



[2015] JMSC Civ. 247

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV 00619

BETWEEN	JENNIFER WILLIAMS	CLAIMANT
AND	REGISTRAR GENERAL'S DEPARTMENT	1ST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	2ND DEFENDANT

Ms. Sharon Gordon instructed by Gordon & Associates for the Claimant

Mr Andre Moulton instructed by the Director of State Proceedings for the Defendants

Damages – Assessment – Personal injury

Heard: September 23, October 1 and December 11, 2015

LINDO J.

[1] On March 31, 2008, the claimant was a visitor at the 1st defendant's office when she sat on a chair provided by the 1st defendant, the seat of which slipped from its frame causing her to fall to the floor and she suffered injuries, loss and damage. She filed a claim form on February 6, 2014 claiming damages for negligence and breach of the Occupiers Liability Act and on May 29, 2015 she filed an amended particulars of claim in which she claimed damages for personal injuries and loss suffered as a result of the negligence of the servant and or agent of the 1st defendant.

[2] The 2nd defendant filed a defence limited to quantum on June 6, 2014 and on June 13, 2014 the court entered judgment on admission against the defendants.

[3] At the hearing, the witness statement of Jennifer Williams filed on May 29, 2015 was admitted as her evidence in chief. Her evidence is that just after the incident she suffered an asthma attack and was seen by a doctor and when she was on her way home she started feeling pain in her lower back and didn't sleep well that night because

of the pain. She indicates that on the next day she went to Dr Nesbeth who referred her to do x-ray and gave her injections and a prescription. She states that she went to Dr Nesbeth many times and was told to do physiotherapy and to see an orthopaedic surgeon so she went to Dr Rose on September 25, 2008 and on other occasions. She states that she was treated by him and that he did surgery on her left shoulder on October 27, 2009 and she did follow up visits with Dr Rose and that on July 7, 2011 she went to Dr Cheeks, a consultant neurosurgeon.

[4] Miss Williams also gave evidence that she had to take chartered taxi during the early part of her treatment and used route taxis and buses “for the last 11 visits to Dr Rose and to Physical Therapy Solutions...”. She stated that she could not perform her jobs as a dressmaker and caterer for over a year after the incident because of the pain so she did not earn an income and indicated that before the incident she was earning \$16,000.00 per week.

[5] In cross examination, Miss Williams admitted that she was first seen by a doctor at Spanish Town Hospital, but had no medical report from that doctor. She stated that she saw Dr Rose eight times and that she was seen by Dr Cheeks three years after the incident.

[6] She said she disagreed with Dr Cheeks’ assessment that she had reached maximum medical improvement but agreed that she now has full active ranges of motion of the left shoulder.

Submissions on behalf of Claimant

[7] Counsel for the claimant submitted that most of the items of special damages claimed have been supported by the evidence and the exhibits tendered and that all the items in the amended particulars of claim have been proven except for the payment for the mckenzie lumbar roll (\$1,690.65), the X-ray done at Barnett Medical centre for \$1,700.00 and medication bought at Bravo Pharmacy at a cost of \$15,554.25). She expressed the view that despite the absence of documentary proof of these, based on the demeanour and credibility of the claimant, the court could still accept that she paid for these items.

[8] Counsel also asked the court to accept that the claimant lost one year's income amounting to \$832,000.00 as stated in her evidence and make an award for same and asked the court to make a total award of \$2,133,747.90 for special damages.

[9] In relation to the claim for general damages, counsel noted that the claimant was examined by Dr Nesbeth two days after the incident and was referred to Dr Rose, Consultant Orthopaedic Surgeon who treated her and referred her to do physiotherapy and surgery. She also indicated that the claimant was assessed by Dr. Randolph Cheeks, Consultant Neurosurgeon.

[10] Counsel outlined the findings of the doctors and indicated that the shoulder pain continued for 1 ½ years until surgery, and that physiotherapy was done and the claimant did all that she could to minimize the long term effect of the injuries.

[11] Counsel referred to the following cases:

1. **St. Helen Gordon & Anor v. Royland Mckenzie** Khan Vol. 5, page 152 ,where the claimant suffered whiplash, pain around the neck and shoulder and was recommended to do physical therapy and had a PPD assessment of 3%. She was awarded \$400,000.00 in July 1998(CPI 48.37) which updates to \$1,907,794.08
2. **Irene Byfield v Ralph Anderson** Khans, Vol. 5, page 255 where the injuries were to the chest, neck, and back and there were abrasions to the lower leg and stomach. Up to 4 years after the accident she was still in pain and an award of \$300,000.00 made in September 1997 (CPI 45.13) This would update to \$1,533,569.68
3. **Dalton Barrett v Poncianna Brown** Khan, Vol. 6, page 104 where the injuries were to the neck, back, left shoulder, left wrist and lip and an award of \$750,000.00 was made in November 2006 (CPI 99.62) When updated this would yield \$1,736,850.03
4. **Jotham Treasure v Thomas Bonnick & Ors.**, Khan, Vol. 6, page 89 where the claimant sustained fracture of the right clavicle and had brief loss of consciousness; he had “no measurable impairment and an excellent prognosis

for normal function and an award of \$650,000.00 made March 2008 (CPI 122.9) updates to \$1,220,138.32 (CPI 230.7 for October)

5. **Dawnette Walker v Hensley Pink Khan**, Vol. 5, page 170 CHECK Vol. 6, page 114. This claimant suffered injury to her neck, right shoulder and upper back, wore a cervical collar for six months. Her PPD was assessed as 5% whole person and an award of \$650,000.00 was made in December 2001 (CPI 60.58) which updates to \$2,475,231.88

[12] Counsel also referred to the case of **Icilda Osbourne v George Barned**...Claim No 2005HCV 294, unreported, delivered February 17, 2006, to indicate that the assessment of damages in personal injury cases has objective and subjective elements which must be taken into account which are the actual injury suffered (objective) and the awareness and knowledge that he/she will live with the injury for some time. She noted that the doctor... states that activities of daily living will aggravate her injury.

[13] Counsel pointed out that it should be borne in mind that it is not sufficient to compare PPD assessed in the case at bar with the reported cases in order to determine the appropriate level of damages but that the court should also consider any evidence of continuing pain and suffering.

[14] Based on the authorities, Counsel submitted that an amount of \$2,500,000.00 would be appropriate compensation for pain and suffering and loss of amenities arrived at "primarily by combining the awards in **St. Helen Gordon's** case and **Jotham Treasure's** case and discounting the total, as the court's approach is to look at the injuries as a whole."

[15] Counsel also submitted that the claimant is entitled to Loss of earning capacity and cost of future assistance. This she said is supported by the prognosis as stated by Dr Cheeks.

[16] She suggested that the sum of \$500,000.00 be awarded for loss of earning capacity and in relation to cost of future assistance, the award should be \$480,000.00, using a multiplier of ten years, as the claimant is now fifty three years. She calculated this at \$2,000.00 per day, for two days per month.

Defendants' submissions on damages

[17] In relation to the award to be made for general damages, Mr. Moulton, Counsel for the defendants, also referred to the case of **St Helen Gordon**, supra, as well as the case of **Anthony Gordon v Chris Meikle and Esrick Nathan**, Suit No. CL1997/G047, unreported, delivered July, 1998.

[18] Anthony Gordon suffered pains to the lower back, left knee and left side of chest, multiple bruises and tenderness of the left hip on movement as a result of an accident on June 15, 1994. Three years after the accident he was still complaining of pain and he saw Dr Rose who diagnosed him with cervical strain, contusion of the left knee and lumbo sacral strain and assessed him as having a whole person PPD of 5%. In July 1998 he was awarded \$220,000.00 which updates to \$1,041,576.22.

[19] Mr Moulton noted that the claimant in the case at bar was assessed as having 3% PPD by both Dr Rose and Dr. Cheeks and that Dr. Rose described the claimant's injuries in a similar fashion as those observed in Anthony Gordon. He also noted that Dr Cheeks' prognosis at the time of his assessment on July 7, 2011 was that the claimant had reached maximum medical improvement. He expressed the view that given the extent of the claimant's injuries her case was similar to that of **St Helen Gordon**, although not as severe, and indicated that the two cases referred to "provide the maximum and minimum of what the claimant could recover and as a guide, they show that the claimant's injuries would be properly awarded with a quantum of \$1,500,000.00".

[20] With regard to the special damages claimed, counsel indicated that there was no objection to the claimant's proffered proof in relation to items to the value of \$347,460.08 and to the proof of the surgery conducted by Dr Rose which based on the receipts provided showed that she paid a total of \$151,000.00. He indicated that a third MRI was conducted over six years after the accident and after the claimant had reached her diagnosed maximum medical improvement so it was unreasonable for further diagnostic tests to have been done at that point. He also noted that the claimant had an abdominal ultrasound conducted and the findings indicated that the source of the pain

was a large fibroid, as indicated by the report of Dr Rose so she should not recover the sum of \$4,000.00 claimed for this as it was not as a result of the accident and injury.

[21] Counsel expressed the view that expenses claimed during the period from the claim form to the amended claim form were excessive and the claimant has not shown through her evidence where those expenses were necessary and directly related to the accident. He therefore urged the court to dismiss the claim for special damages incurred after 2012.

[22] In relation to the claim for loss of income, Counsel for the defendants submitted that the court should not accept the claimant's bald statements as sufficient proof of this item of special damage as she has merely provided an average weekly income. Counsel referred to the case of **Omar Young & Michael Meade v June Black**, SCCA 106/2001, decided December 19, 2003, where the claimant gave oral testimony that his profit was \$18,000.00 and Harrison JA opined as follows:

“there was no detail as to how that profit was arrived at, nor is it stated to be net of expenses or tax. Significantly, at the time of trial in July 2001, the respondent said: ‘I am not working now because of the accident...I have not tried to work since the accident because I am sick.’ The respondent is not entitled to refrain from continuing her business merely because she chooses to. She has a duty to take reasonable steps to mitigate her loss”.

[23] Counsel submitted that the claimant “has not met her burden of proof to claim the loss of income” and therefore should not recover the sum claimed. He however noted that if the court was minded to allow the amount claimed, she would have been required to pay taxes so the amount awarded should be taxed.

[24] In relation to the claimant's claim that she required additional help and employed Judith Brooks, Counsel expressed the view that she should not recover for same as she has not provided proof of such payment. However, counsel noted that in the case of **Omar Young**, supra, Harrison JA appeared to be persuaded by the fact that the claimant required help after discharge from hospital and suggested that in this case, if the court decides that such an award in this regard has been proven the claimant could

recover for the specific period she describes in her evidence after her surgery when she paid \$5,000.00 per week, for a month.

[25] Counsel noted that in relation to the claim for costs for transportation the claimant provided receipts for the sum of \$132,000.00. He indicated that the remaining amount of \$8,800.00 accounting for her travels by route taxis should be dismissed as no proof was provided in respect of that sum.

[26] He pointed out that there was “opaqueness” to her evidence when she was asked to provide the first name of one of the two persons who provided receipts showing payment for transportation and submitted that as a result the claimant should not recover special damages for transportation. Counsel concluded by indicating that the claimant has pleaded and proved “\$639,460.10 worth of special damages”.

Award

[27] In seeking to arrive at an award for pain and suffering and loss of amenities, the court adopts the following dictum by Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481:

“the amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the claimant’s general damages”.

[28] In assessing the general damages, I am guided by the cases cited and have considered the nature and extent of the injuries sustained by the claimant as well as the loss of amenities and the extent to which as a consequence of the accident, she has been affected. I also consider that the percentage permanent partial disability of the whole person is a guide for making comparisons and in arriving at a reasonable award.

[29] Having considered the similarities and distinguishing features of cases provided for comparison, it is my view that the injuries to Anthony Gordon are less severe than those sustained by the claimant in this case, notwithstanding the higher PPD

assessment, and while the case of **St Helen Gordon** is closer in comparison, I find that there was no evidence of continuing pain in relation to **St Helen Gordon** while in the case at bar there is evidence that the claimant's pain was intense for years and she still has back pains and occasional neck pain. I find that the injuries suffered by the claimants Irene Byfield and Jotham Treasure were not as serious as that sustained by the claimant in the case at bar, while Dawnette Walker's injuries appeared to be more serious. I have also taken into account the fact that Miss Williams had to undergo surgery.

[30] In view of all the circumstances it is my view that the sum of \$2,000,000.00 would be adequate compensation for pain and suffering and loss of amenities.

Loss of earning capacity

[31] Under this head of damages the court is being asked to assess the claimant's reduced eligibility for employment or the risk of future financial loss and this in my view involves some amount of speculation. The claimant therefore has to provide evidence, however tenuous it may be, for the court to make an award.

[32] The medical report of Dr Cheeks indicates *inter alia* that "...this chronic lumbar strain is expected to cause her to experience episodes of back pains whenever she engages in activities involving lifting, bending, pushing or pulling...I do not anticipate that these symptoms will worsen but they are expected to persist...".

[33] The medical evidence does not show the likelihood of Miss Williams being at a disadvantage because her job as a dressmaker and caterer does not entail the type of activities described by Dr Cheeks which is likely to cause her to experience episodes of back pains. There is therefore no indication that there will be any diminution in her earning capacity based on her injuries as outlined in the medical reports and as such I am not inclined to make an award for loss of earning capacity.

Cost of future assistance

[34] I find on a balance of probabilities that the claimant required assistance after she had surgery. However, she has not provided any evidence from which I can find that

she should be awarded a sum for future assistance. Her evidence leads me to a finding that she has in fact been working as she has indicated that “when I do my jobs or do housework I get a swelling to my neck. This has been happening for the last three years...” I will therefore make no award under this head.

Special Damages

[35] The claimant has pleaded and has sought to prove her loss under this head by providing medical reports and receipts to substantiate her claim as pleaded. I note that the claimant indicates that she visited Dr Rose up to May 24, 2012 and “I was still in pain after that but I could not afford to go to Dr Rose”. I also note that the medical report of Dr Cheeks who saw her on July 7, 2011, indicates that she has reached maximum medical improvement. She has not indicated that she went to any medical facility after that but stated that she went to Dr Rose for treatment on May 26, 2014.

[36] The defendants have not objected to the sum of \$498,460.08 in respect of the claimant’s claim for medical related expenses.

[37] I agree with counsel for the defendant that the claimant has not shown through her evidence that the expenses incurred after 2012 were necessary and directly related to her accident. I am therefore not inclined to make an award for the sums expended in that regard and in relation to the MRI done on March 25, 2014 at a cost of \$34,000.00 and the aqua therapy and aromatherapy massage costing \$21,500.00. Additionally, I find that claimant has not shown that the abdominal ultrasound at a cost of \$4,000.00 was directly related to the incident and injury suffered as a result so I will not make an award in respect of that item.

[38] In relation to the costs of medication, medical related expenses and reports, I find that the claimant has proved the sum of \$652,669.43. Based on this assessment, I will make an award of \$652,669.43 in that sum.

Loss of income

[39] The claimant has pleaded loss of income “for 1 year @ average of \$16,000.00 per week”, claiming a total of \$832,000.00. She indicates that she could not perform her

jobs “for over a year” after the incident so she did not earn an income. I find that this is a “bald statement” and that she has not substantiated this claim. I agree with Counsel for the defendants that the claimant “has not met her burden of proof to claim the loss of income”.

[40] The claimant has not provided any proof of what her earnings were prior to the accident. She states that she earned approximately \$16,000.00 per week. The court is not told if that sum is her gross or net income. It is difficult for the court to make an award for loss of income in a situation where there is no documentary evidence from which calculations can be done.

[41] There is authority that the court has to use its own experience in these matters arrive at what is proved in evidence: **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173. There is evidence that her earnings came from dressmaking and catering. This evidence is however quite vague.

[42] I have taken into account the fact that the nature of her work is such that she ought to keep records, even if there is no proper accounting. Additionally, I find on a balance of probabilities that she would have lost income for a year from March 31, 2008. I will therefore apply the minimum wage of \$3,700.00 per week in calculating her loss of earnings and allow the sum of \$192,400.00

Cost of household assistance

[43] The claimant has also claimed the sum of \$436,000.00 for household assistance. She indicated that she employed Judith Brooks but she did not bring her as a witness, neither did she provide any proof of payment of the sums claimed. Based on the nature of her injury and the information contained in the medical reports and the fact that she did surgery, I accept that the claimant required assistance at some point.

[44] The dates on which the helper was employed have not been particularised and neither has she provided evidence to show when exactly the helper carried out this job. I note however that she has specifically stated that after she did surgery on November

27, 2009 the helper worked full time for her for a month at \$5,000.00 per week. I am therefore inclined to allow the sum of \$20,000.00 for the period of one month immediately after she had surgery.

Transportation

[45] The claimant's evidence is that she chartered taxi "during the early part of my treatment". She has provided receipts totalling **\$132,000.00**. Additionally, she claims that she took "route taxi and buses" and spent a further sum of **\$8,800.00**, but she has not shown any proof of such expenditure. Notwithstanding the lack of proof, I find the claimant to be a credible witness and I am aware that she would not necessarily receive receipts when she travels by the route taxis or buses so I will allow the sum claimed. Her inability to state the first name of the taxi driver who provided receipts for transportation is not a bar to recovering same as I do not find that to impugn her credibility.

[46] Additionally, I find that Counsel for the defendants' concern about the claimant not providing information in relation to the taxis, may be allayed, in part, as the court has drawn the inference that the numbers written on the receipts "PP8706" and "PA4250", tendered in evidence as exhibits 20 and 21 respectively, refer to the registration numbers of the motor vehicles.

[47] Damages are therefore assessed and awarded as follows:

General damages -

Pain and suffering and loss of amenities \$2,000,000.00 with interest at 3% from February 11, 2014 (date of service of the claim on the 1st Defendant) to date of judgment

Special damages awarded in the sum of \$ \$818,469.43 with interest at 3% from March 31, 2008 to date of judgment

Loss of income awarded in the sum of \$192,400.00 (No interest)

Costs to the claimant to be agreed or taxed.