

BARBADOS

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
Civil Division**

No. 1795 of 2006

BETWEEN

JOHN HAYNES

CLAIMANT

AND

DISCOVERY BAY BEACH HOTEL LIMITED

DEFENDANT

**Before The Hon. Madam Justice Jacqueline A. R. Cornelius, Judge of the
High Court**

2014: June 10

**Mr. Alphonza Carew in association with Mr. Michael Yearwood for the
Claimant**

No appearance for the Defendant

DECISION

Introduction

[1] In this action the Claimant seeks to recover damages against the Defendant for personal injuries sustained as a result of a fall on the Defendant's premises. This is an application by the Claimant brought by Summons dated 11 January 2011 for the assessment of damages pursuant to a default

judgment obtained against the Defendant on 4 December 2009. No appearance was made for the Defendant.

THE FACTS

- [2] By Writ of Summons filed on 9 October 2006 issued against the Defendant the Claimant claimed damages for personal injuries, loss and damages arising out of an accident on 31 October 2003 during the course of his employment at the Defendant/employer's premises. The Defendant filed an acknowledgment of service on 3 October 2007.
- [3] In his Statement of Claim filed 5 February 2009 the Claimant pleaded that, on 31 October 2003, whilst carrying out his duties as a houseman on the Defendant's premises, he was walking on the kitchen floor when he skidded on the wet kitchen floor and thereby injured his lower back. He alleged that his injuries were caused by a breach of the duty of care owed to him by the Defendant under the Occupiers Liability Act Cap. 208 and/or by reason of negligence on the part of the Defendant, its servant or agents.
- [4] No defence was filed and on 4 December 2009 default judgment was entered against the Defendant with damages to be assessed and costs awarded to the Claimant.
- [5] The Claimant's employment was terminated on 31 August 2005 by reason of redundancy. Sometime after, he took up residence in the United Kingdom (UK) where he sought additional medical treatment and is presently employed as a kitchen porter.

THE EVIDENCE

- [6] The only evidence before the Court was the Claimant's Witness Statement filed 9 May 2011. Legal clerk Jo-ann P. Brathwaite deposed at paragraph 2 of her Affidavit of Service filed 9 May 2011 that she served the operations manager with the following documents: (1) a certified copy of an Order filed 3 May 2011, (2) a certified copy of the Witness Statement, (3) a copy of a Change of Attorney and (4) a copy of a Take Notice filed on 9 May 2011. There was no appearance on behalf of the Defendant. There was no trial.

The Medical Reports

- [7] The Claimant submitted two (2) medical reports which both confirmed his date of birth as 7 September 1963 and that he suffered from pain in his lower back. The first medical report dated 11 November 2005 was prepared by Mr. Sylvester Carter, a physiotherapist and the second report dated 7 November

2005 was prepared by Dr. Keith Bush, a consultant orthopaedic physician based in London.

- [8] In his report, Mr. Carter stated that the Claimant was first seen on 5 November 2003 and was seen on eleven occasions during that time and 17 December 2003. His report stated that the initial examination of the Claimant's lumbar range of motion revealed that all movements were restricted due to pain on his left side paravertebral region. The unilateral straight leg raise test elicited pain at 5 ° of hip flexion on the left and at 70° on the right. Examination of the sacroiliac joint revealed negative results for the approximation, squish and gapping test. Mr. Carter stated in his report that no x-rays were taken nor was a MRI scan performed. Mr. Carter's prognosis was that physiotherapy initially seemed to have caused an improvement in the Claimant's pain but it did not resolve the Claimant's pain during the period of treatment. This he attributed to a likely relapse (which he considered was a regular occurrence in some patients) and recommended 3 months of daily lower back exercises through a home exercise program. Mr. Carter concluded that it was impossible to say whether physiotherapy would have effected a complete resolution of the Claimant's pain.
- [9] Dr. Bush stated in his medical report that when he initially examined the Claimant on 20 September 2004 all active lumbar spinal movements provoked pain and in particular flexion was painfully limited with his hands reaching to his knees, flexing his hips also increased his lower back pain; and straight leg raises were limited to 60° on the left and 50° on the right, both increasing his lower back pain. He attributed the Claimant's back injury to the fall on his buttocks and administered pain medication to reduce the Claimant's pain.
- [10] His report further stated that an open MRI scan performed on 16 September 2004 showed "some straightening of the normal lumbar lordosis, but bony alignment is normal and intervertebral disc height is preserved. The spinal canal is capacious and the terminal chord appears normal". He went on to state that the Claimant's "clinical presentation was consistent with minor discogenic pathology and resultant dural irritation, despite the fact that the MRI scan was unremarkable".

[11] Approximately one year later, Dr. Bush noted that the Claimant's condition showed significant improvement. The Claimant's physical examination revealed a pain free range of active lumbar spinal movements and in particular he was able to flex with his hands reaching to below his knees and both straight legs were full and pain free at 70°. Further, overall from the outset, the Claimant gauged a 70% reduction of pain on the visual analogue scale and he had stopped taking the prescribed pain medication. Dr. Bush concluded that he saw no reason why the Claimant should not return to some form of employment that did not involve heavy lifting.

The Claimant's Claim for Special Damages

[12] The Claimant's expenses as a result of the injuries are set out below:

"PARTICULARS OF SPECIAL DAMAGES

| | |
|--|---------------------|
| 1. Cost of Medical Report- Dr. Stephen King | \$ 1,050.00 |
| 2. Cost of Medical Report – Dr. Sylvester Carter | \$ 800.00 |
| 3. Consultation Fees – Dr. Keith Bush (£1280) | \$ 4,480.00 |
| 4. Medical Report – Dr. Keith Bush (£100) | \$ 350.00 |
| 5. Cost of Physiotherapy (Barbados) | \$ 600.00 |
| 6. Cost of Physiotherapy (England) (£28) | \$ 98.00 |
| 7. Consultation Fees – Dr. Keith Bush (£2,360) | \$ 8,260.00 |
| 8. Cost of Physiotherapy (England) (£844) | \$ 2,954.00 |
| 9. Airline Tickets £496.00 | \$ 1,736.00 |
| 10. Cost of food | \$ 800.00 |
| Total | \$21,128.00" |

The Claimant's Claim for General Damages

[13] The Claimant seeks to recover general damages under the following heads: loss of amenities, pain and suffering, past loss of earnings, disadvantage on the labour market, care and assistance and do it yourself.

[14] The Claimant stated in his witness statement that prior to the accident he took great joy and pride in his job and doing odd jobs and activities around the house and since the accident those activities had been curtailed since he experienced pain and discomfort. Counsel for the Claimant submitted the case of *Bonney v Radcliffe Infirmary NHS Trust Kemp & Kemp E3-087* where the Court awarded the sum of £7,500.00 (BDS\$30,450.00) for general damages.

- [15] In his Witness Statement Mr. Haynes stated that as a result of the accident he needed assistance with cooking, washing, shaving, personal hygiene and dressing; and that he relied heavily on relatives and friends to assist him. Counsel for the Claimant submitted the sum of \$10,920.00 being the sum of \$35.00 per day for 3 days a week for 2 years.
- [16] He also claimed that he requires future care and assistance. He proposed that 2 days assistance at the rate of \$40.00 per day or \$80.00 per week, being an annual value of \$4,160.00 at a multiplier of 11 totaling \$45,760.00 is appropriate.
- [17] Counsel submitted that the Claimant is handicapped on the labour market. While acknowledging that the Claimant is gainfully employed counsel argued that the Claimant would be unable to compete with able bodied persons in the event he is thrown back in the open labour market. To this end he submitted that the sum of \$15,000.00 is a reasonable award. He referred to the local case of *Heather Veronique v The Attorney General Civil Suit No. 791 of 2005* (unreported decision of 15 April 2009).

THE ASSESSMENT OF DAMAGES

- [18] In *British Transport Commission v Gourley* [1955] 3 All ER 796, Lord Goddard stated as follows:

“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.”

Special Damages

- [19] In *Kemp and Kemp, The Quantum of Damages Vol. 1* (2010) (Sweet and Maxwell), at 4-001 the learned authors state as follows:

“The assessment of pecuniary loss seeks to ensure that the claimant recovers as near to full compensation as possible, subject to the rules of mitigation and remoteness. Pecuniary losses may take the form either of expenses to which a claimant is put or of loss of financial benefits of which he is or may be deprived because of his injuries...

Although it is far from possible always to achieve arithmetical precision in awards for pecuniary loss, and some estimation on the part of the court is required, the principle of the law long established is that ‘compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong’. A claimant is therefore entitled to recover damages in respect of all reasonable expenses and losses incurred as a result of his or her injuries”

- [20] Thus, having regard to the well established rule that the burden of proof rests on the litigant who asserts, a litigant in matters such as these must plead and prove his/her case.
- [21] The Claimant claims \$1,050.00 for the cost of the medical report of Dr. Stephen King. However, the Court notes that this report was not submitted in the Claimant’s witness statement. Further, the Claimant has not submitted a receipt for the payment of the said report.
- [22] He claims \$800 for the medical report of Dr. Carter of the PhysioCare Inc. No receipt for the payment of the physiotherapy report from PhysioCare Inc. was submitted before the Court. However, the Claimant submitted a letter from PhysioCare Inc. dated 21 July 2004 to the Claimant’s previous attorney-at-law in which Mr. Carter wrote as follows:

“Re: Physiotherapy report for Mr. John Haynes

Thank you for your request of a physiotherapy report on your client. **The cost of the said report is \$600.** The report will be available approximately three weeks following the payment of the stipulated funds.

I look forward to receiving your payment shortly so that I may proceed with writing the requested report.”

- [23] In the absence of the production of a receipt for the sum of \$800.00, it is reasonable for the Court to conclude that the Claimant paid the sum of \$600.00 since Mr. Carter’s report was submitted.
- [24] The receipts for the cost of medical services, inclusive of consultations, treatment and the medical report, provided by Dr. Bush total the sum of £2360.00 equivalent to BDS\$8,260.00.
- [25] The Claimant claims the sum of \$600.00 for physiotherapy in Barbados. Whilst Mr. Carter at page 4 of his medical report states that, “Mr. Haynes was seen in our clinic on eleven occasions during the period 5th November, 2003 to 17th December, 2003” the Claimant has not submitted any receipts and therefore proved his is entitled to be compensated for this sum.
- [26] Further, no evidence has been submitted to the Court that the Claimant paid the sum of £28.00 (BDS\$98.00) for the cost of physiotherapy in England.
- [27] The Court wishes to make a few observations in relation to the last 3 items contained in the Claimant’s particulars of special damages. First, the Claimant claims the sum of £844.00 (BDS\$2,954.00) for physiotherapy at Wimpole Street Physiotherapy Clinic in England. However the Court makes these important observations in relation to the receipts for physiotherapy. These are:
- i. These receipts bear the words (in electronic format), “Wimpole Street Physiotherapy Clinic” at the top. However, (1) the name of the patient or person making payment; (2) the amount of money paid; (3) the date payment was received; and (4) the invoice number (on 2 occasions) are handwritten. In other words, the information outlined above was not computer generated but handwritten on an electronically printed receipt;
 - ii. Every receipt bears the name “John Haines”; thus, the Court finds that the Claimant’s name is spelt incorrectly on every receipt;
 - iii. Some of the receipts do not state the date when the physiotherapy was received so that the Court cannot definitively ascertain whether the treatment was in fact administered in connection to the accident;

- iv. Most of the receipts are unstamped or unsigned (by the person who would have received payment on behalf of the Clinic);
- v. Most of the invoices do not bear an invoice number; and
- vi. Some of the receipts do not indicate the professional services rendered.

[28] Second, the Claimant has not shown or proved that the airline ticket itemized for the sum of £496.00 was an expense incurred in connection to the accident so that the question of whether it is a reasonable expense does not arise.

[29] Third, the Claimant seeks to recover the sum of \$800.00 for food. He has neither shown why he is entitled to receive an award for this item nor has he produced any bills or receipts to the Court.

General Damages

[30] The Court is mindful of the five guidelines that should be taken into account in the assessment of general damages: per Wooding CJ in *Cornilliac v St. Louis* (1965) 7 WIR 491.

The Nature & Extent of the Injuries Sustained

[31] The Court is required to consider the nature and severity of the injury, its impact upon the Claimant and the consequential disability of the Claimant. I accept that the Claimant sustained injuries to his lower back and experienced pain and discomfort resulting from the fall on the Defendant's property.

The Nature and Gravity of the Resulting Physical Disability

[32] There is no medical evidence before me which confirms or suggests that the Claimant is disabled, experiences chronic back pain or that he will continue to suffer great pain indefinitely. Dr. Bush concluded in his report that he saw no reason why the Claimant should not return to some form of employment. The two medical reports disclosed no resulting disability. Of note, none of the medical reports indicated how long the Claimant will endure pain and suffering or if the Claimant will continue to need medication for the pain.

The Pain and Suffering Endured

[33] The medical report of Dr. Bush indicates that the Claimant was given pain medication (including injections) to relieve the pain to facilitate him pursuing a rehabilitation programme and normal sleep.

The Loss of Amenities Suffered

[34] Here, the Court is required to consider the deprivation of amenities or the reduction in the Claimant's enjoyment of life as a consequence of his injury. The Claimant said that prior to the accident he was very active and went running regularly. He said that he undertook leisure and do it yourself, house and yard work and received great pleasure from maintaining his home. However, the pain and discomfort have hampered his ability to enjoy undertaking these activities and chores owing to the injury sustained to his lower back.

The Extent to which the Claimant's Pecuniary Prospects have been materially Affected

[35] In his Statement of Claim, the Claimant claimed that at the time of the accident he was employed as a houseman earning \$75.29 a week. He states in his Witness Statement that he earned \$240.00 weekly at the time he was made redundant. However, the evidence in his witness statement shows that he presently earns \$525.00 weekly. The Court concludes from the evidence before it that the Claimant's pecuniary prospects have not been materially affected.

[36] In *Bonney v Radcliffe (supra)* the claimant a female nurse was awarded £7,500 for pain, suffering and loss of amenity. The facts were that she had suffered a muscular tear to the right lumbo-sacral area when she had to lift a heavy patient during her employment. The medical evidence was that the claimant would continue to suffer from intermittent low back pain indefinitely.

[37] The Court found the following cases from **Kemp and Kemp** particularly helpful: *Straw v Young Kemp and Kemp F5-039* (the claimant, a 47 year old male at the time of the accident, was awarded £3,000.00 for soft tissue sprain injury to his lumbar spine and a prognosis of expected recovery within 33-39 months); *Burton v M & S Thompson Plant Hire Limited Kemp and Kemp F5-042* (a bus driver who suffered soft tissue injury to his lower back was awarded £3,000.00); *Morrison v Fulford Kemp and Kemp F5-038* (46 year old male, at the time of the accident, suffering from sacroiliac joint strain to lower back and back symptoms largely resolved in just over 2 years was awarded £3,000.00); *Dudgeon v Shaw Kemp and Kemp F5-036* (Court awarded £4,000.00) and *Ali v Siao Kemp and Kemp F5-037* (Court awarded £4,400.00 to the Claimant who, aged 67 at the time

of the accident, suffered: soft tissue injury to lower back, restriction of lower back, sleep disturbed; and full recovery from all accident-related symptoms within 2 years). Having considered the authorities and having taken into account the injuries of the Claimant the Court considers an award in the region of £4,000.00 to be just. Accordingly the Court awards the sum of BDS\$15,000.00 for pain and suffering and loss of amenities.

- [38] Mr. Haynes stated that as a result of the accident he needed assistance with cooking, washing, shaving, personal hygiene and dressing; and that he relied heavily on relatives and friends to assist him. The Claimant has not indicated the frequency when these things were done or the period when he received this care or assistance. Taking into account the evidence before the Court I award the Claimant \$3,500.00 for Past Care.
- [39] Having regard to the evidence in the Claimant's Witness Statement, I find the sum of \$4,000.00 appropriate for Do it Yourself in circumstances where the Claimant was unable to garden or engage in domestic jobs which required heavy lifting and assistance from family members.
- [40] The medical reports do not indicate that the Claimant will require future assistance. Accordingly no award is made under this heading.
- [41] The Court is of the view, having regard to the medical evidence before it and particularly the fact that the Claimant is gainfully employed (earning \$525.00 weekly), that no award should be made under the heading "Handicap on the Labour Market".
- [42] The Claimant erroneously seeks an award for past loss of earnings under the heading of general damages. This is a category of pecuniary loss. At **4-003** of *Kemp and Kemp (supra)*, the authors state that the quantification of past loss is essentially an arithmetical exercise. The judge determines the expenses which have been incurred and, provided that they were reasonably incurred, brings them into account at full value". Further, "a claimant is entitled to damages for the loss of his earnings or earning capacity resulting from his injury. Frequently, this is the principal head of loss of pecuniary benefit": (at **10-001**).
- [43] In any event, the Claimant is denied an award under this head of damages. A claimant may be remunerated for loss of earnings where he was employed and owing to the injury was unable to attend work and consequently lost wages or earnings. In the present case the Claimant has not pleaded that he

lost wages owing to the injury in the employ of Defendant. Nor has he pleaded that he lost wages or earnings whilst in the employ of a subsequent employer. In fact he states that he was made redundant in 2005. In effect the Court cannot blindly accept his evidence. The burden of proof is this: he who alleges must prove. The Court is therefore not in a position to conclude (as the Claimant asserts) that if the Claimant had not been injured he would have commenced work earlier than he did. Since he is unable to prove this claim (in the absence of evidence) no award is granted under this heading.

SUMMARY OF AWARDS

[44] In light of the foregoing the Court hereby orders as follows:

The Defendant shall pay to the Claimant the sum of \$32,360.00 inclusive of

(i) Special Damages in the sum of \$8,860.00 and

(ii) General Damages in the sum of \$23,500.00.

[45] Pursuant to the Supreme Court (Civil Procedure) (Amendment) Rules, 2009, (S.I. 2009, No.111), interest on special damages will be at the rate of 6% from 9 October 2006 until payment and interest on general damages shall be at the rate of 6% from today until payment.

[46] The Claimant is awarded costs to be agreed or taxed.

Jacqueline A.R. Cornelius
Judge of the High Court