



[2023] JMSC Civ. 164

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV06937

BETWEEN	HYACINTH FORSYTHE	CLAIMANT
AND	ALPHANSO ALLEN	1ST DEFENDANT
AND	DEVON DILLON	2ND DEFENDANT
AND	SANGUINETTI WILLIAMS	3RD DEFENDANT

IN OPEN COURT

Mr. Raymond Samuels instructed by Samuels & Samuels for the Claimant

Defendants absent and unrepresented

Heard: July 6th, 2023 and September 26th, 2023

ASSESSMENT OF DAMAGES — Personal Injury — Motor vehicle collision — Negligence — Damages — Pain and suffering and loss of amenities — Special Damages — Whiplash injury of the neck — Whole person disability of 6%.

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] This matter concerns an assessment of damages against the Defendants arising out of a motor vehicle collision which occurred on the 25th day of April 2007. The

facts in brief are that the Claimant, who was born on the 29th of November 1967, was a passenger in motor vehicle bearing registration number **7396 DM** travelling from Oxford District to Port Maria in the parish of St. Mary. Upon reaching the vicinity of the pump house, the 1st Defendant, who was operating the motor vehicle with registration number **1040 BS**, collided in the rear of the motor vehicle in which the Claimant was a passenger causing her injury, damages and loss.

- [2] The 1st Defendant was the registered owner of motor vehicle registered **1040 BS**. The 2nd Defendant was the registered owner of the motor vehicle with registration number **7396 DM** in which the Claimant had been travelling. The 3rd Defendant was the operator of said vehicle and the servant and/or agent of the 2nd Defendant.
- [3] The Claim Form and Particulars of Claim initiating this action were filed on the 12th of December 2012. All three defendants were served and an acknowledgment of service as well as defence were filed by the 1st Defendant. The matter was subsequently discontinued against the 1st Defendant on the 18th of September 2020. No acknowledgment of service or defence were filed by the 2nd and 3rd Defendants and on the 23rd of August 2016, an Interlocutory Judgment in default of acknowledgment of service was entered against them. In furtherance of that judgment, the Claimant has approached this Court for damages to be assessed.
- [4] On July 6, 2023, the Claimant gave evidence as to the quantum of damages that she believes the Court should award. On the day of the hearing, the 2nd and 3rd Defendants made no appearance and remained unrepresented, as such, the assessment has proceeded uncontested.
- [5] It is to be noted that a Notice of Proceedings was served on Advantage General Insurance Company Limited, with whom the 2nd Defendant had a policy of insurance at the material time. Advantage General Insurance Company Limited has not intervened in the matter on behalf of the 2nd Defendant.

ISSUE

- [6] The sole issue for the Court is the quantum of damages which should be awarded to the Claimant for special damages as well as general damages for the injuries and other losses suffered as a result of the 3rd Defendant's negligence.

EVIDENCE

- [7] At the hearing on July 6, 2023, the Claimant was sworn and her evidence was taken through her Witness Statement which stood as her evidence-in- chief. It was her evidence that on April 25, 2007, she was a passenger in a motor vehicle driven by Sanguinetti Williams, the 3rd Defendant. The 3rd Defendant was driving from Oxford District and was heading to Port Maria in the parish of St. Mary. He was heading towards the vicinity of the pump house when he slowed down suddenly and the motor vehicle being operated by Alphanso Allen, slammed into the back.
- [8] Ms Forsythe stated that immediately following the collision, she began to feel excruciating pain in her neck. She was taken to the Port Maria Hospital in the parish of St Mary, where she was examined, treated and a cervical collar was placed around her neck. She was admitted overnight for observation and subsequently discharged. Following her discharge, she continued to experience ongoing pain for which she had to take pain medication.
- [9] On the failure of the medication to bring any relief, Ms Forsythe consulted Dr Denton Barnes, an Orthopaedic Resident and was diagnosed with whiplash injury. She paid **\$20,000.00** for a medical report prepared by him. The report and receipt for same were served on the 2nd and 3rd Defendants and placed into evidence during the hearing.
- [10] In respect of her loss of amenities, Ms Forsythe stated that simple activities that she was able to engage in prior to the accident now pose a challenge. She is unable to carry out her domestic chores, take care of her personal hygiene and work without experiencing severe pain in her head, neck and back. She stated in her viva voce evidence that it took her sixteen (16) years after the accident before

she could resume working. She explained that during this time, she relied on her children to support her financially. She is still unable to lift or carry anything. Her ability to read has been adversely affected as she suffers from severe pain in her neck. She is also restricted in terms of what she is physically able to do.

SPECIAL DAMAGES

[11] Special damages are compensatory and are designed to return persons to the position that they were in prior to the injury based on measurable dollar amounts of actual loss. They are normally reduced to a “*sum certain*” at the trial: **Barbara McNamee v Kasnet Online Communications RM Civil Appeal No.15 of 2008.**

[12] The Claimant requested that she be compensated for special damages for which she produced the following documents:

- a) Medical Report of Dr Denton Barnes dated 21st day of September 2012.
- b) Medical Report from Port Maria Hospital as per Dr. THRA Tun dated 28th day of June 2007.
- c) Receipt for Medical Report **\$20,000.00**
- d) Receipt for Medical Report **\$1,000.00**
- e) Receipt for payment of MDCT scan **\$38,000.00**
- f) Receipt for payment MRI cervical spine **\$45,000.00**
- Total **\$104,000.00**

[13] The documentation in proof of these expenses were admitted into evidence as exhibits 1 through to 6. On a review of the receipts presented in respect of sums paid for medical visits, medical reports and MRI examinations, I am satisfied that these expenses had been reasonably incurred as a result of the injuries sustained in this accident and I am prepared to make an award to the Claimant in the sum of **\$104,000.00.**

Transportation

- [14] The Claimant also seeks an award of **\$28,000.00** for transportation expenses incurred which she says was spent on taxis to and from diverse locations to obtain medical attention. She stated that she spent **\$6,000.00** for visits to Port Maria Hospital and a total of **\$16,000.00** at **\$8,000.00** per trip for two trips from Oxford District, St. Mary to Portmore, St Catherine. A further **\$6,000.00** was spent travelling to and from St Joseph's Hospital.
- [15] While the general rule requires special damages to be specifically pleaded and proved, there have been instances where the Court may be called on to exercise its discretion to make an award having regard to what is reasonable in the circumstances and in doing so, the Court may use its experience to arrive at a just award: ***Attorney General of Jamaica v Tanya Clarke (nee Tyrell)***, SCCA No. 109/2002; ***Desmond Walters v Carlene Mitchell [1992] 29 JLR 173***. These circumstances would include a situation where documentary proof of an expense claimed is unavailable. The Court recognizes that this is oftentimes the case with public transportation in Jamaica as a receipt is not normally provided for payment.
- [16] This fact was acknowledged by Sykes J (as he then was) in ***Owen Thomas v Constable Foster and Anor CL – T 095 of 1999 judgment delivered January 6, 2006*** wherein he stated that:

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

On my review of this expense while there were no documentary records in support of same, I found that the trips were necessary and the sum expended reasonable and fully accounted for. Accordingly, the Claimant is awarded the sum claimed under this head of damages.

Loss of Earnings

- [17] In relation to loss of earnings, the Claimant seeks to recover the sum of

\$3,120,00.00. Her evidence is that as a direct result of her injuries, she was unable to work and lost out on possible income from her job as a higgler and farmer. The Medical Report prepared by Dr Denton Barnes confirmed that she experienced severe pain in her neck which lasted for approximately a year. The Doctor also noted that although she would be able to continue her regular profession, she has to refrain from heavy lifting and prolonged standing, both activities would clearly impact her ability to engage in her chosen vocation.

[18] Her evidence outlined that she earned **\$20,000.00** per week as a higgler and farmer and her net loss for the year amounted to **\$1,040,000.00**. She also stated that her average loss for the four (4) years she was unable to work was **\$2,080,000.00** at **\$10,000.00** per week. When questioned about the latter figure, she explained that this loss is solely because of physical challenges which prevented her from working. The Court was not provided with any form of documentary evidence that would support these losses. It was also noted that her earnings as outlined do not fall within the established minimum wage.

[19] While I accept that the requirement for special damages to be specifically proved will not be insisted upon in circumstances where it would be unlikely for documentary proof to be available, the Claimant still bears the burden of presenting evidence that is cogent and sums that are reasonable in this regard. In light of the foregoing, I am persuaded that the better approach is to calculate the average period for which the Claimant was unable to work as one (1) year instead of four (4) years, given her indication to the doctor. I am also prepared to utilise the average weekly loss of **\$20,000.00**. Although she made reference to **\$10,000.00**, I found her explanation in respect of this sum to be vague and lacking in specifics. I was also satisfied that the weekly sum of **\$20,000.00** as a vendor/farmer was reasonable and not an inflated amount. Accordingly, the sum of **\$1,040,000.00** is awarded for this loss.

GENERAL DAMAGES

Medical Evidence

[20] Particulars of the Claimant's injuries were outlined in the Medical Summary Report from Port Maria Hospital and the Medical Report prepared by Dr Denton Barnes.

[21] The Summary outlined that Ms Forsythe presented with injuries from being involved in a motor vehicle accident. She complained of pain in the neck, inability to move her neck, pain associated with movement, pain in her mouth when speaking and pain in her left shoulder. Upon examination and investigation, the following observations were noted:

- unable to move her head;
- experienced painful neck movement;
- tenderness at the cervical spine up to the thoracic spine;
- tenderness at the trapezium muscle left and pectoralis major (left);
- left shoulder joint tenderness at an anterior joint line; and
- under the arm shoulder joint movement limitation at abduction and painful movement.

[22] She was diagnosed as having whiplash injury and musculoskeletal sprain. A cervical collar was applied and she was given an injection, Diclofenac Sodium 75mg and referred to do a cervical spine x-ray.

[23] Dr Barnes' report of September 21, 2012 indicated that he examined the Claimant and on presentation, she experienced intermittent neck pain with a pain score of 8/10 on the visual analog pain scale.

[24] Dr Barnes recorded that Ms Forsythe was in good health and her vital signs were stable. The following findings were also observed:

- Mild spasms of the para-spinal muscles in the neck;
- Claimant was apprehensive on the examination of her neck;

- She had full range of movement of the neck passively;
- There was no bony tenderness in the neck; and
- In her upper limbs, there was Grade 5/5 power, tone and reflexes were normal and sensation was intact.

[25] In relation to assessment, Dr Barnes noted that the Claimant had a whiplash injury of her neck with possible prolapsed intervertebral disc as she had complained of numbness in the C5/C6 nerve root areas. She was advised that she would need a MRI scan of her cervical spine to determine if she had nerve root compression. She was placed on analgesia and muscle relaxant and advised to return for review with the results of the investigation.

[26] The MRI scan of her cervical spine was done at Pines Imaging Centre, Portmore in the parish of St Catherine on August 15, 2012. The following findings were made:

- i. There was normal vertebral bony alignment and marrow signal;
- ii. There appears to be a rudimentary disc at the base of the odontoid process;
- iii. There is mild posterior longitudinal ligament thickening with minor disc bulges at multiple levels, however, there is no significant thecal sac compression or cord signal abnormality and
- iv. The exit foraminae are patent and there is no finding of tonsillar ectopia.

[27] Dr Barnes noted that given that her MRI findings revealed thickened longitudinal ligament and minor bulges with no evidence of nerve root compression or thecal sac compression, she was advised to continue on her analgesia, muscle relaxant and physiotherapy.

[28] In respect of her prognosis, Dr Barnes reported that Ms Forsythe sustained deceleration injury and neck pain following a road traffic accident. He explained that the most common symptoms of whiplash type injury can occur at very low

speed or at varying speed and include neck pain, occipital headache, shoulder and inter-scapular pain and thoracolumbar pain along with upper limb paraesthesia. He noted that the longer these symptoms persists, the less likely it is for the patient to recover and it has been more than two (2) years since Ms Forsythe's injury and her condition/state is steady. He opined that she should be able to continue her regular profession but has to refrain from lifting heavy objects and prolonged standing.

- [29] Dr Barnes assessed Ms Forsythe as having suffered a 6% impairment of the whole person. This rating is attributed to the fact that she exhibited severe symptoms which show multiple level disc bulges but with no definite root compression.

SUBMISSIONS

- [30] In submissions on the appropriate award for pain and suffering and loss of amenities, Mr. Samuels relied on the following authorities and asked that an award be made in the sum of **Six Million Four Hundred Thousand Dollars (\$6,400,000)**:

- i. **Kathleen Earle v George Graham et al** decided on the 11th December 1996 and found in *Khan's Recent Personal Injury Awards Volume 4* at page 174. The Claimant suffered from neck pains, muscle spasms along the para-orical and rhomboid muscles, exquisite tenderness along the core muscles and marked restriction in range of motion of cervical spine due to pain. She was diagnosed with severe whiplash, placed in a cervical collar and engaged in physiotherapy. Her permanent disability of the cervical spine was 10% with a resulting whole person impairment of 6%. The Court awarded general damages in the sum of **\$800,000.00**. Applying the CPI for July 2023 of 130.8, that figure currently updates to **\$6,540,000.00**.
- ii. **Delora Anderson v Jeffrey McLeod et al** 2006HCV0766 unreported decision delivered on October 30, 2009. The Claimant suffered from severe chronic whiplash injury, moderate sized broad based central disc herniation at C5/C6,

annular tear at C3/C4 of spine, mid central disc herniation at C3/C4, loss of cervical lordosis. She experienced intense pain for which she had to utilise a number of medications including a strong nerve medication and had to be hospitalised on occasion. She also experienced severe pain which would awaken her at nights. No permanent partial disability or whole person impairment was assigned to the Claimant. She also received treatment from various medical specialists to include a physiotherapist. General Damages of **\$2,800,000.00** was awarded and this figure now updates to **6,482,123.89** using the July 2023 CPI of 130.80.

iii. **Owen Thomas v Constable Foster and Attorney General of Jamaica CLT 095 of 1999.** In this matter, the Claimant was observed to have a number of injuries which included blood-shot eyes, severe headache, right eye partially closed, bloody and swollen, temporo mandibular joint could open partially and pain when chewing, right cervical muscle painful with moderate whiplash and swollen finger. An award of **\$600,000.00** was made in January 2006 which updates to **\$2,161,983.47**.

iv. **Icilda Osbourne v George Barnes and Others 2005HCV294.** Upon examination, the Claimant was found to be suffering from whiplash injury, tenderness to the posterior aspect of the neck and painful swelling of the lower back. She was prescribed analgesics and muscle relaxants and given fourteen (14) days sick leave. She was subsequently treated by a Consultant Orthopaedic Surgeon two (2) years later who diagnosed her with chronic mechanical lower back pain and chronic cervical strain. She was assigned a Permanent Partial Disability (PPD) of 5% of the cervical spine and total partial percentage disability of 10% of the whole person. She was awarded **\$2,500,000.00** in February 2006 which updates to **\$9,008,264.46** using the July CPI 130.80.

[31] Counsel submitted that in the **Delora Anderson** and **Kathleen Earle** cases, there was marked similarity to the injuries of Ms Forsythe. He also submitted that unlike the Claimants in those matters, Ms Forsythe is still adversely affected sixteen (16) years later and the appropriate award should reflect this. Mr Samuels argued that

the **Delora Anderson** case provides the best guidance and applying the approach taken in that matter to the current situation given the severe, significant and permanent injuries and loss suffered by the Claimant, an award in the sum requested is clearly reasonable and justified.

DISCUSSION/ANALYSIS

[32] The aim of an assessment of damages is to arrive at a figure that will provide adequate compensation to the Claimant for the damage, loss or injury suffered as was enunciated by Lord Blackburn in **Livingstone v Rawyards Coal Co.** [1880] Appeal CAS.25. It is therefore trite law that the sum of money that should be awarded as General Damages ought to be a sum which as “**nearly as possible**” puts the Claimant in the same position she would have been in if she had not sustained the wrong.

[33] In seeking to arrive at an appropriate award for pain and suffering and loss of amenities, the Court is also mindful of the remarks of Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481, 507: -

“The amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the claimant’s general damages.”

[34] On a review of the authorities cited, I found that while the nature and severity of the injuries sustained by the Claimant in the **Delora Anderson** case were somewhat similar to those of this Claimant, there was no record of a permanent disability having been suffered by her. The injuries suffered by **Icilda Osbourne** are more closely comparable to those of the instant Claimant, the distinction however is that the former was assigned a whole person impairment of 10% which would place her in a higher category of awards. It is my opinion that the injuries

suffered by Ms Forsythe would place her on par with **Kathleen Earle**. The similarity between the two is even greater given the fact that they were both assigned a 6% whole person impairment.

[35] In light of the foregoing, I am satisfied that an appropriate award for pain and suffering and loss of amenities in all the circumstances is **Six Million Four Hundred Thousand Dollars (\$6,400,000.00)**.

ORDER

[36] Damages are assessed as follows:

1. Special Damages are awarded in the sum of One Million One Hundred and Seventy-Two Thousand Dollars **(\$1,172,000.00)** with interest at the rate of 3% from April 25th, 2007 to September 26th, 2023.
2. General Damages are awarded for pain and suffering in the sum of Six Million Four Hundred Thousand Dollars **(\$6,400,000.00)** with interest at the rate of 3% from January 3rd, 2013 to September 26th, 2023.
3. Costs to the Claimant to be agreed or taxed.
4. Claimant's Attorney to prepare, file and serve the Judgment herein.