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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2000/L087

BETWEEN	SHARON LAING	PLAINTIFF
AND	JUSTINE OGILVIE	FIRST DEFENDANT
AND	HOWARD MCLEAN	SECOND DEFENDANT
AND	DANIEL FRANCIS	THIRD DEFENDANT
AND	WINSTON DALEY	FOURTH DEFENDANT

Plaintiff represented by Marian Rose-Green Attorney-at-Law

The defendants were not represented.

Heard on the June 20th and September 29th 2002.

ORAL JUDGEMENT

Brown J. (Acting)

On the 4th August 1999 the plaintiff was a passenger in the first defendant's motor vehicle when it was involved in a collision with the third defendant's motorcar along Marcus Garvey Drive. As a result the plaintiff sustained personal injuries and incurred loss and expenses.

The plaintiff was at the material time a porter employed at the Kingston Public Hospital. She is now 28 years old and unemployed.

The plaintiff testified that at the time of the collision she did not take her injuries seriously and did not seek medical attention at first. She was taken to her home, however, later she began to experience severe pain.

On 6th August 1999, two (2) days later she attended the Accident and Emergency Department at the Kingston Public Hospital for treatment.

A medical report from Dr. E. Martin-Clarke was admitted into evidence.

The medical report reads:

"She was diagnosed with soft tissue injury to the left shoulder and back strain. Oral analgesics were prescribed. Dr. Martin-Clarke concluded that injuries were not serious and there should be no permanent disability. He estimated the period of incapacity to be fourteen (14) days."

The plaintiff said she resumed her employment after two (2) weeks sick leave but continued to experience pain.

On June 7, 2002 she consulted Dr. Melton G. Douglas. He examined her and prepared a report, which was admitted into evidence reads as follows:

1. A strain of the left shoulder capsule
2. Thoraco cumbar strain

It was his opinion that the shoulder injury is serious but not permanent. "She will require at least eight (8) sessions of physiotherapy to treat her shoulder and at least three injections of cortisone. In spite of treatment her back pain is unlikely to recover fully. "I anticipate periods of recurrence of her back pain if she does strenuous work. At least eight (8) sessions of physiotherapy will be required to control her back pain for any sustained periods. Surgery is not required. She has a 10% permanent partial disability".

Although Dr. Douglas recommended physiotherapy the plaintiff did not do any as she explained in her evidence that she did not have the money. As a consequence of her failure to act on Dr. Douglas' recommendation she continued to experience pain.

On the 19th May 2001 she consulted Dr. R.C. Rose, Consultant Orthopaedic Surgeon, for the purpose of examination and to obtain a report. This report was also admitted into evidence. She

complained of pain to her left shoulder, chest and lower back. The medical report reads, "my diagnoses are as follows:

1. Mechanical lower back pains
2. Rotator cuff strain
3. Contusion to sternum

Miss Laing's main functional impairments are related to the lower back and left shoulder.

He stated that her total percentage disability of the limbo sacral spine is 10% of the whole person. The percentage disability as it relates to the left shoulder is 16% of the upper extremity, which is equivalent to 10% of her whole person.

Her total percentage is 20% of the whole person. However it is my considered opinion that if Miss Laing had received a programme of physical therapy her symptoms would have been less and her percentage disability would therefore be less".

The Plaintiff says she continued to feel pain in her left shoulder, chest and back. She cannot wash or do her household chores. She has had to employ an assistant to carry out these duties. She also says that she cannot stretch, bend and whenever she has sexual intercourse it pains. She said she was dismissed from her job as her co-workers

complained that she was unable to perform her task satisfactorily. However, because of the pain she has not sought alternative employment.

Inspite of the pains the plaintiff continue to experience, she has not sought any further medical treatment. She relys on non-prescription painkillers. Her refusal to do the treatments recommended by Dr. Douglas has retarded her recovery.

Duty to Mitigate

It is the duty of the plaintiff to mitigate the damage by doing whatever is reasonable to keep down the loss as far as she can. The plaintiff cannot receive damage for an aggravation or prolongation of her injuries, which is due to her own willful act or neglect.

In McAuley v London Transport Executive 1957 2 Lloyds Report 500 it was held that the plaintiff's refusal to undergo an operation was unreasonable, so that the defendant was only liable for loss of wages up to the time when he would have returned to work had he had his operation.

Notwithstanding, a plaintiff will not be prejudiced by his financial inability to take steps in mitigation.

In Clipper Oil Company v. Edinburgh at District Water Trustee 1907 AC. 291 Lord Collins said

> "In my opinion the wrongdoer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means to mitigate it, so much the worse for the wrongdoer, who has got to be answerable for the consequence flowing from the fortious act. However the onous of proof is on the defendant".

In the circumstances there was no evidence to suggest that the plaintiff acted unreasonable and therefore she is entitled to her full damages.

Special Damages

Special damages must be specially pleaded and proved. These consist of out of pocket expenses and loss of earning incurred up to the date of hearing.

The Plaintiff claimed as follows:

(a) Medical Expenses - $15,650

Medical Report

(i) Dr. E. Martin-Clarke - $1,750

(ii) Dr. Melton Douglas - $9,800

(iii) Dr. C. Rose - $10,000

The Plaintiff admitted that the payment for Dr. Rose was

made by the defendant's insurers and with regards to the other payments I find them to be proved.

(b) Transportation to visit

(i)	K.P.H. 4 trips @ $500 each	- $2000
(ii)	Dr Douglas 1 trip @ $600	-$ 600
(iii)	Dr. Rose 1 trip @ $700	- $700
		$3100

I also accepted these as expenses reasonably incurred and proved.

(c) Xray -$700.

The Plaintiff made no mention of this expenditure although, from Dr. Rose's report, one was actually done. In the circumstance no award was made.

(d) Loss of Net Income

5/8/1999 to 20/8/1999 – 2 weeks at $1450.00 per week (sick leave) $2900.00.

21/5/2000 to 5/4/2002 96 weeks at $1450.00 per week $139,200

The Plaintiff was given two (2) weeks sick leave by Dr. Martin-Clarke. She said she was dismissed from 21/5/2000 and had not worked since.

The Plaintiff was therefore entitled to recover all her wages as claimed.

(e) Helper

21/5/2000- to 5/4/2002 – 137 weeks @ $1500 per week.

– $205,500.00.

The plaintiff said she had employed someone to assist her, however, her boyfriend paid for it. This expenditure was recoverable.

(f) General Damage

Counsel for the plaintiff submitted that an award for general damage should include:

(i) Pain and suffering

(ii) Loss of earnings and incapacity on the labour market.

(iii) Future expenses for helper

The plaintiff suffered injuries to the left shoulder and back. Dr. Douglas assessed her permanent partial disability as 10%.

Dr. Rose on the other hand had assessed it one year later as 20%.

However Dr. Douglas had concluded that the injury to the left shoulder was serious but not permanent. Once the plaintiff did the physical therapy she would suffer no further pain.

The plaintiff however sought to give the impression that as a result of the collision she was a paraplegic. She would never be able to work or to look after herself. She was therefore forced to depend on others to assist her for the remainder of her life.

It was clear from Dr. Douglas' report that physiotherapy would assist the plaintiff considerably and thereby reducing the pains she was now experiencing.

Counsel referred to Kathleen Earle v George Graham reported at pg. 173 of the Merdela Grant v Wyndam Hotel Reported at page 174 U. Khan Recent Personal Injury Awards Vol. 4 she submitted that an award of $2 million was appropriate for pain and suffering.

However the injuries in those cases were far more severe than in the plaintiff's case.

The plaintiff had not started any treatment but it was expected that her future pain would be considerably less. Notwithstanding this both doctors agreed that she would have permanent partial disability. In the circumstances an award of $800,000 would be appropriate.

Counsel submitted that a sum of $565,000 should be awarded for loss of income, alternatively $250,000 for handicap on the labour market.

The Plaintiff was an unskilled worker. Her educational qualification was not disclosed. It was obvious that she was being paid the minimum wage as a porter. She is not employed at present but would be able to work again. However she would not be able to do strenuous things. She would certainly be handicapped on the labour market. I therefore award her $200,000 for handicap on the labour market. Consequently no ward was made for loss of future earnings.

Counsel also submitted that an award of $585,000 was appropriate for future helper. I agree that until the plaintiff recovers from her injuries she would be entitled to recover the sums paid.

The plaintiff will now be in a position to commence her treatment. It is estimated that within six (6) months the plaintiff should be able to carryout her domestic chores. In the circumstances I consider an award of $39,000 to be adequate.

Damages are therefore assessed as follows:

Special Damages

$368,350 with interest at 3% from 4/8/99 to 29/8/02

General Damages

Pain and suffering	-	$800,000
Handicap on the labour market	-	$200,000
Future help	-	$39,000
		$1,039,000

With interest at 3% from 2/10/00 to 28/8/02

Costs to the plaintiff in accordance with schedule 'A'