[2023] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00041

BETWEEN	**TRUDY-ANNE SILENT-HYATT**	**APPELLANT**
AND	**ROHAN MARLEY**	**1ST RESPONDENT**
AND	**JASON WALTERS**	**2ND RESPONDENT**

Miss Yualande Christopher instructed by Yualande Christopher & Associates for the appellant

Miss Faith Gordon instructed by Samuda & Johnson for the respondents

1, 2 November 2022 and 28 April 2023

MCDONALD-BISHOP JA

[1] I have read, in draft, the judgment of Straw JA and I agree with her reasoning, conclusion and proposed orders. There is nothing I could usefully add.

STRAW JA

[2] On 19 February 2021, following a trial, Lindo J ('the learned trial judge'), awarded judgment in favour of Mrs Trudy-Anne Silent-Hyatt, the appellant, against Messrs Rohan Marley and Jason Walters, the respondents, in respect of the appellant's claim for damages for negligence. The claim arose from a motor vehicle accident that occurred on 15 April 2016, when a motor truck operated by Mr Walters (and owned by Mr Marley) rear-ended the appellant's motor vehicle as they travelled in the same direction along Half Way Tree Road in the parish of Saint Andrew. Further to that judgment, the appellant was awarded the sums of $5,000,000.00 for general damages for pain and suffering and

loss of amenities, $218,094.36 for special damages, and $900,000.00 for post traumatic stress disorder.

[3] The medical evidence before the court showed that the appellant had a pre-existing medical condition; namely fibromyalgia. As such, in determining the appropriate quantum of damages payable to the appellant in respect of her personal injuries, the learned trial judge was chiefly tasked to determine whether the severity of the injuries suffered by the appellant was attributable to the accident or to the nature of the appellant's pre-existing condition.

[4] The appellant's complaints before this court concern the sum awarded for special damages as well as the refusal by the learned trial judge to make an award of damages for future medical care, which the appellant contends also forms part of general damages.

[5] The following are the appellant's grounds of appeal:

> "*Grounds for Future Care Expenses*
>
> 1. The learned judge erred by **disregarding and/or gave [sic] little weight to the Claimant's pleadings** for Future Medical Care, to wit:
>
> *"The Claimant will require follow-up care, including physiotherapy, orthopaedic and further assessment and commencing with treatment and care from the Rosomoff Comprehensive Rehabilitation Centre. Furthermore, the Claimant requires overseas treatment due to the nature and gravity of her injuries as she has exhausted all her local resources with regards to effective treatment. As treatment is continuing the claim will be amended in the future to include further medical reports"* [sic]
>
> 2. Having ruled and accepted:
>
> *i. Defendants' negligence;*
>
> *ii. That the Claimant suffered additional injuries in the form of an exacerbation of her pre-existing condition as a result of the 2016 incident;*

iii. That an award of $5Million is reasonable for pain and suffering and loss of amenities suffered due to the 2016 incident;

iv. The medical evidence of the Claimant's medical team;

the learned judge erred by **giving such narrow interpretation of her powers under common law**, that she had no authority to make an award for future medical care if the pleadings were not amended to include them and that they were inadmissible for that reason.

3. **By concluding in error that that Future Care Expenses are Special Damages** and not General Damages, the trial judge misapplied the law and limited her jurisdiction to consider the admissibility of the future care expenses put before her.

4. The learned **judge misdirected and contradicted herself by concluding that there was no evidence that the future medical expenses were required to treat injuries attributable to the aggravation of the Claimant's pre-existing medical condition caused by the** 2016 incident.

5. **The learned trial judge exceeded her jurisdiction by expanding the scope, function and purpose of Rule 8.9 of the Civil Procedure Rules** 2006 (Amended), my [sic] imposing and enforcing a function outside of its design.

The Grounds for Special Damages

6. The learned judge erred by giving little or no weight to the notice, set out below, in the Claimant's pleadings, to the Defendant of her continuing medical expenses which she intended to recover, as a result of the 2016 incident:

> 'The Claimant has incurred and continues to incur expenses as a consequences [sic] of the 2nd Defendant's negligence aforesaid.'

6. [sic] By concluding that an amendment to the Claimant's particulars of claim was the only means of introducing additional medical expenses, the learned judge erred by limiting her award of Special Damages to pleaded expenses and rendering them inadmissible, in the face of documentary

evidence of further expenses, thereby unnecessarily, unduly and unreasonably **limiting her jurisdiction**.

7. By failing to recognize that the additional sums for special damages were merely the cost of further treatment for injuries pleaded, the judge erred by **failing to exercise reasonable discretion** in permitting special damages proven, without need for an amendment to the pleadings.

8. The learned judge erred by **failing to give sufficient weight** to the clear, concise and cogent notice of continuing special damages, contained in the pleadings, to wit:

> *'The Claimant has incurred and **continues to incur expenses** as a consequence of the 2nd Defendant's negligence aforesaid…' [emphasis added]*

9. the [sic] learned judge erred in law by **giving a very narrow interpretation of her powers**, resulting in manifest injustice to the Claimant by unnecessarily depriving her reimbursements, the incurrence of which was not in doubt by the judge.

10. Although cognisant of the rule in **Julius Roy v Audrey Jolly** [2012] JMCA Civ 63, that the court has discretion [sic] in relaxing the rule for special damages to be specially pleaded and proved in the interest of justice, the court failed to apply the said rule, although it was manifestly applicable.

Concluding grounds

11. Having ruled that the Claimant had provided sufficient evidence of her special damages of $1,278,628.39 and Future Care expenses of $15,285,010.86 **the judge erred in not awarding both heads of damages in full**." (Emphases as in original)

Submissions

<u>On behalf of the appellant</u>

[6] Miss Christopher submitted that the damages awarded for special damages are, without justification, significantly less than the sums pleaded and proven. In this regard, she said that the learned trial judge acted erroneously when she excluded additional

special damages and deemed them inadmissible purely on the basis that the particulars of claim was not amended to include them. Counsel asserted that the approach taken by the learned trial judge was contrary to the overriding objective of the Civil Procedure Rules, 2002 ('CPR'), was unnecessarily rigid and resulted in manifest injustice to the appellant.

[7] Miss Christopher posited that the purpose of the rule requiring damages to be pleaded and proven is primarily to benefit the defendant, in enabling the defendant to know the precise case that he or she is being asked to meet. Counsel asserted that, in the instant case, the appellant had given the respondents early notice of the damages which she intended to claim.

[8] Miss Christopher in asserted that the necessary statement of facts had been set out in the particulars of claim pursuant to rule 8.9 of the CPR and the learned trial judge exceeded her jurisdiction by requiring the appellant to amend her particulars of claim before awarding all the sums claimed for special damages and future medical expenses. Counsel highlighted specific paragraphs of the appellant's particulars of claim which, according to her, indicated the appellant's intention to amend her claim in the future in order to claim for expenses associated with future medical care and special damages beyond those initially pleaded.

[9] Reliance was placed on the cases of **Alcoa Minerals of Jamaica Incorporated v Marjorie Patterson** [2019] JMCA Civ 49 ('**Alcoa Minerals**'), **Grace Kennedy Remittance Services Limited v Paymaster (Jamaica) Limited and Paul Lowe** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 5/2009, judgment delivered 2 July 2009, **McPhilemy v Times Newspaper Limited and others** [1999] 3 All ER 775 ('**McPhilemy**'), **East Caribbean Flour Mills Limited v Ormiston Ken Boyea and Hudson Williams** (unreported), Court of Appeal, Saint Vincent and The Grenadines, Civil Appeal No 12 of 2006, judgment delivered 16 July 2007 and **Akbar Limited v Citibank NA** [2014] JMCA Civ 43 ('**Akbar Limited**'). These cases were used to further counsel's submissions that the rules as set out in the CPR have evolved beyond

the inflexible practice of excluding additional expenses merely on the basis that the particulars of claim are not amended, at the time of assessment of damages.

[10] This court was directed to several documents that were filed in the court below and which are said to have identified the receipts for additional expenses for special damages as well as receipts and documents in proof of future care expenses. These documents included the appellant's list of documents filed 18 December 2019, the parties' list of documents filed 19 May 2020, the appellant's supplemental list of documents filed 14 October 2020, the appellant's witness statement filed 20 December 2019 and the appellant's written submissions on liability and quantum filed 15 October 2020. On the basis of these documents, and with particular reference to the appellant's witness statement and her supplemental list of documents, Miss Christopher submitted that these documents were worthy of the court's consideration. Counsel submitted that the documents were largely unchallenged and made the precise amounts that were being claimed, plain and obvious to the respondents.

[11] On the basis of the orders made by the learned trial judge at the conclusion of the hearing, counsel further asserted that the assessment of damages was done "on paper", with the result that the appellant filed (1) full written submissions (in which extensive reference was made to various receipts and documents which were relied on); (2) a supplemental list of documents; and (3) a bundle containing receipts.

[12] In the round, Miss Christopher has asked this court to increase the sum awarded for special damages from $218,094.36 to $1,278,628.39, being the full amount that she said was proven by the appellant.

[13] As for future medical expenses, counsel referred to a letter dated 2 June 2016 from the Rosomoff Comprehensive Rehabilitation Centre ('Rosomoff Centre') addressed to Dr Stuart Murray, in which it was detailed that the cost of a typical four-week program at their facility was estimated at US$75,000.00. Counsel also referenced other medical reports which, according to her, substantiated the necessity for the appellant to undergo

treatment at the Rosomoff Centre and that this need arose as a direct result of the accident. Further, an evaluation carried out on the appellant at the Rosomoff Centre demonstrated that she was an appropriate candidate to receive care from the facility and to undergo a four to five-week programme at a cost of US$90,000.00. The appellant, accordingly, asked this court to award her this latter sum, in addition to airfare and accommodation both for herself and an assistant, given that the Rosomoff Centre is located in Miami, Florida in the United States of America.

On behalf of the respondents

[14] Miss Gordon, for the respondents, contended that the decision of the learned trial judge ought not to be disturbed, as the learned trial judge had all the relevant documents before her and had the benefit of hearing the evidence and counsel's submissions. Reliance was placed on the case of **Rachael Graham v Erica Graham and Anor** [2021] JMCA Civ 51, in which the principles as enunciated in the cases of **Hadmor Productions Limited and others v Hamilton and others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, were restated.

[15] Counsel contended that the learned trial judge did not err in refusing to make an award for future medical care, as she had not found that there was any evidence on which she could make such an award. In this regard, reference was made to the medical reports of Drs Shaun Corbett and Neville Ballin. Dr Corbett opined that the natural course of the appellant's pre-existing condition is characterized by periods of flares and relapse of symptoms. Both doctors acknowledged, however, that a traumatic event such as a motor vehicle accident could cause an exacerbation of the condition.

[16] Miss Gordon urged that before awarding a sum in excess of $15,000,000.00, the court must be sure that the services were reasonably necessary and the expenses claimed were reasonable. In this regard, the case of **Janet Edwards v Jamaica Beverages Limited** [2017] JMSC Civ 76 was cited. Miss Gordon maintained that a claim for domestic assistance and future care should have been specifically pleaded and proved, which would have necessitated an amendment to the particulars of claim. Miss Gordon highlighted

further, that there was no evidence led at trial to support the claim for domestic assistance. Rather, this claim was first raised in the written submissions filed on behalf of the appellant.

[17] As it concerns special damages, counsel reiterated that special damages must be specifically pleaded and proved and that it is only in situations where an expense may not be readily capable of strict proof that the rule is relaxed. In the case at bar, the documents on which the appellant relied were available for several years prior to the trial. However, there was a refusal to amend the claim to include these documents and it was only in written submissions that a claim was made for special damages in the sum of $1,278,628.39. Therefore, the learned trial judge was justified in refusing to award special damages above that which had been claimed. The cases of **Murphy v Mills** [1976] 14 JLR 119, **Attorney General of Jamaica v Tanya Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2002, judgment delivered 20 December 2004, **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53, **Owen Thomas v Constable Foster and Attorney General of Jamaica** (unreported), Supreme Court, Jamaica, Claim No CLT 095 of 1999, judgment delivered 6 January 2006, and **Alcoa Minerals** were relied upon in respect of these submissions. Counsel also referenced rules 8.9, 8.9A, 8.11 and 26.3 of the CPR to demonstrate the responsibility of a claimant to set out their case, as well as the potential consequences of failing to do so.

[18] Miss Gordon posited that the overriding objectives of the CPRis to ensure that cases are dealt with justly, inclusive of protecting parties from trial by ambush. As such, if the respondents were to await receipt of the appellant's list of documents and witness statements before being able to properly prepare to meet her case, they would have been prejudiced.

[19] Counsel also pointed to what she described as an undertaking by the appellant, in her particulars of claim, to amend her claim to include further medical reports in support of her claim for future care, but which she failed to carry out. No explanation was given

by the appellant for her failure to amend her claim. Miss Gordon asks this court to dismiss the appeal, with costs to the respondents.

Discussion

[20] This appeal gives rise to the consideration of two issues:

i. Whether the learned trial judge erred in refusing to award special damages above the amount pleaded in the particulars of claim; and

ii. Whether the learned trial judge erred in refusing to award the amount claimed under the heading of future medical care.

[21] In considering the decision of the learned trial judge, this court has regard to the decision of **Flint v Lovell** [1934] All ER Rep 200, which authority has long been adopted by this court and which was most recently cited in **The Attorney General of Jamaica v Clifford James** [2023] JMCA Civ 6. In particular, the observations of Lord Justice Greer in **Flint v Lovell** at page 202 is noted as follows:

> "To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

<u>Special Damages</u>

[22] Having determined liability in favour of the appellant, the learned trial judge went on to assess damages, beginning with special damages. The learned trial judge first enunciated the relevant principles which govern an award of special damages, noting at para. [79] of her judgment that, "… special damages … must be specifically pleaded and

proved …". She then acknowledged that the court has a discretion to relax this rule where required, to ensure justice in a particular case.

[23] In applying these principles to the appellant's case, the learned trial judge noted that the sums of $56,690.00 and $161,404.36 were pleaded and particularized for medical expenses and motor vehicle expenses incurred, respectively. She then stated at paras. [81] to [84] of her judgment:

> "[81] … [Mrs Silent-Hyatt] states also that she was referred to [sic] Rosomoff Center, and an initial assessment which cost US$3,689.00 was done and that she had to borrow all the funds from her friend to pay for the evaluation, accommodation and airfare.
>
> [82] She has provided receipts which show that she incurred medical expenses, and receipts showing a total of $1,278,628.39 have been referred to at paragraphs 43 to 46 of **the closing submissions of Counsel**.
>
> [83] There is unchallenged evidence, supported by the medical evidence, that Mrs Silent Hyatt was assessed at the Rosomoff Center and was seen by Dr Kai Morgan, a Psychologist as well as by a number of other medical practitioners. She would therefore be entitled to recover the sums paid.
>
> [84] In her Particulars of Claim, Mrs Silent-Hyatt indicated that 'as treatment is continuing the claim will be amended in the future to include the further medical reports'. She had a duty to apply to amend her particulars of claim to reflect additional medical expenses but has not done so." (Emphasis added)

[24] In refusing to award special damages in a sum above that which had been pleaded ($218,094.36), the learned trial judge, in reliance on the case of **Lyndel Laing and Another v Lucille Rodney and Another** [2013] JMCA Civ 27, opined that the court could not enter judgment for a sum in excess of what had been pleaded.

[25] It is trite law that special damages must be specifically pleaded and proved (see the cases of **Ratcliffe v Evans** (1892) 2 QB 524 per Bowen LJ, **Akbar Limited** at para.

[61], and **Alcoa Minerals** at paras. [68] – [74]). The relaxation of the principle referred to by the learned trial judge and relied on by counsel for the appellant is relevant to the issue of proof of special damages. This was discussed in the case of **Julius Roy v Audrey Jolly**, per Harris JA at para. [38], where she stated that the requirement for proof is not an inflexible principle, as "… there may be situations, depending on the circumstances of the case, which accommodate the relaxation of the principle. In some cases, the incurring of some expenditure may not be readily capable of strict proof. As a consequence, the court may assign to itself the task of determining whether strict proof is an absolute prerequisite in the making of an award".

[26] In **Akbar Limited**, the appellant had filed an amended statement of claim setting out specific averments as its particulars of special damages. Phillips JA, at para. [61] of the judgment of this court, made the observation that, "Akbar did not attempt to resist the observation of this court that despite having pleaded all of the above items of expenditure, there was no supporting evidence to substantiate the sums claimed as being expended in relation to most of these items". It is within that context that Phillips JA went on to state that "… the requirement that special damages must be specifically pleaded and strictly proven is not inflexible and depending on the circumstances of the case, an award may be made **where strict documentary proof has not been forthcoming** – see for example **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 and **Attorney General of Jamaica v Tanya Clarke** SCCA No 109/2002, delivered 20 December 2004".

[27] The authorities are not indicating any relaxation of the need for specific pleadings in relation to special damages, but rather, the possibility of relaxation of the requirement for proof. The particulars of claim in the case at bar includes a schedule headed "PARTICULARS OF SPECIAL DAMAGES". This schedule referred to 14 documents. At the end of that schedule, the total special damages claimed was $218,094.36. The date of the last medical expense pleaded is 19 July 2016. The sentence above the heading "PARTICULARS OF SPECIAL DAMAGES" states, "The Claimant has incurred **and continues to incur expenses** …" (emphasis added). In the circumstances, it was

expected that an application would have been made either prior to or during the course of the trial, to amend the appellant's statement of case to include the additional medical expenses incurred which were not pleaded (see para. [83] of **Alcoa Minerals**). This was not done.

[28] This application for amendment could have been done at any point before the learned trial judge gave her decision (see **Beep Beep Tyres, Batteries and Lubes Limited v DTR Automotive Corporation** [2022] JMCA App 18 at para. [53] for detailed guidance on the factors a court should consider when an application for amendment is made).

[29] As already indicated, the appellant relies on the supplemental list of documents and the written submissions on liability and quantum both filed on her behalf on 14 and 15 October 2020, respectively, as well as her witness statement filed 20 December 2019. The supplemental list of documents and written submissions were filed after the completion of the evidence. Miss Christopher sought to justify the filing of the supplemental list of documents on the premise that the assessment was heard "on paper". I do not accept this position. The orders of the court made on 21 September 2020, after evidence was concluded, were:

> "1. Claimant's attorney is to file and serve submissions on liability and quantum on or before 28 September 2020.
>
> 2. Defendant's attorney is to file and serve submissions on or before 5 October 2020.
>
> 3. Any responses to authorities cited are to be filed and served on or before 12 October 2020.
>
> 4. The matter is part-heard and adjourned for a date to be fixed by the Registrar."

Therefore, after 21 September 2020, the parties were required to make written submissions to the court on the basis of the evidence that had been led. This included

evidence from the appellant and Jason Walters, through their witness statements and by way of cross-examination.

[30] The supplemental list of documents purported to disclose 102 documents. These documents were primarily receipts and invoices for medical treatments and medical reports. Also included were, receipts relating to motor vehicle repairs, loan documents, a travel itinerary and an invoice for hotel accommodation. Of the 102 documents listed, 10 were pleaded. Likewise, the written submissions on liability and quantum listed the receipts and invoices as pleaded, but also listed the receipts and invoices for the additional expenses purportedly incurred by the appellant after the claim had been filed and which were included in the supplemental list of documents. Quite obviously, as there was no amendment to the appellant's particulars of claim, these additional receipts and invoices were not pleaded. At para. 47) of those submissions it was indicated, "[t]he Claimant has provided applicable receipts for each of these expenses. Therefore, we submit that she should be awarded the full sum of $1,278,628.39 for special damages". Notably, this court has not been provided with those documents.

[31] In light of the appellant's contention that the learned trial judge awarded special damages in an amount less than that which was proved, it is necessary to determine the precise documents that were actually in evidence. At para. [9] of her judgment, the learned trial judge indicated that "[d]ocuments numbered 1 – 42, and including reports from six persons who were called as expert witnesses, were agreed and admitted in evidence". Although we were furnished by the Supreme Court with the notes of evidence, we were not provided with the actual exhibits that were numbered one to 42, whether physically or in soft copy. Further to our request for same, communication was received from the registry of the Supreme Court that efforts to locate the exhibits were unsuccessful.

[32] We, therefore, had to rely on the information provided by counsel for the appellant, who indicated that documents one to 42 were the documents listed in the "Parties' List of Documents" filed in the Supreme Court on 19 May 2020. This was not challenged by

counsel for the respondents. A comparison between the latter document and the list of special damages as set out in the particulars of claim shows that only two of the nine documents pleaded in support of the appellant's claim for medical expenses, were actually put in evidence (being items lettered e. and f. of the particulars of special damages and items numbered 32 and 33 of the Parties' List of Document) and further that none of the receipts or invoices pleaded in support of motor vehicle expenses were actually put in evidence. In the circumstances, it would appear, that the appellant, having been awarded special damages in the amount pleaded would have received an award above the sums specifically proven by actual receipts tendered into evidence.

[33] With respect to the supplemental list of documents, only two receipts listed therein, appear to have been put in evidence among the documents numbered one to 42 (items numbered 10 and 11 of the Parties' List of Documents). These are the receipts at items numbered 82 and 84 of the supplemental list of documents. These receipts were not pleaded and the supplemental list of documents does not state the sums that were charged on those receipts.

[34] In all the circumstances, therefore, documents and in particular, receipts, were put in evidence in support of special damages that were not pleaded. Also, most of the documents that were pleaded in support of special damages were not actually put into evidence. Further, of the documents comprised in the appellant's supplemental list of documents, 10 were pleaded that were not put in evidence and two were not pleaded that were put in evidence.

[35] Notwithstanding my observation that the sum of $218,094.36 pleaded may not have been specifically proven, this award will not be disturbed as there is no challenge before this court relevant to that issue. The real issue, therefore, is whether the learned trial judge was required to have regard to the receipts and invoices filed with the supplemental list of documents and referred to in closing submissions, which were neither pleaded nor put in evidence.

[36] Miss Christopher contended that the learned trial judge failed to have sufficient regard to the indication in the appellant's particulars of claim that expenses continued to be incurred arising from the negligence of the respondents. In **Michael Thomas v James Arscott and another** (1986) 23 JLR 144 (CA), Rowe P discussed the use of the words "and continuing" and stated at pages 151 to 152 of the judgment:

> "In my opinion special damages must both be pleaded and proved. The addition of the term 'and continuing' in a claim for loss of earnings etc. is to give advance warning to the defendant that the sum claimed is not a final sum. **When, however, evidence is led which established the extra amount of the claim, it is the duty of plaintiff to amend his statement of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum**." (Emphasis added)

[37] Based on the foregoing, it is apparent that Miss Christopher is not on good footing with her contention. Not only was there a failure to plead the sum of $1,278,628.39 at any point in time before the conclusion of the trial, but there was a complete failure to put evidence before the court to substantiate the sum.

[38] The appellant's contention is not aided by a reliance on rule 8.9 of the CPR, which provides:

> "**Claimant's duty to set out case**
>
> 8.9 (1) The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.
>
> (2) Such statement must be as short as practicable.
>
> (3) The claim form or the particulars of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

> (4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.
>
> (5) If the claimant is making a claim for aggravated and/or exemplary damages the claimant must set out the grounds on which the claimant relies.
>
> (6) The particulars of claim must include a certificate of truth in accordance with rule 3.12."

[39] This court considered rule 8.9 of the CPR in **Alcoa Minerals** and reviewed the Privy Council's treatment of a similar provision in the CPR of Trinidad and Tobago as well as the impact of **McPhilemy** on the issue of the pleading of special damages. Paras. [62] to [65] of **Alcoa Minerals** will be set out in the interest of completeness.

> "[62] In **Charmaine Bernard v Ramesh Seebalack** a decision of the Privy Council originating from the Court of Appeal of Trinidad and Tobago, the Board had to consider whether there needed to be amendments to the statement of case where there was nothing to indicate the heads of general damages that were being claimed; also whether the statement of case had to be amended to include the claim for special damages. The major issue concerned the interpretation of rule 20.1(3) of the Trinidad and Tobago Civil Proceedings Rules. The equivalent rule was removed from the Jamaican CPR and is therefore not relevant for our purposes but the Trinidad and Tobago provision is set out for greater clarity:
>
> > '(3) The court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference.'
>
> [63] However, Sir John Dyson SCJ, who delivered the judgment of the Board, in considering whether the amendments were necessary, reviewed rule 8.6(1) of the Trinidad and Tobago CPR (which is fairly similar to rule 8.9(1)

of the Jamaican CPR – set out at paragraph [23] above) as well as Part 16.4(1) of the England and Wales Civil Procedure Rules. For comparison, rule 8.6(1) of the Trinidad and Tobago CPR is set out:

> '8.6 (1) The claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies.'

[64] He then addressed the issue of whether an amendment was necessary, by reviewing the arguments of counsel, the relevant rules and the principles as set out in **McPhilemy** at paragraphs 14-16:

> '14. It was common ground in the courts below that an amendment of the statement of case was required in order to permit the claimant to advance the 'lost years' claim and the claim for funeral expenses. It is now submitted on behalf of the claimant that the amendment was not required. It is said that the statement of case included a claim for damages and that information about it could have been provided by the claimant pursuant to Part 35 of the CPR either of her own initiative or in response to a request by the defendants or pursuant to a court order. Alternatively, it is submitted that the details of the claim for damages could have been provided by the claimant in a witness statement (as in part they were).
>
> 15. In the view of the Board, an amendment of the statement of case was required. Part 8.6, which is headed 'Claimant's duty to set out his case', provides that the claimant must include on the claim form or in his statement of case a short statement of all the facts on which he relies. This provision is similar to Part 16.4(1) of the England and Wales Civil Procedure Rules, which provides that 'Particulars of claim must include—(a) a concise statement of the facts on which the claimant relies'. In McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at p 792J, Lord Woolf MR said:

> 'The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.'

16. **But a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant.** The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the material facts and by r 12(1) that 'every pleading must contain the necessary particulars of any claim'. In *Perestrello v United Paint Co Ltd* [1969] 3 All ER 479, Lord Donovan, giving the judgment of the Court of Appeal, said at p 485I:

> Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet… **The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded**…. The claim which the present plaintiffs now seek to prove is one for unliquidated damages, and no question of special damage in the sense of a calculated loss prior to trial arises. However, if the claim is one which cannot with justice be sprung on the defendants at the trial it requires to be pleaded so that the nature of that claim is disclosed… …a mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendants are entitled to fair warning.'

> [65] At paragraph 17, he concluded:
>
> 'These observations are applicable to Part 8.6 of the CPR as well as to Part 16.4(1) of the England and Wales CPR.'" (Emphasis supplied)

[40] Based on the foregoing, it is patent that the appellant's supplemental list of documents could not have satisfied the requirement of setting out, by way of pleadings, the full sum intended to be claimed for special damages. In addition, the filing of a bundle

with the documents listed in the supplemental list of documents could not, by any stretch of the imagination, have been elevated to mean those documents were tendered into evidence. The learned trial judge was not empowered to make an award in respect of sums that were not pleaded and proven. Furthermore, had the learned trial judge acceded to counsel's request for consideration of those documents, it would have been plainly unfair to the respondents who would only have become aware of the new sums claimed, after the close of evidence.

[41] The defect was also not remedied by the appellant's witness statement. At para. 22 of her witness statement, dated 20 December 2019, the appellant gave evidence that she "received treatment from the following medical experts and incurred the expenses, which is includes [sic], but is not limited to the following". Thereafter follows references to eight of the nine receipts that were set out in the particulars of claim in support of medical expenses and bearing dates between April 2016 and June 2016. The appellant's witness statement failed to set out any further medical expenses incurred and which were set out in the supplemental list of documents, except to the extent indicated at para. 23. In that paragraph, the appellant referred to the cost of an evaluation (carried out over three days) at the Rosomoff Centre in the sum of US$3,689.00. This evaluation was required prior to the commencement of formal treatment.

[42] Para. 25 of the appellant's witness statement then sets out a chart itemizing the cost of the three-day evaluation together with the cost of accommodation, airfare and other expenses attendant to the evaluation, all deriving the total of US$3,689.00. Also itemized in the chart were, the projected costs for a five-week program, together with costs anticipated to be incurred by attending the facility, that is, among other things, airfare and accommodation.

[43] Could the reference in the appellant's witness statement to the cost of the US$3,689.00 be sufficient, without more, to allow an increased award for special damages? I think not, as there was no application to amend the statement of case to add this amount as continuing special damages. Further, there was no evidence adduced to

prove the sum of US$3,689.00 or a portion of it. If proof of the cost had been obtained from the Rososmoff Centre, it should have formed part of the evidence before the learned trial judge. This would also include the cost of the airfare and accommodation. In **Akbar Limited**, Phillips JA had to consider which of the pleaded special damages could be awarded without strict proof. She stated that there were several pleaded items for which there would not have been much difficulty in substantiating the sums claimed, as the invoices and receipts were capable of being obtained. The court, accordingly, refused to make an award in respect of those pleaded items (see paras. [61] and [62] of the judgment). A similar conclusion can be made in relation to the cost of the three-day evaluation, which included airfare and accommodation. There would have been no good basis to waive proof of these expenses that were incurred prior to the trial. However, the instant appellant is in a worse position as the sums relating to the evaluation were both unpleaded and unproven.

[44] It is noted that a letter dated 2 June 2016 from the Rosomoff Centre and addressed to Dr Stuart Murray (the appellant's doctor), which forms part of the documents numbered one to 42 that were admitted into evidence, detailed the cost of a four-week program as approximately US$75,000.00. It then stated "inclusive of these charges [the US$75,000.00] are the fees for the initial evaluation which is typically a three-day process and for which the estimated charges would be approximately $1500". This would be relevant to any claim for future medical care. It is also not clear whether the US$1,500.00 included accommodation and/or meals. However, the appellant claims the sum of US$3,689.00 as part of an award for special damages.

[45] Counsel's reliance on the supplemental list of documents containing all these receipts, which were also referred to in her written submissions, does nothing to cure the defect. As stated in **McPhilemy**, "a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant". Additionally, even if the witness statement had included references to the specific expenses incurred, it is unlikely that that would have been sufficient to displace the necessity for specific pleadings consisting of a short statement of fact (or an amended

statement of case; see paras. [68] to [72] of **Alcoa Minerals**). At para. [59] of **Alcoa Minerals**, this court stated:

> "[59] Even when applying **McPhilemy**, therefore, the pleadings must contain the allegations or factual basis necessary to prevent surprise and to set out the parameters of the issues to be decided between the parties. The statement of claim is to provide the allegations of facts which would reflect the general nature of the party's case, while the witness statements could serve the purpose of providing the particulars or additional particulars of the allegations set out."

[46] As this sum was not pleaded and no receipts or invoices were tendered into evidence to substantiate any of the costs associated with this three-day evaluation, the learned trial judge did not err in her refusal to award this sum or any other sums above the amount pleaded.

[47] It is unfortunate that the appellant will be unable to benefit from the full extent of an award for her out-of-pocket expenses, but the requirements for making such an award must be met.

[48] The grounds of appeal numbered 6, 7, 8, 9 and 10 fail.

Future Medical Care

[49] In considering damages for future medical care, the learned trial judge expressed the view that it was a "difficult exercise" to assess the appellant's loss under this head of damages. This, she said, was because the appellant's pre-existing condition manifested the same symptoms as those experienced after the accident (see para. [101]). Nevertheless, the learned trial judge indicated that she believed the appellant's description of her pain since the accident. She further accepted the appellant's evidence that she experienced little or no flares between 2013 (when she was first treated at the Rosomoff Centre) and 2016, prior to the accident (see para. [110]).

[50] The learned trial judge assessed the medical evidence and concluded that all the evidence, except that of Dr Cheeks, suggested that the appellant's pre-existing condition

was exacerbated by the accident. She candidly stated that she preferred the medical evidence of Dr Stuart Murray, who would have been treating the appellant prior to 2013. She also took special note of the fact that prior to the accident, the appellant had stopped taking "narcotic/opioid medication" (see paras. [112] and [113]).

[51] At para. [118] of her reasons, the learned trial judge stated categorically:

> "[118] … I find on a balance of probabilities that injuries sustained by the Claimant in the accident caused a flare-up and as such she had to go back to the doctor who was treating her for fibromyalgia."

[52] Notwithstanding this finding, the learned trial judge refused the appellant's claim for damages for future medical care on the following bases:

i) the evidence led by the appellant was unsatisfactory as, although the medical experts had recommended that the appellant should return to the Rosomoff Centre, no sufficient evidence was led to demonstrate that this need was a direct result of the accident, as opposed to general treatment that the appellant would have undergone as a result of her pre-existing fibromyalgia (see para. [136]). Further, the appellant failed to provide documentary evidence that the sums claimed, were required to be paid because she was still injured (see para. [141]).

ii) the appellant failed to provide "documentary evidence in the form of an invoice from the institution in relation to the costs and neither ha[d] she provided any evidence … that she [was] unable to travel without an assistant …" (see para. [138]). Therefore, it was "not possible on the material before the court to form an accurate or even verifiable estimate of the future costs of the medical treatment and medication" the appellant would require or was likely to incur (para. [140]).

iii) The appellant failed to amend her claim in circumstances where the claim for future care constituted special damages; and no evidence had been led by the appellant to provide a basis for an award to be made (see para. [144]).

[53] In my view, the learned trial judge would have erred in concluding that the appellant failed to provide adequate evidence of a link between the injuries sustained in the accident and the need for treatment at the Rosomoff Centre. This is especially so having regard to the findings she made at paras. [110], [112], [113] and [118] of her decision, by which she accepted that, as a result of the accident, the appellant experienced an exacerbation of her condition. The learned trial judge further accepted that this exacerbation caused the appellant's condition to return to the level of severity that was experienced, prior to receiving treatment at the Rosomoff Centre.

[54] A review of the documentary evidence that was referenced by the learned trial judge also does not support her conclusion. By medical report dated 21 April 2016, Dr Stuart Murray stated:

> "This recent accident has unfortunately served to multiple [sic] the muscle pains that she had already been experiencing and will make it even more difficult to control.
>
> Even with the measures instituted, it will take several months to gain reasonable (not complete) control of her painful condition."

[55] In his further report dated 11 July 2016, Dr Murray recounted the circumstances of the accident (as was reported to him) and stated:

> "This has resulted in a significant **re-exacerbation of her fibromyalgia pains** in her upper back, right shoulder [sic] neck and arms, especially the right arm, radiating all the way down to the fingers. …
>
> **At this point, with the worsening of her state to pre 2013 levels and bearing in mind that all treatment options have already been exhausted locally I think**

> **the best option for her is to yet again seek treatment at the Rosomoff Center as soon as possible.**" (Emphasis supplied)

[56] In a report dated 15 June 2018, Dr Murray reiterated that the appellant's condition was exacerbated by the accident and further stated that it was in the appellant's best interest to return to the Rosomoff Centre in order to "achieve improvement and stabilization of her condition".

[57] In an addendum to his initial medical report, dated 20 July 2018, Dr Neville Ballin stated his impression of the appellant's injuries as follows:

> "**Exacerbation of fibromyalgia** with generalized musculoskeletal pain and multiple active trigger points, not responding to medication. **This is secondary to the motor vehicle accident sustained in April 2016**." (Emphasis supplied)

[58] He then expounded:

> "Ms. Silent had in the past experienced significant improvement in her condition after a course of treatment at the Rosomoff Centre in Florida. This involved intense treatment in the multidisciplinary facility involving a wide range of therapy….
>
> **Ms Silent would benefit from further intensive, integrative therapy at the Rosomoff Centre to restore her physical and mental state and to stabilize her condition**." (Emphasis supplied)

[59] Based on these reports, it is clear that Drs Murray and Ballin (on whose evidence the learned trial judge relied – see para. [119] of her judgment) did not suggest that the appellant would have no need for treatment at the Rosomoff Centre. Rather, both doctors clearly recommended such treatment on the express basis that the accident caused an exacerbation of the appellant's pre-existing condition, as it eroded the improvements which had been made in the treatment of her condition, particularly at the said centre. It is not clear, therefore, what other evidence the learned trial judge would have needed in

order to find that the necessity for the appellant to undergo another course of treatment at the Rosomoff Centre was primarily, if not entirely, because of an exacerbation of her condition consequent upon the motor vehicle accident. The clear aim of the treatment at the Rosomoff Centre would have been to put the appellant in the position that she was in, prior to the accident.

[60] Once the learned trial judge had accepted, as she did, that exacerbation was caused by the accident, there was clear evidence to make the finding that the need to return to the Rosomoff Centre for treatment was sufficiently linked to the accident. However, the learned trial judge appeared to have contradicted herself by preferring the evidence of Dr Cheeks, that the appellant's condition was now the normal ebb and flow of fibromyalgia. The learned trial judge would have erred in this regard based on the facts she initially accepted.

[61] The learned trial judge would also have erred in her statement that the cost of future care was an item of special damages that must be specifically pleaded and proved (see **Shearman v Folland** [1950] 2 KB 43 at page 51 and **Perestrello v United Paint Co Ltd** [1969] 3 All ER 479). It appears the learned trial judge made a distinction between future care and future medical expenses and that her reference to future care was related solely to domestic assistance. She stated as follows at para. [144]:

> "With respect to 'future care', no evidence has been led by the Claimant which establishes that an award ought to be made and, in any event, there has been no amendment to the particulars of claim and neither has any application been made for any amendment to be made. This is an item of special damages which must be both pleaded and proved. In applying the principle that a claim for domestic assistance must be both pleaded and proved, there will be no award under that head."

[62] It is true that the appellant had failed to make out a claim for domestic assistance as an item of special damages. However, since a claim was made for domestic assistance as a future expense and, also, for future medical expenses associated with the Rosomoff

Centre, those latter aspects of the claim should have been treated separately as items of general, rather than special damages.

[63] Against this background, the critical issue to be resolved is whether the appellant had given sufficient proof of the various costs associated with her claim for future medical care to ground her entitlement to damages under this head. The learned trial judge referred to evidence given by the appellant of the costs for the five-week treatment at the Rosomoff Centre being US$101,197.93 inclusive of airfare, accommodation, meals, and the cost of an assistant. She rejected outright the claim for an assistant as she said that there was no evidence from which she could find, on a balance of probabilities, that the appellant was unable to travel without assistance. The finding of the learned trial judge in this regard is unassailable as there is no medical evidence to support the need for an assistant.

[64] On the other hand, the learned trial judge would have erred in stating that there was no evidence before her in support of (at least) an estimate of the cost for treatment at the Rosomoff Centre. In this regard, as stated previously, among the documents (numbered one to 42) that were agreed and admitted in evidence was the letter dated 2 June 2016, from the Rosomoff Centre to Dr Stuart Murray, which spoke to the cost of a typical four-week program inclusive of an initial three-day evaluation. The cost was estimated at US$75,000.00.

[65] Furthermore, the appellant had set out a short statement of facts in the particulars of claim concerning the need for future medical care at the Rosomoff Centre. Details of this pleading were provided in her witness statement. These documents, along with the agreed exhibits, would have provided both the facts and sufficient particulars in order for the learned trial judge to properly consider an award for future medical care (see **Alcoa Minerals** at para. [59]).

[66] Taking into account all the medical evidence, together with the letter of 2 June 2016, there would have been sufficient evidence provided to the learned trial judge, not

only in proof of the need for future medical care, but also relevant to an estimate of the fees required. Therefore, I accept that the learned judge erred in not awarding any sum for future medical care. Further, I would accept the amount as stated in the letter of 2 June 2016 as a basis to award the sum of US$75,000.00 for future medical care.

[67] Regarding other expenses associated with the claim for future medical care, the court was not provided with any documentary evidence to prove the likely cost of airfare or hotel accommodation. As it relates to accommodation, the appellant speaks of two sets of accommodation; one for a caregiver for seven days and one, apparently, for herself for 14 days. However, it is not clear what this information means in the light of the letter from the Rosomoff Centre in which the US$75,000.00 estimated for treatment, is indicated. It seems from that letter that the estimated costs of US$75,000.00 would have included the cost of the appellant's accommodation as an in-patient and/or out-patient. It would suggest, therefore, that the cost of accommodation, whether as an in-patient or out-patient, would have been included in the estimated US$75,000.00. Accordingly, the need for hotel accommodation outside of that indicated in the letter of 2 June 2016 from the Rosomoff Centre, is not clearly or reasonably established for a separate award to be made for accommodation as part of future medical expenses.

[68] Regarding the cost of airfare, it is accepted that the appellant will have to travel overseas to obtain the necessary medical attention. The appellant's witness statement at para. 24 refers to the cost of airfare for two persons at US$1600.00. No invoice was provided to substantiate this evidence. It may be said, however, that the cost of airfare is an expenditure that will reasonably be incurred and so even though the court does not have any supporting documentary evidence, it is a proven fact that it will be an attendant cost that would be reasonably incurred. The court will have to do the best it can to ensure that the appellant is reasonably compensated for her future pecuniary losses. It is believed that an award of US$800.00 (based on the evidence of US$1600.00 which is relevant to two persons) to cover airfare associated with future medical treatment would be fair and reasonable. Accordingly, I would propose an award of US$800.00 to defray the cost of travel for treatment overseas.

[69] The appellant's grounds of appeal numbered 1, 2, 3 and 4 succeed. Ground 11 is, at best, a concluding statement and requires no ventilation.

[70] In conclusion, I would allow the appeal, in part, to allow for an award of US$75,800.00 under the heading of future medical care. In all other aspects of the appeal, the judgment of Lindo J should be affirmed.

[71] As it relates to costs of the appeal, both parties partially succeed. It would seem that no order for costs would be appropriate in the circumstances. However, the parties should be invited to make written submissions on the issue of costs, within 14 days of the date of this judgment, if any of them is of the view that a different order should be made as to costs.

FOSTER-PUSEY JA

[72] I, too, have read, in draft, the judgment of Straw JA and I agree and have nothing else to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed, in part.

2. The judgment of Lindo J dated 19 February 2021 is varied to add the following award of damages to the appellant:

   US$75,800.00 for future medical care.

3. The award of special damages in the sum of $218,094.36 with interest at 3% per annum from 15 April 2016 to the date of judgment (the subject matter of this appeal) is affirmed.

4. All the other orders of Lindo J are affirmed.

5. Any party who is of the view that a different order should be made as to costs of the appeal, is to file its submissions within 14 days of the date of this order, failing which, the order of the court shall be no order as to costs.

6. If submissions are filed by either party seeking an order for costs, the opposing party shall file and serve written submissions, in response, within 14 days of the date of service of the submissions.

7. The court shall consider the question regarding costs, on paper.