

IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2019/0079

BETWEEN:

DORNETTE TONGE

Claimant

and

ASHTON GREGORY

Defendant

Appearances:

Mr. Peyton Knight, Counsel for the Claimant

C. Debra Burnette and Ms. Mandi A. Thomas, Counsels for the Defendant

2021: July 22nd,
September 17th,
October 29th
December 2nd

DECISION

- [1] **GARDNER-HIPPOLYTE, M.:** This is a decision for an assessment of damages, based on injuries received by the Claimant during a vehicle accident. The Claimant's vehicle was at a standstill when she was rear ended. The Defendant accepted liability and quantum is to be determined.

Background

- [2] On the 25th April, 2018 the Claimant was driving her vehicle on the Sir George Walter Highway, as she approached the light it turned to amber, there was vehicle in front of her that slowed down and she did the same until she came to a complete stop. The Claimant indicated that while at a standstill she suddenly felt an impact from the rear of her vehicle and was thrown forward. The Claimant stated that she felt pain in her neck and her lower right leg. She was taken to the hospital where she had x-rays taken but no MRI as the machine was broken. The x-rays revealed no broken bones, she was treated for whiplash and discharged. She also received sick leave.
- [3] The Claimant continued to be in pain and visited her personal Doctor. Dr. Benjamin requested an MRI, and one was done of her cervical area. Subsequently another MRI was also done of her lower back area and a specialist was recommended. The Claimant saw several doctors however

the expert reports that were received in evidence were from Dr. Henry Bedaysie - a neurosurgeon and Mr. Peter Kowlessar – a neurosurgeon, neurologist.

- [4] Judgement on liability was entered on the 9th July, 2019 and the Parties went to mediation to agree on quantum. The Parties did not agree and directions for assessment were subsequently issued. The Defendant's counsel did not challenge the special damages, except requiring that all receipts be submitted. The Claimant had one receipt missing in relation to the flight to Trinidad, and the said receipt was to be forwarded to the Court. It has not been received and therefore will not be included in the assessment.
- [5] The Claimant gave evidence that she is in constant pain in her lower back area, and this has affected her ability to function properly.
- [6] The Claimant sustained the following injuries and prognosis which was articulated in the combined expert report:-¹
- A neck injury in keeping with a (muscle related) whiplash-associated disorder and was expected to resolve with conservative measures that would include appropriate use of a soft, cervical collar, dietary changes, oral medication, and consistent neck conditioning exercises;
 - Lower back injuries differed based on the expert, the difference is as follows:
 - Mr. Peter Kowlessar evaluation date – 15/08/18 – concluded she had discogenic back pain associated with lumbar disc injury, which was expected to improve with consistent conditioning exercises,
 - Dr. Henry Bedaysie evaluation date - 23/08/19 – she now had additional right lower limb neurological features in keeping with a right S1 nerve root abnormality; he recommended conservative lumbar treatment and if this should fail, he recommended decompressive spinal surgery;
 - Both experts acknowledge that her MRI spinal investigation was done two years ago, and her spinal discal structure would have changed
 - Further both experts indicate that they considered the clinical features outlined in Dr. Bedaysie's medical report ...and we agree that her whole person impairment be estimated at 12%.
- [7] The Claimant also sought to lead evidence in relation to a possible promotion and salary increase but under cross examination this evidence was not conclusive. It was agreed that only upon successful completion of the training there may be a promotion and the amount would depend on the outcome of the training. The Claimant confirmed that she has been in the same position since she has been employed with the company, however the nomenclature has changed along with additional duties added to the position.

¹ Combined expert report of Dr. Henry Bedaysie and Mr. Peter Kowlessar dated 12th October, 2020.

- [8] In the witness statement of the Claimant, she refers to various periods when she was on sick leave, but there is no specific claim made for payment of sick days. Additionally, having reviewed the evidence of the Claimant on the 22nd July, 2021 there is no claim made on that date or a specific claim made for non-payment of salary on sick days. However, her Counsel in the further legal submissions sought to summarize the length of time and the amount of the daily rate associated with the sick days. In all it is claimed that the Claimant missed 109 days of work at the daily rate of \$119.50 which totals \$13,025.00.
- [9] An additional amount is also claimed in the further legal submission of Counsel for the Claimant, this is for an invoice for Dr. Bedaysie to attend Court on the 17th September, 2021. This invoice is for the sum of \$3,000.00 USD or \$8,150.70 ECD.

Special Damages

- [10] The Defendant has not challenged the sums claimed for special damages, except the non-production of the receipt of the plane ticket to Trinidad. I find the amount requested for the Claimant's salary while on sick leave not fully proved. Sick leave documents are exhibited as part of the bundle, and sick leave is referred to in the witness statement of the Claimant, however there was no evidence led from the Claimant that she was not paid for the sick leave days nor any documentary evidence indicating social security benefit was not received. As nothing was submitted, the Court is handicapped in making an award under this section.
- [11] I will award \$4,075.35 for the expert fees. CPR 32.11(5) says Parties are jointly and severally liable for the payment of expert fees, Claimant sought to rely on evidence of the doctor it was to her benefit therefore she should incur half the cost. Therefore, the total amount awarded for special damages is \$7,954.98 + \$4,075.35 totalling \$12,030.33.

General Damages

- [12] Once a person suffers personal injuries they are entitled to general damages under the heads as set out in **Cornilliac v St. Louis** (1964) 7 WIR 491 at page 492:
- (a) The nature and extent of the injury sustained;
 - (b) The nature and the gravity of the resulting physical disability;
 - (c) The pain and suffering endured;
 - (d) The loss of amenities suffered; and
 - (e) The extent to which the claimant's pecuniary interests have suffered.

The Nature and Extent of the Injuries Sustained

- [13] The Claimant's injuries are set out in detail in three medical reports. One combined report from Dr. Bedaysie and Mr. Peter Kowlessar, and one provided from each expert prior to the combined report. In summary the information from the combined report is set out at paragraph 5 above. The Claimant received a whiplash injury, and the experts agree on the whole person impairment of 12% but disagree mainly on the severity of the lower back injury.
- [14] Mr. Peter Kowlessar who saw the Claimant on 15th August, 2018 refers to the MRI Lumbar scan of 13/07/18 scan and stated that the Claimant's lumbar scan revealed that her "L4/5 central disc annular tear without neural compression. The central canal was capacious."
- [15] His evidence in Court on the 17th September, 2021 was consistent with his report, in that he stated the Claimant had an annular tear, and he gives his opinion as a neurological surgeon. He said that the MRI is not a photograph.....so you do not see a physical tear but.... you see changes, electromagnetic representation of an annular tear. The annular tear without neural compression means that "the disc, lining of disc is called the annulus and there is a tear in it ...it appears as a bright spot in a MRI sequence...material can protrude from the centre of disc, on this occasion there was a tear but no significant protrusion that would lead to compression of the sac of nerve roots.....so there was no compression of the nerve." The central canal was capacious "in that the central canal in spite of having an annular tear was capacious – meaning plenty space".
- [16] Dr. Bedaysie saw the Claimant on the 23rd August, 2019 and he refers to the same MRI scan of the 13/07/18 and he states:
- **"Clinical exam – lumbosacral spine** – decreased range of movement with spasm, and absent right ankle reflex, diminished sensation S1 dermatome and weakness right dorsiflexion;
 - **MRI scan – Lumbar spine** - Disc dessication is in the lower lumbar spine, Disc herniation at L5/S1, Mass effect on Cauda, Type III marrow changes.
- [17] Dr. Bedaysie was also consistent in his evidence at Court. He indicated the nerve is being pinched on the right side and further stated that about 2/3's of her nerve was compressed. He also places her whole person impairment at 12%.

The Pain, Suffering and Loss of Amenities

- [18] The Claimant at paragraphs 7, 9, 10, 14, 15 and 16 describes the pain and suffering and loss of amenities she endured. She indicated the amount of pain she was in the following situations:
- (i) Feeling pain in the back of her head, neck, and lower right leg;
 - (ii) While waiting at the hospital to see the doctor the pain was getting more intense;

- (iii) Went to see Dr. Benjamin, because of feeling more and more pain in my lower back;
- (iv) was on sick leave for approximately 109 days;
- (v) experiencing sharp shooting pain in her left leg;
- (vi) told ...that I was experiencing pain and would lose my balance when walking backwards;
- (vii) feeling pain from her butt to her lower back;
- (viii) she was on sick leave for four months where she could not get up from her bed, required help to get up, make food to eat, help her to shower, to go to the washroom, and buy cooking gas;
- (ix) lack of sexual desire, pain and discomfort experienced during sexual intercourse;

[19] Counsel for the Claimant referred to the following cases as comparable amounts to be considered:

(a) **Smith v Fleming Et Al²** - the claimant who was 57 years suffered injuries to multiple cervical and lumbar spine degenerative disease, severe stenosis of the spinal canal. His injuries essentially resulted in him being unable to walk without assistance, stand erect or drive, and he would never be able to work again. He could no longer enjoy a sexual relationship with his wife. He was awarded \$45,000.00 USD for PSLA.

(b) **Darrell Christopher v Benedicta Samuels DBA Samuels Richardson & Co³** - the claimant suffered spinal injuries in the central cord compression at the C4 level of the spine, Brown Sequard Syndrome, which is diminished sensation on one side of the body and weakness on the other side. He also received an injury to his left tibia, a fracture. He walks with a cane and his left foot drops, and this prevents his heel from striking the floor, and hinders ambulation. He is significantly disabled. His award was \$60,000.00 USD for PSLA.

[20] The Defendant also provided supporting cases for determination of quantum for PSLA. The cases referred to are:

(a) **Temicia Smith v Brian Dean et al⁴** the Claimant's injuries included Loss of cervical lordosis, posterior annular tear in C5-6 intervertebral disc; posterior central small disc protrusion at C5-6 level causing mild narrowing of spinal cord. This injury would not augur well for the future, would result in increased pain, and will probably need surgical intervention to alleviate conditions. An award of \$70,000.00 (which was elevated) was given for PSLA.

² AXAHCV 2008/0058

³ BVIHCV 2008/0183

⁴ SVGHCV 2013/0098

- (b) **Leanthia Pacquette Lewis v Irvin Durand**⁵ the Claimant injuries – disc herniation C4/C5-C5/C6 post traumatic with mass effect on the spinal cord and compression of left C5 nerve root; a bony contusion was noted in C4. There was an indication that surgery is most likely to decompress her spinal cord. An award of \$50,000.00 was given for PSLA.
- (c) **Collin Hope Jr. v Edmond Lake**⁶ the Claimant suffered from muscle spasm, a cervical sprain due to whiplash injury to the cervical spine and injury to the L3-L4, L4-L5, and L5-S1 discs without significant herniation. Surgical intervention was not recommended, because the injuries were because of annular tears. An award of \$40,000.00 was made for PSLA.

Pain Suffering and Loss of Amenities

- [21] I agree with the principles stated in **Wells v Wells**⁷ where “the amount of the award to be made for pain, suffering and loss of amenity 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 basic estimate of the plaintiff’s damage.”
- [22] Counsel for the Claimant proposes a reasonable amount to be \$180,000.00 and Counsel for the Defendant is suggesting the sum of \$50,000.00 for the PSLA. Having considered the authorities, I find the authorities proposed by the Claimant are not as analogous, as the ones provided by the Defendant. The Claimants in **Smith and Darrell** received injuries that resulted in them being unable to walk unassisted. I accept that the Claimant is in continuous pain, that she is impaired at whole person 12%, however there is nothing in her evidence that equates to the significant disablement referred to in the two cases provided by the Claimant.
- [23] Having reviewed the cases provided by the Defendant I found that it was more analogous to the injuries sustained. After careful consideration of and the whole person impairment of 12%, the amount of pain the Claimant indicates that she suffers and the loss of amenities to her life I award a sum of \$70,000.00.

Future Loss of Earnings

- [24] Counsel for the Claimant referred to the Claimant being unable to work until the age of 65, and thus would have to be compensated for her future losses. It is also suggested that she declined a job because of her injuries and if she had accepted, she would have received an increase of approximately \$250.00-300.00 a month, depending on the outcome of the training she had to undergo. The Claimant is submitting that the Court use her entire yearly salary of \$28,680.84 with a multiplier of 15 and should be compensated the total sum of \$430,212.60.

⁵ DOMHCV 2011/0341

⁶ [2020] ECSCJ NO 132

⁷ [1998] 3 ALL ER 481

- [25] The Defendant proposes that this head is not viable because there is no legal basis on which this claim can be substantiated. The Defendant distinguished the case law provided by the Claimant and I agree with the Defendant's submissions. The Claimant is still in the same position she was in prior to the accident, and unlike the Claimant in Miriam Myers⁸ who was "put out of her employment by her present state."
- [26] Additionally, under cross examination the Claimant indicated that she is working in the same position at the Antigua and Barbuda Transport Board, and she is also a physical therapy assistant⁹. The evidence of Dr. Bedaysie confirmed that she can work, therefore on a balance, I accept that the Claimant is working and is in the same position she was in prior to the accident therefore a claim for her total salary with a multiplier of 15 is unsupported and I decline to make such an award.
- [27] Additionally, the Claimant stated that she had to undergo training to possibly receive a promotion that she was offered by the Antigua and Barbuda Transport Board as a Motor Vehicle Inspector Trainee. Two days after receiving the offer, the Claimant declined citing her current medical issues as the reason. The Claimant in her evidence stated she could not say for sure the exact amount of the salary increase but it would be between \$250.00-300.00. I have noted the correspondence from the Human Resource Manager indicating that an increase in salary would be up to \$300.00, but the Human Resource Manager did not provide a witness statement, nor did she give evidence in Court. I must agree with Counsel for the Defendant in that there is nothing in the evidence that would suggest that the Claimant is unable to work or receive a promotion in the future. I therefore decline to make an award for the increase in salary.

Future Medical Care

- [28] It is proposed by the Claimant that the Court should make an award under this head, however there is no evidence before the Court to substantiate an award of \$70,000.00 as proposed by the Claimant. Counsel for the Claimant refers to a report of Dr. Singh, however Dr. Singh did not give an expert report or witness statement and he was not called as a witness for the Claimant.
- [29] Dr. Bedaysie in his reports recommended conservative lumbar treatment. He further explained in Court that this is initially no surgery but if this fails then he would recommend spinal surgery. The report of both Dr. Bedaysie and Mr. Kowlessar in October of 2020, refer to the fact that the MRI spinal investigation is over two years old and that it is not applicable to her current status, therefore such an updated assessment will guide any further management recommendation. The Court in Curvin Colaire¹⁰ reemphasises that the Claimant must satisfy the Court both as to the fact of damage and the amount that is being claimed. Master Actie as she then was referred to in her judgment in the case Strachan v The Gleaner Company Ltd & Anor (Jamaica)¹¹ stated:-

⁸ Miriam Myers v Dickenson Bay Hotel Management Ltd Db a Sandals Antigua ANUHCv 2013/0231

⁹ Claimant stated this under cross examination

¹⁰ Curvin Colaire v Attorney General of Commonwealth of Dominica et al DOMHCv 2014/0079 at paragraph 21

¹¹ [2005] UKPC 33 (25th July 2005)

“....the second is that whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss....”

[30] I accept this well-established position, but I am also guided by the fact that the Claimant continues to experience back pain and there is a possibility that surgery may be required in the future. The Claimant indicated a third MRI was not explored due to insufficient funds. I have noted a precedent has been established of nominal damages being awarded for future medical care¹² where the Court accepts that there is going to be some future care required but there is insufficient evidence submitted to support a concrete amount. I am satisfied on the balance that there will be some future care required for the Claimant. In the circumstances I will award a nominal amount of \$15,000.00.

Interest

[31] The claimant is entitled to interest and as per the decision in **Nigel Mason v Maundays Bay Management Ltd**¹³ as follows:

1. With regard to general damages, no interest should be awarded before judgment on loss of future earnings;
2. On damages for pain, suffering and loss of amenities interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of evidence of that rate, the statutory rate of interest would be used;
3. With regard to special damages, interest should be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

Court's Order

[32] The Defendant shall pay to the Claimant the following awards:

1. Special damages in the sum of \$12,030.33 with interest at 2.5% per annum from the date of the accident to today's date;
2. Pain and suffering and loss of amenities - \$70,000.00, interest at 5% per annum from the date of service of the claim to the 22nd July 2021;
3. Future medical care in the sum of \$15,000.00;

¹² Seepersad v Persad & Anor (Trinidad & Tobago) [2004] UKPC 19, Geraldine Welsh v Joel Budd GDAHCV 2017/0235 at paragraph 17, Akim Morain v Devon Pierre GDAHCV 2017/0241 at paragraph 17.

¹³ AXAHCV 2006/0090 at paragraph 39

4. 60% of Prescribed costs on the global sum in accordance with CPR 65.5;
5. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master