

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/COM/lab/00641

B E T W E E N

AARON FORBES

Plaintiff

AND

SAFIYYA FEASTE

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: Edward Turner for the Plaintiff

Gail Lockhart-Charles QC with Lisa Esfakis for the Defendant

7 April 2021, 13 July 2021 and 11 February 2022

JUDGMENT

WINDER, J

This is the claim of the Plaintiff (Forbes) for damages arising out of a road traffic accident.

[1.] The action was commenced by Writ of Summons dated 5 June 2018. The Statement of Claim filed on 12 August 2019 is settled in the following terms:

1. The Plaintiff is and was at all material times the owner and driver of a 2008 Daihatsu Hijet Motor Vehicle Registration Number AE7843.
2. The Defendant is and was at all material times the owner and driver of a 2007 Nissan March.
3. On or about the 28th day of March 2017 the Plaintiff was driving his vehicle at the intersection of East Street and Cordeaux Avenue when the vehicle in which he drove was driving (sic) was struck in the Front by the Defendant's vehicle which was involved in five (sic) car collision which pushed the Defendant's vehicle into the Plaintiff's vehicle knocking it off the Road.
4. The said collision was caused by the negligence of the Defendant.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that she:

- (a) Drove without due care and attention (sic)
- (b) Drove at a speed which was excessive in the circumstances.
- (c) Failed to apply brakes as to avoid the vehicle.
- (d) Failed to be careful in all the circumstances.

PARTICULARS OF INJURIES

The Plaintiff who is 47 years of age suffered the following:

At L4-L5 mild discogenic disease, spondylosis, a diffuse posterior disc bulge, and a small central right paracentral HNP impresses upon the ventral aspect of the thecal sac at the right L5 nerve root exits. There is a mild degree of facet joint osteoatropathy bilaterally.

PARTICULARS OF SPECIAL DAMAGE

- | | |
|---|-------------|
| (a) Loss of earnings from March 2017 and continuing | \$59,150.26 |
|---|-------------|

AND THE PLAINTIFF CLAIMS:

- (1) The sum of \$59,150.26
- (2) Damages for pain, suffered (sic) and loss of amenity
- (3) Interest pursuant to Section 2 of Civil Procedure (Award of Interest) act, 1992;
- (4) Further or other relief as this Honourable Court deems just: (sic) and
- (5) Costs

[2.] The Defendant has flatly denied the claim but did not call any witnesses in its case. At the trial Forbes gave evidence in his case and called Ivan Saunders (Saunders), Dario Burrows (Burrows) and Clyde Daxon (Daxon).

[3.] Forbes' evidence was contained in his witness statement which was subject to cross examination. In the witness statement Forbes stated:

1. That on the 28th day of March, A.D. 2017 I was driving my 2008 Daihatsu Hijet Motor Vehicle Registration number AE 7843 at the intersection of East Street and Cordeaux Avenue when I was struck head on in my lane by the Defendant who was also hit from behind by several other vehicles. The Defendant was charged and convicted before the Magistrate Court with driving without due care and attention.

2. That after the accident I was not bleeding therefore I did not go to the Hospital as I assumed I was O.K. About a week later I felt an ache in my back and then reported it to the Defendant's Insurance when I went to check on the damage to my vehicle. The Defendant's agent asked me if I wanted their Doctor to examine my back. I agreed however the examination did not take place until six (6) weeks later. My sister was scheduled for surgery at the Cleveland Clinic and I had already made plans to travel there to support her along with her husband. While at the Cleveland Clinic my sister's husband and I took a physical. I did mention that I was having pain in my lower back to the examining Doctor at the Cleveland Clinic. When I returned home the pain in my back became unbearable and I again complained to the Insurance Agent. They then arranged for me to see Dr. Barnett who recommended that I have an MRI. I also consulted Dr. Ian Archer on the 18th September, 2017 where an x-ray was taken of my lower back. Back spasms were revealed. On 21st September 2017 the MRI revealed a degenerative change at the lumbar L4/L5 level. I SAW (sic) Dr. Dwayne Bowe on two occasions. He recommended a regiment of Exercises that alleviated some of the pain. I still experience pain at present. I continue to the stretching exercises recommended by Dr. Bowe. I lost body weight and was down from 242 pounds to 209 pounds however since the Pandemic my weight ranges 225 to 230.

3. That I am a Building Contractor. At the time of the accident I was contracted to work mainly at the University of the Bahamas, New Ye Cable Bahamas and Aliv, due to the fact that I was unable to perform and supervise the jobs, I had to sub contract most of the work to the following:-

- a. Saunders Roofing and Construction
- b. Real Work
- c. Miller Boy General Contractor
- d. Lloyd Daxon
- e. Dario Burrows

All the Sub-contractors were duly paid for a period of up to seven (7) months, therefore, my profits were decreased as I was unable to perform the jobs. I had to pay my regular workers and the Sub-contractors and so I was unable to pay myself for six months. I usually paid myself \$1,000.00 per week.

4. That since the accident I did not work for six (6) months from 12th April to 2nd October, 2017, further, I was unable to work on roofs as I did before the accident as my back aches constantly even now. I use heat packs to ease the pain to this day. My contracts are less profitable as I had to hire more help to complete the work or spend more time performing the contract.

[4.] Notwithstanding the Defence of a denial, at trial there was no challenge to the claim of negligence, simply as to what, if any, damages Forbes had proven.

[5.] The medical evidence came by way of reports from Dr. Dane Bowe and Dr. David Barnett. Dr. Bowe's report speaks to referral to Dr. Barnett whose report was the principal medical evidence. Dr. Barnett's report stated:

12. Mr. Forbes was involved in an Accident on the 28th March 2017, when the truck in which he was driving was one of 5 vehicles which collided. He felt no discomforts initially, but began to feel slight discomforts in his right lower back, approximately one month, afterwards. However, his symptoms resolved, such that he had no issues with his back when he had an annual physical assessment at the Cleveland Clinic in Florida, in August 2017. In fact, he reiterated that he would have had same assessed then, if it was a problem.

13. On the 1st September 2017, he began to experience pain in his right hip/lateral thigh region, but they were no signs and symptoms of motor nor sensory deficits, below his knees. The absence of the latter findings along with no deficits in the functioning of his lower bowel or bladder nor erectile issues, are in keeping with no significant compression of his neural (spinal cord or lumbo-sacral nerve roots) tissues.

14. However, as was determined by Dr. Than during his assessment at The Cleveland Clinic, Mr. Forbes is severely obese, hence he has an excessive amount of mechanical forces on his spine, in a spine with age related degeneration. [Boden et /BJS 1990]

In addition, with a worn spine and in the performance of his activities of daily living, he could well have also lifted, bent, twisted etc., which could have enhanced; progressed the wear and tear process in his spine.

Further, the Accident is likely to be only one factor of many to enhance the wear and tear process in his spine, as its nexus to when he presented with symptoms, is negligible.

15 In conclusion, he has a non-surgical degenerative lesion in his lumbar spine, which I opine is present as a consequence of multiple factors, including the vagaries of living, including lifting and twisting badly etc., the "normal" wear and tear of aging, his severe obesity etc., which together I assess, accounts for ~ 70% of his existing status. This state, I opine was enhanced by the trauma of the Accident.

16. He was advised that he needs to attend:

- i An exercise therapist to assist him with weight loss, as he needs to lose a minimum of 50-60 lbs, to lessen the weight and thus the mechanical forces on his spine.
- ii To enhance the strength and flexibility of his core muscles to lessen his symptoms and also decrease his risk of further injuries, in the future.

It should be noted that these directives are the same as were ordered after his annual physical. Hence, Mr. Forbes was advised that his present physical status is at most only 30%, as a consequence of the Accident.

17. Mr. Forbes, I opine can return to work, directing his workers to carry out the physical lifting and manual building work, until he is assessed in 3 months time, to determine his response to the management directives, his compliance and his readiness to return to full employment.

[6.] Saunders, Burrows and Daxon gave evidence that they were subcontracted to do roofing repairs and drywall works on projects which Forbes had with the University of the Bahamas, Cable Bahamas and Aliv. Burrows is the brother of Forbes. Forbes claims that the sums paid to these men, as reflected in invoices from them to him, were paid because they performed his contracted work, which but for his injuries he would have done himself.

[7.] I should state here that, notwithstanding this contention by Forbes, there was a scarcity of material to prove his claim of loss of profits. Based upon the evidence, I could not make out what profit was lost by Forbes. The work undertaken by these men appeared to have been supervisory in nature and generally comprised the oversight of a crew of men.

[8.] The medical evidence did not show Forbes as a disabled person. Dr. Barnett's evidence was that Forbes could return to work and direct his men as he otherwise would have. There was no evidence to suggest that the work that was done by other parties would otherwise have been done by Forbes. The witnesses all seem to speak of their relationship of working together with Forbes on projects, even prior to his injury. None of the witnesses mentioned any knowledge of the accident nor did they say that they were engaged by Forbes to do work that he was unable to do because of injury.

[9.] I therefore accepted the Defendant's submission that there is nothing in the evidence to prove that Forbes' engagements with Daxon, Saunders and Burrows were anything other than their usual practice and in the usual course of business, or that this resulted in a loss of revenue that would have otherwise accrued to Forbes but for the accident.

[10.] Special damages must be pleaded and proved. In *Ilkiw v Samuels [1963] 2 All E.R 879* per Diplock L.J., it was stated:

"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised ... it is plain law ... that one can recover in an action only special damage which has been pleaded, and, of course, proved."

[11.] The extent of the loss which I award Forbes arising from his loss of earning capacity is limited to his weekly wages in the amount of \$1000 per week. I will make the award for a period of 16 weeks.

[12.] In respect of the claim for pain and suffering and loss of amenities, the Defendant submits:

"There is significant doubt as to whether the Plaintiff has proved that he suffered any injury as a result of the accident and whether he should be taken to have proved any entitlement to PSLA. The Court is invited to consider the comments of Her Ladyship Justice Charles in *Miguel Fernander v Neptune Water toys Limited* where it was held that "Mr. Fernander has failed to discharge his burden of proof that the accident caused the significant injuries he complained of". It is submitted that the Plaintiff in the present case has likewise failed to discharge the burden of proof that the accident caused the significant injuries complained of, and the Court is respectfully invited to dismiss the claim for PSLS accordingly.

The uncontroverted medical evidence is that the Plaintiff suffered at most only minor discomfort as a result of the accident, which resolved quickly and the minor degenerative conditions that are apparent are caused by factors unrelated to the accident including, weight, age and normal job and life related wear and tear. It is submitted that any discomfort caused was transient and was "enhanced" to a minor extent by the accident, and has been grossly exaggerated by the Plaintiff, who claims to have been unable to work for upwards of 7 months."

[13.] Dr. Barnett's assessment was that Forbes had a non-surgical degenerative lesion in his lumbar spine, which was present as a consequence of multiple factors, including the vagaries of living, including lifting and twisting badly etc., the "normal" wear and tear of aging, Forbes' severe obesity etc., which he assessed, accounts for ~ 70% of Forbes' existing status. Dr. Barnett's opinion, which I accept, was that his condition was enhanced by the trauma of the traffic accident. A regimen for Forbes' recovery was prescribed by

Dr. Barnett, which included weight loss and therapy. Forbes' condition, according to his doctor, was contributed to at only 30% by the accident.

[14.] According to the physician Forbes could return to work directing his workers to carry out the physical lifting and manual building work, until he was further assessed. There is no evidence as to whether Forbes carried out the recovery regimen prescribed by his physician.

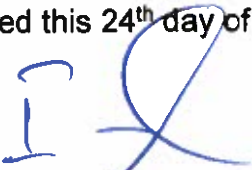
[15.] Forbes seeks an award of \$30,000 for pain and suffering whilst the Defendant's assessment amounts to \$5,000. Having regard to the authorities advanced by the parties and taking into account that the injury was only 30% attributed to by the accident, I will award the sum of \$15,000 to Forbes.

[16.] In the circumstances therefore I give judgment to Forbes in the amount of \$31,775 as follows:

(a) General Damages (PSLA)	\$15,000
(b) Loss of income	\$16,000
(c) Doctors report	\$ 560
(d) Doctors visit	\$ 215

The said sums shall bear interest at the rate of 3% from the date of the filing of the Statement of Claim until judgment and shall accrue thereafter at the statutory rate.

Dated this 24th day of May 2022



Ian R. Winder

Justice