

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA
BETWEEN: ANUHCV2006/0026

ANITA TOBITT

Claimant

AND

GRAND ROYAL ANTIGUAN BEACH RESORT LIMITED

Defendant/Ancillary Claimant

AND

STANFORD FREDERICK

Ancillary Defendant

Before:

Master Cheryl Mathurin

Appearances:

Mr. Kelvin John with Mr. Loy Weste for the Claimant

Mr. Dexter Wason for the Defendant/Ancillary Claimant

2010: July 6th; 27th

October 13th

ASSESSMENT

[1] **MATHURIN, M:** On the 16th December 2004, the Claimant (Ms Tobitt) was a passenger in a bus driven by the Ancillary Defendant (Mr. Frederick) who was hired by the Defendant (Royal Antiguan)

to transport workers to and from work. The bus struck an object and caused it to bounce and skid off the road causing injuries to Ms Tobitt's back and neck. Judgment was entered against both the Defendant and Ancillary Defendant and this is an assessment of the damages that Ms Tobitt is entitled to as a result. At the time of the accident, Ms Tobitt was 35 years old.

Medical reports and evidence

- [2] In a medical report prepared by Dr K.K. Singh exhibited to the amended Claim dated the 2nd April 2009, Ms Tobitt was diagnosed with "*prolapsed of lumbar inter-vertebral disc/lumbo-sacral disc with diminished sensation in the dermatome distribution of L5-S1*" and was referred to the Belmont Clinic to do an MRI after which it was determined that the radiological findings were consistent with central and left lateral disc herniation at L5/S1 with impingement of the thecal sac.
- [3] In the final report prepared by Dr K.K. Singh on the 11th August 2009 wherein which he examined the entire clinical picture of Ms Tobitt, he concluded that she was 8% permanently disabled as a further increase in her permanent physical impairments and that she may require surgery in the future to maintain her current level of abilities. The doctor also stated that she will develop post traumatic degenerative joint disease as she grows older which would increase the percentage of the permanent physical impairments in future. The doctor also stated that there was no indication for spinal surgery at this time in a letter dated 5th September 2009.

Ms Tobitt's evidence

- [4] Ms Tobitt filed an affidavit in support of the assessment of damages on the 18th June 2010. In this affidavit, she stated that immediately following the accident, the Defendant paid for her out-of-pocket medical expenses but has paid none following the Judgment. She exhibited two medical receipts for consultations on the 2nd July 2009 and the 10th August 2009. The receipts total \$930.00.

- [5] Ms Tobitt has also exhibited an estimate of what future surgery will cost her if it becomes necessary. The estimate was prepared by Consolidated Medical Management Limited in Trinidad in the sum of US\$22,529.50.
- [6] Ms Tobitt states that prior to the accident, she was employed as a waitress earning the sum of \$312.00 plus service charges of \$100.00 per week. She states that as a result of her injuries, she has been unable to maintain any gainful employment which requires her to lift items, be constantly mobile or to sit for any extended period at a desk job. She states that she has tried to perform different odd jobs, the longest of which was for three and a half weeks but had to leave due to her illness. She states that she is unable to maintain a job as a direct result of her injuries and permanent disability of 8%.
- [7] Ms Tobitt also states that she continues to experience severe pain, discomfort and suffering in her neck and lower back. She says that she finds it difficult to sit in an upright position for any extended period of time and is unable to perform normal everyday functions such as driving, walking, standing, bending and lifting items and cannot participate in any outdoor activities with her son. She states that she is unable to participate in any sexual activity and that her relationship with her partner has broken down and she has been unable to maintain any further intimate relationships since.
- [8] Counsel for the Claimant has referred me to several authorities which he states would assist in the determination of the quantum of damages in this matter however he has provided no analysis as to the relevance to this claim. I have taken these authorities into consideration and in comparing similar type injuries and circumstances, I think the matter of Celia Hatchett v First Caribbean International Bank BVIHCV 2006/0227 was of most assistance. In that case Ms Hatchett suffered back injuries which comprised "central disc herniation of her lumbar L5/S1 vertebrae with degenerative disc disease at L4/L5 disc level." Dr.Salian stated in that matter that the injury would deteriorate as a result of age resulting in radicular symptoms, stiffness, muscle, motor and sensory loss which would require continued treatment or maybe surgery. That injury was analyzed by the court as being on the top end of the moderate category for back injuries in accordance with the Judicial Studies Board Guidelines for the Assessment of Damages in Personal Injury Cases.

General Damages

- [9] On the question of general damages, the law is settled. The case of Cornilliac v St Louis (1965) 7 WIR 491 is the locus classicus on this point and Wooding CJ set out the considerations to be borne in mind in assessing general damages;
- a) the nature and extent of the injuries sustained
 - b) the nature and gravity of the resulting physical disability
 - c) the pain and suffering experienced
 - d) the loss of amenities if any
 - e) the extent to which pecuniary prospects are affected
- [10] Further, applying the principles in Heeralall v Hack Bros. (1977) 15 WIR 117, the law expects an award of fair compensation, fair to the claimant for what has happened to her through the negligence of the defendant and fair for the defendant to pay for such negligence. Such damages cannot be perfect compensation, but it will be fair compensation for the injuries and for the social, economic and domestic consequences
- [11] That the injury the Claimant suffered has left her disabled to the extent of 8% is established by the medical reports in support of the Claim. Ms Tobitt has outlined the discomfort that she suffers daily and although it is at variance with the indication by Dr Singh that she continued to suffer with low back pain on and off, I am satisfied that the injury has caused her to have to make some adjustments in her life. There is the likelihood that Ms Tobitt may require surgery in the future and also the reality that she will develop post traumatic degenerative joint disease which will increase the permanent physical impairment of 8% in the future.
- [12] Ms Tobitt has alleged that she is unable to secure any employment as a result of her injuries and this is the extent to which her pecuniary prospects are affected. Regrettably, the lack of medical support for this proposition is a constraint on my ability to conclude the same. I do however recognize that the medical report anticipates that her permanent disability of 8% will increase in the future and it is not unreasonable to assume that it may very well impact on her future ability to function at the same pace as today. In the circumstances, I will award \$20,000.00 under this head.

[13] I am of the opinion that the injury to Ms Tobitt is one which is at the top end of the moderate category for back injuries as described by the JSB Guidelines and in all circumstances I am of the view that \$50,000.00 represents fair and reasonable compensation for pain and suffering and loss of amenities for the injuries sustained by Ms Tobitt.

[14] The assessment of what future medical surgery would cost was submitted by way of an estimate in the sum of \$60,829.65. It is not desirable that Ms Tobitt be first awarded the cost of attending a medical assessment and then made to return to the court for a further sum for the cost of the future surgery if it is ordered by the doctor. Mindful of avoiding any prejudice to either party, a judgment here that brings final closure to this matter is desirable in the circumstances I award a sum in the nature of a General Damage award in the sum of \$30,000.00.

Special Damages

[15] On the authority of Hayward and another v Pullinger & Partners Ltd (1950) 1 KBD 581 and Ilkiw v Samuels (1963) 1 WLR 991 it is established that special damages which are generally capable of exact calculation have to be specifically pleaded and proven. A quotation of Diplock J in Ilkew v Samuels (supra) is ample support for this proposition.

"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized... it is plain law... that one can recover in an action only special damage which has been pleaded, and, of course, proved."

[16] In the Particulars of Special Damage listed in the amended statement of claim filed herein on the 3rd April 2009, Ms Tobitt has claimed loss of wages and service charges from December 19th 2004 to April 2nd 2009. Regrettably this claim is completely unsubstantiated by any documentation or evidence whatsoever. There is no indication by letter, salary slip or otherwise that indicates what Ms Tobitt's earnings were, there is no indication that she had to leave because of her injuries, and further there is no medical evidence to support Ms Tobitt's claim that she is or was unable to work as a result of her injuries. I find it unsatisfactory that Ms. Tobitt has presented no evidence of her salary up to at least June 2005 when she states she stopped working with the Royal Antiguan. I

am not satisfied she did not receive service charges at that point. In the absence of any or adequate proof or documentary support, I am constrained to disallow an award under this head of damages.

[17] Ms Tobitt does indicate that she was employed with the Royal Antiguan from September 2004 until or about May 2005. The medical report of March 2005 diagnosed that she was temporarily disabled in the full functions of her lumbo-sacral spine and that she would require final assessment to evaluate the total duration of her temporary disability and to calculate the percentage of permanent physical impairment if any. The next medical report in August 2009 states that she continued to suffer from low back pain on and off and diagnosed her as being 8% permanently disabled. The report gives no indication as to the duration of her temporary disability however Ms Tobitt indicates in her affidavit of the 18th June 2010 that Royal Antiguan paid her salary up to June 2005 and her medical expenses up to the date of judgment except billing for a consultation and medical report from Ortho Medical Associates in the sum of \$930.00. I accordingly make an award of special damages in the sum of \$930.00

[18] Interest is awarded to a claimant in a personal injuries case on the sum awarded for general damages. Interest is awarded to a claimant in a personal injuries case on the sum awarded for general damages for pain and suffering and loss of amenities prior to Judgment. Interest on this sum is calculated from the date of the service of the claim form to the date of judgment at the rate of a short-term investment. After judgment, the claimant is entitled to the full amount awarded at the statutory rate of 5%.

[19] Costs in this claim are to be assessed as prescribed under Part 65.5(1) of the Civil Procedure Rules 2000. The general damages to be awarded are EC\$100,000.00 and special damages of EC\$930.00 which amounts to EC\$100,930.00.

[20] In keeping with Appendix B, costs are calculated up to default judgment and the assessment of damages in the sum of EC\$14,483.70.

Summary of Order

[21] In summary, the following is the order on the assessment of damages:-

1. The defendant will pay the sum of EC\$100,000.00 as the aggregate award for general damages to the claimant.
2. The defendant will pay, in addition, the sum of \$930.00 as special damages
3. The defendant will pay interest at the rate of 3% on the sum of EC\$930.00 from the date of service of the claim (27th January 2006) to date of the judgment (6th May 2009)
4. The defendant will pay interest on the total judgment sum of EC\$100,930.00 at the rate of 5% per annum from today's date until payment.
5. The defendant will pay Ms Tobitt's prescribed costs in these proceedings in the sum of \$14,483.70.

Cheryl Mathurin

Master