



[2014] JMSC Civ. 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2012 HCV 02000

BETWEEN	EVONI MCLEAN	CLAIMANT
AND	PEPSI COLA BOTTLING CO. LTD	1ST DEFENDANT
AND	KIRK ANTHONY KING	2ND DEFENDANT

Mr. R Reitzen instructed by Reitzen & Hernandez for the claimant

Mrs. S. M. Mayhew for the 1st Defendant

Assessment of damages- Personal injury- no measurable PPD

Heard: March 3, 2014 and April 4, 2014

Lindo J. (Acting)

[1] The claim in this matter arose out of a motor vehicle accident which took place on June 30, 2011 when the 2nd defendant, authorized driver of motor truck registered CB6965, owned by the 1st defendant caused the truck to collide in the rear of motor vehicle registered 3182DP, owned and driven by the claimant. The claimant claims damages, interest and costs for the injuries, loss and damage which she suffered as a result of the negligence of the 2nd defendant in his driving, management and/or control of the said truck.

[2] On May 10, 2012 the 1st defendant filed a defence limited to quantum and on June 1, 2012 judgment on admission was entered against the 1st defendant.

[3] On March 3, 2014, the matter came on for assessment of damages. The claimant was sworn and her witness statement dated February 19, 2014 was accepted as her evidence in chief after it was identified by her.

[4] Her evidence is that she on the day after the accident she consulted Dr. Wade as she had pain in her neck, lower back, hands and knees and she couldn't rotate her neck without pain. She said he prescribed painkillers and antispasmodics and she took the medication which helped but when the medication wore off or ran out the pain increased. She indicated that in the first several days she was almost totally incapacitated and that she made three subsequent visits to Dr. Wade.

[5] She further indicated that on her second visit to Dr. Wade he referred her for physiotherapy and on the third visit he prescribed anxiolytic medication and referred her for psychiatric evaluation/psychotherapy and that over the course of these visits her fear of driving was increasing. Dr. Wade's diagnosis was mild whiplash, chronic muscle spasm of the fingers and forearms and posttraumatic stress disorder (PTSD).

[6] Under cross examination by Mrs. Mayhew, Ms. Mclean stated that she was a nurse and that she couldn't recall the date she went to Dr. Abel but it could be about a year after the accident, after the claim had been filed because during the time she was suffering from anxiety and thought she could get over it. She stated that Dr. Abel recommended psychotherapy and ~~she started in May, 2012 and had between six to ten sessions and has since been discharged~~ and that Dr. Abel did not prescribe any medication.

[7] Ms. Mclean also indicated that the physiotherapist, Ms. Frankson taught her exercises which she does every day. She indicated that she is driving "just a little" but had no pleasure in doing things she used to do such as driving to Emancipation park, bathing and washing as she had pains. She said "it hurts me, damage me, frighten me, my mental status is not the same".

[8] She further stated that she did six to ten sessions of physiotherapy, she has a person who does errands for her and that she gets around by cab or her daughter takes

her. She described some of the exercises she did if she was afraid to drive, such as taking deep breaths.

[9] Mr. Reitzen submitted that the claimant made four visits to Dr. Wade these were on the day after the accident and on the second, seventh and ninth week after the accident. He drew the court's attention to the medical report of Dr. Rose where the doctor stated that the claimant had chronic neck pains, chronic mechanical lower back pains and triggering right middle and as well as left middle and ring fingers. He also pointed out that in the final report of Dr. Rose stated under the heading "Impression", the following:

1. Mild whiplash injury
2. Mild soft tissue injury right shoulder
3. Mild mechanical lower back pains
4. Resolved triggering of fingers both hands.

[10] In relation to general damages, Mr. Reitzen cited the case of **Stacey Ann Mitchell v Carlton Davis and Ors. Khan, Vol 5 pg.146**, as being in some ways similar to the claimant in the case at bar. He however expressed the view that Ms. Mclean's injuries were more extensive as the claimant in that case was completely better about one year after the accident but Ms. Mclean was still "not completely out of the woods". He therefore asked the court to make an award 10% more than that awarded to Stacy Mitchell.

[11] With regard to the claim for an award for post traumatic stress disorder, (PTSD), Mr. Reitzen suggested an award of \$700,000.00 based on the award made in the case of **Vanura Lee v Petroleum Co. of Jamaica and Juici Beef Limited...** in 2004. In that case the claimant suffered burns which affected 27% of her body surface area and Dr. Abel, consultant psychiatrist assessed her as suffering from PTSD and major depressive disorder indicating that the injuries she sustained is a source of considerable emotional anguish. Miss Lee's major disability was cosmetic. She was awarded \$300,000.00.

[12] Mrs. Mayhew submitted that in relation to the medical reports, it is noted that the physical examination was done one year and four months after the accident and stated that degenerative changes take place over time. She indicated that the report states that when seen on May 8, 2013, the claimant was able to cope physically and based on the report she had improved significantly. She was of the view that the medical report does not support what the claimant is saying in her statement and noted that she was not assessed with any permanent impairment.

[13] She referred to Dr. Abel's report and noted that in his opinion and recommendations, he stated that "significant symptoms of emotional trauma were indicated in her clinical profile to qualify her for a formal diagnosis of PTSD and major depression" and indicated that Ms. Mclean has not received any form of therapy. She submitted that the claimant has not availed herself of psychotherapy as recommended by Dr. Abel, suggesting that it would go to mitigating her loss.

[14] Mr. Reitzen objected to this submission, indicating that a failure to mitigate must be pleaded and proved. Mrs. Mayhew however, indicated that the claimant's evidence is that she did six to ten sessions of physiotherapy, that she failed to do the full amount recommended and that is a failure to mitigate.

[15] On the issue of general damages, counsel for the defendant noted that the case of Mitchell cited by Mr. Reitzen was a matter which was not contested and other cases may have been brought to the attention of the court as there are a wide range of cases dealing with soft tissue injury. She noted that in the Mitchell case, the claimant had to wear a collar and had severe pains for nine weeks but in the case at bar there was no period of disability.

[16] She referred to the case of **Dalton Barrett v Poncianna Brown and Leroy Bartley** Claim No. 2003HCV 1358, where in November 2006, \$750,000.00 was awarded for pain and suffering and loss of amenities where the orthopaedic surgeon was of the opinion that his PPD would be zero percent and to **Racquel Bailey v Peter Shaw**where the claimant sustained whiplash injuries and later suffered from backache. The doctor concluded that she had reached maximum medical improvement

and her disability was assessed at 5% of the whole person and the award was \$1,000,000.00.

[17] Counsel asked the court to award only \$1,000,000.00 in relation to the physical injuries taking into consideration as well the award made in the case of **Michael Baugh v Juliet Ostemeyer and others [2014] JMSC Civ. 4** where the claimant suffered cervical strain, permanent lumbar spondylosis, mildly dessicated and a mild posterior bulge at disc L2-3, posterior annular tear at disc L3-4, at L4-5 disc narrowed and dessicated and a diffuse posterior disc protrusion with associated mild facet hypertrophy, at L5-S1 a central posterior disc protrusion and his PPD of the whole person was assessed at 4%.

[18] With regard to an award for psychological impairment, counsel for the defendant cited the case of **Angelita Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited .. Khan Vol 6 pg.....** where the claimant had disfigurement which caused distress and was in 2007 awarded \$340,000.00 which updates to \$699,000.00. In that case Dr. Abel, Consultant Psychiatrist indicated that she was suffering from major depression-moderate and PTSD. She also referred to the case of **Protz-Marcocchio v Smatt** where the award for PTSD in 2002 was \$100,000.00 which updates to \$345,000.00 and proposed that an award of \$300,000.00 be made in the instant case as the claimant said she was discharged.

[19] In response, Mr. Reitzen stated that Bailey's case was not useful. He noted that Bailey's pain was to her lower back, she sought medical help twenty two days after the accident and the doctor did not indicate what he is relying on to arrive at the PPD of 5%. He indicated that a person with 0% PPD should not be said to be entitled to a lower award as PPD is one factor to be considered. He indicated that the question is the extent to which the person is in pain, or disabled and the longevity of the injury.

[20] With reference to Baugh's case, counsel noted that the age of the claimant is missing. He noted that only the shoulder was involved but in Ms. Mclean's case her hands, feet and legs were involved. He further noted that Baugh did not avail himself of the medical advice given to him. He also expressed the view that the case of Protz -

Marcocchio v Smatt was not relevant as in that case the claimant was bitten by dogs and did not suffer any major depression.

[21] Special Damages: The parties have agreed special damages in the sum of \$798,484.02

[22] In assessing the damages, I am guided by the cases cited and have considered the nature and extent of the injuries sustained by the claimant as well as the nature and gravity of the resulting physical disability, the loss of amenities and the extent to which as a consequence of the accident, her pecuniary prospects are affected. I also consider that the percentage permanent partial disability of the whole person is a guide for making comparisons and in arriving at a reasonable award.

[23] I note that Dr. Rose's report of June 13, 2013 indicate that the claimant reported only occasional tingling sensation in the fingers and that she was able to perform "all activities of daily living at home and at work". He stated that examination of the cervical spine revealed no localized tenderness and there was full active range of motion of the cervical spine and the neurovascular status was intact in both upper extremities.

[24] Of the cases cited by both counsel, the ones I find closest to Ms. McLean in terms of the physical ~~in~~-injury sustained are Stacy Mitchell and Dalton Barrett, where both claimants sustained whiplash injury and there was no assessed PPD. I note however that Stacey Mitchell was twelve years old at the time of the accident in May 1993 and by September she was deemed sufficiently improved and discharged. The medical evidence presented in the other cases indicated a percentage PPD whereas in the case at bar it is stated to be zero.

[25] The cases of Vanura Lee and Brown which deal with PTSD and major depression are in my view comparable to the case at bar. The case of Protz-Marcocchio is not very useful as in that case there was no finding of major depression by the psychiatrist although Dr. Irons was of the view that she would require therapy.

[24] On the issue of mitigation, the law is clear that a claimant may not recover losses which he should reasonably have avoided. Additionally, I accept that the question of

mitigation is a question of fact and that a defendant has the burden of proving by way of evidence what the claimant might reasonably have done but failed to do in minimizing her loss. In this regard therefore, I agree with Mr. Reitzen that the burden of proof in establishing a failure to mitigate is on the defendant.

[25] I am guided by the decision in the case of **Geest PLC v Lannsiquot (St. Lucia)** 2002 UKPC 48(7 October 2002) PC Appeal No. 27 of 2001, where the issue for the Board was whether the claimant acted unreasonably in refusing surgery and therefore failed to mitigate her loss. Lord Bingham of Cornhill in delivering the judgment of the Board, at paragraph 16 of the judgment had this to say:

“...it should however be clearly understood that if a defendant intends to contend that a Plaintiff has failed to act reasonably to mitigate his or her damages, notice of such contention should be clearly given to the Plaintiff long enough before the hearing to enable the Plaintiff to meet it. If there are no pleadings notice should be given by letter...”

[26] In the case before me the claimant has done sessions of physiotherapy. There is no evidence to suggest that if she had done more she would have been less likely to have suffered to the extent she is claiming or that her loss would have been less than it has been claimed to be. Additionally, there is evidence that Dr. Abel recommended that the claimant pursue a course of psychotherapy aimed at reducing her fear of driving and she has opted to pursue the course. The estimated cost as set out by Dr. Abel is \$360,000 and I will award that sum.

[27] It is my view that having considered the evidence and the cases referred to, using the case of Stacy Mitchell as a basis, an award of \$2,000,000.00 for pain and suffering and loss of amenities to be appropriate, fair and reasonable in the circumstances and I so award. I also believe a reasonable award for PTSD and major depression would be \$800,000.00.

Damages are therefore awarded as follows: Special damages in the agreed sum of \$798,484.02 with interest at 3% per annum from June 30, 2011 to April 4, 2014

General damages for pain and suffering and loss of amenities \$2,000,000.00 and PTSD \$800,000.00 with interest at 3% per annum from the date of service of the claim form ie April 12, 2012 to April 4, 2014

The claimant is entitled to her costs which are to be taxed if not agreed.