[2022] JMSC Civ 213

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05516

BETWEEN	**CHANTE NUGENT**	**CLAIMANT**
AND	**GASFORD ALEXANDER BACCHAS**	**1ST DEFENDANT**
AND	**LYNVAL JAPHETH DUFFUS**	**2ND DEFENDANT**

IN OPEN COURT

Mr Richard Reitzen instructed by Reitzen and Fernandez for the claimant.

Miss DeAndra Butler instructed by Samuda & Johnson for the 1st defendant.

Heard July 19, 2022 and December 9, 2022

Assessment of damages – unrestrained back seat passenger in a taxi- excruciating headache and severe upper back pain – the effect of filing a Form 8A- the implications for cross examination in filing a Form 8A but opting not to call any witnesses- CPR 16.2(4) and CPR 16.2(5)

CORAM: JARRETT, J (Ag)

Introduction

[1] At around 7:45 on the morning of September 7, 2010, yet another motor vehicular accident occurred on our roads. The claimant Chante Nugent was an unrestrained back seat passenger in a taxi which was travelling in an easterly direction along the Barbican Road in St Andrew, when the taxi collided into the rear of another motor vehicle. The claimant who was 26 years old at the time, suffered personal

injuries as a result of the collision. The taxi was owned by the 1st defendant and driven by the 2nd defendant. Aggrieved by what she considered to be the negligence of the defendants, on October 8, 2012, the claimant filed suit against them. Default judgment was entered against the 1st defendant on February 19, 2013, for failing to file an Acknowledgment of Service. Over nine years and several interlocutory applications later, the matter came before me on July 19, 2022, for the assessment of the claimant's damages. The claim against the 2nd defendant was not pursued. The 1st defendant filed a Form 8A indicating that he wished to be heard at the assessment of damages, to be allowed to cross examine the claimant and to make submissions.

The evidence

[2] The claimant gave evidence by way of her witness statement which was amplified at trial with my permission. She said that when the collision occurred her body was "thrown forward with the motion of the taxi against the seat and then thrown back again." She immediately felt severe pain in her upper back and an excruciating headache. Another taxi took her to the Andrews Memorial Hospital and during that journey she was feeling "a lot" of pain in her upper body and was having a pounding headache. As a result of the pain, she felt as if she was going to "pass out". Upon being examined at the hospital, she was "sore and tender" in the upper back on both the left and right sides. She was treated with Voltaren injection and Cataflam tablets, and ultimately discharged.

[3] On arriving home from hospital, the claimant said she was still in "a lot "of pain. On a scale of 1 to 10, the pain was an 8 especially her back pains. Her witness statement was made on June 11, 2019 and, she was still suffering from headaches and pain in her upper back from time to time. Since the accident, the pains in her upper back prevent her from walking, standing and sitting for extended periods of time. Cleaning, bending and lifting objects require care on her part in order to avoid the onset of back pains. She says she suffers from continuous headaches.

[4] The claimant relies on the medical reports of Dr Marlene Brewster dated September 28, 2012 and Dr Cecile Greaves dated September 14, 2016. The latter report basically replicates the earlier one and is said to be based on a review of the claimant's medical chart. It also includes details on the qualifications of Dr Brewster. As Dr Brewster's report is more contemporaneous and is the one on which the claimant was cross examined, I will refer to that report throughout this judgment. For reasons which will become apparent presently, it is important that I reproduce it in its entirety. I do so below:

> September 28, 2012
> The Presiding Judge
> Supreme Court
> King Street
> Kingston
>
> Dear Sirs;
>
> **RE: CHANTE NUGENT**
>
> **Expert Witness's qualification:** Dr Marlene Brewster, M.B., B.S
> Practised General Medicine for 14 years
>
> A review of the chart reveals that the above-named was seen in the Out Patient Department on September 7, 2010 after being involved in a motor vehicle accident. She reports being an unrestrained back seat passenger in a vehicle that hit the back of another vehicle. She complained of headaches and upper back pain. She also had additional complaints unrelated to the accident.
>
> On examination, there was tenderness to right and left upper back. She was not in any distress and her vitals were normal.

She was assessed as having muscular back pain post motor vehicle accident. Treatment commenced with Voltaren injection, and she was discharged home with a prescription for Cataflam tablets in addition to medication for her unrelated diagnoses.

I understand my duty to the court as set out in rules 32.3 and 32.4 and have complied with that duty and have included all matters within the expert witness's knowledge and area of expertise relevant to the issue on which expert evidence is given. I have given details in the report of any matters which to my knowledge might affect the validity of the report.

Reported by……………………………
Dr. M Brewster, M.B., B.S
Acting Medical Supervisor, Out Patient Department

[5] Special damages of $18,000.00 were agreed.

[6] On cross examination the claimant said that when she was seen by Dr Brewster she was still having severe pain in her upper back and excruciating headaches. She said she described those pains to the doctor, and she admitted that the medical report was an accurate description of her injuries. She said she did not request any more pain medication within the immediate days after she was treated at the hospital neither did she seek further medical treatment from her private doctor for the pain she said she had continued to experience. When asked if she had returned to Andrews Memorial Hospital since being treated almost 12 years ago, the claimant said she does not live in Jamaica and therefore had not gone back to that hospital. Asked if she had been to see any other doctor for the pain, the claimant said yes, but she could neither recall the name of the doctor nor when she had made the visits. She has been working at her current job at AT&T in the United States of America for about 6 years and when asked whether that job involved sitting for long hours, the claimant said:" It involves standing and sitting".

In answer on re-examination to the question: 'what do you normally take to manage your pain when you suffer from it, the claimant said that she takes Advil and Icy Pack Ointment to help with the pain to her back.

Submissions

The claimant

[7] Mr Reitzen argued that the case is a moderately serious one in terms of the length of time the claimant has suffered from her injuries. According to him, the 1st defendant through his counsel never sought to have the claimant examined by a medical practitioner and so in reliance on the authority of **Hardy v Gillett [1976] VicRp 36,** where there is evidence that is reasonable and conclusive on the issues, the court must accept it. Counsel urged me to accept the claimant as a witness of the truth when she said that she visited Andrews Memorial Hospital and was given Volatren injection for pain, even though the medical report does not speak about pain. He said that in the normal course of human events, if a patient is in slight pain, the doctor would give tablets, but if the patient is under severe pain, it is expected that injections would be given. Moreover, the claimant's evidence is that her body was thrown forwards and then backwards at the time of the collision and she immediately felt severe pain. Mr Reitzen said that the evidence is not of slight or even moderate pain but of severe pain which was immediate. In relation to this evidence, he said the claimant was not cross examined. He posited that in keeping with **Hardy v Gillett**, the evidence is "perfectly acceptable" and I should accept it.

[8] The mere fact, argued counsel, that a doctor does not describe the level of pain, is not evidence that the pain did not exist or that it was not at a certain level. It would be different, he said, if the doctor had said there was no complaint of pain in the upper back or that there was no complaint of a headache. Counsel argued that in the absence of any further medical report produced by the claimant, the fact is that there is uncontested evidence from her that up to the time of her witness statement, she continued to have headaches and upper back pains from time to time. There is also uncontested evidence that even at the time of trial, the claimant

continues to experience pain in her upper back from time to time and that as a result, she has to be careful in the way she conducts herself in life. There was no cross examination on that aspect of the claimant's evidence dealing with her current disabilities as contained in paragraphs 17 to 19 of her witness statement. Furthermore, counsel submitted, no defence was filed by the 1st defendant whereby his case was put before the court. It was therefore not available to him to challenge the evidence of the claimant's description of her injuries and the resultant disability she has endured.

[9] The decided cases of **Warren Chong v Sabrina Serrant Claim No 2011HCV00026 unreported Supreme Court decision**; **Gaylia Johnson v Dalmin Fitzroy Jones [2021] JMSC Civ 142**; **Mario Brown v Peter Singh & Ors, reported in Khans Vol.5; Carolyn Cooper v Anor v Ralston Smith, reported in Khans Vol. 5; Marion Landell v Judah Campbell Claim No 2006HCV01324, unreported Supreme Court decision; Irene Byfield v Ralph Anderson, reported in Khans Vol. 5; Garfield Scott v Donovan Cheddising Phillip Campbell, reported in Khans Vol. 5;** were relied on by Mr Reitzen, for his contention that an award of general damages within the range of $1,500,000.00 to $1, 750,000.00 is reasonable.

The defendant

[10] Miss Butler submitted that there is nothing in the medical report of Dr Brewster which speaks to the claimant's level of pain on presentation at the Andrews Memorial Hospital on September 7, 2010. Describing pain as acute, moderate or severe is not unfamiliar to medical doctors. In the medical report, Dr Brewster said that the claimant complained of headache and upper back pain, yet although the claimant said that she experienced excruciating pain on her way to the hospital, that is not the type of pain a medical doctor would reasonably overlook. She argued that it is significant that the doctor described the claimant as not being in distress, that her vital signs were normal and that the claimant has said that the report accurately describes her injuries. She said that the claimant paints a picture of great distress and turmoil yet still she was not kept for observation at the hospital.

Counsel asked me to reject the evidence of the claimant where it is inconsistent with that of the doctor.

[11] There was no mention of any follow up in Dr Brewster's medical report. Miss Butler said that that is another significant omission from the report and is inconsistent with the claimant's description of her injuries. It has been 12 years since the accident, and the claimant alleges that she has been suffering headache's and back pains ever since, yet she has not produced any medical report other than that of Dr Brewster. Counsel argued that had the subsequent doctor's visits which the claimant alleges she made, been of any value, she would have provided evidence of them, rather than have their existence come to light on cross examination. If the claimant has been suffering for 12 years, there ought to have been evidence of continued treatment. But there is none. Not even a single receipt for the purchase of Advil or Icy Pack ointment, for what counsel described pejoratively as the claimant's "so called self-treatment".

[12] As to the claimant's evidence that she has been employed for the past 6 years to AT&T, and that that job involves standing and sitting, Miss Butler invited me to discount the claimant's evidence of her current disability in the face of Dr Brewster's medical report, the absence of evidence of any continued treatment and her own evidence on cross examination. In terms of quantum, counsel considered that a discounted figure based on the decision in **Gaylia Johnson v Dalmin Fitzroy Jones [2021] JMSC Civ 142**; would be appropriate and reasonable. She also relied on the decisions in **Eric Ward v Lester Barcoo reported in Harrison & Harrison Revised Edition of Case Notes No.2; Jennifer Anderson v Clipper Transport Ltd and Leslie Eastwood reported in Khans Vol. 4;** and **Derrick Munroe v Gordon Robinson [2015] JMCA Civ 38.** On her submissions, a reasonable award for general damages would fall within the range of $600,000.00 to $650,000.00.

Analysis and discussion

The effect of filing a Form8A

[13] An important issue that arose in this case is the effect of the filing of a Form 8A and the extent of any limitations on a defendant's ability to cross examine the claimant and challenge his or her evidence, in the absence of the defendant calling his or her own witness. During the course of the cross examination of the claimant, objections were made by Mr Reitzen to questions posed by Miss Butler which doubted the nature and extent of the claimant's injuries. According to Mr Reitzen having not filed a Defence and therefore not having set out his defence as required by CPR 10.7, the defendant was not entitled to cross examine the claimant on her injuries and the veracity of Dr Brewster's medical report. I overruled those objections for the reasons that follow.

[14] Prior to the June 17, 2020 amendment to the CPR and the advent of the Form 8A, a defendant against whom a default judgment was entered was limited to being heard only on costs, the time to pay the judgment debt, enforcement of the judgment or an application under CPR 12.10(2) to enter default judgment. This limitation was contained in CPR 12.13. In the landmark decision in **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General [2016] JMSC Civ 22,** CPR 12.13 was successfully challenged in the Full Court on the basis that it was unconstitutional, null and void as it deprived a defendant of the constitutional right to be heard enshrined in section 16(2) of the Charter of Fundamental Rights and Freedoms (the Charter). Section 16(2) of the Charter provides that: -

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law".

[15] Following on the heels of the Full Court's decision in **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General,** was the Court of Appeal's own determination on the issue in the watershed decision in **Al-tec Inc v James Hogan [2019] JMCA Civ 9.** There the Court of Appeal held that CPR 12.3 contravened the constitutional right under section 16(2) of the Charter. It agreed with the decision of the Full Court in **Natasha Richards & Phillip Richards v Errol Brown and the Attorney General** as well as the decision of the Eastern Caribbean Court of Appeal in **George Blaize v Bernard La Mothe and The Attorney General of Grenada** which came to a similar decision in relation to an analogous rule in the Civil Procedure Rules of the Eastern Caribbean Supreme Court. Edwards JA, writing for the court in **Al-tec Inc v James Hogan**, analysed CPR 12.13 within the context of the section 16(2) Charter right. This is how the learned judge put it at paragraph 162: -

> Rule 12.13 of the CPR expressly limits the rights of a defendant to be heard at the assessment of damages hearing, where that defendant has had a default judgment entered against him. Such a defendant can only be heard on the issue of costs, time of payment of the judgment debt and the enforcement of the judgment or for delivery of goods. It manifestly, therefore, limits such defendant's right to be heard on the issue of quantum. He cannot cross examine, call any witnesses, object to any evidence being presented, and make any submissions as to fact or law, all of which are integral to the right to be heard, which is guaranteed by the Constitution.

[16] Edwards JA went on to say at paragraph 168 of the judgment that the CPR 12.3 restriction makes the right to be heard:" non-existent'. The learned judge then said at paragraph 169 that: -

> "The danger associated with barring a defendant from fully participating at an assessment hearing (which is a trial in itself) is that it creates an avenue that enables a claimant to make one sided

> submissions entirely untested. This is clearly not in the interest of justice".

In the result, the court declared CPR 12.3 unconstitutional. It also declared CPR 16.2(2) unconstitutional to the extent that it provided notice of the assessment of damages only to the claimant.

[17] It is this jurisprudential backcloth, that led to the June 17, 2020 amendment to the CPR, which, by virtue of CPR 16.2(4), allows a defendant against whom a default judgment is entered to not only make submissions but to call witnesses and to cross examine the claimant and his or her witnesses. CPR 16.2(5) however requires that a defendant wishing to be heard on the question of quantum, must file and serve a Form 8A by which notice is given to the court and to the claimant whether he intends to call witnesses, to make submissions or to cross-examination the claimant and his witnesses at the assessment of damages.

[18] If the defendant files a Form 8A, and decides not to call any witnesses (as is the case before me), his cross examination of the claimant and his or her witnesses will obviously be limited since he cannot put suggestions of the substance of any contradictory evidence to the claimant and his witnesses, as there is no such evidence to come. Allowing a witness in cross examination to comment on contradictory evidence is of course, the well-known rule in **Brown v Dunn (1893) 6 R 67.** The questions Miss Butler was posing to the claimant which were objectionable to Mr Reitzen, were not suggestions of a contradictory case. Her questions were seeking to impugn the credibility of the claimant's evidence that she was in excruciating pain when she presented at hospital on the day of the accident. They were clearly permissible, given the June 17, 2020, amendments to CPR and the filing by the 1st defendant of a Form 8A.

The credibility of the evidence

[19] Recognising that the evidence of the claimant is uncontradicted, Miss Butler's focus was on the medial report of Dr Brewster which she contends is inconsistent with the claimant's evidence particularly in relation to her alleged headaches. It is clear to me from Dr Brewster's medical report, that the claimant complained on presentation at the Andrews Memorial Hospital that she was having headaches. In my view, the fact that Dr Brewster's own assessment of the claimant does not include a reference to headaches or the claimant's pain level, is not determinative of whether the claimant was experiencing the headaches or the upper back pain that she describes. I interpret the doctor's statement that the claimant was not in any distress and that her vitals were normal, to mean that she was not in any need of urgent medical intervention.

[20] The claimant's unchallenged evidence is that she was unrestrained in the back seat of the taxi, and that the collision caused her body to be thrown forwards towards the front seat of the motor vehicle and then backwards. She said that after the collision, she immediately experienced an excruciating headache and severe pain in the upper back. Her evidence is that the pains were so severe that during the drive to hospital she felt as if she was "going to pass out". Dr Brewster reports that she complained of headaches and upper back pains. I have no difficulty in finding, that the way in which the claimant's body was affected by the collision is consistent with the type of pains she describes. Based therefore on her evidence (which on this issue I find credible); the medical report which indicates that she complained of having headaches on presentation at hospital; the treatment she received of two well-known prescription pain medication, one of which was administered by injection; I find that on the day of the accident, the claimant was experiencing severe pain in the upper back and an excruciating headache.

[21] I am prepared to accept that the claimant continued to have upper back pain and headaches in the immediate aftermath of the accident, and that for a period of time after that, she continued to experience pains in her upper back occasioned by sitting, standing and walking for extended periods of time. I also accept and find that during this time, the onset of her upper back pains occurred if she was not careful when cleaning, bending and lifting objects. In my view her evidence in this regard is not farfetched. Nevertheless, I do not accept that the pains she experienced during this time were severe. Her evidence that she takes over the counter analgesics plainly suggests to me that they were not. I also do not accept that at the time of her witness statement in 2019 or at trial, the pains persisted. If she continued some nine to twelve years after the accident to have upper back pains, I would have expected her to seek further medical care and to provide proof of that care and of the causal connection between the pain and the accident, in order to support her claim for damages.

[22] The claimant gave evidence on cross examination of visiting a doctor in the United States of America where she resides, but she could neither recall the doctor's name, when she visited and the frequency of the visits. This claim was filed in 2013. One would reasonably expect that if she sought further medical care relating to the accident, she would have been keen to obtain documentary proof thereof so as to aid in her pursuit of damages. She would also have had better recollection of those visits. I therefore place no weight on this aspect of her evidence.

[23] I also place no weight on the claimant's evidence that she continues to have headaches related to the accident. She has provided no medical evidence for example, that she suffered a concussion when the collision occurred and that that concussion resulted in her developing migraine headaches which persist to date. There is also no evidence of the claimant undergoing any clinical diagnostic procedure such as an MRI or a CT scan, to determine the cause of her alleged persistent headaches over the prolonged period of 12 years and to establish a causal connection between those headaches and the 2010 accident. She made no mention of using over the counter medications for headaches. In my view it is

illogical for the claimant to endure continuous headaches (for which she has given no evidence of a trigger that causes them to occur), for so many years without seeking medical intervention. So while it is true that her evidence in this regard is unchallenged, as the trier of fact I find it illogical, unreasonable and farfetched for the reasons I have given and therefore do not accept it. In the result, I do not find that the claimant continues to have headaches caused by the accident

The quantum of damages

[24] I have carefully considered all the authorities cited by both counsel, and find the decision in **Marion Landell v Judah Campbell**, to be the most helpful. I remind myself that in assessing the claimant's damages, I am to have regard to the nature and extent of her injuries and any resultant disability that she has endured. There is no issue in this case of her pecuniary prospects being affected. As I have said in the past, assessing damages in personal injury cases is not an easy feat for any trial judge. My goal is to do the best I can to put the claimant back in the position she was in prior to September 7, 2010, when the accident occurred. Thankfully special damages were agreed

[25] Recently in **Johnica Marshall v Andrus Molly & Ors [2022] JMSC Civ 199,** I had to decide the amount of general damages to award to the claimant who found herself in a similar position as that of the claimant at bar. In that case, the claimant was a bartender who was an unrestrained back seat passenger in a taxi which collided with another motor vehicle. As a result of the collision, she fell between the front seat and hit her head on the dashboard. On presentation at hospital, she complained of pain to the forehead, both shoulders, legs, and lower back. The doctor's significant finding on examination was tenderness to the proximal aspect of both anterior thighs. She was diagnosed with soft tissue injuries and given Voltaren, Panadeine and Zantac to be taken for two weeks. She underwent 6 physiotherapy sessions and was unable to work for about a month and a half. In awarding general damages of $ 1, 123,012.20, I relied on the decision in **Marion Landell v Judah Campbell, Claim No 2006HCV01324.** I discounted the award made in that case because I considered that the injuries suffered by the claimant

Marion Landell, were more serious than those suffered by the claimant **Johnica Marshall**.

[26] In the case before me, the claimant suffered an excruciating headache and severe upper back pain. I have found that she continued to have some upper back pain upon prolonged sitting, walking and standing for some time after the accident and that during that time, she had to be careful in cleaning, bending and picking up objects so as not to precipitate the pain. Unlike the claimant **Johnica Marshall,** the claimant at bar did not stay away from work because of her injuries and did not undergo physiotherapy. She also did not suffer soft tissue injuries neither did she have pains to her shoulder and legs. The claimant in **Marion Landell v Judah Campbell,** was hit to the ground by a motor vehicle and suffered soft tissue swelling in the forehead with severe headache and dizziness. She had moderate lower back pain and spasm, left knee tenderness and swelling and mild thombophlebitis or inflammation in the left leg. She was diagnosed with acute cervical strain and lower back pains. The sum of $950,000.00 was awarded on December 4, 2009. That figure updates to $2,101,215.20. The claimant **Marion Landell** clearly suffered far more serious injuries than the claimant at bar. After taking into account the similarities and differences among the authorities and, having regard to the claimant's injuries, I believe that a reasonable award for her general damages is $900,000.00.

[27] In all the circumstances, I make the following orders in favour of the claimant:

a) General damages in the amount of $ 900,000.00 for pain and suffering with interest at 3% from February 2, 2013, to December 9, 2022.
b) Special damages in the amount of $18,000.00 with interest at 3% from September 7, 2010, to December 9, 2022.
c) Costs to be agreed or taxed.

A. Jarrett
Puisne Judge (Ag.)