



[2018] JMSC Civ.163

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2014HCV04384**

<b>BETWEEN</b>	<b>KIMANI DAVIS-REID</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>EUGENE NOLAN</b>	<b>DEFENDANT</b>

Mr. Lamar Neil instructed by Bignall Law for Claimant

Mr. Ramon Clayton instructed by Samuda and Johnson for Defendant

December 20, 2018

**Motor vehicle accident – Differing medical diagnoses by two experts – Criteria for accepting one report above the other – general damages to be assessed for pain and suffering – significance of differing whole person percentage impairment by experts**

**CORAM: MORRISON, J**

- [1] This is a simple matter yet judgment has been prolonged by deficiencies in the presentation of counsel who seem to have forgotten that the purpose of filing bundles with written submissions and supporting list of authorities is to enable the tribunal to pre-prepare for the trial. Enough said.
- [2] I need not here make reference to the facts giving rise to the judgment of this case as the only concern on both sides is as to quantum.

The Claimant is asking for general damages in the sum of \$2,200,000.00 whereas the Defendant urges that a sum of \$1,000,000.00 is to be awarded for same.

**[3]** It is forcefully urged by the Defendant that the most recent medical report of Dr Grentel G. Dundas, Consultant Orthopedic Surgeon dated June 14, 2015 should be the basis upon which this Court should make its award. That this should be so is on the basis that it incorporates or took into account –

- a) the medical report of Dr George Lawson dated July 30, 2014;
- b) the medical report of Dr. A. Aumeerally dated May 31, 2014; and
- c) physical therapy report over the signature of Durga Gongineni dated August 14, 2014

**[4]** Here I shall pause to take note that the Claimant was seen by Dr George Lawson on various dates, namely, 19<sup>th</sup> June 2013, 2<sup>nd</sup> July 2013, 12<sup>th</sup> August 2013, and on 22<sup>nd</sup> January 2014 where he complained of lower back pain, neck and pain and headache. From Dr Lawson's examination findings of 19<sup>th</sup> June 2013 he found that, "There were no gross neurological deficits; head, chest, abdominal and central nervous system examination were non-contributory..." Dr. Lawson, however, after examining the back / lumbro-sacral spine, the neck / cervical spine diagnosed that the Claimant suffered chronic mechanical lower back pain with muscle spasm and cervical strain / whiplash injury.

**[5]** By his report of 31<sup>st</sup> May, 2014 Dr A Ameerally's diagnosis was in simple terms, paraspinal muscle strain of the lumbar region with a 2% whole person impairment.

**[6]** In omnibus fashion Dr Grantel Dundas' diagnosis spoke to, "The diagnosis entertained was mild residues of lumbar strain."

**[7]** He opined, further, that "Radiographs which were done... showed mild reduction in the lumbar lordosis but no pathology in the cervical spine." Significantly he

concludes that, “at this stage I do not think that this gentleman has any measurable ongoing impairment.”

- [8] Chronologically speaking, the important dates on which the Claimant was seen by the named doctors are May 3, 2014 when seen by Dr Ameerally; July 30, 2014 when seen by Dr George Lawson; and June 14, 2015 when seen by Dr Grantel Dundas.
- [9] It is more than merely noteworthy that the Claimant, who had seen Durga Prasad Gogineni, registered physiotherapist, over six physiotherapy sessions, was discharged on September 2013 “as he had very minimal pain and the active movements and muscle strength were achieved to normal. He was advised to continue the exercises at home.”
- [10] It is against the above-sketched background that I am to say which of the reports I am to accept as fairly represents the condition of the Claimant relevant to the time of the accident.
- [11] On the basis of the persuasive Canadian authority of **R v Mohan** [1994] 1 S.C.R. 9 the admission of expert opinion depends on the application of the following criteria:
1. relevance
  2. necessity in assisting the trier of facts
  3. the absence of any exclusionary rule; and
  4. a properly qualified expert
- [12] In **R v Abbey**, 2009 ONCA 624 the Canadian court set out a two-step process for the assessment of expert evidence based on the criteria as set out in MOHAN. The two-step process is described as rule-based and its primary focus is now the role of the judge as gate-keeper within the ambit and context of the relevance and reliability of the markers as pronounced in MOHAN.

[13] The court is not bound to find for a party simply because he leads evidence from a body of experts who genuinely believe that the experts practice conformed to established practice. All that is to be done is to show that the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such an opinion has a legal basis: **Maynard v West Midlands Regional Health Authority** (1984) 1 WLR 634; **Edward Wong Finance Co. Ltd v Johnson Stokes and Master** (1984) Ac 296.

Conversely, it can be shown that the professional opinion is not capable of withstanding legal analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible. Accordingly, a court must scrutinize the basis of the opinion that is preferred to the tribunal as representing responsible practice. In other words, the court is to enquire whether or not the opinion has legal force that is capable of withstanding legal analysis. Viewed as such, a court cannot operate on the basis of preferring one opinion above the other. An experts opinion is to be justified on legal grounds. In order to displace such an opinion, the burden of proof to justify such a refutation is a high one. It should be based on evidence and reason.

[14] It is with regard to the above that the conflicting medical expert reports will be evaluated.

[15] I am also to say, on the courts own motion, that I am guided by the decision in, **Pogas Distributors et al vs McKitty**, SCCA 13/94 and 16/94 where the Court of Appeal held that the first instance tribunal should not focus on the assigned permanent partial disability ratings but on the nature and severity of the injuries to the Claimant, the length of time that the Claimant was affected by the injury and pain, and last but not least, how it has impacted the Claimants life.

#### The Submissions

[16] The Defendant relies on the analogous cases of **Danielle Archer v Jamaica Infrastructure Operator Limited** [2013] JMISC Civ 76, **Anthony Gordon v**

**Chris Meikle and Esrick Nathan** (Khan's Recent Personal Injury awards, Vol. 5, (42; and **Racquel Bailey v Peter Shaw** [2014] JMCA Civ 2, in submitting that the damages the Claimant is entitled to is to be confined to the updated awards especially in view of the suggestion that the Claimant did not suffer any whole person impairment.

[17] Against this the Claimant's submission rests on **St. Helen Gordon et al v Roylan McKenzie**, Khans Recent Personal Injury awards, volume 5, p 162 and **Dalton Barrett v Poinciana Brown**, Khan Recent Personal Injury Awards, volume 6, p 104.

According to the pleadings

[18] Claimant's injuries are:-

- a) Chronic mechanical back pain with muscle spasm;
- b) Cervical strain/whiplash injury;
- c) Paraspinal muscle strain of the lumbar region;
- d) Mild residues of lumbar strain; and,
- e) 2% whole person impairment

[19] It is to be borne in mind that the Claimant saw Dr Lawson on the very day next following this accident. What the court is anxious to determine here is the extent of the injuries to the Claimant as well as the quality of the Claimant's health post-accident.

[20] On Dr. Lawson's medical evidence, the Claimant was found to have soft tissue tenderness to his neck/cervical spine dorsally on the left and involving the trapezius and sternocleidomastoid muscles. The lateral flexion was restricted due to pain especially contra-laterally. On lateral rotation, there was pain near the end of range. The doctor also found that there was diffuse bony tenderness in the lumbar area and evidence of spasm. Motion he says were reduced in fluidity and appeared to induce lumbar, hip and knee pains.

- [21] The Claimant was prescribed oral analgesic and muscle relaxing medications. After three follow-up visits to the said doctor his neck symptoms gradually muted.
- [22] On his visit to Dr Ameerally this professional found him to be afflicted by paraspinal muscle strain of the lumbar region.
- [23] It is to be particularly noted that the Claimant, after the interventions of Dr Lawson and Dr Ameerally, was seen by Dr Dundas some one year later. His diagnosis revealed no deformity, tenderness or spasm. Dr Dundas stated that the X-ray revealed mild reduction in the lumbar lordosis and a 2% whole person impairment. Based on the foregoing I cannot find any basis for not accepting Dr Ameerally's report in preference to that of Dr Dundas report.
- [24] I incline to the view that I am to assess Dr Dundas' report in the light of two years elapsing after the accident at a time when the Claimant was, more or less, likely to have achieved maximum medical improvement.
- [25] In **Patrick Thompson & Anor. V Dean Thompson et al** [2013] JMCA Civ. 42, the Court of Appeal validated the trial judges assessment on the basis that the second medical opinion, which she rejected had reduced the residual permanent impairment of the claimant, had come after a five year recovery period: See also **Pogas Distributors Ltd v McKitty and others**, supra
- [26] In St. Helen Gordon, supra, the claimant's dominant injuries were whiplash with pain centered around the neck and shoulder. The range of movement in the neck and right shoulder decreased to the point where she was assessed at 80% improvement in movement.
- [27] She was assigned a 3% whole person impairment. She was awarded \$400,000 in July 1998 which award in today's money updates to \$2,000,000.00
- [28] Dalton Barrett's case updates to \$1,800,000.00 for tenderness around his right eye and face; tenderness in the lumbar spine; tenderness in left hand.

There was also medical evidence of pain to the lower back, left shoulder and left wrist. Also, there was contusion to his lower hip, lower back and left shoulder.

Later, the claimant was seen by an Orthopaedic Surgeon who assigned him 0% impairment.

- [29] In Danielle Archer, supra, the claimant suffered moderately painful distress, marked restriction to range of motion due to pain significant pain to neck when extended, painful movements on her right shoulder and tenderness to the distal calf muscle of her right leg. Her updated award yields, \$989,170.34.
- [30] Anthony Gordon, supra, was diagnosed with cervical strain, contusion to left knee, lumbro-sacral strain and a 55% whole person impairment. For all his pain and suffering his updated award would fetch \$1,117,988.00.
- [31] As for Racquel Bailey, supra, for a whole person disability rating of 5% she was awarded \$1,000,000.00 which when updated yields \$1,160,528.00.
- [32] I do think the cases of St. Helen Gordon and Dalton Barrett to be useful guides as they are fairly analogous. At the same time I do not consider the cases submitted by the Defendant useful to be from the standpoint of being analogous to the claim at hand their being based on Dr Dunda's report.
- [33] This must mean that the cases as presented by the Defendant are not accepted by this court as the yardstick of judgment their being too low. As such I am to make an award in the sum of \$1,600,000.00 for general damages with interest thereon at 3% computed from the date of the service of the writ to the date of this judgment.