



[2023] JMSC Civ.180

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014HCV03441

BETWEEN	LATOYA WALKER	CLAIMANT
AND	SHAWN STEWART	DEFENDANT

IN OPEN COURT

Ms. Jamila Maitland instructed by Campbell McDermott for the Claimant

Defendant absent and unrepresented

Heard: June 29th, 2023 and September 26th, 2023

ASSESSMENT OF DAMAGES — Personal Injury — Motor vehicle collision — Negligence — Damages — Pain and suffering and loss of amenities — Special damages — Laceration to inner lip — Abrasion to face, left thigh and both knees — whole person impairment

T. HUTCHINSON SHELLY, J

BACKGROUND

[1] The Claimant in her suit filed on July 17, 2014 is seeking to recover damages for personal injury, loss and damage arising from a motor vehicle accident which occurred on December 23rd, 2013 along Barnett Street in the parish of Saint James while she was in the process of crossing the street. The Defendant is the owner

and driver of motor vehicle registration number **7964**. The Claimant asserts that as a result of the negligence in the Defendant's driving, management or control of the said motor vehicle, the collision occurred.

- [2] No acknowledgment of service or defence was filed by the Defendant and an Interlocutory judgment in default of acknowledgment of service was entered against him on the 14th of September 2021 and noted in **Binder 777 Folio 44**. The matter is now before the Court for assessment of damages. On the 26th of June 2023, the Claimant gave evidence as to the quantum of damages that she believes the Court should award.
- [3] On the day of the hearing, the Defendant made no appearance and remained unrepresented, as such, the assessment has proceeded uncontested.
- [4] It is to be noted that a Notice of Proceedings was served on Advantage General Insurance Company Limited, with whom the Defendant had a policy of insurance at the material time. They, however, have not sought to intervene in the matter.

ISSUE

- [5] The default judgment having been entered, the question of the Defendant's liability for the motor vehicle accident and loss sustained has been resolved. As such, the sole issue for the Court is the quantum of damages which should be awarded to the Claimant for injuries suffered and other related losses as a result of the Defendant's negligence.

THE CLAIMANT'S EVIDENCE

- [6] In her witness statement which stood as her evidence-in-chief, the Claimant stated that on December 23, 2013, she was walking along Barnett Street, Montego Bay in the parish of Saint James. Upon reaching the vicinity of Old Fire Station, she stopped on the left side of the roadway and indicated her intention to cross the roadway which is a single carriage lane in both directions. She stated that the cars stopped to allow her to cross the roadway when suddenly the driver of a white

Toyota Corolla motor car with registration number **7964 GF** overtook the line of motor vehicles and collided into the left side of her body.

- [7] The Claimant's evidence is that immediately following the collision, she began to feel pain all over her body and her mouth and face began to bleed. She was transported to the Cornwall Regional Hospital where an x-ray was performed on her cervical spine, facial bone and chest. The results of these tests showed that she had no broken bones. She was prescribed analgesics and released from the hospital with instructions to continue with the dressing of her injuries at the nearest health centre.
- [8] The Claimant subsequently received a Medical Report from Dr N. Thompson of the Cornwall Regional Hospital dated February 27, 2014.
- [9] On January 2, 2014, the Claimant visited Dr Don Gilbert, an Orthopaedic Surgeon, as she was still experiencing severe back and knee pain. She remained under his care until June 29, 2022. She explained that during this time, she engaged in seven (7) sessions of physiotherapy and had an MRI on her left knee. She was assessed as having suffered 4% whole person impairment as a result of her injuries and later received two (2) medical reports dated May 19, 2022 and August 17, 2022 respectively.
- [10] Ms Walker stated that as a direct result of her injuries, she was unable to perform her usual domestic chores and had to be assisted by her sister for twelve (12) weeks at a cost of **\$4000.00** per week. She was also unable to work for the same period of time and suffered a loss of income as a result. She outlined her fortnightly earnings as **\$17,704.80**. Ms Walker outlined other financial losses in terms of medical expenses for reports, physiotherapy, MRI and calculated these losses as amounting to **\$190,500.00**.
- [11] She also gave evidence of ongoing physical challenges in spite of the fact that the accident occurred ten (10) years ago and indicated that she still experiences pain describing it as a '*cramping feeling*'. She stated that bending is now virtually

impossible and whenever she travels in a vehicle as a passenger, she has to sit in the front seat as she cannot sit with her knees flexed for a prolonged period.

SPECIAL DAMAGES

[12] It is an established principle of law that special damages, which are generally capable of exact calculation, must be specially pleaded and proved and therefore in any action in which a claimant seeks to recover special damages, he has a duty to prove his loss strictly¹. The authorities have demonstrated however that the court has some discretion in relaxing the rule in the interest of fairness and justice, depending on the particular circumstances of the case².

Medical Reports

[13] The Claimant requested compensation for special damages for which she produced the following documents:

- (a) Medical Report from Cornwall Regional Hospital dated February 27, 2014;
- (b) Medical Report of Dr Don Gilbert dated May 19, 2022 and August 17, 2022;
- (c) Receipts from Dr Don Gilbert dated April 4, 2014, July 11, 2014 and November 7, 2022 for the costs of the visits and reports - **\$65,000.00** plus **\$9,500.00** and
- (d) Receipt from North Coast Imaging MRI Services dated July 2, 2022 - **\$46,000.00**

[14] The documentation in proof of these expenses were admitted into evidence as exhibits 1 through to 4. I have reviewed the documentation provided in proof of these expenses and I am satisfied that the funds were expended in the amount of **One Hundred and Twenty Thousand Five Hundred Dollars (\$120,500.00)**. Accordingly, this sum is awarded to the Claimant.

¹ **Lawford Murphy v Luther Mills** (1976) 14 JLR 119

² **Julius Roy v Audrey Jolly** [2012] JMCA Civ. 63

[15] Although there was reference in the pleadings to expenses associated with physiotherapy sessions, the Claimant in her viva voce account stated that she did not receive any receipt for this service. As such, in the absence of documents confirming this expense, I am unable to make the award which has been sought for this item.

Transportation

[16] With respect to transportation expenses, whilst this was pleaded, the Witness Statement was silent on the issue and this item was not explored by Counsel at the hearing.

Household Assistance

[17] The Claimant also seeks to recover the sum of **\$48,000.00** which represents the cost of domestic assistance provided by her sister for twelve (12) weeks as she was unable to wash or clean her house. It is clear from the report of the doctor that in February 2014 when he first saw her, Ms Walker's ability to perform these tasks would have been adversely impacted by the injuries she sustained and she would have had to rely on assistance from another. Although, I accept that there was no documentary proof provided in support of this expense, I am satisfied that it was justified and reasonable and the Claimant ought to be compensated in this regard.

Loss of Earnings

[18] In relation to loss of earnings, the Claimant seeks to recover the sum of **\$106,228.80** as her injuries resulted in her inability to work as a Security Officer. Documentary proof of her employment and earnings was provided in the form of a letter from her previous employer, Securipro Limited. She stated that her average fortnightly emolument was **\$17,704.80** and she was unable to work for approximately twelve (12) weeks which resulted in a loss of **One Hundred and Six Thousand Two Hundred and Twenty-Eight Dollars and Eighty Cents (\$106,228.80)**.

[19] When Ms Walker was examined by Dr Gilbert in February 2014, approximately two (2) months after this incident, he found that she was still suffering from lower back pain as a result of a herniated lumbar intervertebral disc and left knee pain and referred her for a course of physiotherapy. She also gave evidence that her ability to work was adversely affected for a period of three (3) months. In light of the Doctor's observation and the referral for further treatment of her injuries, I am persuaded that Ms Walker would have had difficulties resuming her duties as a security guard for a period of at least three (3) months following this accident and suffered the financial loss alleged. Accordingly, she is awarded the sum claimed for this head of damages.

GENERAL DAMAGES

Medical Evidence

[20] The particulars of the Claimant's injuries were outlined in the Medical Summary Report prepared by Dr N Thompson and the two (2) Medical Reports prepared by Dr Don Gilbert.

[21] The Medical Summary indicated that upon examination and investigation, Ms Walker was found to have abrasions to her face, left thigh, both knees and laceration to her inner lip. The x-rays performed on her cervical spine, facial bone and chest were all normal. She was treated with Tetox, Voltaren and intravenous fluid. Thereafter, she was discharged and given analgesia.

[22] Dr Don Gilbert's report of May 19th, 2022 stated that on assessing the Claimant, he observed that she had back pain which was made worse by prolonged standing or lifting of heavy objects. Dr Gilbert also noted that although Ms Walker has returned to work, her back pain interferes with her ability to carry out her tasks and the pain in her left knee causes difficulty when ascending stairs.

[23] A physical examination revealed the following:

- i. hypo-pigmented healing abrasions to the left side of the forehead, left infra-orbital area and left mandibular area.
- ii. The left side of the tip of the left upper incisor and the right side of the tip of the 2nd incisor was chipped.
- iii. There was a healing abrasion to the right elbow.
- iv. There was a healed hypo-pigmented laceration over the left knee with surrounding hyperpigmentation.
- v. In terms of her left knee, there was no patella or joint line tenderness and no ligamentous laxity, however there was crepitus on flexion of the knee.
- vi. The Claimant is incapable of squatting.
- vii. There was grade 5 power in all myotomes except in flexion of the left hip which was grade 4.
- viii. The straight leg raising test on the left side caused lower back pain at 60 degrees elevation.
- ix. There was tenderness along the lumbar spine and the left erector muscles were in spasm.
- x. The Claimant was assessed as having suffered chondromalacia patella with a possible tear of the medial meniscus of the knee.

[24] The Claimant was diagnosed as having:

- Lower back pain due to herniated lumbar intervertebral disc; and
- Left knee pain due to chondromalacia of the patella.

[25] Based on her progress, Dr Gilbert noted the following:

- i. She still experiences pain in her left knee after prolonged sitting.
- ii. She walks with a limp and has to sit in the front of a vehicle when travelling as this allows her to extend her knee.
- iii. She continues to experience lower back pain, is unable to bend her back and is unable to afford physiotherapy.
- iv. She has no tenderness in the lumbar spine or paraspinal muscles and was able to fully flex her lumbar spine without pain.

- v. Her back pain had resolved and she only experiences pain when she is wearing pants.
- vi. She continues to experience pain in her left knee associated with intermittent swelling, instability and difficulty ascending stairs.
- vii. She receives temporary relief after taking analgesics.

[26] In respect of her prognosis, Dr Gilbert noted that Ms Walker's back pain has resolved consistent with the natural history of the disorder, but her knee pain still persists. He also noted that an MRI of the left knee is necessary in order to determine the precise cause of her pain.

[27] In a report dated August 17, 2022, Dr Gilbert noted the following:

"An MRI of the left knee done on the 29th June 2022 and reported on by Dr Phillipa Fung Chung, Consultant Radiologist showed a grade 3 posterior horn medial and anterior horn lateral meniscus tears and a lateral meniscus parameniscal versus ganglion cyst. There was also moderate tibiofemoral osteoarthritis, worse medially, mild patellofemoral osteoarthritis, worse laterally and grade 3 chondromalacia patella. There was also ACL degeneration, mild extensor tendosis, acute on chronic medial and grade 1 lateral patellar retinaculum injury, moderate lateral Hoffa's fat pad oedema, mild deep infrapatellar bursitis, Baker's cyst, moderate joint effusion with synovitis and moderate pre and infrapatellar subcutaneous soft tissue oedema."

[28] The Claimant was diagnosed as follows:

Left knee pain due to a torn lateral and medial meniscus of the left knee as a result of the motor vehicle accident.

[29] With regard to prognosis, Dr Gilbert stated:

"Ms Walker will require arthroscopic partial meniscectomy of the left knee however meniscectomy is associated with radiological post-traumatic osteoarthritis in 55% of individuals at 8 years."

[30] In terms of impairment, Dr Gilbert noted that she has a 10% lower extremity impairment which is equivalent to 4% whole person impairment.

SUBMISSIONS ON DAMAGES

- [31] Ms Maitland relied on the authority of **Stephanie Burnett v Metropolitan Management Transport Holdings & Jamaica Urban Transit Co. Ltd**, Khans 6 Page 195 in support of the Claimant's request for damages in the sum of **Six Million Dollars (\$6,000,000.00)**. In this case, the Claimant suffered from compression of lumbar nerve roots, degenerative disc disease and acute chondromalacia of the left patella. She was assessed as having a Permanent Partial Disability of 13% of the whole person. In December 2006, she was awarded **\$3,000,000.00** in general damages which now updates to **\$10,143,603.13** using the CPI of 129.5 for the month of June.
- [32] Counsel also provided two (2) other authorities which she submitted '*can assist the court in determining a reasonable sum for general damages relative to the injuries pleaded in the originating documents and the treatment sought by the Claimant thereafter.*' The first authority is **Erica McKane v Brian Damille & Anors [2017] JMSC Civ. 93** - The Claimant suffered multiple abrasions, soft tissue injury and a laceration to scalp. Her treatment included Voltaren 75 mg, Zantac 150 mg, cleaning, dressing, and suturing the affected areas. She was sent home with a referral to a health centre for removal of the suture. Her injuries did not require her to be seen by a specialist or to do physiotherapy. The Claimant was awarded the sum of **\$1,400,000.00** for general damages in June 2017 using the CPI of 92.4. This sum now updates to **\$1,962,121.21** using the CPI of 129.5 for the month of June.
- [33] The second decision cited was **Anthony Simpson v Lloyd McMohan C.L 1987 S 460 reported at Volume 4 Khan at page 206** - The Claimant sustained head injuries with loss of consciousness, abrasions to the lateral aspect of right thigh and knee, laceration to the parietal region of the scalp and lacerations to the right side of the face. As a result, in April 2008, the Court awarded the Claimant **\$857,404.58** in general damages, which updates to **\$2,322,884.79** when the CPI of 129.5 for the month of June is utilized.

DISCUSSION/ANALYSIS

[34] On assessment of the authorities and the evidence before the Court, I noted that while the injuries sustained by the Claimant in the **Stephanie Burnett** decision showed some similarity to those of the instant Claimant, they were far more severe in nature and impact and this distinction is reflected in the fact that she was assigned a higher level of impairment.

[35] The injuries sustained by the Claimant in the **Erica McKane** case were not as severe as those of **Latoya Walker**. She was not assessed as having suffered any impairment and was treated with analgesics. Additionally, no referral was made for physiotherapy. I did not find the injuries suffered by **Anthony Simpson** to be comparable to the instant Claimant as he suffered head injuries as well as abrasions and lacerations. It does not appear that he suffered any impairment or long-term effects. Having carefully examined the authorities relied on, it is evident that while none are on all fours with the instant case, Ms Walker's injuries and impairment rating clearly elevates her situation above those of **Erica McKane** and **Anthony Simpson**. In the circumstances, I am persuaded that the appropriate award would be a midpoint between the cases with **McKane** and **Simpson** being at the lower end and **Burnett** at the very top. Adopting this approach, I am satisfied that an award of **\$4 million** meets the justice of the matter.

ORDER

[36] Damages are assessed as follows:

1. Special Damages are awarded in the sum of **Two Hundred and Seventy-Four Thousand Seven Hundred and Twenty-Eight Dollars and Eighty Cents (\$274,728.80)** with interest at the rate of 3% from December 23rd, 2013 to September 26th, 2023.

2. General Damages are awarded for pain and suffering in the sum of **Four Million Dollars (\$4,000,000.00)** with interest at the rate of 3% from October 25th, 2014 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.