[2014] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 46/2010

BEFORE:	**THE HON MRS JUSTICE HARRIS JA** **THE HON MISS JUSTICE PHILLIPS JA** **THE HON MR JUSTICE BROOKS JA**	
BETWEEN	**RACQUEL BAILEY**	**APPELLANT**
AND	**PETER SHAW**	**RESPONDENT**

Miss Catherine Minto instructed by Nunes Scholefield DeLeon and Co for the appellant

Kwame Gordon instructed by Samuda and Johnson for the respondent

16, 17 July 2013 and 30 January 2014

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasons and conclusion and have nothing to add.

PHILLIPS JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasons and conclusions. I have nothing to add.

BROOKS JA

[3] On 17 November 2002, Mrs Racquel Bailey suffered whiplash injuries when the vehicle in which she was a passenger, was struck from behind by a vehicle, owned and being driven by Mr Peter Shaw. Mrs Bailey filed suit in December 2004 in the Supreme Court of Judicature, and Mr Shaw did not contest liability. As a result, judgment by admission was entered in Mrs Bailey's favour with damages to be assessed. On 19 February 2010, G Brown J presided over the resulting assessment of damages, which Mr Shaw contested. The learned judge awarded Mrs Bailey the sum of $800,000.00 for general damages and $416,200.00 for special damages. He also awarded interest on each sum.

[4] Mrs Bailey is dissatisfied with the award. She contends that it is too small, being far less than her injuries and the resultant permanent disability warrant. She asks that this court substantially increases the award. The main issues for determination by this court are whether the learned trial judge misdirected himself in respect of the evidence led before him and whether he erred in accepting the opinion of a general practitioner in preference to that of an orthopaedic specialist.

The medical evidence

[5] Twenty-two days after her vehicle was struck, Mrs Bailey, who was by then suffering from backache, sought medical attention. She was attended to by Dr Terrence Nunes. He prescribed analgesics and sent her to have an X-ray done. He also prescribed physiotherapy. Dr Nunes, having reviewed the radiographs and a report from

the physical therapist who treated Mrs Bailey, also gave a report on her condition. In his report, dated 14 February 2003, he said, in part:

> "X-Ray Results indicated there were no bony injury [sic] but there were some muscular spasm [sic]. [Mrs Bailey] was sent to do physiotherapy. Report from the Physical Therapist showed great improvement and that she should be doing fine in the future."

[6] In March 2005, three months after filing her court claim, Mrs Bailey sought the services of Dr Milton Douglas, a consultant orthopaedic surgeon. He examined her and found that she was still suffering from the effects of the crash. In his report of his findings he stated, in part, as follows:

> "Her gait was normal and her posture relaxed. Her movement was smooth and [sic] was able to get on the examination bed unaided. Tenderness was elicited in the lower lumbar region and the muscles were in mild spasm. She complained of pain on forward flexion, right lateral flexion, rotation of the spine. Her ranges of movement were normal in spite [of] the pain she experienced. There was an absence of neurological deficit."

[7] Dr Douglas concluded that Mrs Bailey had reached maximum medical improvement and that she had suffered a permanent whole person disability rating of five percent. His prognosis explained that Mrs Bailey (whom he referred to as "Mrs Clarke" in his report) would be restricted in her daily life as a result of the injury. He said:

> "[She] has reached maximum medical improvement. Her injuries are in keeping with a road traffic accident as described above. Her injuries are considered serious. She will be able to continue working in the capacity as an accounting clerk providing she modifies her activities. She

> will have to be very selective with the kind of house work she does to avoid aggravating her back pain. She does not require surgery, but would benefit from ongoing physical therapy during periods of aggravation of her back pain. The long term prognosis is that her pain will persist in very much the same manner, restricting her ability to tolerate strenuous work or physically demanding tasks. She was assessed as having a disability rating of 5% of the whole person...."

[8] Mrs Bailey testified that she encountered discomfort in sitting for long periods and in bending forward, both of which her work requires her to do. She said that although she was supposed to seek treatment from a physiotherapist during bouts of pain, she, once a month, goes to a gym instructor who assists her by massages, certain exercises and using hot and cold packs on her back. She further testified that she was not able to afford the services of a physiotherapist.

The learned trial judge's assessment of the evidence

[9] The learned trial judge was not favourably impressed by Mrs Bailey, as a witness. He found that her demeanour was poor and that her evidence was not consistent with her medical history. He noted, in particular, that despite her evidence of her life being adversely affected by pain, her efforts at securing medical treatment for her condition were minimal. He noted that "she had only received treatment from one doctor and sought to obtain a report from a second some 2 years later". Allied to that finding, the learned trial judge found that Mrs Bailey did not follow the advice of her doctors in taking the prescribed analgesics and utilising the services of a physiotherapist in times of aggravation of her back pain. The learned judge found that Mrs Bailey had "embellished

and exaggerated the injuries to justify her claim for the extra help she continued to employ in her household".

The submissions

[10] Miss Minto, for Mrs Bailey, urged this court to find that the learned trial judge had misdirected himself in respect of the evidence. Learned counsel argued that the learned trial judge misquoted or misinterpreted the medical evidence in at least two spheres. Firstly, in respect of his finding that Mrs Bailey had not followed her doctors' advice, Miss Minto submitted that the learned trial judge had stated, at page five of the judgment, that Dr Nunes had opined that physiotherapy "would effectively heal her of the pain". Secondly, Miss Minto submitted that the learned trial judge had opined that Mrs Bailey's refusal to follow doctor Nunes' recommendations for a regime of painkillers and physiotherapy "could have exacerbated the injuries" (page 7 of the judgment).

[11] Learned counsel argued, however, that there was no evidence that Mrs Bailey had refused to take painkillers. She submitted that Mrs Bailey's evidence was that the painkillers did not assist. Miss Minto also submitted that there was no recommendation from Dr Nunes for her to take analgesics after the initial recommendation in 2002. In respect of the physiotherapy, learned counsel submitted that the evidence was that the physiotherapy did not heal her, as, having received the series of treatment by the physiotherapist, that same individual sold Mrs Bailey a "[therapeutic] roll for her back".

[12] Based on those examples, learned counsel submitted that the learned judge made a wholly erroneous estimate of the damages. In those circumstances, she argued, this court should look at the decided cases and make an appropriate award.

[13] Mr Gordon, for Mr Shaw, submitted that the learned trial judge was correct in finding that Mrs Bailey, in failing to follow the advice of the doctors, had not mitigated her loss, as she was obliged to do. He argued that the findings of the learned trial judge, "who relies, in part, on his impression of a witness ought not to be disturbed unless there are good reasons to do so or the judge's findings fly in the face of the evidence".

[14] There is merit in the submissions of both counsel. It is true that the learned trial judge did misdirect himself in respect of some elements of the evidence. Firstly, there was no evidence that physiotherapy and painkillers would have healed Mrs Bailey. Secondly, although Mrs Bailey did say in cross-examination that she did not like to take painkillers, it was speculative to say that Mrs Bailey's failure to follow the doctor's recommendations "could have exacerbated the injuries". If that statement were not contrary to the medical evidence, it certainly was not supported by that evidence.

[15] Despite that error, the learned trial judge's assessment of Mrs Bailey's demeanour, having seen and heard her giving testimony, supplied him with a perspective that this court does not have. In addition, there is logic to the learned trial judge's finding that Mrs Bailey's disability could not have been as severe as she had testified. The evidence revealed that she did not seek any medical attention about her

condition after seeing Dr Nunes. The learned trial judge found, and that certainly seemed to have been the position, that her attendance on Dr Douglas was solely for the purpose of securing a medical report. It does seem that his assessment of Mrs Bailey's reason for consulting Dr Douglas did cause the learned trial judge not to have taken into full account Dr Douglas' opinion as to her disability. Based on Dr Douglas' opinion, Mrs Bailey could not have been considered as "doing fine", two years after the crash.

[16] These are not irreconcilable circumstances. This court can accept the learned trial judge's assessment of Mrs Bailey's veracity and demeanour, while also accepting the thrust of Dr Douglas' report that she does and will continue to suffer adverse effects from her injury. In doing so, however, the court is obliged to review the evidence against the learning provided by the decided cases. The court will however, bear in mind the principle enunciated by Greer LJ in **Flint v Lovell** [1935] 1 KB 354, that the award by the judge in the court below should not be disturbed unless, the court is satisfied that the judge either acted upon some wrong principle of law or that the award was unreasonably high or unreasonably low.

Analysing the damages for pain and suffering

[17] With regard to the question of general damages, Miss Minto cited several cases including **Dawnett Walker v Hensley Pink** SCCA No 158/2001 (delivered 12 June 2003) and **Sasha-Gay Downer (bnf Myrna Buchanan) v Anthony Williams and Another** Khan, Vol 6, page 124. She submitted that, based on the guidance provided

by these cases, an appropriate award for general damages would be between $1,500,000.00 and $2,900,000.00.

[18] Mr Gordon argued that the cases cited by Miss Minto involved injuries that were more serious than Mrs Bailey's. He submitted that the case of **Anthony Gordon v Chris Meikle and Another** Khan, Vol 5, page 142, upon which the learned trial judge had relied, was closer to the injury and disability that Mrs Bailey had suffered. Learned counsel submitted that the award made by the learned trial judge was appropriate to the circumstances of the case.

[19] Of the cases cited by Miss Minto, the two closest to Mrs Bailey's, in terms of injury and disability, are **Sasha-Gay Downer** and **Dawnett Walker** mentioned above. The other cases cited either had no quantified disability or involved much more serious injuries than Mrs Bailey's.

[20] Sasha Gaye Downer was just over 12 years old at the time of her injury which occurred when, as a result of a motor vehicle crash, she was thrown from a bus onto the roadway. She was treated at the time at hospital and sent home with medication and instructions to rest for 14 days. In December 2003, 10 months after the crash, she consulted with Dr R C Rose, an orthopaedic surgeon. He diagnosed her as having:

(i) cervical strain,

(ii) mechanical lower back pain, and

(iii) strained abductor muscles of the left thigh.

Dr Rose examined her again in the months of March and May 2005. On the latter occasion the law report shows that Dr Rose found marked tenderness on palpation of midline of the lower lumbar spine. It continued to state that:

> "He diagnosed mechanical lower back pains. He changed her disability **rating to 5% of whole person** due to precipitation of lower back pains after standing for short periods, performing physical education and bending…" (Emphasis as in original)

Miss Downer was awarded the sum of $1,005,150.00 in July 2007. That award would have been worth $1,476,935.78 when Brown J delivered his judgment.

[21] Dawnett Walker was 36 years old at the time when she was injured in a car crash. The injury to her neck resulted in her being referred to an orthopaedic surgeon the same day of the crash. The injury kept her away from work for over 16 months. She was under the treatment of a physiotherapist for seven months, at the end of which period she was referred to a consultant neurosurgeon, as she was in constant pain. She suffered from "extreme pain to her neck, shoulder, upper back and right arm and numbness to the fingers of the right arm" (pages 2-3 of the judgment). She also was assessed as having sustained a permanent disability of 5% of the whole person. This court awarded her general damages of $650,000.00 in substitution for an award made in December 2001. The updated award would have been $1,672,194.71 at the time when Brown J made his award to Mrs Bailey.

[22] In **Anthony Gordon**, cited by Mr Gordon, the 27 year old claimant was found, over three years after a motor vehicle crash in which he was injured, to be suffering

from cervical strain, contusion to the left knee and lumbo sacral strain. The specialist, who examined him, found that he had "moderate tenderness on palpation of the midline of the whole of the lumbar spine". The specialist also stated that "X Rays of the cervical spine, lumbo sacral spine, chest and left knee revealed no abnormalities". Mr Gordon was assessed to have a permanent disability of 5% of the whole person. The report is sparse in its description of the effects that the rated disability had on his life. The award of $220,000.00, made in July 1998, updated to $645,854.87 at the time of the assessment by Brown J.

[23] A reading of the cases cited above, reveals that both Sasha Gaye Downer and Dawnett Walker had suffered greater pain and suffering than Mrs Bailey, while the report of Anthony Gordon's injury does not reveal that he suffered as much pain and inconvenience as she did. The fact that the learned judge did not seem to have given effect to Dr Douglas' prognosis of Mrs Bailey's condition, would suggest that she would be entitled to a greater sum for pain and suffering than the figure that he awarded. At the same time, it must be recognised that her condition has not been so severe that she has had to be seen by a doctor.

[24] Mrs Bailey was 33 years old at the time of the crash. It cannot be ignored that Dr Douglas considered her injuries as serious. In that regard, Mrs Bailey said, in part, at paragraph 12 of her witness statement that:

> "The pain just comes on sometimes. There is never a week I [sic] that I don't feel some pain. But I now know what brings it on and how to lie down in order to ease the pain and that if I sit, I have to be comfortable. Because there is

> no cure for the pain, I have made adjustments to my life to deal with it. I know certain things I should not do, so I don't do it…."

[25] Based on those considerations, an award of $1,000,000.00 would be a more appropriate award for pain and suffering and loss of amenities.

Analysing the award for special damages

[26] The main aspect of Mrs Bailey's claim for special damages was her claim for recovery of the expenditure on domestic help. After her injury, she hired a domestic helper to work full-time. In his assessment of this aspect of Mrs Bailey's claim, the learned judge took the view that it was exaggerated because she had failed to mitigate her loss. He, therefore, awarded her one-half of her claim under that heading. He said, at page 8 of his judgment:

> "…The failure by her to mitigate her loss must reduce her claim [in respect of the costs of a household helper].
>
> The Claimant had claimed extra help of $780,000.00…Counsel for the Defendant argued that she should be awarded 50% of her claim. I am minded to accept this suggestion in view of her failure to mitigate."

[27] Miss Minto complained that the learned trial judge's halving of this aspect of Mrs Bailey's claim was based on a flawed assessment of the evidence. Learned counsel argued that the learned judge came to his conclusion on this aspect because of his view of the evidence regarding Mrs Bailey's use, or the lack thereof, of painkillers and physiotherapy.

[28] Mr Gordon submitted that the learned judge had correctly assessed the claim for expenditure on household help because Mrs Bailey had failed to specify the need for that help. Learned counsel argued that the medical evidence did not specify the things that Mrs Bailey could not do. He also submitted that although Mrs Bailey did say what household tasks brought on the pain, the learned trial judge rejected her evidence on this aspect because of her lack of credibility. Mr Gordon submitted that Mrs Bailey had failed to justify her claim for the cost of a full-time helper.

[29] Mr Gordon's submission has provided a reason for the reduction of this aspect of the claim that the learned trial judge did not, himself, specifically advance. The learned trial judge's reason, as set out in the quote above, was, as Miss Minto submitted, Mrs Bailey's failure to mitigate her loss. The flaw in that reasoning has already been discussed. The reduction of the claim on that basis cannot, therefore, be sustained.

[30] Mrs Bailey's claim in this regard, is supported by the medical evidence. Dr Douglas, in his report mentioned above, said that she "will have to be very selective with the kind of house work she does to avoid aggravating her back pain". In her testimony in respect of this aspect of the claim, Mrs Bailey said that there were certain household tasks that she could not do. At paragraph 12 of her witness statement, she said, in part:

> "…I know that if I sweep or wipe, the pain comes on in my lower back, so I don't do it [sic]. Washing is a no-no, not even using a washing machine, because I have to bend to sort the clothes. So I hired a helper after the accident."

In cross-examination she said that the helper washes, cleans the house, sweeps the yard and does the ironing. On her testimony, the helper does everything except cooking.

[31] It is true that the learned trial judge was less than impressed with Mrs Bailey as a witness. He "was of the opinion that [she] embellished and exaggerated the injuries to justify her claim for the extra help she continued to employ in her household and sought to recover from [Mr Shaw]". His view of her testimony cannot, however, allow him to ignore the uncontested medical evidence from Dr Douglas.

[32] The cross-examination of Mrs Bailey did not demonstrate that she could have properly operated with a part-time helper. She said that the only household task that she could do without being affected by pain is cooking. Whether that is an exaggeration or not it does seem that Mrs Bailey did have a need for daily household tasks to be done by a helper. Her children were very young at the time of her injury, being two plus and three plus years old respectively. They would not have been able to assist with those daily chores. With the passage of time the children would be able to assist in the household and, therefore, there is merit in the learned trial judge making no award for future expenses for the household assistance.

[33] It does seem, therefore, that the learned trial judge erred in refusing Mrs Bailey's claim for compensation for her hiring a full-time helper. Accordingly, the award for this item should not have been halved as the learned trial judge ordered.

[34] It should be noted, however, that there were some difficulties with Mrs Bailey's claim as set out in her amended particulars of claim. Instead of claiming $780,000.00 for the period 1 December 2002 to 31 December 2006 at $3000.00 per week, the sum should have been $636,000.00. In addition to the figure of $780,000.00, there was a claim for $45,000.00 for the period from 1 January 2007 purportedly to 9 March 2009 at the rate of $4,500.00 per week. The period covered was certainly more than the 10 weeks that that calculation suggests. In the absence of an explanation for those totals, the total of $681,000 ($636,000.00 + $45,000.00) should be granted for this item. In addition to the claim for household help, the learned trial judge awarded the sum of $26,200.00 as re-imbursement for other expenses. When that figure is added to the sum of $681,000.00, special damages would be increased from $416,200.00 to $$707,200.00.

Conclusion

[35] The learned trial judge erred in his interpretation of the medical reports and in his finding that Mrs Bailey had refused to follow the treatment regime that her doctors had recommended. He did not give sufficient weight to the fact that the orthopaedic specialist had opined that Mrs Bailey had suffered a 5% whole person disability and that, as a consequence, there were certain things, including household tasks, which she would not have been able to do. Accordingly the awards made, both for pain and suffering and loss of amenities and for special damages in respect of the hiring of a household helper, did not properly reflect that evidence. The decided cases support a finding that the award for general damages should be increased to $1,000,000.00. It is

also required that the award for the expenditure on the household help should be increased to $681,000.00. All other orders made by the learned judge should remain in place. Costs should be awarded to the appellant to be taxed if not agreed.

HARRIS JA

ORDER

It is ordered as follows:

a. The appeal is allowed.

b. The award for pain and suffering and loss of amenities is hereby set aside and a sum of $1,000,000.00 substituted therefor.

c. The award of $416,200.00 for special damages is hereby set aside and a sum of $707,200.00 substituted therefor.

d. All other awards by the learned trial judge should stand.

e. Costs of the appeal to the appellant to be taxed if not agreed.