



[2016] JMSC Civ. 111

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2014HCV04313

BETWEEN	Mavis Jagaroo	CLAIMANT
AND	Geoffrey Jarrett	DEFENDANT

Charles Campbell for the claimant

Defendant not present or appearing

Heard: June 21 and 24, 2016.

Damages - Assessment of - Whiplash injury - No permanent disability

Tie, J (Acting)

[1] On November 3, 2011, the claimant sustained injuries when the vehicle in which she was travelling overturned. The defendant, the driver of the said vehicle has failed to participate since the commencement of this action. He did not appear, nor was he represented at the hearing of the assessment of damages. The claimant having satisfied the court that the defendant was served with notice of the assessment of damages via publication in a daily newspaper, as previously ordered by the court, the hearing of the assessment of damages proceeded.

[2] The claimant's witness statement dated May 25, 2016 was allowed to stand as her evidence in chief. Therein she detailed the incident giving rise to her injuries and

indicated that shortly thereafter she began feeling pain all over her body. She was taken to the Kingston Public Hospital where she was admitted for three days and her neck placed in a neck collar. She subsequently sought further medical attention from Dr. Chindepalli where she was given medication and advised to start physiotherapy. She deponed in her statement that she followed the advice of the doctor but improvement to her condition was slow.

[3] Medical reports from the Kingston Public Hospital and from Dr. Chindepalli were tendered and admitted into evidence, a 'notice of intention to tender in evidence hearsay statement contained in a document pursuant to the Evidence (Amendment) Act' having been filed and served.

[4] The medical report of Dr Chindepalli covered the claimant's history of treatment with him which commenced the same month in which the accident occurred to January 2016. However, as a result of questions posed by the court, it became evident that she had been involved in another motor vehicle accident which had taken place in 2013 and which resulted in an injury to her back.. This was not revealed to the doctor or in her witness statement which was deponed to on May 25, 2016.

[5] In assessing the claimant's injury that was sustained on November 3, 2011, the subject of the claim before the court, the court considered the medical report from the Kingston Public Hospital and that aspect of the report from Dr. Chindepalli which dealt with her treatment prior to 2013, which was one visit on November 21, 2011. The doctor concluded that she had acute cervical strain/sprain secondary to trauma. He noted that she had neck muscle spasm associated with soft tissue tenderness on both sides of the neck extending down to the inter scapular region. This was consistent with the diagnosis of a whiplash injury by the Kingston Public Hospital. It was also evident from the report that the claimant had not fully complied with the instructions of the doctor as he stated that she did a couple sessions of physiotherapy but did not continue due to financial constraints.

[6] It is trite law that a claimant is not entitled to recover damages which could have been avoided by acting reasonably. What is reasonable is a question of fact and varies depending on the circumstances of the particular case, with the onus being on the defendant to demonstrate that the plaintiff has failed to mitigate. Given the notation of the doctor, it must be considered whether the claimant would have experienced less pain had she continued physiotherapy. The medical report is silent in this regard. In any event I am mindful of the words of Lord Collins in **Clippens Oil Co v Edinburgh and District Water Trustees** [19071 AC 291, 303 : "In my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without means of mitigating it, so much the worse for the wrongdoer, who has got to be answerable for the consequences flowing from his tortuous act." I am of the view that the claimant should not be regarded as having failed to mitigate her loss given that her inability to continue physiotherapy was due to financial constraints and bearing in mind her evidence that her inability to work was as a result of the defendant's negligent act.

[7] As regards the claim for special damages, all items claimed have been strictly proved save for those relating to transportation and loss of income. The fact that the claim for transportation and loss of income have not been strictly proved are excusable given the nature of public transportation and the fact that the claimant is a farmer. As noted by Harris JA in **Julius Roy v Audrey Jolly (2012) JMCA Civ 53**, "*Special damages must be specifically proved – see **Bonham-Carter v Hyde Park Hotel**, 64 LTR 177 However, this is not an inflexible principle. Although specific proof is required for special damages, there may be situations, depending on the circumstances of the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award: see **Attorney General v Tanya Clarke (Nee Tyrell)** SCCA No 109/2002 delivered 20 December 2004; **Walters v Mitchell** (1992) 29 JLR 173; **Ashcroft v Curtin** [1971] 3 All ER 1208; **Grant v Motilal Moonan Ltd & Anor** (1988) 43 WIR 372 and **Central Soya of Jamaica Ltd v Freeman** (1985) 22 JLR 152. In its endeavour to arrive at a reasonable conclusion, the court seeks to satisfy the*

*demands of justice by looking at the circumstances of the particular case: see **Ashcroft v Curtin**. Therefore, to demand strict adherence to the principle laid down in **Bonham-Carter** may cause some injustice to a claimant who had legitimately suffered damage.”*

[8] I am therefore minded to accept the various sums set out in the particulars of claim as regards transportation and loss of income as reasonable.

[9] As regards general damages I have considered the decisions that were presented on behalf of the claimant of **Lascelles Allen v Ameco Caribbean Incorporated et al** (Claim no 2009 HCV03883), **Talisha Bryan v Anthony Simpson et al** (Claim no 2011HCV05780), and **Bruce Walford v Garnett James Fullerton et al** (Claim no 2011 HCV 00705). I find the case of **Walford** to be of little assistance given the fact that the injury there in was of a completely different nature, the claimant having suffered lower back pain with abrasions to the gluteal region. I find that the injuries suffered by the claimant in the **Bryan** case to be more serious than the claimant herein. Therein the claimant suffered a whiplash injury to the neck as well as lower back strain and was awarded the sum of \$1,400,000.00.

[10] I find the case of **Allen** to be a more appropriate guide. The claimant therein suffered injuries to the side, neck and back and was diagnosed with whiplash injury. He was awarded the sum of \$600,000.00 for general damages, which when updated amounts to \$816,686.53. I am of the view that the sum of \$800,000.00 is reasonable to compensate the claimant for her injuries sustained.

[11] I therefore make the following award:-

For general damages, the sum of \$800,000.00 with interest of 3% per annum from the date of service of the claim form as per the last newspaper publication of July 17, 2015 to June 24, 2016.

For special damages, the sum of \$140,000.00 with interest of 3% per annum from the date of the accident being November 3, 2011 to June 24, 2016.

Cost to the claimant to be agreed or taxed.

