[2016] JMSC Civ. 93

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 06627

BETWEEN	**ANNETTE JOHNSON**	**CLAIMANT**
AND	**ER FARMS AND COMPANY LIMITED**	**DEFENDANT**

Mrs. Alia Leith-Palmer, instructed by Kinghorn and Kinghorn for the claimant.

Mr. Rudolph Smellie for the defendant.

Heard: 3rd, 4th & 10th December, 2015 & 6th June, 2016.

Employer's Liability – Claimant injured when she stepped on a broken glass bottle – Duty of the defendant to make its premises reasonably safe and to ensure water boots were provided – Assessment of damages – Summary assessment of cost denied

EVAN BROWN, J

Introduction and background

[1] Annette Johnson sustained an injury to her right foot when she stepped on a broken glass bottle. She claims against the defendant, her employer, ER Farms and Company Limited for the damage which she sustained. The defendant was in the business of producing chicken eggs for sale, and Ms. Johnson was employed to the company as an egg packer and part of the production team as a layer house attendant.

[2] Ms. Johnson subsequently sought and received medical treatment for the injury. In addition to the treatment she received, she also received medical certificates recommending sick leave. The first period of those certificates commenced on 5th July, 2008, and the final period ended 25thAugust, 2008. In total, she received five (5) certificates which amounted to fifty seven (57) days. She returned to work on 26th August, 2008 and continued to work for the defendant until 13th July, 2009.

Case for the claimant

[3] On the 3rd July, 2008, work had ended at approximately 5:00pm and Ms. Johnson at that time was preparing herself to leave the defendant's premises. As part of her duties as a layer house attendant, she was required to dispose of refuse from the layer houses. The refuse was stored in disposal bins. The bins were transported from the layer house to the dumping area on a wheelbarrow.

[4] She manoeuvred the wheelbarrow through the swampy areas which surrounded the layer houses. These layer houses were about 120ft in length. She pushed the wheelbarrow through an area which was previously used to burn trash. Having passed through this area, she pushed the wheelbarrow up a slope to arrive at the dumping area, also referred to as incinerator.

[5] The garbage was deposited by tilting the wheelbarrow forward with the disposal bins. After retrieving the disposal bins to place them in the wheelbarrow, she stepped backwards onto a broken glass bottle and fell on her back. It took her a minute, she said, to realize that the wheelbarrow was on its side. She also said her blood was on the wheelbarrow while her right foot rested on it.

[6] Upon seeing the blood, she made an alarm. Two of her co-workers, Christopher and Michael, rushed to her aid. They proceeded to help her up and took her to the lunch room where one of those co-workers pulled a splinter of glass from the wound. The other co-worker reported the incident to the manager.

[7] She recalled that she saw the boss, Mr. Roy Baker, having a conversation with the manager that evening. However, she was unable to locate them when she was ready to leave. Neither Mr. Baker nor the manager went to her assistance. Mr. Dwyer, the defendant's driver, took her home that evening. Upon her arrival home, she telephoned Mr. Roy Baker and told him of the injury she sustained. His only reply was: "sorry about that".

[8] Under cross examination, she said she was never given any safety gears. Water boots were never provided to her. These were given to male employees who worked outside. She repeatedly requested water boots from the defendant but none was forthcoming. She resorted to wearing her own slippers while she was at work.

[9] At the end of the work day, she changed that pair of slippers to a different pair before she left the premises. She was never told of any policy prohibiting employees from wearing slippers while at work. Further, she said, that the garbage that she deposed of was beside the packing room. The disposal area, also, was strewn with garbage.

[10] Contrary to her evidence in chief, she said she did not contact Mr. Baker on the night of the incident. Also conflicting, was her evidence that she did not buy any medication that evening. She produced a receipt from the St. Jago Pharmacy dated 3rd July, 2008, which evidenced the purchase of medication at 5:41pm.

[11] She asserted that she saw the date on the receipt, but she did not purchase the medication on that day. Ms. Johnson insisted that the medication was purchased on 4th July, 2008, and that Mr. Dwyer transported her directly home.

Case for the defendant

[12] Roy Baker was the General Manager and Chief Executive Officer of ER Farms and Company Limited. On the day of the incident, he was at the company's

premises and saw Ms. Johnson at about 4:50 pm. He was near the exit gate and was among the last persons who spoke with her that evening.

[13] Ms. Johnson, he said, was attired in slippers and had no visible signs of being injured or in pain. Although it was not the company's policy to wear slippers, he did not say anything to her about it as the workday had ended. She boarded the company vehicle and appeared to be in a jovial mood. She said nothing to him about being injured before she left.

[14] Mr. Baker further recalled that on 4th July, 2008, he was contacted by Ms. Johnson by telephone. She reported to him that she had suffered a cut to the bottom of her foot the previous day just before she was ready to leave. She told him it occurred when she took the garbage to the incinerator. She explained that, while she was there, she stepped on a stone and slid from her slipper and stepped on broken glass.

[15] He enquired of her the reason why she did not report the incident to him when she saw him on that day. To his enquiry, she said nothing. Ms. Johnson, he said, also gave no explanation for her failure to report the incident to the management staff. Her only response to him was that she sought medical attention and received medical certificates recommending sick leave.

[16] He never saw the injury. He, however, confirmed that she submitted medical certificates recommending sick leave, and she was paid for those periods. She submitted to the company other medical certificates recommending sick leave beyond 25th August, 2008. These, Mr. Baker said, were rejected.

[17] Upon her return to work, he held a meeting with her in his office. He then expressed his disbelief that she was injured as she alleged and suggested that she abused the company. He threatened to terminate her employment and immediately she undertook to never indulge in such practices again.

[18] The company, nevertheless, continued her employment as she was an experienced employee. She did not, at any point during that meeting, protest to his assertion that she abused the company when she submitted medical certificates recommending sick leave. She also did not profess her innocence or offer to show him the wound.

[19] He asserted that the company provided Ms Johnson with water boots, and all employees were required to wear them in the outer yard. These water boots, he said, would have prevented the injury she sustained. The company, he further stated, held a meeting in September 2007 where he explained the procedures involved in using the safety gears to the employees. It was also his evidence that all reasonable steps were taken to remove broken bottles from the yard to the incinerator. This area was raked daily and cut on a weekly basis.

[20] Under cross examination, he said he was in charge of the safety of the operations at the company. He held monthly meetings with the staff on safety procedures. Ms. Johnson, he said, was sensitized to the requirements and procedures necessary to ensure her safety.

[21] At Ms. Johnson's orientation, she was given certain safety gears and was issued basic instructions concerning their use. These safety gears were: gloves, respirators, water boots and dust masks. He informed her of the policy that safety gears must be used for their prescribed areas, and water boots must be worn on the outside.

[22] Mr. Baker explained that once the safety gears became worn or damaged, they were to be replaced. The employees were advised that the replacement gears were kept in the Production Office. This was a central location which allowed all employees access to safety gears without prior approval of their immediate supervisor.

[23] Ms. Johnson, however, could not access water boots in that manner. The policy of the company was that water boots were issued at the time of employment.

Where replacement water boots were needed, the immediate supervisor or operations manager supplied them to the employees. The company's policy also restricted Ms. Johnson from taking the water boots home.

[24] Mr. Gregory Dawkins, the operations manager and immediate supervisor for Ms. Johnson, said she received water boots. One of his responsibilities was to ensure that gears were available for all employees. Ms. Johnson, he said, was issued with all items necessary for her work.

[25] Where any item necessary for work needed to be replaced, it was to be reported to him directly or through a supervisor. Ms. Johnson made no report to him that any of her gears were worn or damaged. There was no reason to indicate to him that she was otherwise lacking adequate gears to work in.

[26] Mr. Dawkins also had the responsibility to ensure that employees wore their gears. Ms. Johnson was always reluctant to wear her water boots. She disregarded his instructions to wear them. Instead, she often left them by the locker.

[27] He explained that meetings were often held to sensitize the employees about the company's safety procedures. The employees were required to report all accidents on the day they occurred and before they left the compound. He said he erected notice boards and published these requirements on them.

[28] The duty was also his to transport some of the employees to Spanish Town after work, when their usual transportation was unavailable. On 3rd July, 2008, he transported the employees, including Ms. Johnson, to Spanish Town. She was in her usual jovial mood with no signs of pain or discomfort.

[29] The area around the incinerator, he said, was kept in immaculate condition. It was raked daily to remove foreign particles such as broken bottles. In addition to being raked, the bushes were also cut weekly. He said further that the best sanitation practices were adopted by the company.

[30] Under cross examination, Mr. Dawkins said he was also Michael's immediate supervisor. Michael was responsible for cleaning the garbage disposal area. The duty fell to Mr. Dawkins to inspect daily the disposal area after it was cleaned. As this was his practice, he stated that he may have done so on the day of the incident.

[31] In respect of the glass bottle, it was possible that it could have been at the dumping site. This possibility existed as there was no prohibition against workers taking glass bottles onto the site. He stated that all the garbage generated by the farm's activity was deposited in the disposal area. Workers also deposited their garbage in the disposal area.

[32] He recalled that the area was cleaned on 3rd July, 2008 because, on the following morning Mr. Baker enquired whether Ms. Johnson had made a report. He was also able to recall that day as he transported about seven to eight employees from the premises because it was a scheduled delivery day. He speculated that it may have been a scheduled delivery day, as these were: Mondays, Tuesdays and occasionally Thursdays.

[33] On non-delivery days, the workers were transported from the premises by the delivery truck driven by Mr. Dwyer. The truck was unavailable on delivery days. Hence, Mr. Dawkins was responsible for the workers' transportation from the premises to Spanish Town.

[34] Mr. Dawkins explained what was meant by working in the yard. He said that Ms. Johnson was considered as working in the yard when her duties required her to go to the disposal area. It was her responsibility to remove all garbage from inside the grading room and deposit them at the disposal site.

Submissions

The submissions for the claimant

[35] Counsel for the claimant, Mrs. Leith-Palmer, submitted that the defendant breached its common law duty of care as an employer. Counsel relied on ***Davie v New Merton Board Mills Limited*** [1959] 1 All ER 346 in arguing that this duty included the provision of competent staff of men, and a safe system of work with effective supervision.

[36] Counsel cited ***Speed v Thomas Swift and Co Limited*** [1943] KB 557, 563-4, where a safe system of work was said to include: the physical layout of the job, the sequence of the work, and special instructions being issued. She submitted that the employer's duty to provide a safe system of work was not static. A safe system of work was dependent on the operations of the company and included the provision of effective supervision.

[37] In concluding her submissions on the law, she advanced that employers must take steps to ensure the employees' compliance with safety measures. Here, reliance was placed on ***Walter Dunn v Glencore Alumina Jamaica Limited (t/a West Indies Alumina Company (WINDALCO))*** 2005 HCV 1810 delivered 9th April, 2008 and ***Speed v Thomas Swift and Co. Ltd*** (1943) KB 557.

[38] Counsel went on to submit that the defendant: (i) failed to provide a competent and sufficient staff of men, (ii) failed to provide the requisite warnings to the claimant while she exercised her duties, and (iii) failed to modify the system of work which was manifestly unsafe. Mrs. Leith-Palmer argued that Mr. Baker and Mr. Dawkins incompetently executed their tasks by providing no staff meeting to discuss safety procedures.

[39] Mrs. Leith-Palmer further submitted that Mr. Baker's evidence that he saw Ms. Johnson in a jovial mood on 3rd July, 2008 was spurious. She grounded that submission on the payments the defendant made to Ms. Johnson without the

incident being investigated. That was evidence that he knew of the injury and how it occurred.

The submissions for the defendant

[40] Mr. Smellie for the defendant submitted that the claimant did not sustain the injury on its premises. Alternatively, it was urged, if the claimant sustained the injury as alleged, it resulted from her own negligence.

[41] He further contended that Ms. Johnson did not prove that she sustained the injury as alleged. This she failed to do as she did not produce a medical report from the Spanish Town Hospital. Not only that, both witnesses for the defendant saw her at the alleged time of the incident with no injury.

[42] Additionally, counsel submitted, the medical reports of Dr. Sangappa and Dr. Stewart were useless to prove the alleged time of the incident. Both examinations were significantly later than 3rd July, 2008. Dr. Stewart examined Ms. Johnson on the 18th July, 2008, while Dr. Sangappa examined her on 17th April, 2009.

[43] Mr. Smellie placed reliance on the receipt dated 3rd July, 2008 issued by the St. Jago Pharmacy at 5:41pm. This receipt showed that Ms. Johnson purchased medications that evening. He argued that Ms. Johnson was not a credible witness because she gave evidence that she bought no medications that day.

[44] Mr. Smellie also argued in the alternative that, if it were that Ms. Johnson was injured as she alleged, then it was caused by her own negligence. He advanced the point that Ms. Johnson's wanton breach of the company's safety guidelines to wear water boots was sufficient evidence of her negligence.

[45] In concluding, Mr. Smellie submitted that an employer only has a duty to take reasonable care for the safety of his employees. In this regard, the claimant failed to prove that the defendant did not take reasonable care to make its premises safe.

Issues for determination

[46] The primary issue for my determination is: did the defendant fail in its duty of care towards Ms. Johnson in consequence of which she came to sustain the injury to her foot?

Brief statement of the applicable law

Employer's Liability

[47] An employer has a duty to take reasonable care for the safety of his employees. The duty is not an absolute one and may be discharged by the exercise of due care and skill: ***United Estates Limited v Durrant*** (1992) 29 JLR 470

[48] The employer discharges this duty by the provision of a competent staff of men, adequate plant and equipment and a safe system of work with effective supervision. See ***Wilson and Clyde Coal Co. Ltd v English*** [1938] AC 78, 86. It is also trite law that the employer is under a duty to provide a safe place of work for his employees.

[49] An employer's duty to provide competent staff of men was breached in circumstances where: he employed insufficiently qualified or inexperienced persons for a particular task, as in ***Black v Fire Coal Co Ltd*** [1912] AC 149, HL page 170. This duty was also breached where the employer appointed a person who was always engaged in practical jokes and horseplay, as in ***Hudson v Ridge Manufacturing Co Ltd*** [1957] 2 QB 351, 352.

[50] An employer must ensure that a safe system of work was provided for his employees. He must also ensure that, as far as possible, this system is adhered to. A system of work was defined by ***Speed v Thomas Swift and Co Ltd*** [1943] KB 563, 564 as: the physical layout of the job, the provision in proper cases of warnings and notices, and the issue of special instructions.

[51] The duty is also on the employer to ensure, as far as possible, that employees adhere to the system of work. In the words of Brooks J (as he then was) in ***Walter Dunn v Glencore Alumina Jamaica Ltd. (t/a West Indies Alumina Company (WINDALCO))*** 2005 HCV 1810 delivered 9th April 2008, page 6, "this is a question of supervision". His lordship held that it was unnecessary to instruct an experienced workman on things of which he was well aware, unless the employer has reasons to believe that workman was failing to adopt proper precautions.

Findings and analysis

[52] On a balance of probability I accept the evidence of Ms. Johnson and found her to be a credible witness. I accept her evidence that she stepped on a broken glass bottle and sustained an injury to her foot on 3rd July, 2008 as claimed. I also accept that she was attired in slippers when she sustained the injury.

[53] Ms. Johnson was an egg packer, who worked as part of the layer house team as layer house attendant. It was also her duty to remove the garbage from the layer houses and deposit them at the disposal site. This she did at the end of the workday. By this, therefore, she ordinarily worked inside the layer houses during the scheduled work hours from which ended at 5:00pm. After that time, she disposed of the garbage in the layer houses.

[54] Ms. Johnson's evidence went further. She said that she received no water boots to walk through the swampy conditions outside the layer houses while she disposed of the garbage. She was left to walk through those swampy conditions in her slippers.

[55] I do not accept that Ms. Johnson was given water boots at her orientation. However, it was Mr. Baker's prerogative to furnish proof of the issuing of those water boots to her. Similarly, he could have provided proof of their physical existence. Proof could have taken the form of any record bearing the description

of those boots. However, there was nothing proffered on the defendant's case to substantiate his assertion.

[56] Mr. Dawkins, who had the responsibility to issue water boots to the employees he supervised, was also to ensure that they wore them. I do not accept his evidence of seeing water boots belonging to Ms. Johnson stationed by the lockers. Like Mr. Baker, Mr. Dawkins could have substantiated his assertion by simply producing the water boots.

[57] I, therefore, cannot accept the evidence of Mr. Dawkins that Ms. Johnson was reluctant to comply with his instructions to wear water boots. I find as a fact and accept Ms. Johnson's evidence in this regard when she said she requested water boots but did not receive any.

[58] I observed the demeanour of the witnesses and listened carefully to the evidence. Despite the inconsistencies in Ms. Johnson's evidence, on a balance of probability, I prefer her evidence to that of the defendant. I find that those inconsistencies are slight. The important questions are whether Ms. Johnson sought medical attention and contacted Mr. Baker after she sustained the injury that evening. There is no dispute that she received medical attention, evidenced by the medical certificates. I regard Mr. Baker's denial that she contacted him as one of convenience.

[59] It is accepted that Ms. Johnson sustained an injury to her foot when she stepped on a broken glass bottle. The defendant's evidence, however, begs the question: why would Mr. Baker honour Ms. Johnson's medical certificates recommending sick leave? If it were that both he and Mr. Dawkins saw her at the time of the incident and Mr. Dawkins transported her to her Spanish Town destination that evening, then why would Mr. Baker pay her sick leave entitlements?

[60] It was only at the 57th day of the sick leave that Mr Baker began to think that she was being dishonest. But, what caused Mr. Baker to believe that Ms. Johnson was dishonestly receiving funds from the company in the form of sick leave

entitlements? The defendant, through its agents, had ample time, since receiving the first medical certificate recommending sick leave on 5th July, 2008, until 25th August, 2008, to investigate the matter thoroughly and determine it.

[61] Ms. Johnson's first medical certificate recommending sick leave should have propelled the defendant's agents to comprehensively satisfy themselves of the credibility of the incident. They, however, failed to do anything to substantiate their assertions that Ms. Johnson was dishonest about sustaining the injury on the premises.

[62] I find that the payments made by the defendant to Ms Johnson without investigation, showed that it accepted that she was injured on the premises. I accordingly accept Mrs. Leith-Palmer's submission that Mr. Baker's evidence of seeing Ms. Johnson that evening was spurious.

[63] Mr. Dawkins' evidence of transporting Ms. Johnson from the premises to Spanish Town that evening is also difficult to accept. One aspect of the difficulty is that he was uncertain as to whether the day was a scheduled delivery day. Beyond that, however, I believe Ms. Johnson that it was Mr. Dwyer who transported her home on the evening of the incident.

Is the defendant liable for Ms. Johnson's injury?

[64] The finding that Ms. Johnson was injured on the defendant's premises, naturally leads to the question of liability. Did the defendant fail in its duty of care towards Ms. Johnson when she was injured? The claimant averred that the defendant was negligent in failing to provide her with water boots and a safe system of work.

[65] It is well established in law that the defendant, ER Farms and Company Ltd, has a duty to take reasonable care for the safety of its employees. Ms. Johnson, being an employee of the defendant, is entitled to the reasonable exercise of due care and skill by the defendant for her safety.

[66] She was therefore entitled to the reasonable provision of: competent staff of men, adequate plant and equipment, a safe system of work with effective supervision, and the provision of a safe place of work. Where the defendant failed to provide these for Ms. Johnson, then it is liable in negligence.

[67] The question of the defendant's liability, therefore, was whether Ms. Johnson was provided with sufficient footwear to safely execute her duties. That is, whether the defendant provided her with adequate equipment in the course of her employment as a reasonable employer would provide.

[68] As I said earlier, neither Mr. Baker nor Mr. Dawkins provided any evidence of proof that Ms. Johnson was supplied with water boots. Proof was within their grasp since, according to Mr. Baker Ms. Johnson was not allowed to take the water boots home. Since the water boots were to be kept at the premises, then there ought to have been little difficulty in supplying information about them.

[69] What colour water boots were they? What size did Ms. Johnson wear? When did it become apparent that she was not wearing them? What was done to get her to wear them? Apart from the bald assertions, no evidence was led from which it could be inferred that water boots were provided. The defendant therefore failed to satisfy this court that it fulfilled its duty of providing adequate equipment to Ms. Johnson.

[70] The defendant was aware of the physical conditions of both outside the layer houses and at the garbage disposal areas. Consequently, it was not only its duty to provide adequate safety equipment to Ms. Johnson but also to insist upon its use. Since the defendant failed to supply Ms. Johnson with the water boots, no negligence can be attributed to her. In wearing her slippers she merely exercised a choice of footwear, perhaps impractical, but not approximating a failure to have regard for her own safety.

Conclusion

[71] I therefore find that ER Farms and Company Limited was negligent. It failed to reasonably provide Ms. Johnson with water boots to safely execute her duty at the disposal area. I shall now consider the matter of damages.

Assessment of damages

Special Damages

[72] I found medical expenses of $49,125.00 and transportation expenses of $5,000.00 proved. Special damages of $56,125.00 are awarded with interest at 3% from 3rd July, 2008 to the 6th June, 2016.

General Damages

[73] Ms. Johnson was seen by Dr. Ravi Prakash Sangappa and Dr. Winston Stewart. In Dr. Winston Stewart's report dated 20th September, 2010, he examined Ms. Johnson on the 18th July, 2008 and observed that she was in "mild painful distress". He examined her musculoskeletal system and noted the following to her right foot: "moderate swelling and tenderness to area on and around healing laceration".

[74] Dr. Stewart again reviewed her on 18th September, 2008, as she complained of pain to her right foot, and around the healed laceration. Her complaints continued, and she was again examined on 17th November, 2008 for pains to those areas. She was then ordered to undergo repeat x-rays. The results of the x-rays were reviewed on 3rd December, 2008, and all showed "normal". Her final diagnoses was: (i) laceration to the right foot, (ii) missed foreign body to the right foot, and (iii) neuralgia to right foot secondary to infected right foot laceration and complicated by early diabetes. Dr. Stewart concluded that she was expected to recover over the six months following the incident and made no assessment as to PPD.

[75] Dr. Sangappa's interim report was dated 11th May, 2009. He examined her on 17th April, 2009 and made the following observations: "Ms. Johnson's complaints of foot pain at times, and she had a 3 cm healed scar to the right heel with mild tenderness". Then at his recommendation, Ms. Johnson underwent x-ray of the injured foot.

[76] The x-ray examination was carried out on 1st September, 2009, and bore the following results:

> *No foreign body is seen. There is no bony lesion or soft tissue reaction. No soft tissue mass is seen.*

The examination was then concluded as a "negative study". Dr. Sangappa then made his final report dated 15th October, 2010, in which he made the same observations as he did in his interim report. He then recommended that she should take analgesics whenever she experienced pains and to wear a heel cushion. In similar fashion to Dr. Stewart, he also made no assessment as to PPD.

[77] Ms. Leith-Palmer relied on two authorities. The first was ***Stafford Hamilton v Deward Singh& Ors Suit No. C.L. 1989/H 062***, reported at Harrison's 2nd Edition page 157. In that case, the claimant suffered bruises and abrasions to the feet, and lacerations to the left heel and to the right proximal forearm. The claimant was then unable to work for five (5) weeks, and during this period he could not wear shoes. The claimant's award was $27,000.00. The updated figure, using the March 2016 consumer price index of 229.3, is $418,317.56.

[78] The final authority Mrs. Leith-Palmer cited was ***Shaquille Forbes v Ralston Baker &Ors.*** Claim No. 2006 HCV 02938, delivered on 3rd March, 2011. The claimant sustained a 6cm laceration to his forehead. He was awarded $400,000.00. Using the consumer price index for March 2016 of 229.3, the updated figure is $543,043.22. Mrs. Leith-Palmer then argued that Ms. Johnson's injury was more severe than those claimants in ***Stafford Hamilton*** *supra,* and

Shaquille Forbes *supra.* She then completed her submission that the claimant should be awarded $700,000.00 as an appropriate award in the circumstances.

[79] Mr. Smellie made no submission on the appropriate award in the event of a finding for Ms. Johnson. The court must, however, bear in mind the principle of *restitutio in integrum.* That is, Ms. Johnson must be placed in the position she would have been in had the tort not been committed. Equally to be borne in mind is that awards must be comparable, reasonable and moderate: ***Beverley Dryden v Winston Layne*** SCCA 44/87 delivered 12 June 1989. This is the basis of relevance on previous awards.

[80] Ms. Johnson, like the claimants in the cases cited by Mrs. Leith-Palmer, also suffered a laceration. It was unchallenged that Ms. Johnson's resumed work after the expiration of the sick leave. There was no evidence that she experienced any grave difficulties ambulating when she resumed work. Further, the medical assessment of Dr. Sangappa, three months before her employment was terminated, found the wound to be healed though with mind tenderness.

[81] Again, like the claimant in ***Stafford Hamilton v Deward Singh & Ors,*** *supra*, Ms. Johnson was unable to work. Her period of resuscitation was however longer than the period for that claimant. Ms. Johnson's injury was not as extensive as those of the claimant in ***Stafford Hamilton v Deward Singh & Ors (****supra).* Her injury, however, was exacerbated by the complications caused by early diabetes.

[82] Having considered the matter, the court is of the view that a just award for general damages should be $700,000.00 with interest at 3% from 14th January 2010 to the 6th June, 2016.

Costs

[83] Mrs. Leith-Palmer sought to invoke the court's power under part 65 of the ***Civil Procedure Rules*** (CPR) to summarily assess and award cost. She submitted that the sum of $500,000.00 should be awarded as cost to the claimant.

[84] In making a summary assessment of costs rule 65.9 becomes pivotal and provides so far as is relevant:

> *(1) In summarily assessing the amount of costs to be paid by any party the court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing or otherwise dealing with the matter in respect of which costs are to be assessed and must allow such sum as it considers fair and reasonable.*
>
> *(2) A party seeking assessed costs must supply to the court and to all other parties a brief statement showing-*
>
> *(a) The disbursements incurred; and*
>
> *(b) The basis on which that party's attorney-at-law's costs are calculated.*
>
> *(3) In summarily assessing the costs the court may take into account the basic costs set out in Appendix B to this Part.*

The Court of Appeal in ***Director of State Proceedings & Others v Administrator General of Jamaica*** [2015] JMCA Civ 15, McDonald-Bishop JA (Ag), as she then was, said at paragraph 29:

> *It becomes evident that the summary assessment of cost was not intended by the rules to be done arbitrarily or on any random basis. The relevant rules cited above stipulate that summary assessment of cost must be done in accordance with rule 65.9.*

[85] It is mandatory for the court to consider the time reasonably spent on the matter when summarily assessing costs. In addition, the court must allow such sum as is fair and reasonable. The party who wishes for costs to be summarily assessed must also put before the court a brief statement showing the disbursements incurred and the basis of the calculations.

[86] In the instant case, the claimant had furnished no statement to the court showing disbursements incurred or the basis on which costs were calculated. There was no representation before the court as to time spent in dealing with the matter and preparing for and attending the hearing. There was no representation of any pertinent matters in dealing with matters connected to the case. In sum, there was nothing done by the claimant in fulfilment of the requirements of the relevant rules for costs to be summarily assessed.

[87] Further, rule 65.9 (1) provides that the court must allow such sum as is fair and reasonable, after considering all matters before it. Fairness and reasonableness requires an objective assessment of the circumstances. Part 65 provides certain criteria by which this objective standard may be arrived at.

[88] Additionally, the court is duty bound not only to summarily assess costs but also to take into account the matters enumerated in rule 65.17(3). Such matters included: any agreement made on the basis of charging fees and any unusually expensive steps taken by the attorney. The quantification of costs was, therefore, not simply a matter for the subjective evaluation of the court based on arbitrary considerations. The exercise of the court's discretion was subject to established rules of procedure.

[89] The claimant has not placed any material necessary for the proper exercise of the court's discretion under these rules. The court is then unable to assess both the fairness and reasonableness of awarding $500,000.00 as costs in these proceedings. I am therefore of the view that that claim for the summary assessment of costs was not properly brought. I reject that submission and order that costs to be awarded to the claimant, to be taxed if not agreed.