



[2016] JMSC Civ. 12

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2012 HCV 02941**

**BETWEEN SHERINE WILLIAMS CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT**

Ms. Joan Thomas instructed by Shelards, for the Claimant

Mr. Dale Austin instructed by the Director of State Proceedings for the Defendant

Heard: July 1 and 22, 2015, October 28, 2015 and January 15, 2016

***Damages – Assessment – Personal Injury – Application
to amend Particulars of claim after close of evidence
and at time of filing submission but before judgment***

LINDO, J

[1] On May 28, 2012, Sherine Williams filed this claim for damages for personal injury and loss suffered as a result of a motor vehicle accident which occurred on March 6, 2010 in which she was hit by a motor cycle owned by the defendant and driven by Saunjae Williams, the servant and or agent of the defendant.

[2] Liability is not in issue as on June 7, 2013 a defence admitting liability and limited to quantum of damages was filed on behalf of the defendant. Judgment on admission was also entered.

[3] Miss Williams' medical evidence is contained in the medical reports of Dr. Andrea Myers dated February 17, 2012 and Dr. Emran Ali, Consultant Orthopaedic

surgeon dated October 22, 2013. Her witness statements dated September 18, 2013 and supplemental witness statement dated December 5, 2013 were admitted as her evidence-in-chief

[4] Her evidence is that after the accident she was taken to the Annotto Bay Hospital where she was treated with antibiotics and analgesics, did an x-ray and was fitted with plaster of paris backslab which she wore for two weeks. She also indicates that she continues to feel pain in her right ankle and knee and she is unable to sit comfortably in the rear seat of a motor car and has difficulty bending her right knee and keeping it in a bended position for long periods.

[5] She further states that she visited Dr. Zin Myint on July 30, 2011 as a result of ongoing pains she was experiencing and he prescribed medication for which she paid \$2,054.55 and that she incurred transportation costs and that at the time of the accident she was employed as a security guard and as a result of the accident she was unable to resume her employment and lost income of \$51,000.00 for the period March 6, to April 16, 2010.

[6] In cross examination by Mr. Austin, she disagreed that she was discharged on the same day because her injuries were minor. When pressed, she indicated that she did not tell Dr. Myers about any injuries to her elbow. She agreed that she went to Dr. Myint more than a year after the accident and that she did not go back to the hospital or to any other doctor in relation to the injuries. She however stated that the pain never stopped after the accident so she took pain killers and when the pain got worse she went to the doctor. She also insisted that her visit for x-rays done at Apex Ultrasound Services were in connection to the injuries she received as a result of the accident.

[7] When it was suggested to her that the injury she claimed she was suffering from when she went to Dr. Ali 3 ½ years after the accident are not injuries caused by the accident, she denied it. She also denied that the receipts she provided are not solely connected to the pain she suffered as a result of the accident and denied that she

suffered any injury between March 6, 2010 and the day she visited Dr. Ali but admitted that Dr. Ali did not prescribe any medication and she did not request any, and he did not refer her to any other doctor for further treatment. She also admitted that she did not have any certificate in respect of sick leave from any doctor and she did not seek to obtain a letter from the company she worked with in relation to the period she claimed she was not paid while purportedly on sick leave.

[8] Miss Williams indicated that she continued receiving treatment at the Maxfield Park Health Centre where she worked, on the recommendation of the doctor, was unable to state which doctor and stated that the last time she received treatment at the Health Centre was in 2013. She also indicated that she was required to see a doctor or health professional on Mondays, Wednesdays and Fridays.

[9] Dr. Myers, who treated Miss Williams at the Annotto Bay Hospital immediately after the accident, gave evidence that on March 6, 2010 she examined the claimant and noted that she had an abrasion to her right elbow and right leg, swelling and tenderness to the right leg as well as haematoma to the right posterior lateral aspect of the leg. Her medical report indicates that the claimant was treated with voltaren intra-muscular, tetanus toxoide intramuscular and brufen.

[10] In cross examination Dr. Myers indicated that an x-ray was ordered and it revealed that the claimant had no fracture and that the claimant was discharged the same day as her injuries did not warrant admission. She stated that it is not usual to prescribe antibiotic for the injuries suffered by the claimant. She also stated that no other medical practitioner or health professional subsequently contacted her regarding the claimant.

[11] Dr. Emran Ali, Consultant Orthopaedic Surgeon who was called as an expert witness, gave evidence by video link from his office at Oxford Medical Centre, Hope Road, on October 28, 2015, the court having been satisfied that the persons present in the room with him were Monique Ellington, a representative from the law firm, Shelards,

the attorneys representing the claimant, and Faith Hall, a representative from the office of the Director of State Proceedings, the attorneys representing the defendant.

[12] Dr. Ali stated that the claimant consulted with him on October 9, 2013 and he examined her and prepared a medical report. His report which was admitted in evidence, indicates that the claimant "had a healed superficial one inch scar above the right iliac crest and 1½ inch superficial scar behind the right elbow...she had full range of movements in the right elbow...she had full range of movements in the knee and ankle and walked without a limp. X-rays showed no evidence of bony injury..." He was of the opinion that she suffered soft tissue injuries from which she has not fully recovered and he assessed her for a 3% permanent partial disability of the whole body.

[13] In cross-examination by Mr. Austin, he stated that he saw the claimant in relation to a motor vehicle accident she had on March 6, 2010 for the purpose of providing a medical certificate. He indicated that she was referred to him by her attorneys-at-law and he was provided with the medical report of Dr. Myers by the attorney. He further stated that he did not request any further medical record from the hospital at which she was first treated and he was not aware of any other medical practitioners that she had seen before coming to him. He admitted that this was not "best practice."

[14] He stated that the claimant provided her own history of her injuries which he was dependent on and that if the history was not necessarily accurate he could only base his assessment on that information. He indicated that it was possible that the claimant could have suffered other injuries during the intervening years between the date of the accident and the date he examined her which she may have attributed to the accident. He stated that he did not do any medical tests, but did a physical examination and did an assessment of her PPD based on the information he got from her and his examination. This assessment he said was partly based on the American Medical Association approved mathematical formula and guidelines but about 70% of the assessment was based on his own experience.

[15] Dr. Ali further stated that he did not see the claimant for any follow up sessions, did not prescribe any medication nor did he refer her to anyone for treatment and that she did not request any medication for pain or otherwise. In further response to Counsel for the defendant he stated that when the claimant left his office she did not limp or manifest any sign of physical injury and that antibiotic treatment would not be used to treat the claimant's injuries from the accident.

[16] Paula Ferguson gave evidence that she is the claimant's sister and that on a number of occasions she took her to the Maxfield Park Health Centre from her home in Vineyard Town and that her sister paid her \$1,500.00 on each occasion and she issued cash receipts to her for transportation.

[17] In cross-examination, she stated that the drive from Vineyard Town to Maxfield Park took about ten to fifteen minutes on a clear day. She admitted that her sister worked at the Health Centre and indicated that she charged her sister \$1,500.00 for each trip to take her there. She stated that she did not know if on the days she took her sister to the Health Centre her sister signed in to work and she could not recall the dates her sister went to the Health Centre. She also could not recall if she went to work on the days she took her sister to the Health Centre or any dates on which she took her sister and stayed with her.

[18] She agreed that the receipts she gave her sister may not actually represent days she went to the Health Centre and indicated that the dates she wrote the receipts were the dates she received payment. She indicated that over a 5 weeks period she took approximately \$23,000.00 from her sister. She insisted that she could not agree that the going rate for taxi fares from her sister's house to Maxfield Park was \$250.00. When it was suggested to her that that was the fare and it would be more responsible to take the cheaper alternative, she agreed that it would be the better option.

Submissions

[19] Counsel for the claimant relied on the following authorities as being instructive:

1. **Trevor Benjamin v Henry Ford and Anor.**, Claim No. 2005HCV 02876 where the claimant sustained soft tissue injuries and an award of \$700,000.00 was made for general damages on March 23, 2010 (CPI) which updates to \$1,031,226.05 (CPI 230.7 October 2015)
2. **Sheila Richards v Vincent Kinglack**, Suit No. CL1989/R012, delivered February 15, 1991, Harrisons Assessment of damages for personal Injuries, pg. 363, where the claimant sustained severe contusion to left leg, ankle and foot, lacerations to left hand and foot, multiple abrasions on right leg with moderate degree of contusions and moderate degree of contusions with abrasion on the left arm, spent a month in hospital and had to wear crutches after discharge and was awarded \$60,000.00 (CPI) which updates to \$1,949,577.46 (CPI 230.7)

[20] She submitted that the injuries sustained by the claimant in the case at bar are more serious than those suffered by the claimants in the cited cases and noting that the claimant in the case at bar had a PPD of 3%, suggested that an appropriate range of award for general damages would be between \$2m and \$2.5m.

[21] Counsel for the defendant submitted the following cases as instructive and upon which the court may place reasonable reliance in assessing the damages:

1. **Reginald Stephens v James Bonfield and Conrad Young**, CL1992/S230, delivered September 23, 1996, reported in Khan, Vol. 4, page 212. In this case the claimant suffered an abrasion of the left leg and bruise of the right foot and experienced pain for four weeks following a motor vehicle accident. He was awarded \$40,000.00 which updates to \$224,143.79
2. **Eric Ward v Lester Barcoo**, Suit No. CL1989/W245, delivered May 29, 1991, reported in Harrison and Harrison...page 206 where the claimant suffered blows to right foot and right side of chest resulting in tenderness and pain in the lower back and was awarded \$16,000.00 which updates to \$469,618.32

[22] In seeking to arrive at an award for pain and suffering and loss of amenities, the court adopts the following dictum by Lord Hope of Craighead in **Wells v Wells** [1998] 3 All ER 481:

“the amount of award for pain and suffering and loss of amenities cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the claimant’s general damages.”

[23] Having considered the similarities and distinguishing features of the cases provided for comparison, I find that the injuries to claimant are less severe than those sustained by Trevor Benjamin and Shiela Richards but appear to be more serious than that of Reginald Stephens. I find that the case of Eric Ward is more comparable with the injuries sustained by the claimant at bar although there is no indication of any resulting scar in the case of Ward, neither is there any indication that the claimant in the case at bar suffered any lower back pain.

[24] I have also given due consideration to the medical evidence presented and I accept that the claimant was treated by Dr. Myers at the Annotto Bay Hospital , was X-rayed and the X-ray showed no fracture and that she was treated with a plaster of paris back slab. There is no indication that she required any further treatment after being treated at the hospital and given voltaren intra muscular and tetanus toxoide intramuscular and brufen and she has provided no evidence to show that she received any medical treatment at the Maxfield Park Health Centre.

[25] **I have given very little weight to Dr. Ali’s evidence as I find that his opinion and conclusions were based on the history as reported to him by the claimant who I do not accept as a credible witness.** Having done only a physical examination of the claimant and noting that he saw a “healed superficial one inch scar above the

right iliac crest and a 1½ inch superficial scar behind the right elbow. She had full range of movements in the right elbow... the right leg ...there were no obvious scars. She had full range of movements in the knee and ankle and walked without a limp..." he went on to state that in his opinion she suffered "soft tissue injuries from which she has not fully recovered..." and assessed her for a (PPD) permanent partial disability of 3% of the whole person but he has not provided a basis for this assessment.

[26] **I was not impressed with the claimant. I found her evidence unconvincing. She could not recall the name of any doctor, nurse or health professional who treated her at the Maxfield Park Health Centre although she worked there and she did provide any evidence of any course of treatment she received at that facility. Additionally, her evidence that she received antibiotic treatments for her injuries was shot down by both Dr. Myers and Dr. Ali.**

[27] **Although the PPD rate is a factor to be considered, I find that on the whole the injuries suffered by the claimant in this case were not very serious. Additionally, it is the fact that Dr. Ali arrived at the PPD rating based mostly on his own experience, and had only done a physical examination of the claimant and clearly relied heavily on the information given to him by her which leads me to find that notwithstanding that he was called as an expert witness, not much weight should be given to his expert report.**

[28] Having considered the evidence and the submissions of both Counsel, and using the case of Ward as the preferred guide and augmenting it to account for the fact that this claimant had abrasions which left scars. I find that general damages in the sum of \$700,000.00 would be reasonable and appropriate in this case.

Special damages

[29] For special damages, the claimant has, by her Further amended schedule of special damages attached to the particulars of claim filed on December 5, 2013,

pledged the sum of \$110,254.55 “and continuing” for medical expenses, travelling expenses and loss of earnings.

[30] Additionally, Counsel made an application for the “schedule of special damages to be amended to include a claim for Court attendance fee of \$10,000.00 for the attendance of Dr. Ali for purposes of cross examination.

[31] She prayed in aid the overriding objective of the Civil Procedure Rules (CPR), indicating that it was in the discretion of the court to allow the amendment as part of the special damages of the claimant. She cited the case of **Shaquille Forbes (by his mother and next friend Kadina Lewis) v Ralston Baker, Andrew Bennett and the Attorney General of Jamaica** Claim No. 2006 HCV 02938 (unreported) delivered March 3, 2011, as authority that the inclusion of the court attendance fee for the expert witness ought to be allowed as no prejudice would be suffered by the defendant as that witness was requested by the defendant for the purpose of cross-examination.

[32] Counsel for the defendant noted that it is a principle of law that special damages must be strictly pleaded and proved and indicated that the claimant has a duty to mitigate her loss. He rejected the claimant’s contention that she is entitled to \$1,500.00 for each trip to travel to and from the Maxfield Park Health Centre, pointing out that the claimant’s evidence that she was attending the Health Centre for treatment, and not for work, is “highly suspect and not credible.”

[33] Counsel also indicated that it is clear that the claimant failed in discharging her fundamental duty to mitigate and is therefore precluded from recovering avoidable loss. He noted that this is so even if the court were inclined to accept the evidence of treatment at Maxfield Park Health Centre on all the dates identified on the receipts tendered into evidence. He added that if the court were to accept that if it were \$250.00 for a trip by taxi, then that cheaper alternative would have been the better option and the claimant ought not to recover any amount over and above the sum which would have been the cheaper alternative.

[34] The claimant has not provided any evidence of any course of treatment undergone as a result of the accident, save and except for the treatment given at the Annotto Bay Hospital. She has failed to establish a nexus between the accident which occurred on March 6, 2010 and her visit to Dr. Zin Myint on July 30, 2011 and the purchase of antibiotics on that day, her visit to Dr. Emran Ali on October 9, 2013 or the requirement to have an x-ray done on her cervical spine at Apex X- Ray and Ultrasound Services on September 7, 2011.

[35] I am therefore of the view that she has provided no basis to claim compensation in relation to these items of expenditure and therefore no award will be made in respect of those items.

Loss of earnings

[36] The claimant has given evidence that she was a security guard employed to Atlas Protection Company and earned an average net salary of \$17,000.00 per fortnight and that as a result of the accident she was unable to work for six weeks from March 6, 2010 to April 16, 2010. The evidence she provided was her payslips for February 24, 2012, March 9, 2012 and March 23, 2012 although the accident took place in March 2010.

[37] With regard to this claim for loss of income, I am not persuaded that she claimant had not worked and or earned any income for the period of six weeks as claimed. She has not provided any cogent evidence from which I can find on a balance of probabilities that she did not work for the period claimed and therefore lost income.

[38] She has sought to provide evidence of her attendance at her workplace on a number of occasions subsequent to March 6, 2010, to be treated for the injury she sustained as a result of the motor vehicle accident. However, having considered her demeanour, I do not accept that she is a witness of truth and therefore reject her claim under this head.

Travelling

[39] **On a careful appraisal of the evidence put forward and the submissions on the issue of expenses for travelling, I find that the claim under this head is exaggerated and excessive.** The claimant produced 15 receipts from her sister claiming she paid her for transportation to the Maxfield Park Health Centre between March 8, 2010 and April 21, 2010, totalling \$22,500.00 and 6 receipts from G. Harris for the period between June 13, 2013 and August 29, 2013, totalling \$ 9,000.00. **She failed to provide any evidence of a connection between her visits to the Health Centre and the accident which occurred on March 6, 2010. She has however provided proof of payment for x-ray done at St Joseph's Hospital on March 8, 2010 and I find that she would have incurred travelling expense in that regard.**

[40] **I did not find the witness Paula Ferguson to be a credible witness and therefore found it difficult to accept that she would take the sum of \$22,500.00 from her sister over a period of five weeks for transportation.** I also do not accept that the trips which she claimed to have made were for the purpose of taking her sister for medical treatment.

[41] Additionally, the claim for payment made to G Harris for travelling expenses for the period June 13, 2013 to August 29, 2013 has not been substantiated neither has it been shown to be as a result of the accident on March 6, 2010.

[42] On the evidence, I accept that a trip to the Health Centre took no more than about fifteen minutes from the claimant's home. I am of the view that the sum of \$250.00 per trip as suggested by Counsel for the defendant is a more realistic cost than the sum claimed and that the claimant had a duty to avoid increased expenditure for transportation. This duty seemed to have been appreciated by her sister who claimed to have provided transportation on a number of occasions.

[43] On the issue of mitigation, I note that the onus is on the defendant to show that the claimant ought reasonably to have pursued some course of action in order to mitigate her loss. I find that in cross examination of the witness, Paula Ferguson, the defendant has shown that the claimant might reasonably have saved travelling expense by taking a form of transportation which was not as costly as the sum claimed.

[44] **I find that as a result of the accident the claimant would have incurred some costs for transportation as I accept that she would have travelled to the St. Joseph's Hospital to do x-ray on March 8, 2010** and it is therefore my view that the sum of **\$1,000.00** would adequately compensate the claimant for transportation expenses incurred.

[45] On the application to amend the Particulars of Claim to include the cost of attendance by Dr. Ali, I find that it became necessary for Dr Ali to be cross examined on his expert report and this was sanctioned by the court when the order was made for his evidence to be taken by video link. I therefore find that this item of special damage is proved and I am therefore inclined to make an award in that sum.

[46] On a review of the pleadings and the evidence presented, I find that the following items of special damage proved:

Cost of medical report of Dr. Myers.....	\$ 2,500.00
Cost of medical report from the Annotto Bay Hospital.....	\$ 1,000.00
Cost of x-ray at St Joseph Hospital	\$ 3,000.00
Cost of attendance by Dr. Ali	\$10,000.00

Award

[47] General damages for pain and suffering awarded in the sum of **\$700,000.00** with interest at 3% from the date of service of the claim form to the date hereof.

Special damages awarded in the sum of \$17,500.00 with interest at 3% from March 6, 2010 to the date hereof

Costs to the claimant to be agreed or taxed.