



[2013] JMSC Civ. 168

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM No. 2006 HCV 03177

BETWEEN	VERONICA IRVING	CLAIMANT
AND	BRIAN ROWE	1ST DEFENDANT
AND	PHILLIP PEART	2ND DEFENDANT

Miss C. Hudson instructed by K. Churchill Neita & Co.
for the Claimant

Mrs. K. Sewell and Miss M. Reid instructed by Nunes,
Scholefield, DeLeon & Co. for the Defendants

Written submissions ordered to be filed by 14th March 2011; received 9th
September, 2011

Heard: 25th February, 2011 and 8th November, 2013

***Assessment of Damages – Medical Injuries – Nexus between accident and
injury - Expert Witnesses – Conflict on findings – How resolved***

Coram: Morrison, J

I will not attempt to hide under cover of an excuse for the late delivery of this judgment. At the date of this judgment, despite reminders, I am yet to receive further submissions so earnestly insisted upon as being necessary for the completion of the presentation of the written submissions. Significant time has since passed, I too have been overly remiss. For that I offer my sincere apology.

[1] “It is common for Judges to have to decide between conflicting expert evidence. When this happens the duty of the judge is to make findings of fact

and resolve the conflict": **Sewell v. Electrolux Ltd.** (1997) The Times, 7th January, 1997.

The divergent medical opinions that have been engendered in the case at bar are not irresolvable.

The Issue

[2] The critical question, raised to its zenith, is whether the diagnostic finding that the Claimant is afflicted by multi-level disc disease in the cervical spine is attributable to the vehicular accident in which she was injured on the 8th January, 2006.

The Claim

[3] Tersely put, the claim is for injuries sustained as a result of the first and second Defendants' acknowledgment (at the time of assessment) that their vehicle had rear-ended the vehicle in which the Claimant was a passenger.

[4] The particulars of injuries that the Defendants had to meet were itemized in the Claimant's second, Further Amended Particulars of Claim, filed on May 28, 2008. They are –

- (1) whiplash injury;
- (2) painful movement in the neck, right shoulder, posterior chest and lower back;
- (3) persistent neck and lower back pain;
- (4) limitation of motion in neck to due to pain;
- (5) pain in neck and upper back accompanied by muscle guarding spasm;
- (6) 8% whole person disability.

The prognosis as pleaded speaks to the Claimant being likely to have intermittent flares of axial pain in the neck and back due to whiplash.

[5] The defence of the first and second Defendants was filed on November 15, 2006. At paragraph 7 the Defendants say, "they do not admit the particulars of injury and damages as alleged ... and require that the Claimant provide strict proof of her injuries, damages and loss."

The Facts

[6] Permit me to re-trace the events that has led to the present disagreement. Ms. Veronica Irving a District Constable and a quinquagenarian in 2006 was on the 8th January of that year, a passenger in a motor vehicle registered PC 1167 as it travelled along Greenwood Road, St. Catherine when by reason of the acknowledged negligent driving of motor vehicle registered 8901 CC the latter collided with the rear of the former resulting in injuries to the Claimant's person. Chronologically, the Claimant was obliged, because of her injuries, to seek out medical services and expert opinions which produced various reports that are contained in Exhibit 1, 2A, 2B, 2C, 3A, 3B, 3C, 4A and 4B.

[7] The Claimant saw one Dr. Joan Chung on the day following the accident. Dr. Chung's report speaks to the Claimant's narration to her of painful movements of the neck, pain in the right shoulder, posterior chest and low back pain. In consequence, Dr. Chung prescribed a course of analgesics and muscle relaxants. So far unremarkable.

[8] The Claimant's next medical encounter was with Dr. Mark Minott, Consultant Orthopaedic Surgeon. This was on 7th February, 2006 and was on the recommendation of Dr. Chung. The generated report is dated December 4, 2006 (Exhibit 2A). In it Dr. Minott says "her neck was extremely tender with little or no movement in any plane of the neck. There was no sensory or motor deficits in her upper limbs." He diagnosed the Claimant as having suffered a severe whiplash injury, hence, "She was given a new prescription for analgesia, prescribe a soft collar to be worn during her periods of transportation in a car and to obtain physiotherapy to the neck."

[9] On March 8, 2006 the Claimant returned to Dr. Minott for evaluation and complained of neck pains. According to Dr. Minott, the Claimant was not able to do the recommended physiotherapy due to her state of penury.

[10] He was to see her again on April 5, 2006 on her follow up visit. "She was indeed much better with her neck pain and the range of motion in her neck. The pain in the hands was now resolved." However, rejoins Dr. Minott, his patient "still had pain at the limits of her range of motion." Again, physiotherapy, among other recommendations, was advised.

[11] On May 10, 2006 she reported to Dr. Minott that in spite of physiotherapeutical intervention she "had severe pain in her neck to her lower back. She had not taken any analgesic for one week and on physical examination there was a poor range of motion in her neck." Continuing, Dr. Minott says that, by June 20, 2006, though there was some improvement his patient still had significant pain with reduction of range of motion in her cervical spine.

[12] From July 18, 2006 through to September 27, 2006 to November 1, 2006 the essence of Dr. Minott's findings related to the range of motion in her neck with tenderness to her paraspinal muscles, pain in the neck and mid-back region, poor range of motion in her thoracic lumbar and lumbar sacral spine. She was diagnosed as having fibromyalgia in her neck and back and, significantly, as not having radiculopathy: "the deep changes to the state of the nerves caused by disorder usually in the canal where the nerves make its exit from the spinal cord." (according to Dr. Minott))

[13] From Dr. Minott's report of January 10, 2008 he gave in respect of the Claimant a permanent impairment rating of 8% of the whole person based on his opinion that, "she is likely to have intermittent flares of axial pain in her neck and

upper back” owing to the whiplash injury. However, Dr. Minott revised downwards, his December 1, 2008 report in respect of the Claimant’s whole person impairment to 3% it being a cervical strain with permanent impairment of 1% and thoracic spine permanent impairment of 2%.

[14] Hence these tears: The Defendants are aghast at the permanent impairment rating assigned by Dr. Minott and moreso as we shall later see, that of Dr. Dundas. Enter the records of Dr. Konrad A.R. Lawson, registered medical practitioner with the Medical Council of Jamaica with qualifications BSc; MBBS; and FRCS. This Consultant Orthopaedic Surgeon with the South Eastern Regional Health Authority parades a no less professional resumé which bespeaks his illustrious capacity. In his report of January 5, 2011 he iterates that “I am acting as an expert witness for the purpose of evaluation” of Veronica Irving by consultation to assist the Supreme Court in its deliberations. He had perused Dr. Minott’s written medical reports, referred to his earlier report of January 15, 2010 and to a letter from K. Churchill Neita dated February 1, 2010. I now quote in part from his report of January 5, 2011: “I have reviewed my records concerning this patient and continue to stand by my findings as reported on January 20, 2010. Based upon the history related to me by Miss Irving, along with my findings on physical examination on the 8th day of December, 2009, my diagnosis remains that of a soft tissue injury of her neck and back resulting from a Class I cervical strain.”

[15] Let me pause to throw some retrospectant light on the report of January 16, 2010. Here, as before, Dr. Lawson says that “he was mindful of his obligations to assist the Court in its deliberations”. In this report he described her then current symptoms as intermittent pains in her neck and lower back. From the sub-headings, “History”, there is this important piece of information: “Ms Irving also reports that she was referred by Dr. Dundas to have MRI studies done but she is unaware of the results.” Under sub-head, “Physical Examination”, he reports that Miss Irving demonstrated a near normal range of motion of her neck

and back with some discomfort shown and that “no significant spinal tenderness was demonstrable.” He diagnosed her as experiencing on-going intermittent painful symptoms from soft tissue injury to her neck and back and rated her whole person impairment at 1%.

[16] It was from the 15th January, 2011 *vis-à-vis* the January 5, 2011 that he recruited his steadfastness of a 1% whole person impairment rating as “Miss Irving demonstrated no evidence of either a spinal instability or spinal nerve deficit from impingement. Nothing in her history or examination findings at that time (15/11/2011) suggested to me that further investigations, radiographic or otherwise were indicated.” However, at the time of producing the January 5, 2011 report Dr. Lawson had the benefit of seeing Dr. Dundas’ addendum in which the latter diagnosed Miss Irving as having multi-level ‘disc disease’”, about which he Dr. Lawson “can neither concur with nor refute as it must be based on his findings at the time of performing his examination and investigation of Miss Irving.” He dilates that “Such a condition can be demonstrated on radiographs or magnetic resonance imaging (MRI).”

When the emphasized portions of the extracts from Dr. Lawson and Dr. Dundas are juxtaposed it is evident that Dr. Dundas’ examination of Miss Irving was more thorough-going as he had used more of the enabling diagnostic tools at their disposal in helping to assess the medical condition of Miss Irving.

[17] What is Dr. Dundas’ finding? These reports were tendered by him and are dated 13th March, 2009, 31st August, 2009, and 7th February, 2010. From the March 13, 2009 report Dr. Dundas entertained chronic cervical strain and chronic lumbar strain. Investigations were ordered and in consequence Radiographs were done which revealed a loss of lumbar lordosis and degenerative disease at L3/4 and L2/3. In the cervical spine there was cervical spondylosis involving C4/5, C5/6 and C6/7. No instability was demonstrated in dynamic views. (My emphasis)

In his opinion, Dr. Dundas emphatically says that, "His patient's extent of complaint seems to exceed her demonstrable radiographic pathology." In other words, her overwrought complaints were incompatible with and unconfirmed by the use of the relevant diagnostic tools.

The August 31, 2009 report, in fine, rested on a finding that she had multi-level disc disease in the cervical spine for which "the residue in this area would amount to 19% of the whole person. The lumbar disease (from his earlier report) would be classified as Category 1 which amounts to about 5% of the whole person. The combined impairment would be twenty-three percent (23%) of the whole person" (sic). The radiographs referred to earlier and on which Dr. Dundas had relied had been done by Medical MRI Services (Ja.) Ltd under the auspices of Dr. Trevor N. Golding who, opined that Miss Irving had multi-level disease most severe at C6-C7.

[18] Finally, the February 7, 2010 report of Dr. Dundas flays the January 27, 2010 report of Dr. Lawson in relation to the multi-level disease and its attendant rating of 19% of the whole person using the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition, page 564. He concludes, rather disapprovingly, "I am therefore not sure of the basis for Dr. Lawson's computation of his impairment."

[19] One of the four (4) professionals who interacted with the Claimant, directly or indirectly, only two (2) gave *viva voce* evidence and were cross-examined. However, it has to be said that Dr. Dundas' findings as to 23% permanent impairment rating of the whole person of the Claimant is fraught with inconsistency he having earlier expressed a contrary view. One would think that having been so advised by Dr. Golding that an explanation would have been forthcoming. However, that is to stray from the point. Absolutely no nexus was established between the accident and the finding of Dr. Golding and the derivative finding of Dr. Dundas. It remained an open question. In short, I cannot place any great store on Dr. Dundas' findings. Dr. Joan Chang's report obviously

does not assist in establishing the nexus. This leaves me with the reports of Drs. Minott and D. Lawson. I prefer the findings of the report of Dr. Minott if only because it was at a lesser remove from the date of the accident to that of Dr. Lawson as by the time Dr. Lawson saw the Claimant the Golding "disc disease degeneration" finding and that of Dr. Dundas had already materialized.

[20] It is to be noted that whereas Dr. Minott's December 1, 2006 report was based on the Claimant's chronic cervical and thoracic spine pain due to her whiplash injury. Dr. Lawson's January 5, 2011 report was based on "a diagnosis of a cervical strain type of soft tissue injury only." Dr. Lawson's report seems not to have treated with the "thoracic" aspect of Dr. Minott's report. Is it that by the time that Dr. Lawson saw the Claimant, that is, 15th January, 2010, her medical condition had so abated, so as not to throw up any concern, if indeed there was any, as to the Claimant's "thoracic" findings by Dr. Minott? If one considers that by January 10, 2008 Dr. Minott was of the view that the Claimant had reached maximum medical improvement, would this explain the differences between the two reports? In any event, Dr. Lawson had the benefit of seeing Dr. Minott's report and nary a word was said, both in his reports and in his testimony, about the emphasized difference. Certainly, from my vantage, Dr. Lawson ought to have shed some light on that aspect of their differences. None was forthcoming and I therefore accept Dr. Minott's rating of 3% permanent impairment on the whole person.

[21] Notwithstanding, I can derive no finding of fact, not from the reports or testimonies, that the Claimant had a pre-existing condition which would have pre-disposed her to prolonged pain from a whiplash injury or to have developed multi-level disc disease. Not dissimilarly, there can be no finding of fact to suggest that the trauma of the accident had exacerbated or accelerated any pre-existing degenerative proceed. Thus, it was not open to this court to abide the submission that the Claimant had asymptomatic multi-level disc disease which had now worsened to its symptomatic manifestation.

[22] Accordingly, I am to turn my face against the 23% rating of Dr. Dundas even as I embrace the 3% rating by Dr. Minott.

The Law

[23] It is trite law that in a civil trial the facts in issue are those which the Claimant must prove in order to succeed in his/her claim together with those which the Defendant must prove in order to succeed in his/her defence. The facts in issue are determined by reference to the substantive law and by reference to what is alleged, what is admitted or not and what is denied. Having so fulfilled that obligation what the Claimant had then to establish was, that the accident was the direct cause of her multi-level cervical degenerative disc disease. The calculus of that probability in this case is not supported by the medical evidence. It is no part of the duty of the court to speculate as to whether or not this is so: **Cherry Dixon-Hall v. Jamaica Grande Limited**, SCCA No. 26/2007 decided on 21/11/2008. Here the Court of Appeal confirmed the lower court's decision that the Claimant had failed to prove a nexus between the accident and her injury. Causation had not been established.

[24] Apropos, is the case of **Horrel Patterson v Econocar Rentals Ltd.**, Suit No. C.L. 1991/p 146 decided by K. Harrison, J. (Ag.) as he then was. The evidence was that as a result of an accident the Claimant experienced pain in the neck, back and leg and in consequence he had to undergo continuous medical treatment for (8) months. It was revealed that the Claimant had degenerative disc disease. In the final analysis the Court accepted the medical opinion that the disc disease was caused by natural wear and tear, that is, the aging process. It is quite apposite that I quote from that judgment: "But it is quite evident from the medical evidence presented that age is a factor to take into consideration when one thinks of degenerative disc disease ..."

[25] There as here, the Court did not find any evidence to show that the accident caused or accelerated the disc disease condition. On the strength of the above authorities I am impelled to the view that, in fact and in law, the claim at bar suffers from a deficit of proof.

Quantum of Damages

[26] To adopt a descriptive phrase, there is a “yawing gulf ”of a difference between the claim for general damages of between \$5,500,000.00 and \$6,000,000.00 and that of \$1,300,000.00 as submitted by the Defendants. However it has to be borne in mind that the claim for general damages was based on a 23% ruling for permanent impairment. Even as I discount that rating I bear in mind the cautionary words of Forte, J.A. in **Pogas Distributors Ltd., et al v. McKitty**, S.C.C.A. 13/94 and 16/94: “The learned trial judge misdirected himself by looking at percentages and did not properly address the injuries and the period of total incapacity ...”

[27] In this respect I am guided also by **Cornilliac v. St. Louis** (1968) 7 W.I.R. 491 where the relevant considerations for fair and reasonable compensation was set out by Wooding, C.J. to be –

- a) the nature and the extent of the injuries sustained;
- b) the nature and gravity of the resulting physical disability;
- c) the pain and suffering endured;
- d) the loss of amenities endured; and
- e) the effect on future pecuniary prospects.

General Damages

[28] In deference to counsel for the Claimant I should not be interpreted as saying that I have not considered the cataract of cited cases supplied only that I find some of them to be inapposite having regard to my findings of fact. Having said that, the invitation by the Defendant’s counsel to treat with Dr. Lawson’s

report in preference to that of Dr. Minott, is revisited for the reasons as have been advanced, still I pay no particular regard to percentages only.

[29] In the summary of Dr. Minott's December 4, 2006 report, he concludes that "Veronica Irving has had a temporary disability lasting eleven months, although she has been to work intermittently during this time. No comment can yet be made on the extent of her permanent impairment". In his subsequent report of January 10, 2008 he gave her an impairment rating of 8% of the whole person on the basis that, "although she is working intermittently since December 2007, she is having great difficulty coping with her employment and the use of the public transportation system. In my opinion she is likely to have intermittent flares of axial pain in her neck and upper back because of this whiplash injury ..."

[30] In his report of December 1, 2008, be it noted, he says, he was asked to review his findings in light of the new guidelines outlined in the 6th Edition of the American Medical Association, "Guides to the Evaluation of Permanent Impairment". This he did, as I have already adverted to. However, Dr. Minott did not resile from the qualitative analysis which he gave in his report of 10th January 2008. In fact Dr. Lawson's report did not make for a great difference with that of Dr. Minott's report. In his January 15, 2010 report, under the sub-head "Impairment Rating", he offers the view that, "it is possible that she may continue to experience these symptoms indefinitely and she may have to consider retiring her job as result." In this their area of general agreement, it is that the quality of the Claimant's life has been and is likely to be compromised. Accordingly, of the triad of cases relied on by the Defendants, namely, **Trevor Benjamin v. Henry Ford and Others**, Claim No. HCV 02876 of 2005; **Richard Asphall v. David Daley**, Claim No. 2005 HCV 1528 and **Dalton Barrett v. Poncianna Brown and Leroy Bartley**, Claim No. 2003 HCV 1358, I inclined to the **Dalton Barrett** case, supra, case in preference to the others, the injury being somewhat similar. However, in the latter case, it is observed that after (9) months the Claimant healed without disability, whereas in the present case the

Claimant may continue to experience the symptoms of flares of axial pain in her neck and upper back. What ought to matter is not the percentages that have been assigned as the permanent impairment rating but rather the injuries and the period of total incapacity.

[31] The facts of the **Dawnette Walker** case, supra, makes it readily distinguishable for the instant case and is thus inapplicable. So too are the cases of **Marcia McIntosh**, **Stephanie Tilmut** and **Carrington Mahoney**. In the **Dalton Barrett** case he was diagnosed with mechanical lower back pains and a mild cervical strain. He was prescribed physical therapy and lifestyle modification. The physical therapy proved to be so effective that by the time he was to see another doctor he became pain free. His permanent partial disability rating, not unsurprisingly, was given as zero percent. The award of \$700,000.00 for pain and suffering by Brook, J (as he then was) translated as of March 2011 with approximately \$1,300,000.00. As to the period of incapacity, it seems to have run from December 2, 2002 to October 2003.

[33] In the case at bar the Claimant's period of incapacity to POGAS is the controlling consideration. However, it is to be noted, that the present Claimant is a much older person than Barrett was at the time of their respect accidents. Of note is the proneness of flairs of axial pain to the current Claimant's neck and upper back which has led me to conclude that her period of incapacity will be greater than that of Barrett. Accordingly, I deem that an award of 1,800,000.00 is commensurate with her heath status.

[34] I now turn my focus on the claim for special damages. However, having to challenges mounted by the Defendant in respect of certain items deemed to be unsubstantiated, it suffices to say that special damages were agreed at \$190,549.09. The area of disagreement surrounds claims for transportation costs as well as costs for extra help.

Extra Help

Here the Claimant seeks to recover the sum of \$260,350.00. Absolutely, no documentary support was tendered in proof of this item.

In her testimony the Claimant says that she paid the sum of \$1500.00 per week for two years and that thereafter she spent between \$2,000.00 and \$2500.00 per week for extra work.

However, at paragraph 22 of her witness statement the witness says that: " The first year after the accident I was not able to do much household chores, even to wash small items I couldn't do. Gradually with time I improved and can now wash, but I cannot wash large loads. Doing even small loads bring on the neck pain, so as not to make it worse I have to wash in smaller load, over a 2-3 day period just to keep the back in acting up."

[35] On that evidence it is borne out with clarity that after one year Ms Irving was able to wash small loads. This confirms Dr. Minott's assessment of her injury. Accordingly, the claim as it stands has to be downgraded to compensation for one year's extra help.

Transportation

Here the Claimant seeks to recover the sum of \$47,800.00. She had to travel to the offices of Dr. Minott at Hope Road at \$3,000.00 per round trip, she having made thirteen trips to his office. Add to that her claim for travel to Dr. Dundas and to the St. Joseph Hospital at \$1,000.00 per round trip.

The complaint by the Defendant about the costs of transportation being excessive is I think over blown. In the first place to expect taxi drivers in Jamaica to issue receipts to passengers is rather fanciful. It simply does not consort with our social reality. Equally fanciful is the suggestion that the taxi fares to Hope Road and Half-Way-Tree does not show equality of costs. In any event I accept the evidence of the Claimant in this respect.

[36] Accordingly, I award the sum of \$47,800.00 for transportation costs. As to the cost of extra help I award the sum of \$72,800.00.

In the upshot, for special damages, I award the sum of \$311,049.89 with interest thereon from 8th January 2006 at 3% to the 8th November 2013. General Damages in the sum of \$1,800,000.00 with interest thereon from date of service of the writ to the 8th November, 2013. Attorney-at-law costs is awarded in the sum of \$40,000.00