

HUTCHINSON v. CLARKE

[HIGH COURT - CIVIL SUIT NO. 360 OF 1991 (King, J. (Actg.))

November 5, 8, 25, 1993]

(1994) 30 Barb. L.R. 270

Damages - *Personal injury - Whiplash injury to neck which aggravated pre-existing arthritis of the cervical spine - Injury to left forearm and fingers - Quantum.*

Facts: The cars driven by the plaintiff and defendant collided on the Spring Garden Road on December 15, 1990. As a result of the accident, the defendant suffered a whiplash injury to his neck which aggravated pre-existing arthritis of the cervical spine. He also suffered injury to his left forearm and fingers. The defendant, 49 years at the time of the accident, was a craftsman and cupboard builder who worked with heavy duty tools. After the accident he continued working, assisting his employee when he could. One of two consultants visited by the defendant recommended electromyography and nerve conduction studies to evaluate the possibility of cervical radiculopathy in 1991 and again in 1992. The defendant did not follow these recommendations. It was estimated that the defendant [271] would continue to suffer from intermittent episodes of muscular spasm and neck stiffness.

Held: If the defendant was not found solely responsible for the accident, he would have been awarded \$150,000 as general damages for his injuries and \$4,000 for three months loss of earnings.

Cases referred to:

Cooper v. Firth Brown [1963] 2 All E.R. 31.

Corthorn v. Foster [1990] C.L.Y. 1620.

Jacobson v. Hughes [1983] C.L.Y. 1020.

Littlewort v. Adams [1993] C.L.Y. 1559.

Phipps v. Orthodox Unit Trusts Ltd. [1957] 3 All E.R. 305.

Segree v. Shepherd [1992] C.L.Y. 1644.

Stretton v. Copley [1989] C.L.Y. 1217.

Mr. H deB. Forde, Q.C. and *Miss M. Greene* for the plaintiff.

Mrs. M. Woodstock-Riley for the defendant.

KING, J. (Actg.): The plaintiff was driving his employer's motor car ME 692 along the Spring Garden Road on December 15 1990 in a northerly direction when it was involved in a collision with a motor car MB962 owned and driven by the defendant. ...

The defendant received injuries to his neck, back and left arm. Two days after the accident he attended a Dr. Mohamad who prescribed a collar. He was x-rayed. He put Dr. Mohamad's medical report as well as one by Dr. David Corbin. The relevant bills from these were put in.

Dr. Mohamad found as per Exhibit "C" -

"tenderness over the trapezius muscles (of the neck) as well as the cervical spine. The range of movement of the neck was restricted by pain. Power and sensation in the upper limb was normal. A diagnosis of WHIPLASH INJURY WITH PERIPHERAL NERVE irritation was made. Mr. Clarke was treated with anti-inflammatory drugs as well as valium and reviewed two (2) weeks later.

On December 31st, 1990 Mr. Clarke complained that there was no ease in symptoms and there was still quite significant tenderness over the cervical spine and trapezius muscles. Movements of the neck had however improved slightly. The patient was fitted with a cervical collar and drug therapy was continued.

On January 23th, 1991 movements of the neck had improved fairly significantly, but the patient still complained of numbness in the left forearm [271] and fingers. At this point Mr. Clarke was started on quite an extensive course of physio-therapy.

An X-ray showed no bone injuries but there was evidence of mild arthritis in the neck.

When the patient was seen about a month after the physiotherapy was started, he appeared to be quite comfortable but mentioned that he was still experiencing some discomfort in the left forearm and fingers.

CONCLUSION

As a result of the motor vehicle accident, Mr Clarke suffered a whiplash injury to his neck, which resulted in aggravation of the arthritis already existing in the cervical spine. As a consequence, the patient suffered from nagging neck pains which at times were quite excruciating. The numbness in the forearm and fingers of the left hand also prohibited Mr. Clarke from performing his daily duties as a self-employed handicraftsman, and resulted in a subsequent loss of income. This neck pain and nerve irritation can be recurrent and hence it would not be surprising if Mr. Clarke continues to suffer from intermittent episodes of muscular spasm and neck stiffness and concomitant loss of earnings.

In addition, this injury necessitated the use of anti-inflammatory muscular relaxing drugs which are both irritant (to the stomach) and addictive. Because of the recurrent nature of the illness, Mr. Clarke may find himself using these drugs on a prolonged basis in the future."

Dr. Corbin's report, Exhibit "D", is in these terms:

"I first saw this 49 year old man in July 1991, at the request of Mr. Winston Seale. He had symptoms and signs suggestive of cervical radiculopathy. I suggested he should have electromyography and nerve conduction studies to evaluate this possibility.

When I reviewed him on 14th October 1992, the symptoms were the same, and electromyography is again recommended. The cost of electromyography and nerve conduction studies combined is \$500.00. Please let me know whether I should proceed. I will then be in a position to furnish a medical report (approximate cost \$750.00). Any further consultations would be \$80.00 each, and would be required once every 2 months. The cost of physiotherapy would be about \$200.00 per month for about 6 months. Medical follow-up should be estimated for about 2 years." [272]

There was no objection to an amendment to include a claim for \$610.00 for medical expenses, but no supporting receipts were put in and I have no note that the plaintiff agreed to this item.

The defendant continued that the injury still bothered him a lot as he cannot use any electrical tools whatsoever as he gets numbness in his arm and neck as soon as he turns them on. He was a craftsman and produced work at his home and sold at Pelican Village. In addition, he built cupboards with heavy duty tools. His earnings working alone after expenses, were about \$1,300.00 - \$1,500.00 a month with expenses totalling about \$1,025.00 a month.

He did little work now but engaged a worker whom he assisted when he could. He did not now earn the same as before, but gave no idea in chief how much he earned under the current arrangements. Nevertheless, he claimed \$600.00 a week as loss of earnings...

Cross-examination concluded in an effort to show that the defendant was still engaged in his business and had even taken on a partner. He denied these, but admitted that at time of the hearing, his assistant gave him about \$130.00-\$150.00 gross a week. He admitted making no contributions to national insurance and income tax...

Counsel contended that special damages in connection with medical expenses had been agreed, but I have only a note that the plaintiff agreed to an application to amend this head; not that he agreed to the figures, but if I find for the defendant, counsel may indicate if he in fact agreed.

As to general damages, counsel referred to Dr. Mohamad's report which indicated a moderate to severe injury with recurrent disability while Dr. Corbin's pointed out the costs of investigations and a likely cure over two years. The following cases were cited in support of the contention that damages of between \$17 000.00 and \$21 000.00 should be awarded. In *Corthorn v. Foster* [1990] C.L.Y. 1620 the plaintiff, aged 39 years suffered whiplash injury to his neck in a motor cycle accident. He suffered increasing pain and stiffness in the neck and was able to reverse his car only with the use of mirrors. Discomfort continued over some period and would have decreased if he gave up his job, which he chose not to. An award of \$5,500.00 was made in 1990, which, I am told, would convert to Bds, \$17,500.00.

In *Stretton v. Copley* [1989] C.L.Y. 1217 a 50 year old plaintiff was awarded \$6,000.00 for an injury described as "at the higher end of a moderate whiplash", which improved with prolonged physiotherapy and manipulation. He would suffer permanent restriction of movement in neck and irregular discomfort from pins and needles to hand. This award would convert to Bds\$21,960.00.

Counsel suggested that an award of \$18,000.00 was acceptable, but, in my view the defendant's injuries were nearer to those of Stretton's. His difficulty lies in his claim for loss of earnings or earning capacity. He seeks \$600.00 per week and continuing, but continuing until when? He has not had the investigation and treatment recommended by Dr. Corbin, which would not exceed \$3,500.00 over two years. By this time his evaluation and remedy would have been determined.[273] One must recall Dr. Mohamad's report which indicate considerable improvement after two - three months with him. As it is, his continuing suffering would amount to a failure to mitigate his losses under this head.

Another difficulty raised by the plaintiff but not the defendant, would be determining his real loss of earnings. In Chief, he spoke of earning between \$1,300.00 - \$1,500.00 a month (or \$325.00 - \$375.00 per week) after expenses, but made no statutory payments. He now earned about \$130.00 - \$150.00 a week. In the event I find for the defendant, not enough help has been given me to assessing damages under this head. In addition, he has failed to mitigate. I believe the loss suffered could be calculated with some certainty and the court is entitled to assistance in these matters. I was referred to the 18th Edition of McGregor on Damages. Here, the learned author said *inter alia* from paragraph 343 at page 214.

"A plaintiff claiming damages must prove his case ... he must satisfy the court both as to the fact of damage and as to its amount. If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages; ... where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. ... Where precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can."

A further problem is this. When did the defendant begin his earnings of Bds\$130.00 - \$150.00 a week? This is essential in this exercise to determine the quantum on which the calculation should be based. It is clear that the defendant never earned \$600.00 a week as claimed. The best that counsel did was to say that the evidence of earnings and expenses were given and, where there is uncertainty, the court can make an assessment. Unaided as I am, I have no base on which I can make an assessment.

In response, counsel for the plaintiff pointed out that there was uncertainty in this area as, (a) his figures differed, between \$600.00 a week, \$1,350.00 a month and \$150.00 a week. As a self employed person he bought and sold and ought to have books to show his takings; (b) there was no evidence to show how long he had been off work; or (c) how his income had been reduced. In these circumstances the court was in an uncertain position.

Counsel contended that income tax, stabilisation tax, National Insurance contributions must be taken into account as only the net income must be considered. He cited cases in support of this contention:

Phipps v. Orthodox Unit Trusts Ltd. (1957) 3 All E.R. 305.

Cooper v. Firth Brown [1963] 2 All E.R. 31. [274]

Since there is nothing on which I can work, except I speculate, I am unable to make any assessment under this head if I find for the defendant.

As to general damages, counsel contended that there had been pre-existing arthritis. An x-ray taken very early in his treatment by Mr. Mohamad showed mild arthritis in the neck which was described as "resulting in an aggravation of the arthritis already existing in the cervical spine." I cannot agree with counsel that there was no evidence of neck pain, for there is abundant evidence that there was.

Reliance was placed on the following in support of the contention that damages, if awarded the defendant, should not exceed the equivalent of £5,000.00:

- The Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injury Cases, page 22 e and f. Whiplash Injuries under (e) with full recovery over a few years merit £2,500.00 to £5, 000.00, while minor injuries with moderate symptoms with full recovery within at most two years merit up to £2,500.00.

- *Littlewort v. Adams* [1993] C.L.Y. 1559. An award of £2,500 to a 43 year old (\$9,600 for injuries similar to the defendant's.

- *Segree v. Shepherd* [1992] C.L.Y. 1644. An award of £4,000.00 (\$15,360.00) a 45 year old again with similar injuries to the defendant's.

- *Jacobson v. Hughes* [1983] C.L.Y. 1020. A 24 year old awarded £3,000.00 (\$11,500.00) again for similar injuries with good, but not full recovery.

The difficulty with this defendant is that the extent of his injury, and its effects and recovery time are unknown, as Dr. Corbin's advice has been ignored over some years. He has failed to build on his early 3 months recovery under Dr. Mohamad and consequently his symptoms continue when they may well have been abated by the trial date.

However, doing the best I can, having considered all the cited authorities and the defendant's known condition, I would award \$15,000.00 for general damages if I find for the defendant....

I am satisfied, and find, that the plaintiff's story is the truth, that the defendant's is not and that the defendant lacked proper knowledge of how that highway should be used. I find he drove in the left lane of the dual carriageway going out of town, crossed the plaintiff and was the cause of the collision. No contributory negligence was pleaded and there is little room for finding the plaintiff partly liable...

Judgment is entered for the plaintiff in the sum of \$3 753.89 for special damages which is to bear interest at 8% per annum from today until paid, with costs to be agreed or taxed for two.

The defendant's defence and counterclaim are dismissed. However, if I had found for the defendant I would have awarded him the unproven special damages of \$610.00 for medical expenses, if the plaintiff indicated he had consented to this sum **[275]** when the defendant sought to amend his particulars. There was no claim for damage to the motor car although evidence of it was led. I would have awarded general damages of \$15,000.00 for his injuries, and, accepting that he would have lost earnings for some period, a nominal sum of \$4,000.00 reflecting three months' earnings at \$1,300.00 a month. These sums would bear interest at the usual rates, the special damages from the date of filing his counterclaim and the general damages from today, with costs to be agreed or taxed. **[276]**