

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2014/CLE/gen/00401

BETWEEN

JOAN ENETHA BUTLER

Plaintiff

AND

THE ATTORNEY GENERAL

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Ntshonda Tynes with Roshar Brown for the Plaintiff

Audirio Sears for the Defendant

5 January 2021

DECISION

WINDER J.

At the conclusion of the trial of this action on 5 January 2021 I indicated to the parties that I was satisfied that the plaintiff (Butler) had proven her claim in negligence and invited the parties to lay over submissions on damages. This is my decision on the assessment of damages arising out of Butler's fall into a utility conduit while at Arawak Cay.

1. This claim was commenced by Writ of Summons (specially endorsed) which was filed on 17 Oct 2013. In relation to her damages claim, the Statement of Claim provides, in part, as follows:

3. By reason of the matter aforesaid Butler has suffered pain, injury, loss and damage.

Particulars of Injury

Fractured left ankle

Particulars of Special Damages

1. Loss of earnings - \$450.00 per week from 20th October, 2012 and continuing;
2. Home help at \$150.00 per week from 20th October, 2012 to 22nd February, 2013.

2. Butler gave evidence of her damages. Her evidence in chief was given in a witness statement and supplemental witness statement filed on 11 November 2016 and 22 December 2020 respectively. The witness statement of 11 November 2016 provides in part as follows:

2. On Friday the 19th October, 2012 I drove some guests from the Royal Towers of the Atlantis Hotel to Twin Brothers at the fish fry at Arawak Cay.
3. I parked my taxi #295 in the taxi parking area at Arawak Cay and accompanied the guests across the road to Twin Brothers.
4. Shortly after 8:00p.m. I was walking back to my vehicle when I stepped on what appeared to be a plank of solid steel near the taxi.
5. As I stepped on the steel plank, the plank shifted and my foot dropped into a hole which was hidden by the plank. The plank hit the front of my ankle as I fell in pain.

6. Soon after I fell, two young men came to me and lifted me into my taxi. One of the men got some ice and made an icepack which I applied to my left ankle.

...

14. On 31st October, 2012 I went to see Dr. Strachan at Princess Margaret Hospital and I was given pain medication and advised to return the following day.

15. On the 1st November, 2012 I went to the Princess Margaret Hospital and after receiving x-rays, Dr. Moss diagnosed me with a fracture of my ankle. He then applied a soft cast to my foot and leg.

16. I was advised to return on the 13th November, 2012 to see the specialist Dr. Bowe.

17. I followed up with Dr. Bowe who gave me a hard cast which I wore for a few weeks.

18. I also did physiotherapy for several weeks.

19. I have continued to suffer pain in my left ankle since the incident and I now need a cane to walk as my left leg now gives out from time to time.

20. I have been unable to work since October 2012.

3. Butler's supplemental witness statement stated, in part, as follows:

3. I was born on the 15th December, 1940 and I was 71 years of age when I suffered a life-changing injury at Arawak Cay on the 19th October, 2012. I am now 80 years of age.

...

8. As a result, I was unable to do basic tasks and household chores which I had done for myself previously. From around the 20th October, 2012 until about the 22nd February, 2013 I hired help to assist with cooking and housework. I did this at a cost of \$150.00 per week.

9. Afterwards, to save money, I relied on family members to assist with cooking, cleaning, grocery shopping and errand running, all things which I had done for myself prior to my injury.

...

15. Prior to my injury, I also worked 7 days a week as a taxi driver, a job I had started around 2007 and one that I had planned to continue for the rest of my life.

...

17. I enjoyed my occupation as a taxi driver as it allowed me to meet and interact with people from all over the world. I also enjoyed the independence it allowed me.

...

19. On average I earned a net take-home pay of \$450.00 per week or \$23,400.00 per year.
20. I have not been able to work since my injury due to the pain and weakness that I have continued to experience in my left leg.
21. As a result, since the 19th October, 2012 I have become a dependent of my children and grandchildren, something which has caused me much anguish and distress.

4. Dr. Caroline Burnett gave the medical evidence on behalf of Butler, in her witness statement filed on 23 December 2020. She was subject to cross examination during the trial on her evidence. She introduced Butler's medical report in the form of a letter dated 1 November 2013. The report provided as follows:

Joan Butler, a known hypertensive and diabetic, was a patient at the Accident & Emergency Department of the Princess Margaret Hospital on 1 November 2012. She complained of pain and swelling in her left foot after an alleged slip and fall one week before presentation (foot went into a pothole). She has bandaged the ankle with no resolution of the pain.

Significant clinical examination findings were swelling of the left ankle and foot and tenderness of the lateral aspect of the left foot. X-rays showed a questionable fracture of the left cuboid and cuneiform bones. She was immobilised in a Simpson boot cast and discharged on oral analgesics and fourteen days sick leave with a referral to the orthopaedic clinic.

Ms. Butler was first reviewed in the orthopaedic clinic on 20 November 2012. The X-rays were reviewed and a unicortical fracture of the left distal fibula was confirmed. She was placed in a full below knee cast. Her last visit was on 22 January 2013 where the fracture was noted to be healing well on repeat X-rays. She had no tenderness or swelling and was discharged from clinic.

Final Diagnosis: fracture of the left distal fibula managed conservatively.

5. While she was not the attending physician for Butler on the day in question Dr Burnett indicated that she was the Deputy Medical Chief of Staff at PMH at the time. At the date of trial she was the Medical Chief of Staff. According to Dr. Burnett, convalescence for the ankle fracture that Butler sustained could run anywhere from six to twelve weeks depending on how the fracture healed.

Further, when questioned by Defence Counsel she confirmed that Butler might experience residual pain, swelling and tenderness causing her to require the aid of a walking cane after the period of convalescence had come to an end.

6. Wesley Ferguson (Ferguson), President of the Bahamas Taxi Cab Union also gave evidence in the matter. His evidence in chief was filed in his witness statement filed on 22 December 2020. He was subject to cross-examination on his evidence. Ferguson sought to address the issue of lost wages relative to a taxi driver. He told the Court that he provided a letter that detailed what taxi drivers could expect to receive upon loss of use of their vehicles. The letter at paragraph 4 reads as follows:

“4. I confirm that the contents of the said letter are accurate and true, that is, in 2012 the BTCU’s valuation of the loss of use of a 5 passenger vehicle was \$45.00 per hour or \$360.00 per day and the BTCU’s valuation of the loss of use of an 8 passenger vehicle was \$60.00 per hour or \$480.00 per day.”

7. The defence did not concur with the contents of the letter provided by Ferguson. They say that there is no certainty of what Butler may have earned during the period of loss that she claims for.

General Damages

PSLA

8. Counsel for Butler submits that more than 8 years post injury, she continues to experience pain, weakness and the giving way of her left ankle. They say she is unable to stand or walk for long period of time without assistance. They claim for Pain and Suffering and Loss of Amenity (PSLA), relying on the case of ***Lubin v Major (Civil Appeal No.6 of 1990)*** to claim that the local courts can use decisions originating from the English courts, adjusting the award in those decision upwards taking into consideration the higher cost of living in The Bahamas. They also seek to convince the Court that an uplift should be made with respect to inflation beginning from the date of Butler’s injury.

9. Respectfully, I point out the recent decision of the Privy Council in the case of ***Scott v AG et al [2017] UKPC 15***, in which the Board declined to follow this approach. The dicta to which I refer is found at paragraph 16 of the Board's opinion as follows:

16. Is there a principle that guideline figures, suggested by the JSB for particular types of injury, should be routinely increased to reflect different levels of the cost of living between England and the Bahamas? The Board has concluded that there is no such principle. There are three reasons for this. The first, and most important one, is that a prescriptive approach to the assessment of damages whereby they are determined by the rigid application of a scale which is then increased at a preordained rate is incompatible with the proper evaluation of general damages. The second reason is that, on a proper understanding of the relevant case law, it is clear that no such principle has been pronounced by the Bahamian courts. Finally, it would be wrong to apply an unchanging uplift without evidence of an actual, as opposed to a presumed, difference in the cost of living between England and the Bahamas.

10. Butler's Counsel goes on to reference *Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, 15th edition (JSB Guidelines)*. They submit that Butler's ankle fracture falls within the upper limit for modest injuries and the lower limit for moderate injuries. They say that this will call for an award of £11,730.00.
11. The *JSB Guidelines* are also relied on by Counsel for the defence. They have submitted that Butler's injuries fall squarely into the category of Modest injuries. They say that in light of what they perceive as a delay in seeking treatment, her age at the time of the injury, the rate of recovery at her age and any pre-existing conditions she may have been suffering from at the time (although they do not go on to state the conditions to which they refer), \$8,000 is proffered as a sufficient amount for the injury sustained by Butler.

12. The 15th edition of the JSB guidelines sets out guidance relative to quantum for modest to moderate ankle injuries as follows:

(c) Moderate £11,730 to £22,680

Fractures, ligamentous tears and the like which give rise to less serious disabilities such as difficulty in walking on uneven ground, difficulty standing or walking for long periods of time, awkwardness on stairs, irritation from metal plates, and residual scarring. There may also be a risk of future osteoarthritis.

(d) Modest Injuries up to £11,730

The less serious, minor or undisplaced fractures, sprains, and ligamentous injuries. The level of award within the bracket will be determined by whether or not a complete recovery has been made and, if recovery is incomplete, whether there is any tendency for the ankle to give way, and whether there is scarring, aching or discomfort, loss of movement, or the possibility of long-term osteoarthritis.

Where recovery is complete without any ongoing symptoms or scarring, the award is unlikely to exceed £6,560...Where the recovery is complete within a year, the award is unlikely to exceed £4,690...Modest injuries that resolve within a short space of time will attract lower awards.

13. Having considered the evidence in this matter I find that Butler's injury does fall between the moderate and modest bracket of awards. The overlap of these categories in Butler's case arise out of her difficulty walking and standing. Indeed the medical evidence provided by Dr. Burnett supports her claims in this regard. As such in all the circumstances I will award Butler \$15,000 for her PSLA claim.

Loss of Congenial employment

14. Butler claims loss of congenial employment on the evidence. They say that \$6,000 as an award under this head would be a reasonable award. They rely on the case of *Hale v London Underground Limited [1993] PIQR Q30*. In that case the plaintiff a former firefighter who sustained psychological injury while on duty at a fire in one of London's major underground stations was awarded £5,000 for this head of damage.

15. This head of damage was explored by Charles J. in the consolidated case of ***Felix Thompson et al v Fenton Strachan et al 2014/CLE/gen/00303 and 2015/CLE/gen/00141***. In her consideration of the subject in that case which presented similar facts, Charles J. opined the following:

[65] Mr. Thompson averred that he enjoyed driving his taxi and interacting with passengers from the four corners of the earth and he looked forward to driving repeat visitors. For this, he claimed the sum of \$10,000 in damages for loss of congenial employment.

[66] Mr. Armbrister cited the case of *Hale v London Underground Ltd* [1968] 112 SJ 32 to substantiate his assertion that a plaintiff is entitled to damages under this head. In *Hale*, Otton J said "it is now well recognized that this is a separate head of damage."

[67] As I understand it, this is a relatively modern head of damage and it is a separate award from loss of earnings and pain, suffering and loss of amenity. In simple terms, it is meant to be an award to compensate plaintiffs who lost their jobs because of injuries and found that they had lost a major satisfaction in their life that they derived from their employment. An award is then made on account of the future loss of this job. The notion for the basis of this was expressed by Edmund Davies LJ in *Morris v Johnson Mathey* [1967] 112 Sol Jo 32. He stated that "the joy of a craftsman in his craft was beyond price."

[68] It appeared from the evidence that Mr. Thompson loved his job. He loved to take tourists around the city. In fact, at the time of the accident, he had just picked up some guests from the Royal Towers to transport them to Cable Beach. He made this stop to go and purchase a phone card when the unfortunate accident took place.

[69] Under this head of damage, I will make an award of \$3,000.00.

16. The defence did not traverse this head of damage in their submissions. Loss of congenial employment is as set out a valid head of damage. Having heard and considered Butler's evidence I am convinced that she has been impacted by not being able to work as a taxi driver after the injury. I will therefore award her \$3,000 under this head of damage.

Special Damages
Home assistance

17. Butler's evidence was that, following her injury she needed assistance around the home from 20 October 2012 to 22 February 2013 (approximately 18 weeks) at \$150.00 per week. The defendant says that Butler has not provided any proof to support this claim.
18. I accepted Butler's evidence that she required and did pay for home assistance. I do not consider the sum claimed by Butler on a weekly basis for home assistance during her convalescence to be unreasonable. It is a fact that for at least part of the period claimed, Butler's left foot was confined to a cast. Butler's last visit to PMH was 22 January 2013 when she was discharged. I will therefore award the weekly sum claimed for home help for the 14 weeks leading up to her discharge by the physician at PMH in the amount of \$2,100.00.

Loss of Income

19. Butler says that she fully expected to be able to work as a taxi driver until her current age, 80 had it not been for the admitted negligence of the defendant. She claims for lost income as a taxi driver from 20 October 2012 to present as follows:
 - i) October 20, 2012-December 15, 2016 (216 wks x \$450) \$97,200.00
 - ii) December 16, 2016-December 15, 2018 (104 wks x \$350) \$36,400.00
 - iii) December 16, 2018-December 15, 2020 (104 wks x \$250) \$26,000.00

\$159,600.00
20. Counsel for the defence seeks to persuade the Court that Butler has not proven any such loss and as such no award should be made under this head of damage. They rely on the Court of Appeal case of ***Automotive & Industrial Distributors v Omerod [2003] BHS J. No.103*** as follows:
 26. Loss of profit or loss of past income is a matter that is susceptible of forensic proof. It is not like loss of the ability to enjoy a physical activity. Like special damages, it must not only be pleaded but must be strictly proved.
 - ...
 47. ...where there is credible evidence of an amount of loss of earnings whether it be by way of profit, dividends or lost wages/salary, the fact that there is no documentary evidence to show the exact sum lost will not deter

the court from making a reasonable assessment of such loss based on facts which it accepts as having been proven on a preponderance of probabilities.

21. Insofar as the aforementioned excerpt from *Omerod* is concerned, I am not persuaded that it advances the defendant's points relative to Butler's claimed loss of wages. I have considered the dicta cited from the authority and I am not convinced that it prevents a claim by Butler under this head in any way.
22. In addition to Butler's evidence I have also considered the evidence of her witness Ferguson. While I remain unpersuaded by the figures or the formula set out in Ferguson's evidence, it was unchallenged that Butler earned her living as a taxi driver at the time of the incident. I have taken into account the vagaries of taxi work and Butler's advanced age of 71 at the time of the incident, already some 6 years above the normal retirement age. I accept that a reasonable award based on the evidence is necessary. I will award a lump sum of \$50,000 for loss of income, which award shall include the 14 weeks from the time of her accident to discharge by PMH.

Mitigation

23. The defendant submits that Butler failed to mitigate her damages as she delayed seeking medical treatment. They say that this delay may have had an impact on her injuries and consequentially her losses. Counsel for Butler did not address mitigation in their submissions.
24. Nevertheless, the defendant has not provided any evidence (medical or otherwise) that supports the position of failure to mitigate on the part of Butler. It is a fact that Butler suffered a broken left ankle as a result of the defendant's negligence and the evidence of Dr. Burnett in no way led this Court to believe that the few days delay between the occurrence of the injury and Butler's presenting to hospital had any or any significant impact on her treatment or prognosis. I find no merit in the submission relative to mitigation on behalf of the defendant.

Summary of Award

25. I summarise the awards for Butler below:

| | | |
|-------------|------------------------------|----------|
| i. | PSLA | \$15,000 |
| ii. | Loss of Congenial Employment | \$ 3,000 |
| iii. | Special Damages | |
| | Home Assistance | \$ 2,100 |
| | Loss of Income | \$50,000 |
| TOTAL AWARD | | \$70,100 |

Conclusion

26. Judgment is awarded to Butler in the amount of \$70,100.00. The said sum shall bear interest at the rate of 3% per annum from the date of service of the Writ of Summons to the date of judgement and to accrue thereafter at the statutory rate.

27. Butler has asked the court to award costs to her on an indemnity basis. I am not inclined however to award costs on an indemnity basis as the conduct of the defendant, in my view, was not so egregious or contumacious to warrant the punishment of indemnity costs.

28. Butler shall have her reasonable costs of the action, such costs to be taxed in default of agreement.

Dated this 26th day of April, A.D. 2021


Ian R. Winder
Justice