

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2010-02607

BETWEEN

KELLY BOYER-HURDLE

Claimant

AND

MERLIN HARROO

First Defendant

AND

**LELTUS MANNETTE
(wrongly sued as KELTHIS MANNETTE)**

Second Defendant

AND

MOTOR AND GENERAL INSURANCE COMPANY LIMITED

Co-Defendant

Before: Master Margaret Y Mohammed

Appearances:

Mr Martin George for the Claimant

Ms Sophia Sandy for the First and Second Defendants and Co-Defendant

DECISION-ASSESSMENT OF DAMAGES

Introduction

1. Before the court is the claimant's assessment of damages for personal injuries and other loss which she incurred in a motor vehicle accident on June 29, 2006 as a passenger in a motor vehicle owned by the first defendant, driven by the second defendant and insured by the co-defendant (collectively referred to as "the defendants"). I have assessed the claimant's general damages in the sum of \$ 50,000.00 with interest at the rate of 6% per annum from June 23, 2010 to October 18, 2012. The sum of \$50.00 as special damages is awarded with interest at the rate of 3% per annum from June 29, 2006 to October 18, 2010. The defendants are to pay the claimant prescribed costs in the sum of \$15,405.19.

Preliminary objection

2. At the start of the trial, but before the receipt of evidence Counsel for the defendants objected to the admissibility of paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 18 and 19 of the claimant's witness statement. While I agree with Counsel for the claimant that it may have been more appropriate for this objection to be made prior to the start of the trial I did not agree that the application was made too late since it was made prior to the receipt of the evidence. I therefore allowed the objection to be made.
3. The objections concerned the relevance of paragraph 7 - the information told to the claimant by Dr Blackburn, the pictures of the claimant's left injured forearm and the documents in support of the claimant's claim for her loss of earnings and medical expenses. Apart from the paragraph 7 objection the other objections were on the basis of hearsay. I agree that paragraph 7 of the witness statement is irrelevant since it sets out the other passengers in the motor vehicle at the time of the accident. This paragraph is therefore struck out.
4. The other objections raised 2 issues: (a) whether documents disclosed to the defendants pursuant to Part 28.18 of the Civil Proceedings Rules ("the CPR") made them

admissible into evidence as exhibits to the claimant's witness statement without further proof and if so (b) whether the documents are admissible as proof of the contents or merely to the fact that the documents were made by the person signing the document.

Does disclosure of documents amount to admissibility?

5. It was undisputed that the documents objected to by the defendants were disclosed to them. It was also undisputed that the claimant was not the maker of the said documents, that is the medical report, pictures and various receipts and that the claimant failed to produce the makers of those documents or to file the appropriate hearsay notices. Part 28.18 of the CPR sets out the procedure for a party to prove a document after there has been disclosure. It states :

“(1) A party shall be deemed to admit the authenticity of any document disclosed to him under this Part unless that party serves a notice that the document must be proved at trial.

(2) A notice to prove a document must be served not less than 42 days before the trial.”

No notice to prove any documents was given by the defendants as required by the rule.

6. Part 10 of the CPR places a duty on a defendant to set out its case. The claimant alleged in her amended statement of case that as a result of the accident she sustained injuries to her ribs, left thigh, left arm and multiple puncture wounds. The third defendant in its defence admitted liability but did not admit to the claimant's personal injuries, consequential loss and damages and put the claimant to strict proof of her loss. In my view the effect of the third defendant's plea was to put the claimant's injuries and expenses which she has suffered as a result of the accident in dispute and the onus was therefore on the claimant at the Assessment of Damages to adduce evidence to prove that she has indeed suffered the injuries pleaded, the effects of her injuries and the expenses incurred.

7. In considering the issue of whether documents are admissible as proof of the contents or the fact that they were made, Jones J in **Badewatie Ramnarine v Azziz Mohammed and ors**¹ had this to say:

“The question for my determination is whether the documents are admissible as proof of the contents or merely to the fact that the documents were made by the persons signing the document. In other words, are the receipts evidence of the fact that the claimant incurred the expense or merely that a receipt was given by the person purporting to sign it. Truth or authenticity. In my opinion in the absence of a hearsay notice the receipts are only admissible as evidence of the fact that they were made and not to the truth of the contents.

In the majority of cases the distinction is negligible and the issue at the end of the day is credibility. For example where a claimant says I spent \$4000 on an MRI here is the receipt for the expense. At the end of the day the issue is whether I believe that the claimant is speaking the truth. The fact that a receipt was obtained by the claimant would be a factor to be taken into consideration in assessing the claimant’s credibility. The difficulty arises where there is no primary evidence of the incurring of the expense and the claimant merely seeks to tender a bundle of receipts. The receipts are admissible but insofar as the truth of their contents are concerned it is hearsay evidence.”

8. Counsel for the claimant has failed to advance any reason for me to depart from the aforesaid position of Jones J which I respectfully adopt. The medical evidence which the claimant attempted to place before this court was a medical report of Dr Victor Blackburn dated June 30, 2006. It was not disputed that Dr Blackburn is the medical practitioner and the physician who attended to the claimant. The claimant has no medical expertise and cannot give evidence on the opinions of Dr Blackburn. In my view only Dr Blackburn can give expert medical evidence on the medical condition of the claimant. The claimant cannot do so. If Dr Blackburn could not have attended court

¹ CV 2009-00202 at page 9

to give evidence on the claimant's condition the hearsay rules under the Evidence Act and the CPR allow for exceptions for his report to be admitted into evidence so that the claimant's medical evidence could be placed before the court for consideration in determining the measure of damages to award to the claimant.

9. In this case, unfortunately, Dr Blackburn was not called to give evidence on behalf of the claimant neither was any hearsay notice filed by the claimant seeking to have the report admitted into evidence under the hearsay rule. In this regard, the medical report of Dr Blackburn dated June 30, 2006, having been disclosed can be admitted for the fact that it was made. However, since the maker of the document did not give evidence and no hearsay notice was filed this court cannot attach any weight to truth of the information contained therein.
10. In the absence of a hearsay notice or the maker of the documents giving evidence, the pictures, receipts and medical report dated June 30, 2006 are only admissible of the fact that they were made and not to the truth of the contents.
11. In the circumstances, the following parts of paragraphs 8, 9,10,11,12,13,14,18 and 19 of the claimant's witness statement objected to by the defendants on the basis of hearsay are struck out since they all concern information which are not within the direct knowledge and expertise of the claimant.
 - (a) Paragraph 8- The words "seriousness of my injuries" and "I had two fractured Ribs; third degree burns, lacerations to the upper arm and left forearm as well as multiple puncture wounds"
 - (b) Paragraph 9 – The words "which exposed the deltoid muscle True copies of the pictures showing injuries to my forearm are hereto annexed as "K.S.W.1".
 - (c) Paragraph 10 – The words "firstly cleaning and debriding the woundthe details of the medical procedure were noted in the medical report of Dr Blackburn, a true

copy of which is exhibited at Tab 2 in the bundle of documents filed on the 19th April, 2012.”

- (d) Paragraph 11- The words “ treatment of my third degree abrasion burn injury...unsightly permanent”
- (e) Paragraph 12- The words “after the skin grafting procedure....until it fell off by itself.”
- (f) Paragraph 13- The words “pieces of glass that were left deeply embedded in my arm....felt pieces of glass in the arm”
- (g) Paragraph 14- The words “extent of my injuries” and “left maimed and permanently scarred”.
- (h) Paragraph 18 – The entire paragraph
- (i) Paragraph 19 – The words “A true copy of the Authorization and Request for Employment records (Accident) detailing the loss of wages or earnings is exhibited at Tab 4 in the bundle of documents filed on the 19th April, 2012.”

What is an appropriate award for General Damages for this claimant?

12. **Cornilliac v St Louis** ² has set out the guiding principles in assessing a claim for general damages namely: (a) The nature and extent of the injuries sustained; (b) The nature and gravity of the resulting physical disability; (c) Pain and suffering; (d) Loss of amenities; and (e) The extent to which pecuniary prospects were affected. Other similar cases are also guidelines for the possible range of an award of damages³.

² (1966) 7 WIR 491

³ Aziz Ahamad v Raghubar 12 WIR 352

The nature and extent of the injuries sustained and the resulting physical disability

13. The only evidence with respect to the claimant's injuries is she suffered a large wound extending from the top of her left shoulder to her left elbow. As a result of this injury she underwent surgery on her arm and she remained hospitalized for 4 days, until July 2, 2006, when she returned abroad for further treatment. Her treatment abroad kept her hospitalized for 23 days. Due the scar which remained after the injury the claimant felt embarrassed when persons stared at her. Her 8 year old daughter was afraid to touch her and her intimate relationship with her husband was negatively affected resulting in a breakdown of her marriage.
14. In assessing the claimant's loss under this heading the court is handicapped by the absence of any medical evidence. It is not adequate for the claimant to give oral evidence of the injuries sustained and the resulting effects. In order to establish her claim there is no medical evidence on the nature of the injuries sustained and the residual effect on the claimant's ability.

Pain and suffering

15. The claimant's pain started from the day of the accident to some 10 months thereafter. As at April 2012 the claimant's pain has appeared to have reduced significantly however she still experienced discomfort from her injuries. I have noted that although the claimant has given evidence of feeling pain for a prolonged period of time, there is no evidence that the intensity of the pain has caused her to seek further medical attention nor to resort to medication to alleviate her pain.

Loss of amenities

16. After the claimant was discharged from the hospital abroad she was confined to her bed for an unknown period of time. She was cared for by her husband who changed her bandages and assisted her in performing some personal hygiene functions for a period of 6 months. I accept that the remaining scars made the claimant feel self conscious and this would have adversely impacted on her social life.

Loss of pecuniary prospects

17. The claimant was employed as an Assistant Account at Quest Diagnostic at the time of the accident. She resumed work in October, 2006 but there was no evidence to suggest that after her resumption of work, due to her injury, she was incapable of working and or medically unfit to work. At the trial of the Assessment of Damages the claimant admitted under cross-examination that at present she is not working since she is a student which is funded by a grant. The claimant is therefore not entitled to any award under this heading.
18. In arriving at an award for the claimant's general damages for pain and suffering and loss of amenities I did not consider the authorities referred to me by Counsel for the claimant to be relevant since the injuries outlined in those authorities were far more severe than that suffered by the claimant. The 2 authorities referred to me by Counsel for the defendants **Maharaj v Khan**⁴ and **Alfred v Mahabir**⁵ concern similar injuries but due to the age of these decisions they provided little assistance in determining an award. Bearing in mind the evidence, in particular the absence of medical evidence I am of the opinion that an award of \$50,000 is appropriate as fair compensation for this claimant as general damages.

⁴ 570/73

⁵ 1586/80

Has the claimant proven her claim for Special Damages?

19. The claimant's pleaded claim for special damages were (a) loss of wages in the sum of US \$ 19,451.76, (b) loss of overtime of US \$5 ,016.30, (c) medical expenses of US \$ 16,884.00 and (d) Police Report of TT \$ 50.00. It is settled law that special damages must be pleaded, particularized and be "strictly" proved⁶ and the burden is therefore on the claimant to prove her loss. In **Bonham v Hyde Park Hotel** ⁷ which was adopted in **Grant v Motilal Moonan** Bernard CJ had this to say:

" Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage. It is not enough to write down the particulars, so to speak, throw them at the head of the Court saying 'this is what I have lost; I ask you to give me these damages.' They have to prove it".

20. The nature of the evidence to be adduce to satisfy the court to prove the special damages was addressed in **Ramnarine Singh and anor v The Great Northern Insurance Company Limited and Johnson Ansola**⁸ by Mendonca JA at paragraph 97 where he stated:

" From these cases it seems clear that the absence of evidence to support a plaintiff's viva voce evidence of special damage is not necessarily conclusive against him. While the absence of supporting evidence is a factor to be considered by the trial Judge, he can support the plaintiff's claim on the basis of viva voce evidence only. This is particularly so where the evidence is unchallenged and which, but for supporting evidence, the Judge was prepared to accept. Indeed in such cases, the Court should be slow to reject the unchallenged evidence simply and only on the basis of the absence of supporting evidence. There should be some other cogent reasons."

⁶ Grant v Motilal Moonan Ltd (1988)43 WIR 372 per Bernard CJ

⁷ (1948) 64 TLR 178

⁸ Civ Appeal No 169 of 2008 and Civ Appeal 121 of 2008

21. The claimant's viva voce evidence is she was unable to continue to work as an Assistant Account at Quest Diagnostic and she was only able to return to work on October 23, 2006. During the period July 25, 2006 to October 23, 2006 she was not paid save and except for 3 days during the period June 28 to June 30. Her loss of income was USD \$19,541.76 and her total loss of overtime was USD \$ 5,016.30. This evidence was challenged by the defendants and the claimant failed to provide any supporting documentary evidence to support her assertion. Additionally, there is no medical evidence to corroborate the claimant's position of her inability medically to resume work for such a long period. For these reasons I am constrained to make no award for the claim for loss of earnings.

22. Similarly, the claimant has failed to place before me any evidence which addresses the truth of the sums claimed for her medical expenses. The documents referred to in Tab 3 of her list of documents were admitted into evidence for the fact that they were received by the claimant. However, in the absence of the maker of the documents giving evidence on the truth of their contents or the appropriate hearsay notices being filed to explain the failure of the maker of the documents being able to give evidence I am likewise constrained to make no award for this loss. My difficulty in accepting the truth of the information in these documents is there is no primary evidence of the incurring of the expense and the claimant merely sought to tender a bundle of receipts. However, I will take judicial notice that the cost of the police report is \$50.00 and this was unchallenged by the defendants. This sum is awarded.

Order

23. The claimant's special damages are assessed in the sum of \$50.00 with interest at 3% per annum from June 29, 2006 to October 18, 2012.

24. The claimant's general damages are assessed in the sum of \$50,000 with interest at 6% per annum from June 23, 2010 to October 18, 2012.

25. The defendants to pay the claimant prescribed costs in the sum of \$ 15,405.19.

Dated this 18 day of October, 2012

Margaret Y Mohammed
Master (Ag)