

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV3133/2004

BETWEEN	CAROLYN JOBSON	CLAIMANT
AND	WHISTLING BIRD IN NEGRIL	1 ST DEFENDANT
AND	JIM BOYDSTON	2 ND DEFENDANT

Carol Davis for the Claimant.

Ian Wilkinson instructed by Ian G. Wilkinson & Company for the 2nd Defendant.

Heard 8th, 12th and 13th April and 17th September 2010

Campbell, J.

ASSESSMENT OF DAMAGES

(1) On the 8th September 2001, the claimant, her husband and two children were guests in the defendant's hotel. They had been guests at that hotel on previous occasions. The family occupied a cottage. A few hours after she had arrived and whilst sitting on a bed with the children, an electrical fan affixed to the ceiling fell on her.

(2) The Claimant, a massage therapist and Spa Director, was knocked from the bed to the floor. She was struck in the face, her neck snapped back and there was blood everywhere. She was helped by her husband and assisted to the bathroom. She observed blood coming out of her mouth. Her teeth were chipped and loose; some were hanging from her mouth.

(3) The first defendant was a resort hotel situated along the Negril beach strip, and was an unregistered company. The 2nd defendant was the owner and Managing Director of the 1st defendant.

(4) Shortly after the incident, the hotel night manager and a security guard who was on duty there, rendered assistance to the claimant. She testified that no medical assistance was available in Negril at that time of night, and the following day being a Sunday, the claimant still had a difficulty in obtaining medical attention in Negril. The most senior of the staff on duty that night was Ms. Frances Johnson. Ms. Johnson acknowledged that the ceiling fan had fallen and that the claimant was injured and accepted liability on behalf of the hotel for the incident.

The following Monday, the claimant sought attention at Dr. Wynn Zor's Oasis Dental Clinic in Montego Bay, where she was x-rayed and given antibiotics.

(5) On 21st December 2004, the claimant filed a claim form with particulars of claim which were amended on the 2nd February 2010. The claimant obtained judgment in default of Acknowledgment of Service and Defence on the 26th day of April 2004 and a date was set for Assessment of Damages. An application filed on 15th June 2007 to set aside the Default Judgment was refused.

General Damages

Her face

(6) The evidence was, the fan crushed the claimant's jawbone. There were teeth hanging from tissues from her mouth. Six of her top front teeth were loose and shaking. About four teeth at the bottom were chipped, sensitive and wobbly. The teeth that were hanging out had to be re-inserted and realigned. The claimant testified that the blades of the metal fan had hit her between her nose and mouth; she was also hit in the face with other parts of the fan. She testified that although her teeth had been cosmetically enhanced, she was having no problem with them prior to the accident. Cross-examined she said there was no bone loss. She said she lost one right front tooth. She said she had no implants done although recommended by Dr. Nallapati, because

she could not afford it. Dr. Wynn Zor was the first consultant she saw after the accident, he did a number of things, he did x-rays, prescribed medication and calcium, provided the claimant with a mouth guard, and wired teeth.

(7) Dr. Wynn Zor's report confirmed that the lateral and central incisors are slightly extruded, slightly shaky and very sensitive. Dr. Zor realigned and wired the two teeth. The report of Dr. Martin recorded that the claimant's first visits on the 10th July and the 24th August 2001 were prior to the accident. On those visits, he did cosmetic work on the claimant as well as a root canal.

On the 16th October 2001, Dr. Martin saw the claimant and observed that the trauma sustained had made the bone loss worse and recommended implants and crowns totaling US\$21,500.00.

(8) Dr. Nallapati recorded that he has been seeing the claimant since 15th February 2004 for "cleanings and regular maintained." However tooth loss of number 8 could not be saved due to 'extensive chronic infection and bone loss' the tooth was extracted.

Dr. Nallapati is not trained to offer the treatment required by the claimant; of the treatment he has given to the claimant he says, "a lot of the procedures done are to do with the damage caused by the accident." It is clear from the report that the claimant had a pre-existing condition of bone loss which may have been aggravated by the trauma caused by the fan.

(9) Ms. Carol Davis, for the claimant, relied on Carmen Bartley v H.I. Bernard (suit No. C. L. 1991/B163) Cor: Cooke J.). A consent judgment on the 19th September 1991), which dealt with a tooth extraction, that left jagged pieces of the mandible protruding through the lacerated

tissue, substantial removal of the buccal and lingual plate on either side of the socket. By consent, damages assessed at \$90,444.80, updated \$733,630.00.

The back injury

(10) Dr. Miller-Rowe said he saw the claimant on the 26th September 2001 when she complained of developing “neck and shoulder stiffness and then back and right hip pain with numbness going down the right ankle” She was unable to sit or stand without excruciating pain. After four days, she went to the chiropractor who diagnosed her left leg to be shorter than the right due to a pelvic tilt. Dr. Miller-Rowe was unable to confirm these complaints and restricted his report to, “that there was no visible sign of trauma besides the limp. X-rays of the spine and skull showed spondylosis and narrowing of c5 - 6, disc space and l5 - 51 disc space narrowing, and degenerative disc disease at L1, L2 and L3.

(11) The Orthopedic surgeon, Dr. Derrick McDowell, saw the claimant on the 10th October 2006, more than five years after she was struck by the fan in her face. On examination, the doctor noted restriction of all movements in the cervical spine. There was also weakness in the left upper limb especially in C8 and T1 myotomes, as also in C6 and C7 myotomes. It was noted that she had recently complained of pain in the lower back. Mr. Wilkinson submitted that there is no medical evidence adduced establishing any such injury to her back or the extent of it. There was no sequelae or prognosis. He says there is no nexus established between the injury to the claimant’s face and any back or spinal problem. Dr. McDowell had advised an MRI be done, the claimant said she was unable to afford the procedure. He diagnosed her as having a herniated disc and fibromaglia of the spine. She had x-ray to her back and neck on the advice of Dr. Tomlinson. There was no abnormality shown in the bony structure, there was no fracture. She

describes her injury as being soft tissue injury. X-ray on her back and skull showed no abnormality.

(12) The claimant had introduced evidence via report of Dr. Miller-Rowe, that she suffered a pelvic tilt, with a shortening of the left leg, which caused her to walk “strange” to avoid pain. The orthopedic surgeon however makes no reference to these features. The Court was not given any report from the Chiropractor, on whom it appears the claimant attended.

Counsel relied on the case of **Merdella Grant v Wyndham Hotel Co.** (Khan Vol. 4 p194). In that case, the claimant was injured when she was supplied with a chair which collapsed beneath her. She suffered lower back pain. She was diagnosed as suffering lumbar strain, disc problems at L3 and L4, and herniation of L4 and L5. Counsel submitted that the instant claimant’s injuries are similar. An award of \$1,400,000.00 for general damages in July 1996, was updated to \$5,405,151.00. The injuries in **Merdella Grant** are more serious than those of the instant plaintiff.

The court has no evidence before it, that “the possible herniated disc” is a probable consequence of the trauma to her neck she had suffered more than five years before. Other than the pain and stiffness of which she complained in her visit to Dr. Miller-Rowe, the claimant has failed to adduce any evidence to show that her back injury was as a result of the incident in the hotel. I make an award for general damages of \$3,500,000.00

Special Damages

Loss of Earnings

(13) The claimant has loss of earnings for two periods, (1) 4 weeks at US\$3,000 per week and (2) US\$900 per week (being 45% loss of income) for 32 weeks. She claims that as a result of the

accident she was unable to work for one month, from the 8th September to the 10th October 2001. She had her teeth wired up and had a mouth guard on and would not allow herself to be seen in that condition. In addition, pains in neck and back made her unable to stand for long.

(14) The claimant has failed to produce documentary support for the loss of earnings claimed. She is not on the hotel's payroll, but operates her business from the facility. In order to establish her earnings, she has brought statements for the period, February, March and April for which she claims an average of US\$13,967.00 per month. Mr. Wilkinson has argued that she has had more than sufficient time to provide the necessary documentary proof of her earnings and that she has suffered the loss claimed. The court has before it evidence that she gives to the hotel a commission of 20% of her earnings, that in addition, there are other up-front charges. She is responsible for payment of certain categories of part-time workers including a Mrs. Mosser that supply services at the spa. Such statements as she has provided are referable to an earlier period and nothing by way of earning statements have been put before the court for either the four weeks period or the much longer period of 32 weeks.

Mr. Wilkinson argued that her evidence is, she was on vacation when she got injured. There is also evidence that she returned to work during the week ending 16th October. The medical certificates of Dr. Zor and Dr. Martin record a history of visits for the first two weeks after the accident. I find that she was unable to work for a period of two weeks. The claimant offers no explanation for the disparity in the figures for the three months earnings provided. The court will use the figures for the month of February, i.e. US\$6,580.00, and make an award for loss of earning for two weeks for an award of US\$3,290.00.

(15) In support of her claim for the period of 32 weeks, she states that her weakened state prevented her from performing at her maximum and she only averaged 45% of her normal pre-

accident earnings. The home visits she made were no longer possible as she was unable to carry her massage tables. She now works at another resort, Jamaica Inn, in a mostly administrative capacity. The principles are well-known, special damages must be specifically pleaded and proven, otherwise it cannot be recovered. Watson v North Metropolitan Tramways Co. (1886) 3 TLR 273; Ratcliffe v Evans (1982) 2 Q.B. 524 at 528 (per Bowen LJ), and Ilkiw v Samuels (1963) 1 W.L.R 991. These principles have been fashioned to take into account the realities of the Jamaican situation that some claimants, by virtue of their situation in life, do not keep records (Walters v Mitchell (1992) 29 JLR 173 by Wolfe J.A.). In the circumstances, the court may make award if the court accepts that the claimant suffered the loss. The claimant worked for an established resort which is still in operation, no specific proof of her earning for the periods claimed were adduced before this court, the claim for loss of earnings for the period of 32 weeks fails.

Future Medical

The claimant rest her claim for future medical care on the report of Dr. Derrick Martin based on his examination done in October 2001, more than eight years ago. It is clear that the claimant had dental concerns prior to the accident. Dr. Martin indicated that the trauma made the 'bone loss worst.' There was therefore some bone loss prior to the trauma. The certificate of Dr. Wynn Zor indicates that there were four teeth that needed attention due to the injury he observed. The certificate of Dr. Nallapati recorded an extraction of tooth number 8, one of which Dr. Martin had advised an implant, and did some of the cosmetic enhancements which Dr. Martin had ordered. I would make an award of US\$10,000 for future medical care.

Summary of Awards

General Damages

Pain and Suffering and Loss of Amenities \$3,500,000.00 at 3% interest from the 19th March 2004 to the 17th September 2010.

Special Damages = \$81,000.00 (with interest at 6% from 8th September 2001 to 17th September 2010).

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| (a) 3 X-rays | \$11,500.00 |
| (b) Chiropractor fees | \$1,200.00 |
| (c) Doctor's fees (Dr. Miller) | \$1,500.00 |
| (d) Physiotherapist fees | \$14,300.00 |
| (e) Medical reports | \$3,000.00 |
| (f) Dental fees: Dr. John McDowell | \$11,000.00 |
| (g) Dental fees: Dr. Nallapati | \$49,500 |
| (h) Loss of Earnings US\$3,290.00 (with interest on item a – f at 6% from 8 th September 2001 to 17 th September 2010). | |
| (i) Future Medical US\$10,000.00 (No interest). | |

Costs to the claimant to be agreed or taxed.