



[2017] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05552

BETWEEN	SHEREEN MATTISON	CLAIMANT
AND	COUPLES RESORT LTD	DEFENDANT

Personal Injury – Wet kitchen floor at hotel, waitress falls – Assessment of Damages.

IN COURT

Monique Cohen instructed by Kinghorn & Kinghorn for Claimant

Kalima Bobb-Semple for Defendant.

Heard: 29th November and December 19, 2017

BROWN YVONNE J. AG.

[1] This is a claim arising from an incident which occurred on November 12, 2007 whilst the claimant Shereen Mattison was employed as a waitress under a contract of service with the defendant, a limited liability company, situated in Ocho Rios in the parish of St. Ann.

[2] On the day in question, the claimant alleged that she was in the process of carrying silverware from the kitchen to the restaurant on the defendant's premises, when, upon reaching the washing area of the kitchen, she slipped and fell into a "puddle of water," which had settled on the kitchen floor. As a result, she suffered injury, loss and damage and incurred expenses.

- [3] The defendant filed its defence on January 24, 2003 in which it denied the claimant's assertion of negligence and required strict proof of the allegations.
- [4] However, when the matter came up for trial on the 29th November 2017, the defendant conceded negligence, thereby leaving the Court to exercise the function of assessing the damages to which the claimant is entitled.
- [5] Upon agreement of the parties, the medical reports of Doctors Grantel Dundas Ian Neil, Denton Barnes, Peter Scarlett, Adolf Mena were admitted into evidence. So too were the MRI Reports from the University of the West Indies and the Radiology report from Island Radiology dated December 4, 2007.
- [6] In an extensive report dated 10th July, 2014 Dr. Denton Barnes chronicled Miss Mattison's medical condition on each of her visits which numbered 28 (commencing on 27th August 2009 and ending April 2014).
- [7] Dr. Barnes stated that the claimant was in class 1 of the lumbar spine regional grid which is equivalent to 9% impairment of the whole person. He noted that she would need to take medications continuously. This burden of treatment, the doctor said, "would add an extra 1% impairment bringing the overall impairment of the whole person to 10%.
- [8] Dr. Barnes offered a very detailed prognosis, but the salient features were:
- a) Miss Mattison had an un-displaced fracture, therefore she had a normal anatomical result, however she continues to have back pain.
 - b) Axial loading resulting in a compressed fracture of the body of L4, however there was no loss of height in the vertebra and there was no displacement of the fracture fragments and she had no instability of the spine, and columns were intact.
 - c) She had no residual deformity, she is having pain, however, and she is able to do most of her activities of daily living.
 - d) She was found to have an anatomic abnormality of disc bulge at L5/S1 which would be the cause of her symptoms.

- [9] Besides Dr. Barnes, the claimant also sought the intervention of other doctors, namely Ian Neil and Grantel Dundas both orthopaedic surgeons and at the behest of the defendant, she was also attended to by Dr. Adolf Mena.
- [10] Dr. Ian Neil, a consultant orthopaedic and spinal surgeon, in his report, dated 10th December 2007, described the claimant's low back pain as para spinal and myofascial in nature. He indicated that there was no clinical and pain x-ray evidence to support the CT findings of a fracture. He added that the "lucent line most likely represent vascular channels in the bone" and advised that the claimant needed aggressive pain management and physiotherapy.
- [11] Dr. Dundas who provided a more detailed report than his counterpart Dr. Ian Neil, diagnosed the claimant as having chronic lumbar strain and query lumbar disc protrusion. In his report dated 17th May, 2011, he, like Dr. Neil, stated that there was no fracture but rather vascular channels in L4, based on a review of the CT scan. He added that the x rays showed no evidence of bone injury. Having noted his findings, Dr. Dundas suggested that the claimant:-
- a) have a trial of rigid back brace for about 2-3 months to assess the effects of this sort of stabilization on her pain level;
 - b) have a re-evaluation by a pain therapist;
 - c) report of the MRI to see where there has been a progression of her lumbar spine status. He referred her to Dr. Neville Bullion for the pain therapy.
- [12] It must be mentioned that the claimant was also exposed to the medical expertise of Dr. Peter Scarlett who reviewed her condition on 25th February, 2008. He stated his findings as being mild tenderness in the lumbosacral area and recommended, among other things, the use of back support strap.
- [13] On May 18, 2008, the claimant was seen by Dr. Adolfo Mena also an orthopaedic surgeon. His diagnosis was chronic low back pain, and he noted that this pain had a measurement of 3% to 5% of the whole person.

[14] Both Doctors Scarlett and Barnes pointed out that the claimant should avoid heavy manual work. Dr. Barnes went further to state that “she (needed) a sedentary occupation”.

General Damages

[15] In relation to general damages, counsel for the claimant urged the Court to give credence to the medical reports of Doctors Dundas and Barnes, as they had provided details of the claimant’s injuries and had indicated a specific disability rating. He argued that Dr. Mena’s report should be accorded “the least weight” as he had seen the claimant once and that was eight (8) years after the incident.

[16] Conversely, the defendant’s counsel Miss Bobb-Semple opined that Dr. Barnes’ findings should be given little weight as his level of expertise at the time he treated the claimant, was not in the category of Doctors Dundas and Mena; they being at the time, orthopaedic specialists.

[17] I have given due consideration to the diverse views of the attorneys Mr. Kinghorn and Miss Bobb-Semple regarding the weight to be attached to the doctors’ opinions. But this claimant had been treated by Dr. Barnes more often than any other doctor. His reports were also more detailed. It behoves me then, to place greater reliance on his reports.

[18] In advancing that an award of \$10,000,000 would be appropriate for general damages, Mr. Kinghorn submitted two cases for consideration. The first ***Mane Jackson v. Glenroy Charlton and George Stewart*** reported at volume 5 of *Khan’s Reports*, where the claimant, a customer service representative, was injured in a motor vehicle accident. Upon examination she was said to have suffered tenderness of nape of neck and left rib cage; tender swelling to the lateral epicondyle of the left elbow; tenderness of the lower back especially to the left sacroiliac joint. She was advised to wear a neck brace which she did for one month. She was seen about a month later with persistent pain in the neck and back, but x-ray showed no bony joint injury.

- [19] Yet a few months later she was diagnosed with whiplash with sequelae and left sacroiliac contusion. About nine (9) months later she was diagnosed with L4/5 lumbar disc prolapse and her permanent disability was assessed at 8% whole person. For this claimant, the sum of One Million Eight Hundred Thousand Dollars (\$1,800,000.000) was awarded for pain and suffering and loss of amenities. This sum now updates to Seven Million Six Hundred and Thirty Four Thousand and Eight Two Dollars and Sixty Nine Cents (\$7,634,082.69) when the CPI of August 2017 is applied.
- [20] In the second case, ***Saascha Grant v. Salva Dalwood and Jamaica Urban Transit Company Ltd.*** reported at Volume 6 of Khan's Report, an award of Three Million Dollars (\$3,000,000.000) was made in June 2008 for pain and suffering, which updates to Seven Million Four Hundred and Eighty Two Thousand Three Hundred and Twenty Four Dollars (\$7,482,324). The claimant in that matter, a conductress, sustained injuries when she was flung from her seat on the JUTC bus on which she was working, when the bus driver applied his brakes suddenly. Her injuries were marked swellings, spasms and tenderness to the paravertebral muscles, bilaterally. She was assessed as having severe mechanical thoracic lumbar back pain, secondary to a severe injury of the thoracolumbar spine. She made several visits to various doctors and her final assessment in July 2006 disclosed (1) chronic cervicotoracic pain with subjective cervical radiculopathy; (2) chronic mechanical low back pain with subjective lumbar radiculopathy. Her permanent disability was assessed as 10% whole person. This claimant was also advised to avoid working on a bus and to seek a career change due to the prognosis that, among other things, the problem would impact her ability to carry out her profession.
- [21] In advancing her view that the claimant's award for pain and suffering should be Two Million Dollars (\$2,000,000.000), Miss Bobb-Semple, counsel for the defendant, submitted four cases for consideration, namely: ***Iris Smith v. Arnett McPherson & Donald Oldfield*** reported at Volume 5 of Khan's Report, ***Barbara Brady v. Balig Investment Co. Ltd & Vincent Loshusan & Sons Ltd.*** reported

at *Volume 5 of Khan's Report*; ***Candy Naggie v. The Ritz Carlton Hotel Company of Jamaica*** reported at *Volume 6 of Khan's Report* and ***Andrew Ebanks v. Jephther McClymont*** also reported at *Volume 6 of Khan's Report*.

- [22] As regards Iris Smith, she sustained blunt trauma to lower back, blunt trauma to right side of neck, obvious soft tissue swelling around left knee, low back pain, lumbar sacral strain, multiple soft tissue injuries and spasm of neck and lower back. She was diagnosed as having lumbar strain and her disability was assessed as approximately 5% of the total person. She was required to have twice yearly follow-up treatment. For pain and suffering, she was awarded Three Hundred and Fifty Thousand Dollars (\$350,000.00) in June of 2000. This updates to One Million Five Hundred and Seventy Eight Thousand Two Hundred and Forty Two Dollars and Fifty Two Cents (\$1,578,242.52) using CPI of 245.8 (Oct. 2017).
- [23] The claimant in Barbara Brady's matter suffered loss of consciousness, severe lower back pains and marked tenderness along the lumbo-sacral spine and joints. She was plagued by lower back pains aggravated by her sitting for more than half-an-hour, through bending and prolong walking. The doctor opined that she would have permanent intermittent lower back pains, aggravated by physical activities, although the pains could be reduced by back strengthening exercises. Her permanent partial disability of the lumbar spine was assessed at 5% of the whole person. For pain and suffering she was awarded Three Hundred Thousand Dollars (\$300,000.00) which updates to One Million Five Hundred and Nineteen Thousand Seven Hundred and Eighty Five Thousand Dollars (\$1,519,785) using October 2017, CPI of 245.8.
- [24] In the Candy Naggie case, the claimant, a twenty five (25) year old hotel employee, fell backwards at work while lifting a heavy urn with ice. She suffered pain across the lower back radiating to the right thigh; and protrusion of L4/L5 to the right side. She was diagnosed with mechanical lower back pains and the doctor indicated that she would be plagued by intermittent lower back pains

aggravated by prolonged sitting, standing, bending and lifting. She was assessed as having total permanent partial disability 10% of the whole person.

- [25] In December 2005, an award of One Million Seven Hundred and Fifty Thousand Dollars (\$1,750,000.000) was made for pain and suffering and loss of amenities. Using CPI 94.65 this figure updates to Four Million Five Hundred and Forty Four Thousand Six Hundred and Thirty Eight Dollars and Fourteen Cents (\$4,544,638.14).
- [26] Having reviewed the cases offered for consideration, I hold the view that the claimants in those cases submitted by Mr. Kinghorn, experienced more serious injuries than the claimant at bar. Although assessed with 10% whole person disability, like the claimant Mattison, Schassa Grant's prognosis was that her problem was expected to continue to mar her daily activities and social life. However, in Mattison's situation, Dr. Barnes asserted that despite her pain, "she would be able to do most of her activities of daily living".
- [27] Miss Bobb-Semple contended that the Iris Smith and Barbara Brady cases were more aligned with the case at bar, in relation to the injuries suffered by those claimants. However, I do not share her opinion because whereas Brady and Smith were assessed with approximately 5% whole person disability, Mattison was assessed with 10% in Dr. Barnes' estimation. Furthermore, she was advised to have a career change which should involve lighter duties and less standing. In that regard, I am bound to accept that Mattison's suffering exceeds that of Smith's and Brady's.
- [28] Nonetheless, I am in agreement with Miss Bobb-Semple that Candy Naggie's matter is of more utility in determining the award for the claimant at bar, although unlike Naggie, the claimant Mattison had expressed no impairment in respect of her "sexual activity".

[29] In light of the foregoing, I consider an award of Three Million Five Hundred Thousand Dollars (\$3,500,000.000) appropriate for Miss Mattison's pain and suffering.

[30] In his advocacy for the claimant to be awarded for loss of future earnings, Mr. Kinghorn relied on the dictum of Justice Sykes in ***Osbourne, Icilda v George Bared & Metropolitan Management Claim #2005HCV2941*** where the claimant's handicap on the labour market was highlighted. In that case the claimant's ordinary activities were described as "painful." However, in the instant case, Dr. Barnes opined that Miss Mattison had "no residual deformity, she is having pain, however and she is able to do most of her activities of daily living".

[31] Miss Bobb-Semple argued that Miss Mattison had done nothing by way of mitigation and neither had she made any attempts at finding a job since her release from the defendant's employment. I find resonance with counsel Miss Bobb-Semple's position that the law does impose a duty to mitigate and there is no evidence that this claimant did anything whatsoever to embrace the concept or notion of mitigation. She could have made efforts to find a job which did not require her to be on her feet; cashier attendant readily comes to mind.

[32] Notwithstanding that observation, I am also mindful of the fact that her injuries have now forced her to abandon a career which she may have loved to take on something which may not bring her said satisfaction as waitering did. This has to enter the discussion. In my opinion therefore, an award must be made under this heading, but it cannot be the sum of Three Million Nine Hundred and Ninety Thousand One Hundred and Ninety Three Dollars and Sixty Cents (\$3,991,193.60) which Mr. Kinghorn has canvassed, and neither should it be as low as Miss Bobb-Semple has suggested.

[33] I must repeat that I am mindful of the element of mitigation which Miss Mattison has shunned. Even so, I must give consideration to her age which in my estimation, is an important factor in respect of future earnings. It is against that

background then, that I will discount Mr. Kinghorn's sum by 20% due to the lack of mitigation. As such, an award of Three Million One Hundred and Ninety Two Thousand Nine Hundred and Fifty Four Dollars and Eighty Eight Cents (\$3,192,954.88) I deem appropriate for loss of future earnings.

[34] In relation to loss of earnings, I quite agree with the position advanced by Miss Bobb-Semple and so I consider an award of One Million One Hundred and Ninety Two Thousand Seven Hundred and Twenty Three Dollars and Forty Six Cents (\$1,192,723.46) reasonable.

[35] Under the rubric of special damages, the sum of Two Hundred and Fifty Eight Thousand Dollar (\$258,000.00) has been agreed for medical expenses.

[36] Loss of earnings is One Million, One Hundred and Ninety Two Thousand, Seven Hundred and Twenty Three Dollars and Forty Six Cents (\$1,192,723.46). Hence the global figure for special damages is One Million, Four Hundred and Fifty Thousand, Seven Hundred and Twenty Three Dollars and Forty Six Cents (\$1,450,723.46).

[37] Based on the foregoing, awards are made as follows:

1. Special damages in the sum of \$1,450,723.46 at 3% per annum from the date of the accident to today (December 19, 2017).
2. General Damages in the sum of \$3.5 million at 3% per annum from the date of filing of the Claim Form to today (December 19, 2017).
3. Loss of Future Earnings in sum of \$3,192,954.88.
4. Cost to the claimant to be agreed or taxed.