[2014] JMSC Civ. 56

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2009HCV05998

BETWEEN	**KAREN REID**	**CLAIMANT**
AND	**HARBOUR VIEW MEDICAL CENTRE**	**1ST DEFENDANT**
AND	**MINISTRY OF HEALTH**	**2ND DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

Miss C. Hudson instructed by K Churchill Neita & Co. for the Claimant
Miss Alethia Whyte instructed by the Director of State Proceedings for the Defendant

Assessment of damages

Heard: March 4, 2014 and April 9, 2014
Lindo J. (Acting)

[1] The claim in this matter is for damages for negligence arising out of a misdiagnosis by nursing staff at the Harbour View Medical Centre. The claimant claims that she suffered injuries, loss and damage as a result.

[2] The claim and particulars of claim were filed on November 13, 2009 and the particulars of claim were subsequently amended and a further amended particulars of claim was filed on October 19, 2011.

[3] A defence was filed on January 10, 2011 admitting liability and on February 8, 2011 judgment on admission was entered against the 3rd defendant with damages to be assessed.

[4] The matter came on for assessment of damages on March 4, 2014 and the claimant was sworn and her amended witness statement filed on May 24, 2012 and further witness statement dated October 9, 2013 were admitted as her evidence in chief. The following documents were agreed:

medical report of Dr. Aggrey Irons dated July 1, 2009
medical report of Dr. Irons dated September 8, 2011
the response of Dr. Irons to questions asked on behalf of the 3rd defendant dated May 5, 2013, filed on June 5, 2013
medical report of Dr. Arscott dated January 17, 2011
medical report of Dr. Peter Swaby dated July 17, 2011
medical report of Dr. Irons dated February 20, 2013
medical report of Dr. Myo Kyaw Oo dated April 9, 2013
receipt from the National Public Health Laboratory, dated May 17, 2007.
Special damages were agreed at $44,000.00.

[5] In amplification of paragraph 13 of her witness statement dated December 2, 2011, she gave evidence that she left her community after the baby was born and that the baby was born on September 24, 2005.

[6] On extensive cross examination by Miss Whyte, attorney-at-law for the 3rd defendant, the claimant gave evidence of further tests taken by her and of a test done by her boyfriend. She could not recall the exact dates of the result of these tests but indicated that in 2005 she got results which were negative and she didn't know what to believe. She said she was "shocked, lost".

[7] The claimant indicated that the first time she sought counselling was after 2007 when she found out she was HIV negative and that she sought treatment in January 2009 when she saw Dr. Irons.

[8] In further response to counsel for the 3rd defendant, the claimant indicated that she did a second test at the Victoria Jubilee Hospital before getting back results for the first test and did not ask why a second test was being done. She further indicated that she started go to the Comprehensive Health Clinic after the baby was born as she got a referral to go there. She indicated that she did not have any signs of HIV and when asked what were the signs, she said vomiting, diarrhoea and so on. She further stated that cells in HIV patients break down but her cells were not like people who had HIV.

[9] In response to Ms. Hudson on re-examination, the claimant stated that she got the referral from the Victoria Jubilee Hospital to go to the Comprehensive Clinic.

[10] Counsel for the claimant submitted that general damages be assessed to take into account the fact that the claimant's HIV status was in the public domain; her relationship with her child's father came to an abrupt end as he denied paternity; she had to take anti-retroviral drugs for over two years; she had to undergo c-section which "never had to be because on the 5th day of September the second test result also proved that the initial test was inaccurate".

[11] Counsel was of the view that the factors outlined were good breeding ground for harbouring suicidal thoughts and to sink into deep depression as Dr. Oo found. She invited the court to bear in mind the principle that there is no doctrine of precedent in personal injury awards and suggested that in looking at comparable cases the court should be mindful of comments made by Sykes J. in the case of **Phillip Granston v The A G 2003HCV 01680** where at page 24 he said:

> *"...in assessing damages there is a subjective and an objective component. The subjective aspect is the specific effect on the particular claimant. The objective element*

> *focuses on similar injuries in the past. The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases."*

[12] Both Counsel cited the case of **Joan Morgan and Cecil Lawrence v UHWI and the AG. 2005HCV 00341** an unreported judgment delivered on December 19, 2007, as providing useful guidance for assessing damages related the psychological injury of post traumatic stress disorder (PTSD) and depression.

[13] In that case, Joan Morgan was also told she had an HIV positive result and she was examined by Dr. Irons whose first examination revealed that his findings were 'very invasive' and 'occupied Ms. Morgan's thinking to the exclusion of appropriately performing her daily routines'. He diagnosed her as having severe PTSD and indicated that her prognosis was poor. The second examination by Dr. Irons revealed that Ms. Morgan suffered from worsening phobic anxiety and sexual anmedonia leading to abstinence for the past year; that she lives in constant fear of sexual contact and there was no guarantee as to the 'outcome as the prognosis worsens with the passage of time'.

[14] Counsel for the defendant noted that the court in assessing the damages used the Guidelines for Assessment of Damages in Personal Injury Cases (Guidance Studies Board of England) and determined that the claimant fell into the category 'moderately severe' PTSD and made an award of $3,500,000.00 in December 2007. This updates to $6,346,746.57 using the CPI 211.8. She expressed the view that the degree of the PTSD suffered by Joan Morgan was more severe than the claimant in this case, when the findings of Dr. Irons in respect of each claimant are compared and suggested that in assessing the damages for pain and suffering and loss of amenities regard should be taken of the fact that the defendant will be making a payment for the cost of the claimant's future counselling to enable the satisfactory resolution of the claimant's disorder and discount the amount awarded.

[15] In relation to the scar as a result of the caesarian section. Counsel for the claimant expressed the view that the case of Keisha Banks (by next friend Lurline Mitchell) v Llewelyn, Khan, Vol. 4 page 138 is instructive. In that case the claimant sustained burns to her leg and suffered keloid scarring and on May 27, 1997 was awarded $325,000.00 which updates to $1,591,560.00. Counsel for the defendant cited the case of **Pamella Gabbidon v Oscar Mills** Vol. 5 Khan, pg. 210 as useful in determining an appropriate award. In that case the claimant suffered 2nd degree burns to both lower limbs, forearms and face, 20% of her skin was affected and she spent about three months in hospital. The doctor opined that the scars were permanent and because of their extent and type it was best not to interfere surgically. She was awarded $450,000.00 in November 1998 (CPI 48.83) which updates to $1,951,873.90 using the CPI 211.8.

[16] Counsel noted that the scar of the claimant in the instant case was to one area and was shorter than the scars of Gabbidon who had no hope of surgical intervention to improve them, while it was stated that surgery could result in 60% improvement for the claimant. Additionally, she indicated that the scars of Ms. Gabbidon were in areas that could not easily be covered but with the instant claimant, the scar being on her stomach, it could be easily covered with clothing.

[17] The evidence in relation to the cost for the proposed surgery to improve the scar from the caesarean section based on the medical report of Dr. Arscott is that it will be approximately $285,000.00. The report states that scar revision followed by treatment with superficial x-ray could improve approximately 60% of the nature and appearance of the claimant's scar. I will therefore make an award in the sum of $285,000.00. There is no evidence as to the cost of the medication which the claimant will be required to take. Any amount to be awarded in this regard must be based on facts as the court cannot make an assumption or be speculative. As a result I will make no award as it relates to the medication.

[18] The claimant is also claiming for aggravated damages for the defendant's failure to promptly disclose the test result. The claimant's evidence is that the doctors and nurses "somehow must have known" that she was not HIV positive. In coming to a determination on that issue, I place reliance on the judgment in the case of **Rookes v Bernard [1964**] 1 All ER 367 at 407 F-G where Lord Devlin said

> *"... moreover it is very well established that in cases where damages are at large, the jury,(or the judge) if the award is left to them can take into account the motives and conduct of the defendant where they aggravated the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong maybe such as to ignore the plaintiff's proper feelings of dignity and pride. They are matters which the jury can take into account in assessing the appropriate compensation."*

[19] There is no evidence that the defendant was malevolent or spiteful in not giving the test results to the claimant. I believe the mere failure of the doctors and nurses to promptly disclose to the claimant the result of the two tests which revealed that she was HIV negative is not a sound basis for making an award for aggravated damages and as such I will make no award under that head.

[20] I find that the claimant in the case at bar endured a greater degree of suffering than the 1st claimant in the case of Joan Morgan. In this regard, I do not agree with counsel for the defendant. The time which elapsed from the first diagnosis to the date Joan Morgan was told she was not HIV positive was about 2 weeks whereas the claimant in this case had to take medication for HIV, was advised against giving normal birth, had to undergo caesarean section with the resulting scar, was advised against breast feeding her baby which aroused the suspicion of other mothers who had also just given birth and she was not advised of her status until some two years after the first diagnosis.

[21] Using the Joan Morgan case as a guide, and based on the evidence that this claimant endured a longer period of doubt as to her HIV status and had to take medication for HIV and undergo surgery instead of having natural birth, I believe she

should be given an award in excess of that made to Ms. Morgan. I believe the award made in Morgan's case should be increased by at least 40% in order to reasonably compensate the claimant.

[22] On the issue of mitigation raised by the defendant's attorney, this court is of the view that a claimant may not recover losses which she should reasonably have avoided. Additionally, I accept that it is a question of fact and a defendant has the burden of proving by way of evidence what the claimant might reasonably have done but failed to do in minimizing his loss. In this regard, I agree with counsel for the claimant that there is no conclusive evidence before the court to satisfy the court on a balance of probabilities that the claimant acted unreasonably in waiting two years to take the confirmatory test at another institution when she did not receive the results of the further tests done at the Victoria Jubilee Hospital.

[23] I am guided by the decision in the case of **Geest PLC v Lannsiquot (St. Lucia)** 2002 UKPC (7 October 2002) PC Appeal No. 27 of 2001 referred to by Counsel for the claimant, where the issue for the Board was whether the claimant acted unreasonably in refusing surgery and therefore failed to mitigate her loss. Lord Bingham of Cornhill in delivering the judgment of the Board, at page 16 of the judgment had this to say:

> *'... it should however be clearly understood that if a defendant intends to contend that a Plaintiff has failed to mitigate his or her damages, notice of such contention should be clearly given to the Plaintiff long enough before the hearing to enable the Plaintiff to meet it. If there are no pleadings, notice should be given by letter..."*

[24] I do not accept that the claimant in this case acted unreasonably in failing to seek counselling or treatment during the time she thought she was HIV positive. I accept the opinions of Dr. Irons and Dr. Oo of the need for future psychiatric care and accept Dr. Iron's finding that she will need 18 to 20 sessions at an approximate cost of $10,000.00 per session, before her conditions are satisfactorily resolved. I will therefore make an award of $200,000.00**.**

[25] I have taken into consideration the submission by counsel for the defendant that as payment will be made for the cost of future counselling for the claimant the amount awarded for pain and suffering and loss of amenities should be discounted. I do not believe that fact is a good basis for discounting the award so I will refrain from so doing.

[26] Having considered the evidence and the cases referred to and in view of my findings, I believe an award of $8,500,000.00 for pain and suffering and loss of amenities to be fair and reasonable in the circumstances.

Damages are assessed as follows:

General damages:

pain and suffering and loss of amenities $8,850,000.00 with interest at 3% from November 23, 2009 to April 9, 2014.

Cost of future treatment for PTSD $200,000.00,

Cost of future surgery $285,000.00 – a total of $9,335,000.00

Special damages as agreed in the sum of $44,065.00 with interest at 3% from the April 2005 to April 9, 2014.

Cost to the claimant to be agreed or taxed.