



Ian Birnie v Nigel Batiste
Royal Court
19th December 2018

JUDGMENT
50/2018

Application for compensation of damages and costs

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION
Civil No. 2164

Between:

IAN BIRNIE

Plaintiff

-v-

NIGEL BATISTE

Defendant

Before: Howard Edward Roberts Esq, OBE, QC, Lieutenant Bailiff

Date of hearing: 18th December 2018

Judgment handed down: 19th December 2018

The Plaintiff, Mr Birnie, represented himself.

Advocate M G A Dunster represented Mr Batiste, the Defendant.

Judgment

1. On 10th August 2016 the Plaintiff was walking along the Grand Bouet towards the coast when he was hit by a piece of metal which had been dislodged from a lorry being driven by the Defendant at only 3 to 4 mph in the same direction. Whilst shaken - the words he used in evidence were “stunned” and “dazed” - the Plaintiff suffered no immediately obvious injury. The defendant pulled over into a close entrance a little way down the road and got out of the lorry’s cab, picked up the piece of metal, spoke to the Plaintiff, gave him his (the Defendant’s) phone number, got back into the lorry and proceeded on his journey, which was from St Andrews to a recycling yard. There are differences between the parties as to precisely what was said between them, how the piece of metal parted company with the lorry, and, perhaps more significantly, the size and nature of the piece of metal; I will return to these differences later. The Plaintiff proceeded to the home of a friend, where he was given a brandy and phoned the police to report the accident; a police officer came to the house 2 or 3 hours later and took a statement from him.
2. The next day, 11th August 2016, the Plaintiff’s head and shoulder ached quite badly and he made an appointment to see his doctor on 12th August. Dr Wilson found a lump on the Plaintiff’s head and a slight bruise on his shoulder. He recommended a brain scan, which took place several weeks later and was reported as normal. The Plaintiff said in evidence that he kept having “horrendous” headaches (though not as bad as a migraine) which were not relieved by

taking Solpadeine, and loss of sleep. Dr Wilson prescribed 3 x amitriptyline, which the Plaintiff had taken previously, but which he reduced to 2 then 1 for fear of becoming addicted. He visited Dr Wilson from time to time thereafter, and on one occasion a Doctor Andrews; the Plaintiff candidly accepted that some of his doctor's consultations were to renew prescriptions for his pre-existing conditions but said that Doctor Wilson always asked about his headaches.

3. Mr Batiste was prosecuted for failing to secure the load on his lorry; on 26th November 2016 he pled guilty, was disqualified from driving for 6 weeks, and was fined £400. I think Mr Birnie indicated that he did not feel able to pursue a civil claim until the criminal proceedings had been disposed of. But, however that may be, his evidence to the court was that when he began talking to the Defendant's employer's insurers they had a good rapport until the insurers' claims manager told him he would have to have a medical examination in Southampton and bear the cost of travel for that. The Plaintiff refused to go to Southampton on those terms and turned his mind to issuing proceedings before the Royal Court. There is nothing before the Court allowing me to speculate as to why the Plaintiff did not ask an Advocate to issue proceedings on his behalf and I certainly do not so speculate; but I note that on 10th August 2018 the Bailiff granted the Plaintiff's application under Rule 90 of the Royal Court Civil Rules 2007 for him to sign the summons himself, and that the stress which the Plaintiff attributes to dealing with these proceedings must surely have arisen from that decision on his part.
4. The "Cause Form" served pursuant to the Bailiff's permission of 10th August 2018 is understandably less focussed than would be expected of any qualified Advocate; and it is entirely right that *Les Défences* dated 15 September 2018 address that form in the way in which it is set out. In the *Défences*, the Defendant admits liability, and I think inevitably so, but (rightly in my view) puts the Plaintiff to proof in respect of causation and extent of damage. Where I do take issue with the *Défences* is in their assertions that there is something egregious about the Plaintiff's claim that his driving licence position was affected by the accident, and his use of the first page of a draft settlement agreement to set out some factual background. In respect of the former, the evidence now before the court has to be evaluated but could explain why the Plaintiff may genuinely believe the truth of what is in his "Cause Form"; so far as concerns perceived doctoring of the draft settlement agreement, I cannot think what advantage the Plaintiff might think to gain, and am much more inclined to believe it was simply an attempt to set out the facts for the court without disclosing the without prejudice context.
5. The parties are not agreed about certain facts relating to the accident itself. I am not sure to what extent those disagreements are really relevant to the extent of the Plaintiff's recoverable damages, but will address them briefly:
 - a) Mr Batiste testified that he was happy to take Mr Birnie to hospital or a doctor and had asked if he wanted that; Mr Birnie testified that he made no such offer; given Mr Birnie's "stunned" and "dazed" state, I believe Mr Batiste's recollection is more likely to be accurate.
 - b) Mr Birnie's evidence was that the piece of metal slid off the back of the lorry and hit him; Mr Batiste, convinced as he was that the load had been secured below the side boards of the lorry, testified that it had blown off, but then accepted that this was just his assumption because he thought it was all tied down; the police report (at D5 of the Defendant's trial bundle) unhelpfully states that a "long piece of metal fell from a passing truck" and "a piece of metal that was sticking out from the lorry struck Mr Birnie". Mr Birnie was the only eye witness to how the piece of metal which hit him parted company from the lorry, and I accept his testimony in that respect.
 - c) Mr Birnie testified that the piece of metal which struck him was 4' - 6' long with mitred corners and described it as an angle iron. Mr Batiste, having previously put in evidence photographs of a piece of aluminium corresponding to that which he said had left his lorry on 10th August 2016, produced a similar item which he

described as a cap that goes on a sash bar holding glass in place. He had up to 40 years' experience as a grower and was clear that all of the load on his lorry was aluminium from a greenhouse which was being demolished, not least because the recycling yard would not accept mixed waste. I accept Mr Batiste's evidence in this respect.

6. For completeness I have to mention one other matter of dispute between the parties. Mr Birnie did not give evidence of this in chief, but alleged in his cross examination of Mr Batiste that on the occasion of the hearing in the Magistrate's Court the latter had offered him the sum of £600 as an inducement not to pursue a civil claim against his employer's insurers. Mr Batiste emphatically rejected any such assertion and I unhesitatingly accept his evidence in that respect. At some point in this judgment I have an inescapable duty to address the matter of Mr Birnie's veracity, and this appears to me an appropriate point to do that as this allegation by him is, I judge, wholly false: Advocate Dunster in his skeleton argument identifies two respects in which "the Plaintiff has shown himself willing to misrepresent material issues"; those were firstly the removal of text from the first page of a draft settlement agreement appended to the cause form, for which I have proffered a possible innocent explanation at para 4 above; and secondly his claim to have lost his driving licence in consequence of the accident whereas it had in fact been revoked the previous year for different medical reasons, concerning which Mr Birnie clarified in evidence that he had tried to get his licence back soon after the accident and was told he could not because he had been referred for a brain scan. So there are possibly other interpretations of what Advocate Dunster categorises as misrepresentations in these two respects; but it is incontrovertible, on my findings, that the suggestion of Mr Batiste offering him an inducement is a complete fabrication on the Plaintiff's part. However, what I find particularly striking, as with much of Mr Birnie's evidence and material placed before the court, is the utter irrelevance to the issue of quantum of damages of Mr Birnie's fabrication of this asserted inducement. It appears to me that a rational person intent on misleading a court will focus his lies where his evidence might influence the court's judgment. Advocate Dunster's skeleton argument suggests that because Mr Birnie has allegedly misrepresented certain matters his credibility generally is "fatally" weakened, adding a Latin tag *falsus in uno, falsus in omnibus*, with which I indicated at the PTR that I disagree. By and large, Mr Birnie has been courteous and restrained in court, and I do not believe that he has been deliberately lying; but evidence put before the court which I need not refer to in detail demonstrates that he has had serious issues in his life in recent years, and my conclusion, without intending any offence, is that his relationship with reality is at times tenuous; his evidence does therefore have to be approached with some caution, although I reject any assertion that he is not to be believed in anything.
7. I turn to the real issue in this case, of assessing the measure of damages to which the Plaintiff is entitled in consequence of the admitted breach of duty of care by the Defendant. So far as possible I will approach that task, as the Defendant has helpfully done in his skeleton argument and the schedule of loss attached thereto, by reference to the heads of claim set out in the Plaintiff's Cause Form:
 - A. *Cost of taxis: Plaintiff's claim £2,900.* It is incontrovertible that the Plaintiff's licence was suspended some months before the accident, and, although the jointly instructed medical expert opines it is unlikely that he would have been judged as unfit as a result of the accident, it was not restored until early February 2017. The Plaintiff testified, however, that he tried to regain his licence shortly after the accident and was told by the relevant authority that he could not because he had been referred for a brain scan. I do find it a little odd that the States Driver and Vehicle Licensing Officer does not record the Plaintiff's visit in her letter of 21st August 2017, but am unwilling to conclude that he has simply fabricated this evidence. Thus, in my judgment, his reasonable taxi fares between the date of the accident and the restoration of his licence are recoverable. He may have spent more during the relevant period on taxis but the dated receipts in evidence total £174.60 and I can only award that sum.

- B. *Cost of two brain scans; Plaintiff's claim £760.* Advocate Dunster challenged the Plaintiff as to whether he had in fact paid for brain scans, given the States secondary care contract. He said that he had paid for them; however, he did accept that he could not be sure that he had two brain scans referable to the accident, and the evidence suggests that in fact he only had one. I therefore award the cost of one brain scan, at £380.
- C. *Doctor's costs: Plaintiff's claim £400 approx.* There are numerous diary entries recording visits to the Plaintiff's doctor and the Defendant suggests that consultations relating to the accident should be priced at £200. As stated at para 2 above, the Plaintiff candidly accepted that some of his doctor's consultations were to renew prescriptions for his pre-existing conditions but said that Doctor Wilson always asked about his headaches. I award £300 under this head.
- D. *Telephone and mail costs: Plaintiff's claim £300 approx.* Advocate Dunster helpfully referred me to an English County Court decision - *Taylor v Browne [1995] 8WLUK 179* - in which a claim for damages to compensate for "general inconvenience in dealing with administrative matters arising out of the accident, including making telephone calls, writing letters and attending upon insurers, solicitors and repairers" was rejected. I note the Plaintiff's scepticism about English case law authorities, and this court is clearly not bound to follow decisions of County Courts in that jurisdiction; but I respectfully agree with the judge in that case that this would be a novel claim, the acceptance of which would open the floodgates to every litigant involved in a tort action to make a similar claim. I therefore disallow this purported head of claim.
- E. *Prescription costs up to [the Plaintiff's] 65th birthday: Plaintiff's claim £200 approx.* There was some misunderstanding that this claim referred to the Plaintiff's 68th birthday, and some suggestion that any prescription charges may have been paid through the States Social security system. Mr Birnie stated that he paid his own prescription charges, but it does seem to me that his £200 figure is plucked out of the air and may be over-stated. I award £100 under this head.
- F. *Loss of driving licence which resulted in using taxis and walking: Plaintiff's claim to be decided by court, £5,000.* The Plaintiff's use of taxis is addressed at A above and clearly walking cannot attract an award of damages. What this refers to is quite inscrutable, although he said in cross examination that it was really more about sleep deprivation, headaches etc., which is dealt with at H below I make no award under this head.
- G. *Loss of [the Plaintiff's] time in dealing with mail, telephone calls etc since August 2016; 87 weeks at 1/2 hour per week average x £100 pr wk £8,700.* For the reasons given at D above, this purported head of claim as drafted is not recognised. I asked the Plaintiff, because he had submitted a document setting out the time that the accident had allegedly cost him, whether what he was really claiming was the recognised head of loss of earnings; and, if so, whether he could offer any proof of loss and justify the prima facie rather high figure claimed at £200 per hour. At that point the Plaintiff applied for an order that the court sit in camera to receive his evidence on this matter and, although Advocate Dunster opined that it appeared an unusual course of action, I acceded to that application. The Plaintiff's evidence given in camera, without disclosing confidential identities, was that he was working with a substantial commercial concern on a project which upon fruition was expected to yield substantial dividends, and the accident had delayed this because it had caused him to have trouble concentrating. The Plaintiff's evidence did not in my judgement establish a loss of £8,700 or any quantifiable sum. I therefore make no award under this purported head.

H. *Sleep deprivation: Plaintiff's claim to be decided by court?* This head of claim was rightly recognised by the Defendant as falling within general damages, which the Plaintiff can legitimately claim as pain, suffering and loss of amenity. The Defendant characterises this as:

1. Bruising to right parietal area of head, cuts and bruising to right hand chest area, which he suggests lies at the bottom bracket of Judicial College Guidelines for minor injuries produced to the court, and assesses at £300.
2. Head injury with alleged associated headaches, sleep deprivation and dizzy spells, which he suggests lies at the bottom bracket of Judicial College Guidelines for minor brain or head injuries, and assesses at £1,760.

The Plaintiff's evidence is that he did indeed suffer headaches, which were at first "horrendous", and loss of sleep, on some days immediately after the accident waking during the night then sleeping until as late as 4pm. He gave evidence as to the veracity of the notes about these matters appearing in his filofax / diary, which he said were mainly recorded at the time they occurred. On its being pointed out to him that the last entry about headaches was on 24th August 2016 the Plaintiff quite frankly acknowledged that they did become fewer and fewer such that he thought it wasn't worth writing them down any more, but said that he was still getting headaches "months after the accident". He also said that he suffered giddy spells, including one after the accident which caused him to fall and break some ribs, but he was not claiming that was related to the accident. In general my assessment is that the Plaintiff was candid with the court about the extent of his headaches and sleep loss following the accident and I accept his evidence in these respects. I also note and agree with the Plaintiff's self-assessment that "part of my problem is caused by re-living the accident, and the stress of these proceedings". I rule as a matter of law that the stress of proceedings cannot constitute a recognised head of damage, but the anxiety of re-living an accident can, as can headaches and sleep deprivation.

Over against this I must pay due regard to the jointly-commissioned expert report of Dr Christopher Gardner Thorpe, to whom the Plaintiff had indicated that he still gets headaches, perhaps twice every four or five days, and sleep deprivation, but that there are other issues in his life as well as thinking about the accident. I am mindful not to afford too much weight to what the Plaintiff told Dr Gardner Thorpe, because it does not constitute sworn evidence and in some respects (even matters as basic as the location of the accident) is inaccurate; but to the extent confirmed in the Plaintiff's evidence what he told the expert does in my judgment paint a picture of a man with numerous troubles, but one of those undoubtedly being his re-experiencing of the accident and, as he said in evidence, worry about how close he came to losing an eye. Dr Gardner Thorpe reports as follows:

"The headaches have the characteristics of so-called tension headache and as is often the case they are accompanied by various features of depression of which sleeplessness is a very common feature. Symptoms in this setting are real and not imagined but fortunately often respond well to therapy.

Mr Birnie is left with symptoms that have reduced since the immediate aftermath of the accident and, since they are symptoms, they are as he describes them. They are his symptoms. He has indicated the lack of resolution of some of his symptoms. However, as always it will be for the court to decide the validity of the history given by a claimant.

The prior medical history of various conditions is unlikely to have had any bearing on the post-accident symptoms. Thus it is unlikely he was particularly vulnerable to the effects of the injury. Furthermore, the accident is unlikely to have had any effect upon the prior symptoms."

I entirely accept Dr Gardner Thorpe's opinion that "it is unlikely [the Plaintiff] was particularly vulnerable to the effects of the injury", and as indicated above am appropriately circumspect about some of the history given to the expert by the Plaintiff. But I do not reject what he told the court in evidence, including about how the experience of the accident continues to trouble him.

Advocate Dunster found two head injury cases in English County Courts in which damages for pain, suffering and loss of amenity were set at respectively £1,750 (judgement) and £1,500 (settlement), where the injuries could be seen as not dissimilar to those suffered by the Plaintiff in this case, and in one of those cases included anxiety; I note, however, that in one of those cases the total injury duration is given as 1 month and in the other as 12 months. I also respectfully to some extent share the Plaintiff's scepticism about necessarily following English County Court cases. The English Judicial College Guidelines I do regard as more persuasive, and I note that the figures in those two cases are at the lower end of the bracket of those Guidelines for "Minor Brain or Head injury", which is how Advocate Dunster categorises the Plaintiff's injuries. I asked Advocate Dunster whether the plaintiff's injuries might not more accurately be characterised as "Less Severe Brain Damage", given that he has testified to poor concentration and memory; but on further consideration I have seen no evidence that this is a case of "brain damage", whereas it is certainly a case of "head injury". The guidelines for minor head injuries enjoin the taking into account of:

- (i) the severity of the initial injury - even as "minor" head injuries go, I judge the initial injury to have been towards the lower rather than upper end of the scale;
- (ii) the period taken to recover from any symptoms - the evidence before the court is that whilst they became less severe the Plaintiff's headaches continued for months and his irregular sleep pattern lasted until early 2017;
- (iii) the extent of continuing symptoms - although the Plaintiff's symptoms have reduced over time, in my judgement he is still suffering some symptoms, notably his anxiety over the accident more than 2 years after it happened;
- (iv) the presence or absence of headaches - the Plaintiff certainly has suffered headaches, initially "horrendous" ones. His evidence, which I accept, is that he had headaches for months.

The guidelines state that "The bottom of the bracket will reflect full recovery within a few weeks". This is certainly not such a case. In my judgement the Plaintiff's head injury falls somewhere in the middle of the "Minor brain or head injury" scale, which is between £1,760 and £10,180; I therefore set damages in that respect at £6,000.

Finally there is the matter of what Mr Dunster categorises as bruising to right parietal area of head, cuts and bruising to right hand chest area, which he suggests lies at the bottom bracket of Judicial College Guidelines for minor injuries. I agree that what the Plaintiff describes as a lump on his head and a slight bruise on his shoulder were minor injuries which probably cleared within a week, and I agree with the Defendant's assessment that the appropriate award of damages in respect of them is £300.

8. I therefore formally find that the Defendant is (as he has accepted) liable to the Plaintiff in damages, and I assess those damages as follows:

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|---------------------------------------------------------|------------------|
| Cost of taxis | £174.60 |
| One brain scan | £380.00 |
| Doctor's costs | £300.00 |
| Prescription costs | £100.00 |
| General damages for pain, suffering and loss of amenity | <u>£6,300.00</u> |
| Total damages | £7,254.60 |

Lieutenant Bailiff

19th December 2018