant developed Piriformus Syndrome, i.e. a compression of the sciatic nerve as it passes from the pelvis to the buttock en route down the thigh. She experienced weakening of both knees which buckled and caused her fall frequently. As a result she had difficulty sitting for long periods, required the use of a cane for three and a half years and was unable to drive for three years.

Her disability rating as assessed at 12% of the whole person according to Dr. Minott. An award of \$4,000,000.00 was given for Pain and Suffering and Loss of Amenities. This award updates to a sum of \$7,163,043.47 as at May 2013. It is clear that Ms. James suffered far greater injuries than those of the present Claimant and as such this case serves no useful guidance in the present matter.

[40] In **Candy Naggie** the Claimant suffered from severe back pain across the lower radiating to the right thigh, a protrusion of L4/L5 to the right side and a blunting sensation from the right groin to the toes. She developed depressive condition and was given anti-depressants. She was diagnosed with mechanical lower back pains and assigned a 10% whole person disability. She was awarded \$1,750,00.00 for Pain and Suffering in December 2005 which updates to \$3,657,241.01. These injuries are much worse than those suffered by the instant Claimant. In the circumstance I have also disregarded in arriving at an appropriate award for the Claimant herein.

[41] In **Barbara Brady v Barlig Investment Co., Ltd. & Vincent Loshuan & Sons Ltd**, Volume 5, p252 of Khans Recent Personal Injury Awards made in the Supreme Court, (Khan's Reference) the Plaintiff suffered loss of consciousness, severe lower back pains and marked tenderness along the lumbo-sacral spine as well as both sacro-iliac joints. She was seen by Dr. R.C. Rose, F.R.C.S., who having examined her diagnosed her as having severe lumbar sacral strain. Since her accident the plaintiff was plagued by lower back pains by sitting for more than ½ hour, bending and prolonged walking. She received physiotherapy up to 1994. She was evaluated yet again in 1995 by Dr. Rose where she complained of inter alia, lower back pains. He assessed her permanent partial disability of the lumbar spine at 9%, which was

translated to 5% of the whole person. The plaintiff was awarded \$300,000.00 for pain and suffering and loss of amenities in November 1998 which updates to \$1,214,870.95.

[42] In **Anthony Gordon v Chris Meikle And Esrick Nathan**, Volume 5 or Khan's reference, p142, the Claimant sustained injuries from a motor vehicle accident resulting in the main pains to the lower back, left knee and left side of the chest. He was diagnosed with cervical strain, lumbo sacral strain and contusion to the left knee. He was awarded the sum of \$220,000.00 for pain and suffering in July 1998 which translated to \$899,193.71 today.

[43] In **Cordella Watson v Keith James & Errol Ragbeen**, Volume 5 of Khan's reference, p.256, the plaintiff suffered injury to her back causing severed lower back pain. In the final analysis, she was assessed by Dr. Rose as having a 5% permanent partial disability to the lumbo sacral spine or its equivalent of 3% of the whole person. Critically, the judge found, inter alia, that had the Plaintiff undergone a proper back care programme as suggested by Dr. Rose, her symptoms might have been reduced. As such, and taking into account other factors, the court awarded \$200,000.00 for general damages in 1997 which updated to \$863,695.93.

44. In arriving at an appropriate award for General Damages I considered the reliability of the **Barbara Brady** case and discounted its uselessness. In the present case the Claimant's injuries are not as serious as those of Ms Brady and this amount should therefore be reduced to take into account the discrepancies. Dr Fray certainly did not describe the Claimant's injuries as "acute" or "severe".

45. The **Anthony Gordon** case is not analogous to the present case and is thus not considered as being helpful.

46. The **Cordella Watson** case is also so regarded.

47. Finally, in **Ronald Edwards v the Attorney General**, the Claimant suffered from pain in the neck, testicles and severe lower back pain and some degenerative changes were noted. He was assessed as having a 5% Whole Person disability and awarded \$1,000,000.00 in December 2010 for pain and suffering. This award updates to a sum of \$1,176,085.66 as at May 2013. It is to be observed that Ronald Edwards suffered slightly worse injuries than those of the present Claimant and any award should be adjusted to reflect that consideration.

48. After a studied consideration of the preferred cases I am led on to think that an appropriate figure to compensate the present Claimant for general damages, using the **Ronald Edwards** case as a basis, is \$1,200,000.00.

49. In the upshot, I award \$421,999.62 for special damages with interest thereon at 3% per annum from June 27, 2009 to the date of judgement and the sum of \$1,200,000.00 for general damages with interest thereon at 3% from February 10, 2010 to the date of judgement.

Costs are to go to the Claimant if not agreed then such costs are to be taxed.

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