[2015] JMSC Civ. 101

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012 HCV 07136

BETWEEN	**MARCIA SMITH**	**CLAIMANT**
AND	**DWAYNE MCLEARY**	**1ST DEFENDANT**
AND	**MARLON MORGAN**	**2ND DEFENDANT**

Mr. Obiko Gordon instructed by Frater, Ennis and Gordon for the Claimant

Ms. Karla Brydson instructed by Archer, Cummings & Company for the 2nd Defendant

HEARD: April 13, 2015 and May 26, 2015

ASSESSMENT OF DAMAGES – PERSONAL INJURIES – PRE-EXISTING CONDITION – LOSS OF EARNINGS

GRAHAM-ALLEN, J. (AG.)

[1] This is an assessment of damages against the 2nd defendant. On July 15, 2013 judgment in default of acknowledgement of service was entered against the 2nd defendant. On February 19, 2015 the judgment was varied to be judgment on admission. The issue of quantum is to be determined by the court.

Award

[2] Special Damages - $170,604.98 with interest at 6% from September 29, 2010 to May 26, 2015

Loss of Earnings - $759,587.40 no interest

Transportation - $10,000.00 no interest

General Damages

Pain, Suffering and Loss of Amenities	-	$3,000.000.00 with interest at 6% from January 28, 2013 to May 26, 2015

Costs to the claimant to be agreed if not taxed.

Background

[3] The claimant Marcia Smith claims damages for injuries and consequential expenditure and loss sustained by the negligence of the 1st defendant, the servant or agent of the 2nd defendant.

[4] On September 29, 2010 she was a passenger seated in the back left side of a motor vehicle owned by the 2nd defendant and driven by the 1st defendant. The vehicle was traveling from St. Mary towards Ocho Rios, St. Ann when it collided in a railing on the left side of the road and fell into the water drain. The claimant was taken to the St. Ann's Bay Hospital where she was hospitalized for five (5) days.

Evidence of the Claimant

[5] The claimant's witness statement dated June 13, 2014 stood as her evidence-in-chief. She testified that she was 43 years old at the time of the accident. Three (3) medical reports were admitted in evidence by consent.

Exhibit 2 – The medical report from the St. Ann's Bay Hospital dated October 11, 2011.

Exhibit 3 – The medical report of Dr. Lambert-Brown dated October 10, 2012.

Exhibit 4 – The medical report of Dr. Kevin J. Morris dated August 13, 2013.

[6] The medical report from St. Ann's Bay Hospital was under the signature of Dr. Denton Barnes. He reports that the claimant was admitted September 29, 2010 and discharged October 3, 2010. His findings were that the claimant has an abrasion and haematoma to her forehead, neck pain, back pain and numbness in fingers of her left hand and laceration to her upper lip (2cm). She was diagnosed with the following:

(a) Cerebral concussion

(b) Whiplash injury – CT Scan – Normal

(c) Soft tissue injuries.

[7] The claimant was seen by Dr. Lambert-Brown on June 13, 2011 at the Family Care Medical Centre and Lab Co. Ltd. He states she is right handed and had been a patient at the facility for the past two (2) years. On examination of the claimant he made the following findings:

(a) Right shoulder – Restriction of movement, pain on movement, tender anterior, posterior and superior.

(b) Left Shoulder – Restriction of movement, mild pain on movement.

[8] Dr. Lambert-Brown reports that on a return visit by the claimant on December 23, 2011 she complained of having upper lumber pain for the past three (3) days, which worsened whenever she moves. She also complained of being unable to see well since the accident and that the neck pain had gotten worse. The claimant was examined and diagnosed with muscle spasm and whiplash. The doctor supplemented his evaluation with a lumbar spine X-ray. His impression:

(a) Cervical spondylosis

(b) Lumbar muscle spasm

[9] On October 9, 2012 a follow up visit was done. The claimant complained of slight headache and neck pain. Dr Lambert-Brown's prognosis was that the cervical spondylosis and lumbar muscle spam has now became chronic and long term. The cervical muscle sprain or strain is also now definitely chronic. The claimant has a whole person impairment (WPI) of 4%.

[10] The claimant was seen by Dr. Kevin J. Morris (a family doctor of optometry) on May 1, 2013. He states that:

> *"She reports not seeing from the right eye. She had two (2) accidents in the past which may have contributed to this. When she was age 10 she was hit with a sling shot in the*

> *right eye and 2010 she was in a motor vehicle accident and she hit her right forehead. She was receiving treatment from Dr. Nicholson (who is now deceased) for glaucoma in the right eye."*

He formed the following impressions, *"Miss Smith has lost vision in her right eye as a result of two (2) accidents she had in the past, however, I am unable to ascertain the degree of damage from the last accident in 2010 as I had not seen her before that accident. Unfortunately she will be unable to regain vision in that eye but I have advised her to continue with Timoptic eye drops and have frequent follow up visits."*

[11] At paragraph 10 of the claimant's witness statement she states:

> *"That prior to the accident I had injured my right eye when I was about 10 years old, that I was still able to see out of the right eye save and except some blurry vision that as a result of the accident I hit my forehead and injured it. That ever since hitting my forehead the sight in my right eye has deteriorated until I am no longer able to see out of it."*

[12] Under cross-examination the claimant explained that she was hit in her right eye by someone when she was 10 years old and was admitted at the Kingston Public Hospital for one (1) week. She maintained that she was able to see from the right eye but not 100% she said "if a person is far away she could see that person but not that clearly." When confronted with the medical report of Dr. Morris she admitted seeing Dr. Nicholson prior to the accident on September 29, 2010, but denied knowing if she had glaucoma.

[13] On further cross-examination when asked whether she had complained about the discomfort in her right eye to any of the nurses at the St. Ann's Bay Hospital and whether she received medication, she said that she did but received no medication. She was also asked whether she told Dr. Lambert-Brown about the discomfort in her right eye when she first visited his office on June 13, 2011. She said she never told him. She stated further that after the accident she could not see out

of the right eye clearly and that is why she went to see Dr. Morris on May 1, 2013. She went on to say that she cannot see anything from her right eye now.

[14] The claimant was further cross-examined in relation to her physiotherapy treatment and the wearing of a neck collar. She said that the last time she went to physiotherapy was in 2014 and that she wore a neck collar for four (4) months.

Loss of Earnings

[15] The claimant in her evidence-in-chief stated that she is a craft vendor and was earning US$55 per day. At paragraph 9 of her witness statement she states:

> *"That at the time of the accident I was also a craft vendor. I made and sold bracelets and paintings to tourists. That after I was released from the hospital I could not immediately return to work because of my injuries and it took me over five (5) months to recover enough to return to work that is to say about 156 days. That I earned approximately US$55.00 per day as a craft vendor."*

[16] When cross-examined in relation to her loss of earnings she said:

> *"I was a craft vendor from 1993. This is my only means of employment. I would earn US$275.00 per week which amounts to US$1,000.00 per month. I have no records. I know my stock that I have. I know what I sell so when losing I know. During the six (6) months nobody sold craft for me. I make some of the items."*

[17] The court needs to determine the following:

> Whether the loss of vision in the claimant's right eye was caused by the injuries sustained in the accident on September 29, 2010.
>
> Or
>
> Whether it was attributable to the claimant's pre-existing injury to the right eye.

[18] This court finds the Canadian case of **Jon Athey v Ferdinando Leonati and Kevin Johnson and Jon Athey v Edward Alan Gagne, Dolphin Delivery (1985) Ltd. and Dolphin Transport Ltd.** [1996] 3 SCR 458 very instructive. The court in that case

held that "*a defendant is liable for injuries caused or contributed to by his or her negligence…. The plaintiff need not establish that the defendant's negligence was the sole cause of the injury. The law does not excuse a defendant from liability merely because other causal factors for which he or she is not responsible also helped produce the harm… It is sufficient if the defendant's negligence was a cause of the harm."*

[19] The court finds that the claimant has lost vision in her right eye and will be unable to regain vision in that eye. The court accepts the claimant as a witness of truth. The court finds that the sight in her right eye deteriorated after hitting her forehead in the motor vehicle accident on September 29, 2010. The court is of the view that the inability of Dr. Kevin Morris to ascertain the degree of damage from the accident in 2010 is immaterial. He opined that the claimant has lost vision in her right eye as a result of two accidents she had in the past.

[20] The Court concludes that the claimant has proved on a balance of probabilities that the defendant's negligence caused or contributed to the loss of vision in her right eye.

[21] The court also has to determine whether the claimant took reasonable steps to avoid the loss of vision in her right eye.

[22] The basic rule of mitigation of losses is that a plaintiff may not recover losses which he should reasonably have avoided. It is settled law that the onus lies on the negligent defendant to show that the claimant ought, on the facts, reasonably to have pursued some course of action, which he did not, in order to mitigate his loss. Although the claimant does not have to take the most "efficacious" course, the defendant must put forward a "concrete case" to demonstrate what the claimant might reasonably have done but failed to do (**Richard Sinclair v Vivolyn Taylor** [2012] JMCA Civ. 30).

[23] This issue arises as a result of the tenor of the cross-examination of the claimant in relation to steps taken by her to seek medical assistance for the “discomfort” she felt in her right eye after the motor vehicle accident on September 29, 2010.

[24] Counsel for the 2nd defendant submitted that the claimant only sought medical assistance three (3) years after the accident when she went to see Dr. Kevin Morris on May 1, 2013. This is against the background that the she was being treated for glaucoma in her right eye prior to the motor vehicle accident.

[25] The court finds that the 2nd defendant has failed to discharge the onus placed on him to demonstrate what the claimant might reasonably have done but failed to do in this case.

[26] The court finds as follows:

(i) That the medical reports of Dr. Barnes and Lambert-Brown reveal that there are at least five occasions recorded prior to May, 1 2013 when the claim ant received medical attention from these doctors.

(ii) That the two occasions in relation to Dr. Barnes are on the day of the accident September 29, 2010 and a follow-up visit November 16, 2010 where he wrote “Doing well last visit 16.11.10.”

(iii) That the three visits to Dr. Lambert-Brown were made on June 13, 2011, December 23, 2011 and October 9, 2012.

(iv) That it was on the second visit that the claimant complained to Dr. Lambert-Brown that she was unable to see well since the accident.

(v) That she was referred to ophthalmologist, Dr. Kevin Waite, but there is no evidence that she went to see him.

(vi) That apart from the referral, there is no record in either reports that the claimant received treatment for her right eye.

(vii) That the claimant was receiving treatment from Dr. Cindo Nicholson, Ophthalmologist in August, 2012.

(viii) That a receipt dated 16/08/12 was tendered and admitted in evidence in proof of the expenses incurred by the claimant for eye examination by Dr. Nicholson.

[27] The court forms the view that the claimant sought assistance from Dr. Kevin Morris after Dr. Nicholson became unavailable. The court concludes, that the action of the claimant was reasonable in the circumstances in mitigating her loss.

[28] The final issue to be determined is whether the sum claimed for loss of earnings it being an item of special damages was strictly proved.

[29] Special damages ought to be strictly proved and as a consequence, a claimant cannot expect "to write particulars, and, so to speak, throw them at the head of the court. They have to prove it." However, this is not an inflexible requirement; a court must take into account the particular circumstances of the case: (**Electoral Office of Jamaica v Haughton Duhaney** [2012 JMCA Civ. 27).

[30] Apart from the oral testimony of the claimant, no documentary evidence was provided to the court to prove the claimant's claim for loss of income for 156 days at US$55 per day as pleaded.

[31] Counsel for the 2nd defendant submitted that there was nothing placed before the court to substantiate the claimant's claim. Counsel however submitted that the sum of JA$6,000.00 per week which amounts to JA$24,000.00 per month and JA$144, 000.00 for the six (6) months would be sufficient to compensate the claimant for her loss of earnings.

[32] This submission by Counsel suggests that she conceded that the claimant ought to be awarded a reasonable sum for her loss of earnings notwithstanding the absence of documentary evidence.

[33] The court has already said that it accepts the claimant as a witness of truth. The court accepts her evidence concerning her loss of earnings and will allow an award in the absence of documentary evidence. The court finds that the sum proven is not excessive. The court is guided by the decision in **Walters v Mitchell** [1992] 29 J.L.R. 173.

[34] The Jamaican equivalent of US$55 per day is $4,869.15. The rate of exchange for the period was $88.53. The court awards the sum of JA$759,587.40 for loss of earnings.

Cases Considered

[35] Counsel for the claimant submits that an appropriate award would be somewhere in the region of $3,000,000.00. In support of his submission, three cases were cited:

(i) **Evon Taylor v Eli McDaniel & Ors** 1977 C.L.T128,Khan Vol. 5, pg. 140. The claimant suffered whiplash injury and in June 1999, he was awarded $495,000.00 which updates to $2,184,984.06 using the CPI of February 2015 of 221.5.

(ii) **Sasha-Gay Downer (b.n.f. Myrna Buchanan) v Anthony Williams and Dovon Griffiths** 2005 HCV 1825, Khan Vol. 6 pg. 124. The claimant sustained cervical strain, mechanical lower back pains and strained adductor muscles of left thigh. She had a PPD rating of 5%. In July, 2007 she was awarded $1,005,150 which updates to $2,768,702.43 using the CPI of February 2015 of 221.5.

(iii) **Yvonne Black v Oshnell Morgan & Renford Williams** 2006 HCV 00938. The claimant suffered from muscular spasm of neck, neck pain and burning sensation across shoulder and lower back pains. She had a PPD rating of 10%. In April 2007 she was awarded $2,300,000.00 which updates to $4,946,116.50 using the CPI of February 2015 of 221.5

[36] Counsel for the 2nd defendant submits that the award should not exceed $1,400,000.00. Three (3) cases were cited in support of the submission:

(i) **Anthony Gordon v Chris Meikle and Esrick Nathan** 1977 C.L.G 047 in which the claimant sustained cervical strain, contusion to the left knee and limbo sacral strain. In July, 1998 he was awarded $220,000.00 which up dates to $1,203, 816.41.

(ii) **Cordella Watson v Keith James & Errol Ragbeen** 1994 C.L.W236, Khan Vol. 5, pg.256. The claimant sustained injury to her back causing lower back pain. She had a PPD rating of 3%. In November 1997 she was award $200,000.00 which updates to $ 967,650 using the CPI for February 2015 of 221.5.

(iii) Samuel Hartley v Grays In Sugar Factory Ltd & Ors 1987 C.L. H 011. The claimant sustained injury to his left eye and consequential blindness. In December 1995 he was awarded $250,000.00 which updates to $1,530,837.91 using the CPI of February 2015 of 221.5.

[37] Having considered the awards for general damages in the cases referred to by both Counsel, the court is of the view that the case of **Sasha-Gay Downer** is more comparable to the instant case and provide a reasonable guide as to the award to be made to the claimant in this matter.

[38] The Court is of the view that notwithstanding the 4% PPD of the claimant in this case, and the 5% PPD in Downer's case, the claimant in this matter has an additional injury of loss of vision in her right eye which makes her injuries more serious than the injuries in the Downer's case. The court came to the view that the award would have to be above the award in Downer's case.

Analysis

[39] In arriving at the award the court considered the following factors:

(i) the pain and suffering the claimant endured in the past as well as the pain and suffering she continues to endure for which she is still receiving treatment

(ii) the prognosis made in arriving at the 4% PPD

(iii) the loss of vision in her right eye and that she will be unable to regain vision in that eye

(iv) the hospitalization for five (5) days at the St. Ann's Bay Hospital

(v) the wearing of a neck collar for four (4) months

(vi) the physiotherapy treatment she endured up to 2014

[40] The court does not agree with the award suggested by Counsel for the 2nd defendant. The court accepts the award suggested by the Counsel for the claimant. The court believes that an award of $3,000,000.00 is more reasonable.

[41] In relation to Special Damages the claims for the cost of the Umbrella, the blouse and the Sony Ericsson W850 Cellular were disallowed as they were not strictly proved. The sum of $25,000.00 was claimed for transportation but $10,000.00 was agreed by the parties. The loss of earnings is dealt with separately. The total sum of $170, 604.98 was strictly proven.

Conclusion

[42] The court assesses damages against the 2nd defendant as follows:

(i) Special Damages awarded in the sum of $170,604.98 with interest at 6% from September 29, 2010 to May 26, 2015.

(ii) Loss of Earnings the sum of $759,587.40 no interest.

(iii) Transportation the sum of $10,000.00 no interest.

(iv) General Damages for Pain and Suffering and Loss of Amenities in the sum of $3,000,000.00 with interest at 6% from January 28, 2013 to May 26, 2015.

(v) Costs to the claimant to be agreed if not taxed.