[2019] JMSC Civ 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV00064

BETWEEN	**DWAYNE TYRELL**	**CLAIMANT**
AND	**ORAYNE MANNING**	**DEFENDANT**

CONSOLIDATED WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015HCV01463

BETWEEN	**JEROME DUNSTAN**	**CLAIMANT**
AND	**ORAYNE MANNING**	**DEFENDANT**

IN OPEN COURT

Anika Townsend, instructed by Townsend, Whyte & Porter, for the claimants.

Pauline Brown-Rose, for the defendant.

November 13, 2018, and February 13, 2019, & April 5, 2019

ASSESSMENT OF DAMAGES – THE ROLE OF EXPERT WITNESSES – THE EXPLANATION OF TERMS IN EXPERT REPORTS

ANDERSON, K., J

The Introduction

[1] These claims arose out of a motor vehicle collision in which the claimants in these consolidated claims sustained injuries and incurred loss. The defendant admitted liability in both claims, judgment was entered for the claimants on the defendant's admission of liability, and both claims proceeded to assessment of damages. On November 13, 2018, these claims came on for hearing for assessment of damages, before me. At that time, the claim ***Jerome Dunstan v Orayne Manning, Claim No. 2015HCV01463****,* proceeded, and damages were assessed, by this court, and that claimant was awarded.

[2] The other claim, ***Dwayne Tyrell v Orayne Manning, Claim No. 2014HCV00064***, did not proceed at that time, as the claimant was not then present, as he resides outside of the jurisdiction. A further date, February 13, 2019, was set for the hearing of the assessment of that matter, and the claimant was ordered to be present at that hearing. On that date, the claimant was present and the assessment of damages was heard by me. This written ruling, therefore, emanates from that hearing. In this claim, judgment on admission was entered on May 2, 2018.

The background

[3] On March 13, 2010, the claimant, who was then a serving member of the Jamaica Constabulary Force, and within the course of his duties, sustained injuries when a vehicle, driven by the defendant, collided with a vehicle in which the claimant was travelling. At the time of the accident, the claimant was twenty-four (24) years of age. He was taken to the Kingston Public Hospital, on the said date, where he was examined by a doctor and his injuries were determined to be: (i) Basal skull fracture; and (ii) Lateral orbital wall fracture. The treatment he then received was described as 'Augmentin.' He spent two days at the Kingston Public Hospital and then he was discharged.

[4] On March 26, 2010, the claimant was seen by Consultant Maxillofacial Surgeon, Pierre-John Holmes. He noted that the claimant was found to have a left zygomaticomaxillary complex fracture (fracture of the left cheek bone), and underwent surgery described as *'open reduction and internal fixation of his left zygomaticomaxillary complex fracture with titanium mini-plates and screws.'* The claimant was discharged on March 27, 2010.

[5] The claimant, in his witness statement, filed on January 31, 2019, which stood as his evidence in chief, stated at paragraphs 20 to 21, that, following his surgery he continued to experience pains, along with flashback of the accident, and that he would experience fear when he was travelling in motor vehicles. As a result, he sought further medical attention and received prescribed medication in April, 2010. At paragraph 22, of the said witness statement, the claimant continued that, despite those medications, he continued to experience pains, and, on July 7, 2010, he sought and received further medical treatment. He continued to purchase medication and received medical attention up until December, 2010.

[6] Additionally, under cross examination, the claimant gave testimony that he returned to work six months following the accident, but he was assigned light duties. The claimant was last seen by Dr. Holmes in May, 2011, when at that time, he noted that the claimant had residual deficits of 'mild left cheek numbness,' which Dr. Holmes noted to be 'probably permanent.'

[7] The claimant then stated, at paragraph 41 of his witness statement that, his pain worsened as the 'over the counter medication' was no longer effective. Therefore, on September 26, 2011, he sought further medical attention from Consultant Orthopaedic Surgeon, Dr. Kimani White. In recounting the history of the claimant's injuries, Dr. White stated that there was *'…Computed tomography of the head demonstrated multiple facial bone fractures. [The claimant] was admitted, placed on analgesia and referred to the Faciomaxillary Consultant, Dr. Pierre Holmes …'*

[8] Dr. White noted that the claimant complained of intermittent, mild to moderate neck pains, occasional chest pains especially after prolonged standing, recurrent nasal discharge and left facial numbness, and also the claimant was taking oral and topical analgesia medication, to assist in the management of the pains. Dr. White also noted a 7cm scar to the right parietal-occipital region of the claimant's scalp, and opined that, according to the 6th edition of the Guides to the Evaluation of Permanent Impairment, the claimant has sustained a class one chronic cervical sprain which meant that a 1% whole person permanent impairment rating was assigned to him.

Submissions

[9] Counsel for the claimant, submitted that an appropriate award of general damages to the claimant, would be: $8,000,0000.00. In support of that sum, counsel placed reliance on two cases, namely, **Tanya Reid v Vanyard Dacres, et al.**, Suit No. C.L.R. 021/98, delivered August 17, 2000, and **Henry Brian v Noel Hoshue, et al.**, Suit No. C.L. 1996B219, delivered September 30, 1997.

[10] Counsel for the defendant, on the other hand, submitted that a just award for the claimant's injuries, would be: $2,200,000.00. To justify that proposed sum, counsel placed reliance on four cases. They are as follows: **George Dawkins v The Jamaica Railway Corporation,** Suit No. 1990D 038, delivered January 24, 1997, **Charley Brown v Byron Cummings, et al**. Suit No. C. L. 1989/B 026A, delivered January 10, 1992, **Nicholas Sergeon (by next friend Princess Brown) v Livingston Muirhead** Suit No. C.L. 1991 S041, delivered April 24, 1998, and **Lorraine Garrell (by next friend Aston Garrell), et al v Byron Williams,** Suit No. C.L. 1998G 010, delivered October 5, 1995.

Analysis

Special Damages

[11] The sum of $50,844.30 is agreed between the parties as the sum to be awarded as special damages. The defendant therefore, is only disputing the sum claimed by the claimant as the sum to be awarded for general damages for pain and suffering and loss of amenities. The assessment of the award to be made for general damages, will next be addressed.

General Damages

[12] In arriving at an appropriate award for general damages, it must be borne in mind that awards must be comparable, reasonable and moderate. In that regard, see: **Beverley Dryden v Winston Layne** SCCA 44/87 delivered 12 June 1989. This is the basis of reliance on previous awards. As stated before at paragraph **[9]**, the claimant relied on two cases in support of the sum of $8,000,0000.00, being sought, as general damages.

[13] In the first of those two cases, **Tanya Reid v Vanyard Dacres, et al,** *op. cit,* the claimant there suffered the following injuries in a motor vehicle accident: A blow to her head upon impact, and pains to her chest, shoulders, face, head and knees. The left side of her face was sutured, her cheek bones were fractured, and her mouth could not open, as it was swollen. She also could not move her shoulders and she was given medicine by way of spoon. She visited the clinic as an outpatient for almost one month. She was assessed at 2% disability rating of the whole person. She was awarded the sum of $1,375,000.00, which updates to $6,300,000.00, using the current Consumer Price Index (CPI) of 254.3. The CPI at the time of the award was 55.5.

[14] In the second case upon which the claimant relied, **Henry Brian v Noel Hoshue, et al.,** *op. cit.,* the claimant in that case, suffered the following injuries resulting from a motor vehicular accident in which he was involved: Shock, excruciating

pains, dizzy spells, abrasions over the frontal region of the scalp, pain and suffering in back, and severe headaches. The claimant in that case, was not assigned any permanent disability rating, as the injuries did not appear serious. He was awarded the sum of $350,000.00, which updates to $2,200,000.00 using the current CPI of 254.3. The CPI at the time of the award was 45.1.

[15] The defendant, on the other hand, as stated before at paragraph **[10]** above, placed reliance on four authorities for the proposed award of $2,200,000.00. The first of those authorities was **George Dawkins v The Jamaica Railway Corporation**, *op. cit,* in which the claimant, suffered abrasions to the eyelids, laceration of the lower eyelid, and multiple facial fractures. His lacerations were sutured and he was treated with antibiotics. He was left with scarring and facial deformity and would require future surgical procedures to correct same, including '*grafting to the zygomatic frontal area (artificial impant)'*. He was awarded the sum of $450,000.00 which updates to $2,800,000.00, using the current CPI of 254.3. The CPI at the time of that award was 42.1.

[16] In the second case relied upon by counsel for the defendant, **Charley Brown v Byron Cummings, et al**. *op. cit*, the claimant there suffered lacerations and abrasions to the face, fracture of the left mandible and left cheek bone, multiple abrasions over the body, including the upper and lower limbs. He was awarded $50,000.00, which updates to $970,000.00 also using the current CPI of 254.3, and the CPI at the time of that award was 13.1. Thirdly, counsel submitted for the court's consideration, **Nicholas Sergeon (by next friend Princess Brown) v Livingston Muirhead,** *op cit.,* where the claimant, an infant, in that case, suffered contusions of the anterior abdominal wall, swelling of the right hand, bilateral periorbital haematoma and abrasions to the forehead, trauma to the eyes resulting in their swelling and temporary blindness, trauma to the knee, fracture of the right fibula, fracture of skull and undisplaced fracture of third metacarpal of right hand. In that case the claimant was awarded the sum of $750,000.00, which updates to $4,100,000.00 with the current CPI of 254.3, while the CPI at the time of that award was 46.5.

[17] Finally, counsel for the defendant relied on **Lorraine Garrell (by next friend Aston Garrell), et al v Byron Williams**, *op. cit,* where the infant claimant, in that case, suffered depressed fracture of the left parietal bone and displaced closed fracture of shafts of left femur and right humerus. The infant claimant was awarded $300,000.00, which updates to 2,300,000.00, with the present CPI of 254.3, and the CPI at the time of that award was 33.7.

[18] In order to arrive at an appropriate award therefore, the principle stated above must be adhered to, that is, awards must be comparable, reasonable and moderate. For awards to be comparable, the nature of the injuries sustained by the claimant must be comparable to those sustained by the claimants in previous cases, being relied upon as guidance for the present award. It follows therefore, that the evidence of the nature of the claimant's injuries, must be thoroughly examined. What then is the nature of the claimant's injuries in the present claim?

[19] Firstly, I accept the evidence of the claimant, as to the nature of the injuries he received as a result of the motor vehicle collision on March 13, 2010, and I also accept his evidence as to the treatment he received for the injuries which he sustained and the pains he suffered. The results of the claimant's examination, on the date of the incident, was that he sustained basal skull fracture, and lateral orbital wall fracture. Upon his presentation to Dr. Pierre John-Holmes, to treat conditions of the face, jaws, and neck, the claimant was noted to have sustained a fracture of the left zygomaticomaxillary complex fracture, to his face, and he underwent a surgery with titanium mini-plates and screws.

[20] Dr. White, on the other hand, who subsequently examined the claimant, noted in his report, dated March 12, 2012, the history of the claimant's injuries and treatment, and stated that the claimant sustained '*multiple facial bone fractures.'* In my view, the evidence of the specialist, Dr. Holmes, is to be preferred to that of Dr. White, in this regard, who was only recounting the history of the claimant's injuries and treatment when he noted '*multiple facial bone fractures.'*

[21] Further, Dr. White noted as part of his examination of the claimant, the following: '[t]here was diffused, mild left supra-clavicular tenderness.' There was no explanation proffered in the medical report of Dr. White, as to what exactly is meant by that. This point was raised by the court, and counsel for the claimant sought to proffer an explanation, to this court, of that which appears, on the face of it, to be medical terms, used in the medical report. Counsel for the claimant then submitted, without reliance upon any authority, that the court, when faced with an issue such as this, may have regard to any medical dictionary, once such dictionary has been previously utilized by the court to define terms in medical reports, that are not readily understandable by the layman, which a judge of this court is, in relation to matters other than law.

[22] To address that issue, I will have regard to the judgment of the Privy Council in **United States Shipping v Shipping St. Albans** [1931] A.C. 632, at page 642, where it has been stated as follows:

> *'The extent to which the opinions or conclusions of skilled persons are receivable by way of proof in point of fact has not been seriously in doubt from the time when, in 1782, in Folkes v. Chadd (2), Lord Mansfield stated the grounds on which the evidence of Smeaton, the famous constructive engineer, was to be admitted upon a disputed question of obstruction to a harbour: "the opinion of scientific men upon proven facts may be given by men of science within their own science." Another Chief Justice, Lord Russell of Killowen, explained the rule in a modern case of Reg. v. Silverlock. (3) The witness must have made a special study of the subject or acquired a special experience therein. "The question is," Lord Russell said, "is he peritus; is he skilled; has he an adequate knowledge?" '*

It follows then that, the question is, does the witness have adequate knowledge, and has that witness made a special study of the subject or acquired a special experience in the subject matter of which he is to render expert opinion on, before the court?

[23] It also follows that, if the witness is indeed possessed of such special skill in the subject matter, and has rendered a report of same, then only he is qualified, in the view of the court, to explain any term not easily discernible by laymen. In that

regard, the following extract from the text: Civil Procedure, Vol.1, The White Book, 2000, at paragraph 35.2.2, is instructive:

> *'The function of the expert witness is (inter alia) to explain words, or terms of science or art appearing on the documents whch have to be construed by the court, to give expert assistance to the court (e.g. as to the laws of science, or the working of a technical process or system) … (British Celanese Ltd v Courtaulds Ltd (1935) 152 L.T. 537, HL.)'*

[24] I am of the view, therefore, that counsel's attempt to proffer an explanation of the above examination finding of Dr. White, was improper, as only an expert witness is empowered and recognized as being competent enough, to give such explanation. Counsel, simply put, does not have specialized experience, or special study to give such explanation. Additionally, I do not accept, that it is then proper for this court, without the assistance of an expert witness as to same, as urged by counsel, to have regard to medical dictionaries for the supposed definition of terms used by an expert in his or her report. From the foregoing therefore, the claimant has not proven that examination finding by Dr. White and as such, no regard will be had to that observation by Dr. White, for the purpose of this assessment.

[25] Having observed the nature of the claimant's injuries, it is my view that the cases of **Tanya Reid v Vanyard Dacres, et al,** *op cit,* and **Henry Brian v Noel Hoshue, et al,** *op. cit,* relied upon by counsel for the claimant, were not useful guides for an appropriate award to the claimant. The claimant in the **Tanya Reid** case (*op. cit)*, suffered injuries that were more severe and extensive, and was assigned a higher disability rating than that of the claimant in the present claim. By contrast however, the claimant in the **Henry Brian** case (*op. cit)* did not sustain injuries to the extent of those sustained by the claimant in the present claim, as the injuries of that claimant did not go beyond that of abrasions, and did not attract a permanent disability rating, unlike the claimant in the case at bar.

[26] As it relates to the cases relied upon by counsel for the defendant at the case at bar, I did not find, as useful guides, the cases of **Nicholas Sergeon (by next friend Princess Brown) v Livingston Muirhead,** *op. cit,* and **Lorraine Garrell**

(by next friend Aston Garrell), et al v Byron Williams, *op. cit,* as the claimants in both of those cases were infants and they sustained injuries that went beyond those of the claimant in the present claim and thus, were not comparable. Equally, I find the case of **Charley Brown v Byron Cummings, et al,** *op. cit*, to also not be comparable, as the claimant seemed to have sustained injuries that were not as extensive as those of the claimant, in the present claim.

[27] In the final analysis, I find the case of **George Dawkins v The Jamaica Railway Corporation,** *op. cit,* relied upon by the defendant, to be a useful guide to the award of general damages for pain and suffering and loss of amenities. As with the claimant in the present claim, the claimant in that case suffered facial injuries resulting from an accident (a train collision in that case, although the claimant in the present case was injured in a motor vehicular collision).

[28] As with the claimant in the present claim, the claimant in the **George Dawkins** case, (*op. cit*), was also treated with analgesia and required surgery, which included, '*grafting to the zygomatic frontal area (artificial implant),'* whereas the claimant in the present claim underwent surgery to the same area of his face with '*titanium mini-plates and screws.'* I have observed, however, that there was no evidence of a permanent partial disability rating of the claimant in the **George Dawkins** case, (*op. cit)*, and as such, I find that the injuries of the claimant in the present claim, although comparable to those of the claimant in the **George Dawkins** case, (*op. cit)*, were however, more extensive.

Conclusion

[29] I am therefore of the view, that the award of general damages for pain and suffering, and loss of amenities, in the present case, must be a sum which reflects that of the **George Dawkins** case, (*op. cit),* but to also take into account the permanent disability rating assigned to the claimant in the case at bar. I find then, that an appropriate award of general damages for pain and suffering and loss of amenities, in this case, is $3,000,000.00. Interest is also awarded on both special

damages and general damages. Interest on special damages is to run from the date that the cause of action arose, and interest on general damages is to run from the date of the service of the claim, on the defendant. **See: Vanyard Dacres and Carla Dacres v Tanya Reid – SCCA No. 103/00.** Both the interest on general, as well as on special damages, will run until the date when judgment was entered on the claim, that is, the date at which judgment on admission was entered herein, and not on the date when the ruling of the assessment of damages, was announced. In that regard, see: **Rule 42.8 of the Civil Procedure Rules.**

Orders

1. Special damages are awarded to the claimant in the sum of $50,844.30 with interest at 3% from March 13, 2010 to May 2, 2018.

2. General damages are awarded to the claimant in the sum of $3,000,000 with interest at 3% from October 4, 2014, to May 2, 2018.

3. The costs of this claim are awarded to the claimant, and such costs shall be taxed, if not sooner agreed.

4. The claimant shall file and serve this order.

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Hon. K. Anderson, J.