

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2004 HCV 3065

BETWEEN RACQUEL BAILEY CLAIMANT
AND PETER SHAW DEFENDANT

Miss Catherine Minto instructed by Nunes Scholefield Deleon & Co. for the Claimant.

Mr. K. Gordon instructed by Samuda and Johnson for the Defendant.

Assessment of Damage: Personal injury motor vehicle accident – passenger - not wearing seat belt - injury to back - Physical Therapy treatment prematurely discontinued

Heard: 24th and 25th September 2009 and 19th February 2010

G. Brown, J. (Ag.)

On the 17th day of November 2002 the Claimant was a passenger in a motor car driven by her husband along the Waltham Park Road when the Defendant's motor car negligently collided into the rear of the stationary car. She received injury to her back.

On the 8th day of December 2002 she saw Dr. Terrence Nunes, a Medical Practitioner. His report dated the 14th of February 2003 reads:

Re: Motor vehicle Accident of Raquel Bailey

Dear Sirs,

I saw the above individual 22 days after her motor vehicle accident on the 8/12/02. The above accident apparently took place on the 17/Nov/02. However on the 8/12/02 she was seen at Mancare Medical Centre having backache. She was given analgesics and sent for X-Ray.

X-Ray Results indicated there were no bony injury but there were some muscular spasm. She was sent to do physiotherapy. Reports from the Physical Therapist showed great improvement and that she should be doing fine in the future.

Sincerely

TERRENCE NUNES

Between the 13th December, 2002 and the 12th February 2003 she did eleven sessions with the physical Therapist at Caduceus. She was last seen by Dr. Nunes on the 14th February 2003 when he wrote his medical report. She did not return to see Dr. Nunes or the Physical Therapist thereafter and did not seek any further medical treatment.

On the 10th of December 2004 the Claimant commenced civil action against the Defendant to recover damages in negligence.

On the 4th March, 2005 she was examined for the first time by Dr. Melton Douglas who later gave her a medical report dated the 12th April 2005. It reads:

"HISTORY

By her own account, Mrs. Clarke reported she was an unbelted driver in a motor car that came to a halt at a stop light. A car ran into the rear of the vehicle and she started having pain in the lower back. The pain persisted for days and had to return for further treatment by her doctor. X-rays of the lumbar spine were reported as no bony injury but muscle spasm present.

Physiotherapy was recommended and commenced December 2, 2002. She had several sessions and partial relief was gain in terms of her back pain.

PRESENT COMPLAINT

Mrs. Clarke was examined in the office on March 4, 2005. She complained of persistent pain in the lower back. She said she had to resort to the use of a lumbar roll while seated at work and in the car. Her back pain is aggravated when she stands, or does housework including washing, and if she sits for long periods. Analgesics have been used to relieve her pain. Numbness in the

right buttock has been an occasional complaint but will last only short periods. She said the pain has caused her to limp on a few occasions. She had not lost any time off from work in the recent past months.

PHYSICAL EXAMINATION

Her gait was normal and her posture relaxed. Her movement was smooth and was able to get on the examination bed unaided. Tenderness was elicited in the lower lumbar region and the muscles were in mild spasm. She complained of pain on forward flexion, right lateral flexion, rotation of the spine. Her ranges of movement were normal in spite the pain she experienced. There was an absence of neurological deficit.

INVESTIGATION

Plain radiographs of the lumbar spine done in December 2002 were reported as no bony injury, but muscle spasm present. X-rays of the lumbar spine were repeated on March 4, 2005 and again were normal.

DIAGNOSIS

Lumbosacral Strain

PROGNOSIS

Mrs. Clarke has reached maximum medical improvement. Her injuries are in keeping with a road accident as described above. Her injuries are considered serious. She will be able to continue working in the capacity as an accounting clerk providing she modifies her activities. She will have to be very selective with the kind of house work she does to avoid aggravating her back pain. She does not require surgery, but would benefit from ongoing physical therapy during periods of aggravation of her back pain. The long term prognosis is that her pain will persist in

very much the same manner, restricting her ability to tolerate strenuous work or physically demanding tasks. She was assessed as having a disability rating of 5% of the whole person...”

The Claimant gave a dismal picture of her injuries and the pain and sufferings she endured since the accident. This was documented by her Counsel in her written submissions as follows:

- (1) Severe pain and discomfort in neck and lower back
- (2) Swelling and tenderness on the cervical muscles
- (3) Whiplash
- (4) Muscular spasms in the neck and back
- (5) Inability to sit or stand for long period or bend without feeling pain
- (6) Inability to lie in certain positions without feeling pain
- (7) Inability to bend without feeling pain
- (8) Restriction in her ability to do certain recreational activities
- (9) Numbness in right buttock
- (10) Tenderness in lower lumbar region
- (11) Pain on rotation, forward flexion, and right lateral flexion of the spine.
- (12) Lumbar sacral strain
- (13) Permanent disability of 5%

It was the Claimant’s evidence that the injuries had also affected her sexual activity with her husband. She said *“sexual intercourse became very painful and her husband did not understand. This eventually caused the breakdown in her marriage”*. However the doctors did not include this in their medical reports.

She also mentioned that she could not travel long distances because of the pain to her back.

Dr. Nunes had from the inception recommended analgesics (painkillers) to alleviate her pain however the Claimant said she refused to take them after a while. She did not include any expenditure for medication in special damage. He had also recommended physiotherapy which would effectively heal her of the pain.

In her witness statement the Claimant deponed as follows: "*the physiotherapy was not able to get rid of these things. I was made to understand that it was a life time thing and that from time to time I would have to get therapy to ease the pain.*" She later continued "*the doctors have told me that there is nothing they can do for me. What I need to do is go to Physiotherapists when the pain comes on. I had seen a specialist, Dr. Melton Douglas, and he told me the same thing.*"

This was not the opinion of Dr. Nunes who treated the Claimant and had recommended that she continued the physical therapy. He stated that "*report from the physical therapist showed great improvements and that she should be doing fine in the future.*" She stopped immediately after he had examined her and never returned to see him. She had in her possession this report from February 2003 and was aware of his prognosis.

The Claimant did not seek any further medical treatment for her injuries notwithstanding the pain and suffering she said she experienced regularly. She did not seek treatment from Dr. Douglas and only saw him on March 4, 2005 to obtain a medical report for this action. Her conduct was certainly not consistent with the injuries as described by her counsel.

The Claimant had a duty to act reasonably to mitigate her damage. In this instant case she rejected the medical recommendation to take painkillers and to do physiotherapy. The onus was on her to show that she acted reasonably. This was a question of fact. *In Ponnampalam*

Selvanayagam v University of the West Indies (1983) 34 WIR 267 at page 272 Lord Scarman said:

“Their Lordships do not doubt that the burden of proving reasonableness was upon the Appellant. It always is, in a case in which it is suggested that’ had a plaintiff made a different decision, his loss would be less than it actually was. Their Lordships would add a further comment on the law, well establish though it is. The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based on the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage.”

It was contended that the Claimant did not mitigate the damage as she elected to discontinue the physiotherapy treatment as recommended by Dr. Nunes which would have given her relief.

However she argued that she did so due to impecuniosities as *“when her husband left her he emptied our account and took everything.”* There was no evidence to show when they separated, even though she alleged that sex with him was a problem.

The evidence showed that the Claimant was employed at the time accident as an accounting clerk and was so employed when she saw Dr. Douglas in March 2005. The injury did not affect her attendance to her work as Dr. Nunes did not recommend any sick leave for her. Immediately after the accident she employed a helper and continued to do so although there was no evidence that Dr. Nunes had recommended it.

It was quite obvious that Dr. Nunes did not consider the injuries to be as serious as Dr. Douglas described it some two years later. The latter found that *“her gait was normal and her posture relaxed. Her movement was smooth and she was able to get on the examination bed unaided... .. She complained of pain on forward flexion, right lateral flexion, rotation of the*

spine. Her ranges of movement were normal in spite the pain she experienced. "The Claimant's actions i.e. refusing to mitigate the damage could have exacerbated the injuries.

I was not impressed with the Claimant as witness. Her demeanor was poor. She had great difficulty answering simple questions. Her evidence was inconsistent with her medical history as she had only received treatment from one doctor and sought to obtain a report from a second some 2 years later. She never returned to see Dr. Nunes for further treatment although her life had been adversely affected by pain. She was told by him that the physiotherapy was solving her condition. Notwithstanding his prognosis she came to the conclusion that *"it was a lifetime thing and that from time to time I would have to get therapy to ease the pain."*

Her injury was diagnosed to be lumbosacral strain and did not include whiplash as suggested. Dr. Douglas' report was clearly based on the answers he elicited from her.

I was of the opinion that the Claimant embellished and exaggerated the injuries to justify her claim for the extra help she continued to employ in her household and sought to recover from the Defendant.

It was also the Defendant's contention that the Claimant was contributory negligent by 25% due to her failure to wear a seatbelt. Thus, *"her lumbosacral strain could have been minimized or reduced if she was a belted driver as her spine would not have been jerked to the extent that it was."*

Counsel for the Claimant on the other hand submitted that the Defendant had not pleaded contributory negligence and therefore could rely on it. The burden was on the Defendant to show on a balance of probabilities that if the Claimant had been wearing her seatbelt, she would not have suffered the injury or she would have been less severely injured than she was.

I agree with the submission by Miss Minto and will make no reduction in respect of the damages to be awarded.

Special Damages

- 1) The parties had agreed the medical expenses and the police report.
- 2) Extra Help

The Claimant had two young children at the time of the accident and needed the assistance as she could not look after them and herself. She was entitled to recover money paid to the household helpers. The failure by her to mitigate her loss must reduce her claim.

The Claimant had claimed extra help of \$780,000.00 up to the 30th March 2009. Counsel for the Defendant argued that she should be awarded 50% of her claim. I am minded to accept this suggestion in view of her failure to mitigate.

General Damages

Pain and Suffering and loss of Amenities

Counsel for the Claimant submitted that a sum of \$2,000,000.00 was a reasonable award. She relied on Olive Henry v Robert Evans and Greg Evans (page 156 of Volume 5 of the Khans).

Counsel for the Defendant on the other hand made reference to Anthony Gordon Chris Meikle (page 142 of Khan's Volume 5). The Claimant, a 27 year old man was a sideman who was injured in a motor vehicle accident. His injuries were as follows:

Pains to the lower back, left knee and left side of chest

Multiple bruises to right hand and left calf

Tenderness of left hip on movement

Moderate tenderness on palpation of the midline of the lumbar spine

Lumbo sacral strain

Contusion to the left knee

Cervical strain

The permanent partial disability of the lumbo sacral spine was assessed to be 5% of the whole person.

The award for general damages was \$220,000.00. That figure updates to \$645,854.87.

In this instance case the only injury suffered by the Claimant was lumbosacral strain, unlike the two cases cited by Counsels.

In my opinion, an award of \$800,000.00 would be appropriate in the circumstances of this case.

Future Medical Care

The Claimant claimed the sum of \$500,000.00 for future physiotherapy as Dr. Douglas opined that she “*would benefit from ongoing physical therapy during periods of aggravation of her back.*” However, since 2003, the Claimant has not returned to the physiotherapist for any treatment and I find no merit to this item.

Damage is therefore assessed as follows:

Special Damages \$416,200.00 with interest at 3% from the 17th November, 2002 to today.

General Damages \$650,000.00 with interest at 3% from the service of the claim form.