[2016] JMSC Civ. 238

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 00246

BETWEEN	**CLAUDETTE WILLIAMS**	**CLAIMANT**
AND	**EGBERT LINDO**	**1ST DEFENDANT**
AND	**JASMINE HAMILTON**	**2ND DEFENDANT**
AND	**KELIESHA BLOOMFIELD**	**3RD DEFENDANT**
AND	**CLIVE MCFARLANE**	**4TH DEFENDANT**

IN OPEN COURT

Jacqueline Cummings Instructed by Archer, Cummings & Cofor the Claimant.

Oraina Lawrence instructed by Kinghorn&Kinghorn for the 4th Defendant.

Heard: 11th-13th, April 2016.

Negligence – Contributory negligence

BROWN BECKFORD J

BACKGROUND

[1] An accident occurred along the Spanish Town Road, Kingston which involved a minibus licensed to carry passengers and a motor truck. The Claimant, who was a passenger in the minibus at the time of the incident, suffered severe injuries as a result of the collision. Subsequently, she initiated a claim against the Defendants claiming damages for the injuries and consequent losses which she suffered. By way of an agreement, the Claimant was paid a sum by the insurers

of the 1st, 2nd and 3rd Defendants representing a full and final settlement of the claim against these Defendants. The Claimant is pursuing her claim against the 4th Defendant who was the driver of the motor truck.

PRELIMINARY MATTERS

A. *Issue*

[2] Whether the Release and Discharge signed by the Claimant constitutes full and final settlement against the 4th Defendant.

B. *Submissions*

[3] The 4thDefendant contends that it does.The agreed settlement figure having been satisfied, the Claimant is barred from continuing proceedings against him as it was intended to be in full satisfaction of the claim. The 4thDefendant rejected the Claimant's application of ***Jameson and another v Central Electricity Generating Board and others****[2000] 1 AC 455.*It was submitted by Counsel for the 4thDefendant that the principles in ***Jameson***are not binding on and should be rejected by the court.

[4] Counsel further relied on the case of ***Phillip Ward (administrator in the estate of Damion Phillip Ward , deceased) and Christine Gabbidon(administrator of the estate of Damion Phillip Ward, deceased) v Jamaica Public Service Co. Ltd, Kaiser Bauxite Company and Jamaica Bauxite Mining Ltd.*** *Suit No. CL 2000/W006*in support of the position that the Claimant should not have been allowed to proceed with the claim since she had accepted a settlement offer from the 1st, 2nd and 3rd Defendants, which was intended to be in full settlement of the claim. In ***Phillip Ward*** the Claimant's entire claim was assessed at the Assessment of Damages hearing. It was held that there could be no further assessment.

[5] The Claimant on the otherhand contends that the wording of the Release and Discharge released only the 1stto 3rdDefendants. The Claimant contends also that the maximum amount of damages has not been received by her.Lastly, it

was highlighted that in these circumstances, the parties are not *'joint'* tortfeasors but should be treated as *'several'* tortfeasors since the parties were not acting in concert. Halsbury's Laws of England 4th edition volume 45(2) para 346 and section 3 of the Law Reform (Tortfeasors) Act 1946 were relied on in support of the submisson.Counselalso relied on the case of ***Jameson*** where the House of Lords noted that:

> *"where there are two separate causes of action, satisfaction of one should not be a bar to proceeding on the other."*

C. *Analysis*

[6] ***Jameson,*** which has been applied in this jurisdiction, is authority for the position that where two or more tortfeasors have by their separate acts caused the same harm, each tortfeasor is jointly and severally liable with the other tortfeasors for the whole of the loss. The question posed to Lord Hope of Craighead was:

> *"whether the liability of concurrent tortfeasors for the same harm is discharged by a settlement which has been entered into with one of them".*

With respect to the submissions of the 4th Defendant otherwise, this is the very question that arises in the case at bar.

[7] In answering the question *'did this settlement with one tortfeasor discharge the other tortfeasor?'* Lord Hope of Craighead said the critical question is whether the claim has in fact been satisfied. The answer, he said, is to be found by examining the terms of the agreement and comparing it to what has been claimed.The meaning, he said,that is to be given to the agreement will determine its effect. Where the Claimant agrees to accept a sum in full and final settlement of the claim, this agreement brought to an end his cause of action against the Defendant for payment of damages. The effect, he said, is to fix the amount of his claim in just the same way as if the case had gone to trial and he had obtained judgment.Once the agreed sum has been paid, his claim against the

defendant would have been satisfied. Satisfaction discharges the tort and is a bar to any further action in respect of it.

[8] He pointed out however,that there may be cases where the terms of settlement or the extent of the claim against the tortfeasor with whom the Claimant made the agreement would show that the parties did not intend to treat the settlement as satisfaction for the full amount claimed. The question then becomes, not whether the Claimant received the full value of her claim, but whether the sum received in settlement was intended to be in full satisfaction of the tort.

[9] In the Amended Particulars of Claim,the sum of $1,692,894. 23 is claimed as special damages. The Release and Discharge is said to be *"in full and final satisfaction of all claims, costs and expenses in respect of all personal injury and loss and damage and consequential loss."*It further says the payment is by way of compromise of the claim against the 1st–3rd Defendants and their insurers, releasing and discharging them from all claims and demands.

[10] A comment in the judgment of LordClyde is instructive as to how to interpret the agreement. He stated at page 211 in ***Jameson***that:

> *"where the proceedings have been brought against both concurrent tortfeasors, release of one may more readily be seen as a reservation of rights against another."*

[11] Having regard to the sum paid *vis a vis* the sum claimed as special damages alone, and the limiting of the compromise to the 1st– 3rd Defendants, it is unlikely that the Claimant was giving up her claim against the 4th Defendant.

[12] I find the agreement was not intended to be in satisfaction of the Claimant's entire claim for damages. Section 3(1) of the Law Reform (Tortfeasors) Act which provides that judgment against one tortfeasor is not a bar to proceeding against any other person who would be liable as a joint tortfeasor is applicable.

THE CLAIM

(1) NEGLIGENCE

[13] The definition of negligence is now trite law. The classic statement of negligence and the duty of care was made by Alderson B. in ***Blythe v The Birmingham Waterworks Company*** *11 Exch. 781* where he said

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."*

In***Blythe,*** the Defendant had installed water mains along the street with hydrants located at various points. One of the hydrants across from plaintiff's house developed a leak as a result of exceedingly cold temperatures and caused water damage to the house. The plaintiff sued for negligence.

[14] In ***Glenford Anderson v George Welch*** *[2012] JMCA Civ.43* Harris JA said of the tort of negligence at paragraph 26:

> *"It is well established by authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to the Claimant by the Defendant, that the Defendant acted in breach of that duty and that the damage sustained by the Claimant was caused by the breach of that duty ..."*

As to the burden and standard of proof she went on to say:

> *"It is also well settled that where a Claimant alleges that he or she has suffered damages resulting from an object or thing under the Defendant's care or control, a burden of proof is cast on him or her to prove his case on the balance of probabilities"*

[15] In Bingham &Berrymans' Motor Claims Cases 11th Edition it is stated at paragraph 4.1 that:

> *"There is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected."*

[16] As such, a collision between two vehicles raises an inference of negligence with the burden of proof being on the Defendant (Bingham & Berryman's paragraph 5.11).

(2) LIABILITY

[17] No liability is attributable to the Claimant; she being a passenger in the bus.The negligence of the 4th Defendant was particularised as follows:

PARTICULARS OF NEGLIENCE OF 4TH DEFENDANT

(a) Driving without due care and attention

(b) Failing to keep any proper lookout

(c) Colliding into motor vehicle registered CD 6850

(d) Making a right turn from a major road to a minor road without looking out or having due consideration or regard for other users of the roadway

(e) Making a right turn without ensuring that it was safe so to do

(f) Disobeying a traffic signal

(g) Failing to heed the presence of motor vehicle registered CD 6850

(h) Failing to stop, slow down, swerve, or in any other manner so as to manage and/or control the said motor vehicle so as to avoid the said collision

[18] These facts are not in issue. It is not an issue that the bus was travelling on the straight road and had the green light or that the truck was in the process of turning from left to right across three lanes. The turn was accommodated by a filter lane but no light. Both the Claimant and the 4th Defendant are agreed that the point of impact was to the rear half of thetruck.

SUBMISSIONS

A. *Claimant's submission*

[19] The basis of the Claimant's case is that the actions of the 4th Defendant were negligent. In the Witness Statement of Claudette Williams which was filed on the 10th of December 2010, it was particularly noted at paragraph 4 that:

> *" the stoplight at the intersection was green and the vehicle that I was travelling in had the right of way, however on reaching the intersection, the motor truck made a sudden turn at the stop light across the path of the vehicle in which I was travelling which caused both motor vehicles to collide…"*

[20] It was further submitted that at the time the 4th Defendant saw the vehicles approaching, he was stationery and it would have taken him thirty seconds to complete the turn. Counsel relied on the case of ***Earl Allen and Conley Suddeal v Lascelles Watt (by his next friend Alice Vernon)*** *(1990) 27 JLR 134*and ***The Administrator General for Jamaica (Administrator Estate of Louis Kelly, deceased) v Doctor Randolph Edwards*** *(1991) 28 JLR 80*to support the assertion that though the driver of the minibus accelerated and was going faster than the permitted speed limit, excessive speed is not itself evidence of negligence and therefore an additional act of negligence must be proven. Counsel then referred to the guidance provided byBingham & Berryman's Motor Claim Cases 11th edition at page 343 to support the view that the motor truck which was laden with cement, block and steel, would have been unable to move quickly from its stationery position to the opposite side of the road in time to avoid a collision. Reference was also made to the case of ***James Mitchell and Aaron Gordon v Leviene McKenzie and Dorrell Gordon*** *(1992) 29 JLR 378***.**

[21] Counsel on behalf of the Claimant addressed the question of the 4th Defendant's liability. Counsel relied on the case of ***Baker v Market Harborough Industrial Co-operative Society Ltd****[1953] WLR 1472*to support the argument that if the court is unable to determine how to apportion liability between two motor vehicles, then the court is required to find both drivers equally liable. It was also noted that since the Claimant was a passenger in the motor vehicle, no liability could be attributed to her.

B. *Defendant's Submission*

[22] Counsel submitted on behalf of the 4th Defendant, that the 4th Defendant saw some vehicles, among which the minibus was travelling, approximately 75 feet away. Counsel further noted, that the Claimant's version of the events should not be accepted as a true statement of the facts. Instead, it was submitted that the 4th Defendant's version as to the occurrence of the accident was more plausible taking into consideration the section of the motortruck which was damaged by the collision. It was noted that the minibus collided into the middle section of the motor truck closer to the back and this supported the assertion that the truck was already on Chesterfield Drive when the collision occurred.

[23] Counsel in her submissions, challenged the credibility of the Claimant and submitted that based on the evidence which was presented by the Claimant, the negligence of the 1st Defendant was clearly established and there were no steps which the 4th Defendant could have taken to prevent the collision in the circumstances. In light of this, it was submitted that the court should find in favour of the 4th Defendant or in the alternative, if the court considers that both the 1st and 4th Defendants are liable, the 1st Defendant ought to bear the greater portion of the blame. In fact, it was submitted that based on the principles in the case *of* ***Pamella Thompson and others v Devon Barrows and other*** *CL2001/T143delivered on the 22nd of December 2006*, that the court should not find the 4th Defendant more than 50% liable in the circumstances.

[24] Counsel also made references to the cases of ***James Mitchell and Aaron Gordon v Leviene McKenzie and Dorrell Gordon*** *SCCA 104/1991 delivered October 21, 1992* and ***Humphrey v Leigh*** *[1971] RTR 363, CA*which offered guidance on the law concerning the duty of the driver of car crossing the main road from the minor road. These cases, she submitted, could be properly compared to the current case which is to be determined. Counsel further relied on the case of ***Calvin Grant v Pareedon and Pareedon****Suit No. C.L. 1983/G 108 unreported April 18, 1986*to highlight the principle that:

> *"where there is evidence from both sides in a civil action for negligence involving a collision on the roadway and this evidence… seeks to put blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious."*

In light of this, Counsel urged the court to take into consideration the evidence which was presented that supported the view that the 1st Defendant increased his speed when he was approaching the motor truck. It was also interesting that at paragraph 3 of her witness statement, the Claimant noted that the minibus in which she was travelling increased its speed on reaching the vicinity of the area where the accident occurred.

ANALYSIS

[25] In determining liability for the collision the following factors must be taken into consideration:

(a) The condition of the road;

(b) The speed at which the vehicles were travelling;

(c) The distance of the bus from the intersection at the time the truck commenced crossing; and

(d) The action taken by the respective drivers to avoid the collision.

A. *Condition of the road*

[26] There is no dispute that the road surface was dry, asphalted and in fairly good condition. It was also daytime with no impediment to visibility. The 4th Defendant's evidence is that the driver of the bus overtook a line of traffic while he was in the process of turning and that the excessive speed of the bus driver caused him not to be able to complete the turn. The Claimant's evidence is that the bus driver did not overtake a line of traffic. As to how many vehicles were travelling in the direction of the bus there is some inconsistency. She said at first

*"at the time of the accident no other vehicle were in the other lanes".*She later said she did not remember if other vehicles were in the other lanes going in the same direction as the bus. Pressed, she continued to say she did not recall if there were any other vehicles on the road. She maintained however that the bus did not overtake any vehicle at any point.

[27] How then to locate her evidence that the bus increased the speed in the vicinity of D&G. On a road way with no other vehicles, what could be the purpose of speeding up. It could be to beat the light or overtake. But in any event,overtaking other vehicles cannot be supportive of the 4th Defendant's case as that would mean there were vehicles even closer to him than the fifteen feet at which he first saw the 4thDefendant.

B. *Speed at which the vehicles were travelling*

[28] The Claimant refers to be bus as *"speeding"* particularly when she said that the *"bus not still speedingat the time of the accident."*She gives no further assistance concerning the rate of speed. She indicates the bus increased its speed in the vicinity of Seaviewwhich is the road the truck was turning onto. In cross examination, she says the bus increased the speed in the vicinity of D&G which would be some distance from Seaview. No estimate of the rate of speed of the bus is given by the 4thDefendant. He gave no estimate of his own speed but it is safe to say as a laden truck with blocks and cement, it would be travelling much more slowly than the bus.

C. *Distance of the bus from intersection*

[29] The Claimant in cross examination says she saw the truck some twenty feet from the collision and that it had already made the turnbefore she saw it.She also says, consistent with the Witness Statement, that she saw the truck at the stop light when she was at D&G. The truck therefore would have been at the stoplight before the bus

[30] The 4th Defendant does not indicate his distance from the bus was when he first saw it. The traffic he said was seventy-five feet away and the bus came from behind the traffic. The bus therefore would have been further than seventy-five feet away from the truck.The road is straight for some distance therefore the driver of the bus ought to have seen the truck well before twenty feet.

D. *Evasive action to avoid collision*

[31] The Claimant says at the time of the accident the bus was travelling at its increased speed. She further said the driver did not apply the brake or swerve. The 4thDefendant said he increased his speed when he saw thebus. The bus not being near at the time, he did not stop. He apparently did not anticipate the increased speed of the bus.

E. *Cause*

[32] I find that the truck had entered the intersection and commenced turning before the bus approached the intersection. This evidence of the 4th Defendant is consistent with the Claimant's account, in cross examination where she said "*that truck was already in the road trying to go across Seaview and it had already made the turn when I saw it*." She also maintained the truck turned in front of the bus. The collision impacting the rear half of the truck supports this.

[33] This then is not the same situation as ***James Mitchell***. In that case the truck *"drove right across the road into the path of the oncoming bus"* moving from the soft shoulder onto the roadway without any indication that he intended to do so and in so doing afforded the bus driver no opportunity of avoiding the collision. In those circumstances it was found that the bus driver did nothing to contribute to the accident. The 4th Defendant's evidence that he stopped at the intersection before proceeding is not disputed.

[34] The speed of the bus driver, whatever it was, was excessive, given that he did not stop or was not able to stop before the collision. This is so whether he

overtook a line of traffic or not. Given the straight road, this would be due to either him not seeing the truck until just before this collision as the Claimant said and therefore not paying due care and attention or due to him being behind a line of traffic. For whichever reason,he was going too fast.

[35] This act of speeding therefore was clearly the substantial cause of the collision. It is conceded that the act of speeding is not by itself evidence of negligence. There had to be some breach of the duty of care.

[36] The increase in speed changed the dynamics of the situation as it existed when the truck commenced turning intoSeaview. I find that given the part of the truck that was impacted, the truck could have completed it'sturn had the bus driver not increased his speed.

[37] I find that the bus driver increasing his speed in circumstances where the truck had commenced turning intoSeaview, was negligent. I find that it is more probable that he misjudged the speed of the truck ortime it would take to complete its manoeuvre, specifically to leave the lane in which the bus was travelling free. Hence he took no evasive action when he had to have seen the truck turning. This too is the reason the possibility of a collision was imminent only at the last moment.

[38] In these circumstances was there any duty of care on the part of the 4th Defendant? The Claimant's submission on the point are well founded that the Defendant has a duty to ensure he could complete the manoeuvre safely.

[39] It was said that a prudent person will guard against the possible negligence of others when experience shows such negligence to be coming. On the truck driver's account, other vehicles were closer to him overtaking on the straight road. This is not uncommon in Jamaica. Thus the possibility of speeding on that stretch of road should have been in the contemplation of the 4th Defendant.

[40] Given the fact that he was operating a laden vehicle, he ought to have taken every care to ensure he would be able to complete turning before any vehicles could reach him. He ought to have waited, in the circumstances, until the roadway was clear or he was acknowledged by oncoming traffic. This is especially so in circumstances where oncoming traffic would have the green light and therefore no need to stop.

[41] The truck driver's want of care however does not rise to that of the bus driver and is therefore less to blame for the collision. I would therefore assess his negligence for the collision at 30%.

ASSESSMENT OF DAMAGES

A. General Damages

[42] In relation to the quantum of damages which the Claimant should be awarded, it was submitted, that the sum of Seven Million Dollars ($7,000,000.00) is a fair amount to be awarded to the Claimant for general damages. It was furthersubmittedthat the cases of ***Terrence Lawrence v Earnest Young and Donald Young*** *(Khan Vol.3 pg. 75)*and ***Beverley Francis v DonovonPagon and Maurice Smith***(*Khan Vol 4 pg 52)*where updated awards of $3,158,184.32 and $6,833,594.07 respectively, were made was applicable in this instance. The cases of ***Marlene Brown v Lema Malcolm and Derrick Gray****(Khan Vol. 6 pg. 8)* and ***Winnifred Hunter v Micheal Brown*** *(Khan Vol. 6 pg. 56)*where updated awards of $1,871,140.94 and $1,277,583.46 were awarded was also referenced as being comparable to the instant case.

[43] Counsel on behalf of the 4th Defendant submitted that the Claimant produced no further medical report since the last report from Dr. Waite dated 10th April 2007. Therefore, it was submitted that there was no medical report to substantiate the claims made by the Claimant that her pain is so severe that she is now forced to receive an injection every year. Counsel submitted that in considering the issue of damages, the court must have regard to the case of ***John Shirley v Jamaica***

Premix Ltd. and Hopeton Smith *C.L 1991/S 105*reported at page 214 of Harrison's where an updated sum of $2,663,556.00 was awarded to the Claimant who suffered fracture of the right femur at the lower end; blow to the right thigh and multiple abrasions and lacerations over the right arm and elbow. Counsel also made reference to the cases of ***Floyd Miller (b.n.f Henry Miller) v Fitzroy Hamilton and Barrington Laidley****Suit No. C.L. 1987/M 349 delivered 20th June 1990* and ***Wade Mckoy v Hilda Beckford*** *Suit No. C.L 1984/M396 delivered 4th October 1990* where updated awards of $1,972,366.00 and $2,131,259.00 respectively were made to the Claimant. On this basis Counsel submitted that the Claimant in the instant case suffered more serious injuries and in view of the noted distinctions, a reasonable sum to be awarded in the circumstances is $2,500,000.00.

(1) Pain and Suffering

[44] The Claimant suffered the following as disclosed in the medical report of Dr. Phillip D. Waite, Consultant Orthopaedic Surgeon:

> *Shatzker VI fracture of the tibial plateau*
>
> *Undisplaced medial condylar fracture of the left femur*
>
> *Resolved mild cerebral concussion*
>
> *Chronic hypertension, anaemia and rheumatoid arthritis.*

[45] She had surgical intervention on the 7th of March, 2006 and was discharged from the hospital one week after. She continued to have mild pain to the knee and a hinged knee brace was applied. She was prescribed antibiotics and analgesics and advised to continue non-weight bearing on the limb. The wound continue to heal and kneeflexion continued to increase. Some seven weeks post operation, the wound was healed and the range of motion increased to 90%.

[46] The fracture however was not healing satisfactorily and on the 7th of July, 2006, she was assessed with 100% lower extremity impairment. Further, temporary disability was put at a further 6-9 months with further surgery being a strong

possibility. By August 2006, this became a reality as bone grafting was deemed necessary. By February 2007, she was able to full weight bear with a mild limp due to hip abductor weakness. Ranges of motion had improved to 85% flexion. She was advised to return to work but only allowed to perform light duties.

[47] Permanent disability was not assessed. No indication of changes were made to the temporary disability. There is no indication the hip abductor weakness was related to the broken bones. There is a further report of Dr. Waite in October 2013 indicating that the Claimant has osteoporosis around the left knee requiring yearly intravenous injections to help to improve the bone stock. She still feels pain in the knee up to the time of trial.From the medical history, it can be seen that the Claimant suffered significantly for up to a year enduring two surgeries and a multitude of physiotherapy sessions. It is noted that pre accident, she suffered from rheumatoid arthritis.

[48] The cases of ***Beverley Francis***and ***Winnifred Hunter***were relied on by the Claimant most closely resemble the Claimant. ***Beverley Francis*** was diagnosed with a comminuted supra condylar fracture of the left femur. After physiotherapy and other treatment, the range of movement at the knee joint was restricted in flexion to 90% and she walked with a limp. There was a 90% chance of her developing osteoarthritis. Permanent partial disability was assessed at 20% of the lower limbs and 10% of the whole person duality. The award of $350,000.000 for pain and suffering and loss of amenities update to $3,187,523.85 using CPI for March 2017 .

[49] Ms. Hunter at the time an octogenarian, was diagnosed with fracture to lateral tibial plateau. She had surgery on her left knee and became stable at 90% range of motion. Nearly two years later she still complained of pain and soreness in the left knee. Her residual disability was assessed at 24% of the whole person. The award of $850,000.00 now updated to $3,226,701.65 using CPI of March 2017. ***Hunter*** is the preferred authority given that it is later in time and the values therein closer to the current value of money.

[50] In the circumstances of the differences in age, the Claimant at bar was not as old as Ms. Hunter at the time of the collision, her occupation which requires her to be on her feet, the length of temporary disability, a reasonable sum for pain and suffering and loss of amenities is $3,500,000.00. The 4th Defendant's liability being 30% is $1,050,000.00

B. *Special Damages*

[51] After careful examination of all the receipts and statements placed before the court, Special damages as follows will be awarded:

(a) Doctor fees	-	$432,700.00
(b) Hospital expenses	-	$400,916.30
Total	-	$833,616.30

This amount is reflective of all hospital and doctors' fees for the period of February 2006 – May 2007. These were proved by documentary evidence.

(1) Cost of Future Surgery

[52] There is no future surgery indicated by the evidence. Therefore, no award will be made in this regard.

(2) Travelling Expenses

[53] The court has given consideration to the travelling expenses claimed and will make an award only for travelling made to the doctor and for physiotherapy sessions, being:

(a) Physiotherapy Trips (26 trips @ $800.00)	-	$20,800.00
(b) Doctors Visits (11 trips @ $800.00)	-	$8,800.00
Total	-	$29,600.00

These expenses I find proved by the acknowledgement from the suppliers. There will be no award made for travelling to work, having regard to the fact that there is no evidence placed before the court to suggest what the arrangements to travel to work were before the accident or why there was a necessity for fresh arrangements after the accident.

[54] Therefore, the court will award $29,600.00 for travelling expenses.

(3) Loss of Earnings

[55] It was noted that the Claimant was unable to return to work for 12 months after the incident and was paid only a basic salary until June 2006 and then a salary advance of $25,000.00 per month until she resumed work in February 2007. When she returned to work, her employers then deducted the advance payments from her salary.

[56] Counsel for the Defendant further submitted that in relation to special damages, the Claimant is not entitled to loss of earnings since she was paid her salary. Neither is she entitled to be paid commission since commission is not guaranteed.

[57] I agree that since Ms. Williams has been receiving payment for the period of her injury she would not be entitled to claim loss of earning *per se*. However, the issue which requires more observation is whether she can claim the monies advanced to her and subsequently withdrawn once she resumed full duties and her claim for loss of commission she would have received if she had worked overtime.

[58] The Claimant has given evidence supported by documents provided from the hospital that the sums of $25,000.00 per month paid to her as an advance were being withdrawn from her salary despite the repayment being incomplete. This is sufficient to satisfy the court of lost earnings. Based on the evidence presented, I find that she should be compensated for the months of July 2006 – February

20078 months at the average rate of $26,696.80 per month having regard to the salary she received in October 2005- December 2005 and February 2006. This totals $213,574.40.

[59] As it relates to the commission, the court requires some basis as to which this commission would have been computed as well as evidence that she would have worked a consistent amount of hours on a regular basis so as to justify this award.

[60] In the case of ***Albert White v Office of Disaster Preparedness and Emergency Management, Trescelian Williams and The Attorney General*** *(Cl. No. 2000 W 159 A delivered July 31, 2008)* the court was able to grant an award of overtime pay based on the fact that the Claimant presented specific evidence of his past working schedule and the fact that this was a regular arrangement. It was also noted in ***White*** that the Claimant presented evidence of the rate at which he was paid for the extra time he worked. The principle garnered from McDonald Bishop J (as she then was) in ***White*** is that where the court is able to quantify the overtime payment at a particular rate as well as determine a regular routine from the evidence then such a claim will be upheld.

[61] In the present case, the Claimant has not presented evidence of a regular routine of working more than the prescribed hours nor has she presented evidence of the rate she was paid in order to enable the court to properly make an award. Therefore, no award will be made in the circumstances.

[62] Total special damages would therefore be $1,076,790.70of which 30% is $323,037.21.

ORDERS

[63] The Claimant is hereby awarded against the 4th Defendant the following:

(a) General damages in the sum of **$1,050,000.00**

(b) Interest on general damages at a rate of 3% per annum from the 24th April 2007 to the 9th May, 2017

(c) Special Damages in the sum of **$323,037.21**

(d) Interest on special damages at a rate of 3% per annum from the 26th February 2006 to the 9th May 2017

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Justice Cresencia Brown Beckford