

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-01254

BETWEEN

GISELLE KAHL

Claimant

AND

SEELAL HARRILAL

First Defendant

GUARDIAN GENERAL INSURANCE LIMITED

Second Defendant

Before Master Patricia Sobion Awai

REASONS

Appearances:-

Mrs. InDr.a Lutchman-Ramdial instructed by Ms. Tosha Lutchman for the Claimant

Mr. Roger Kawalsingh instructed by Ms. Joseph for the Defendant.

BACKGROUND

1. On July 18, 2011, the Claimant, a 37 year old aesthetician, was injured in a motor vehicle accident. Her vehicle was at a standstill along Mucurapo Road, St. James when it was hit from the rear by a vehicle owned by the defendant. The Claimant commenced these proceedings against the defendant and the co-defendant, insurer of the defendant's vehicle, to recover damages for losses sustained in the accident. There was a consent judgment on liability and the matter came before me for assessment of damages.

THE EVIDENCE

2. Three witnesses testified on behalf of the Claimant while the defendant called no witnesses. The Claimant also brought evidence before the court through hearsay notices. Below I set out a summary of the evidence brought on behalf of the Claimant.

Evidence of Giselle Kahl

3. The Claimant had been a self employed aesthetician since 2001 or thereabouts. She worked five days a week from Tuesday to Saturday usually from 10am to 6pm. Her services included waxing, pedicures, manicures and facials. Her job "requires a lot of bending and sometimes staying in one position for a while which causes a lot of pain."
4. It is convenient to set out the rest of Claimant's evidence in chronological order.

July 18, 2011: The accident occurred which was described as a violent collision that pushed the Claimant's vehicle about six feet forward. Her upper body went forward and she felt a "jerking sensation". Later that night she began feeling pains in neck, chest and shoulder.

July 19, 2011: The Claimant visited the office of her general practitioner Dr. Ferdinand. Having examined her, he prescribed Cataflam for the pain.

January, 2012: Some six months later, the Claimant visited Dr. Corlis Alexander, a general practitioner, on the advice of a friend. Dr. Alexander recommended that an MRI be done.

February 6, 2012: An MRI of the Claimant's cervical spine was done.

February 10, 2012: Dr. Alexander reviewed the MRI and recommended physiotherapy.

March 2012 to June 2012: The Claimant did physiotherapy with one Kern Roberts of Altus Health. The physiotherapy sessions entailed neck traction, use of machines and heating pads as well as manual exercises and stretches.

July 2012: The Claimant visited Dr. Mencia, a consultant orthopaedic surgeon, who referred her to Dr. Adam, a neurologist.

August 17, 2012: The Claimant was seen by Dr. Adam who carried out nerve conduction studies and prepared an electromyogram report. Dr. Adam advised her to continue physiotherapy and continue to take Cataflam painkillers as needed.

February 2013 to September 2013: The Claimant resumed physiotherapy with Kern Roberts at his private practice at Memphis Rehabilitation.

5. At paragraph 26 of her witness statement, the Claimant described the effect of the accident in the following terms:

"This accident has changed my life. I live with a lot of pain which has now become a part of my life. I do hope to be able to access the treatment I need to recover properly from it and move on as I did before the accident."

Medical Evidence

6. The medical evidence was provided by Dr. Rasheed Adam, a neurologist, who was called as a witness. Additionally, three medical reports were admitted into evidence without the makers being called upon to testify. These were (1) a report dated September 4, 2014 of Dr. Ferdinand (2) a report dated February 6, 2012 of Dr. Ameeta Varma (the MRI Report) and (3) a report dated Feb 10, 2012 of Dr. Corlis Alexander.

Evidence of Dr. Rasheed Adam

7. The Claimant was examined by Dr. Adam, a neurologist on August 17, 2012, just over a year after the accident on

a referral from Dr. Mencia. His report entitled "Nerve Conduction Studies and Electromyogram Report" dated August 17, 2012 reads in part as follows:

"SUMMARY

The (L) median nerve shows normal distal motor and forearm conduction velocity.

The (R) median and (L) ulnar nerves show normal distal motor utensils.

Muscle responses sound. No fasciculations noted.

IMPRESSION

Normal nerve conduction study.

This suggests that the source of symptoms is more proximal at the nerve root level C6 nerve root involvement as seen on MRI Scan."

8. In his report dated February 7, 2014 Dr. Adam indicated that the Claimant was reviewed on January 27, 2014, but this appears to be an error as Dr. Adam indicated in cross examination that he had only seen the Claimant once. An extract of this medical report is set out hereunder.

"Examination showed some discomfort on head turn, normal shoulder mobility and no focal neurologic findings. Her findings indicate neck strain with left C6 nerve root involvement from herniated disc. I advised she continue physiotherapy exercises, Cataflam and vitamins.

The injury Ms. Kahl suffered is as a result of the accident of 18/07/11 and her symptoms of continuing pain is a result of that accident. Her management at present is physiotherapy, neck exercises and medications. If there is no improvement then surgery be considered - anterior cervical fusion and the cost of this surgery including hospitalization, anesthetic and surgical fees are approximately \$100,000.00TTD. At present it is difficult for her to work as an Aesthetician because this requires bending and standing."

9. Under cross examination, Dr. Adam said he had seen no reports done contemporaneously with the accident. When he stated that the injury was a result of the accident, this was based purely on what the Claimant told him. He agreed that he had no scientific evidence to connect the injury with the accident.

Evidence of Dr. Anthony Ferdinand

10. Dr. Ferdinand saw the Claimant on July 19 2011, the day after the accident. He reported as follows:

"Please be informed that the above patient was examined at this office on July 19, 2011 subsequent to being involved in a motor vehicle accident the previous day. Her main complaints were pains in the left shoulder and left anterior chest wall.

Examination revealed painful but full movements of the left shoulder and tenderness over the anterior chest wall. There was no restriction of the neck movements but there were neck pains of moderate severity at that time. She was prescribed cataflam 50 mg tablets. My professional fee was \$200.00 (T&T).

*I did not see her again concerning this complaint.
Please be guided accordingly"*

Evidence of Dr. Ameeta Varma (MRI Report)

11. An extract of the report dated February 6, 2012 is set out below (emphais mine):

Patient: Giselle Kahl

D.O.B. 16.06.1974

Ref. Doctor: Dr.. C. Alexander

Exam: MRI - Cervical Spine

*Clinical History: - **Neck pain x at least 5 years.**
Experiences paraesthesia and numbness in the upper
liimbs. R/O Spondylolisthesis +/-Nerve root
compression.*

MRI CERVICAL SPINE

MR IMAGING TECHNIQUE

Sagittal T1, T2, STIR and axial T2 FSE sequences have been obtained on a 1.5 T magnet.

MRI FINDINGS

There is a loss of cervical lordosis with mild end plate osteophytosis. There is a small depression in the superior end plate of C6 vertebral body. Type II end plate changes are seen at C3-4 level and type I end plate changes are seen at C5-6 level. Vertebral height, alignment and marrow signal intensity otherwise appears unremarkable.

Atlantoaxial joint appears unremarkable.

There is variable disc desiccation at all levels with annular tear at C5-6 and C6-7 levels and mild decrease in disc height at C5-6 level.

C2-3 level: There is no significant disc bulge or compromise of spinal canal and bilateral neural foramina.

C3-4 and C4-5 levels: There is posterocentral mild disc bulge causing mild narrowing of spinal canal. Bilateral neural foramina are patent.

C5-6 level: There is diffuse disc bulge with posterior broad based disc herniation centered to the left of midline. These findings lead to moderate to severe narrowing of spinal canal with indentation of cord and impingement of left C6 nerve root. There is mild narrowing of bilateral neural foramina.

C6-7 level: There is posterior disc herniation (9mm TS x 3mm AP) causing mild narrowing of spinal canal. Bilateral neural foramina are patent.

C7-T1 level: There is no significant disc bulge or compromise of spinal canal and bilateral neural foramina.

Cervical cord appears unremarkable in signal intensity.

OPINION

Loss of cervical lordosis

Variable disc desiccation at all levels with annular tear at C5-6 and C6-7 levels and mild decrease in disc height at C5-6 level

C3-4 and C4-5 levels: posterocentral mild disc bulge causing mild narrowing of spinal canal

C5-6 level: diffuse disc bulge with posterior broad based disc herniations centered to the left of midline causing moderate to severe narrowing of spinal canal with indentation of cord and impingement of left C6 nerve root and mild narrowing of bilateral neural foramina

C6-7 level: posterior disc herniation (9mm TS x 3mm AP) causing mild narrowing of spinal canal

Evidence of Dr. Corlis Alexander

12. A medical report/ referral form signed by Dr. Alexander of Altus Health and dated Feb 10, 2012 gives the following diagnosis as "Disc disease of c-spine/herniation, C5-6, C6-7 levels. C6 nerve root impingement." The Claimant was referred for physiotherapy and a doctor's visit.

Other Evidence

13. Mr Kern Roberts, a physical therapist was called as a witness. Other evidence before me were receipts which were put in through a hearsay notice.

Evidence of Kern Roberts

14. This witness was a physical therapist who treated the Claimant from about March 2012, approximately eight months after the accident. She was referred with cervical spine disease and herniation of C5- C6m C6 - C7discs and C6 nerve root impingement. The initial complaint was pain and discomfort of neck and shoulders with numbness radiating into both hands.

15. Therapy consisted of a range of pain management modalities, ice, moist heat, ultrasound, electro-stimulation and physical modalities, strengthening and conditioning, massage therapy as well as therapeutic exercises. Because of slow progress, the Claimant was asked to be reevaluated by her physician after 2 months i.e. on June 15, 2012.

16. The Claimant restarted in February 2013 at Mr Roberts' private practice but she opted to discontinue treatment in September 2013.

17. In a report dated August 28, 2014 addressed to the Claimant's attorney, Mr Roberts expressed the following opinion on the effects of the accident and on the Claimant's need for further physiotherapy as follows:

"It is quite possible that the increase in upper extremity and neck pains and repetitive stresses may be as a result of the injury sustained in the motor vehicle accident. It is also possible that Ms Khal (sic) would also need further corrective physical therapy interventions to remedy that any other pains or discomfort that may arise."

Hearsay Documents

18. Among the hearsay documents tendered into evidence were receipts for doctors' visits, physiotherapy and rental of a motor vehicle as well as a discharge form issued by Trinidad and Tobago Insurance Ltd.

NEXUS BETWEEN THE CERVICAL SPINE ILLNESS AND THE ACCIDENT

19. At the time of the assessment, it was clearly established that the Claimant was suffering from an injury of the cervical spine. The MRI report dated February 6, 2012 clearly outlined the nature of the injury to the Claimant's cervical spine. The report found, inter alia, loss of cervical lordosis, variable disc dessication at all levels, disc bulges at various levels with impingement of left C6 nerve root and disc herniation at the C6-7 level.

20. In February 2012 based on this MRI report, Dr. Alexander diagnosed the Claimant with disc disease of C-spine/herniation at C5-6 and C6-7 levels with C6 nerve root impingement. She sent the Claimant for physiotherapy.

21. In his report February 7, 2014 which arose out of an examination done on August 17, 2012, Dr. Adam diagnosed neck strain with left C6 nerve root involvement from herniated disc. He recommended continued physiotherapy and Cataflam.

22. One of the major issues in this case is whether the cervical spine injury as outlined in the MRI report and in the reports of Drs. Alexander and Adam was caused by

the accident. Attorney for the defendant argued that Dr. Adam's report should be disregarded as there was no scientific link between his findings and the injuries sustained by the Claimant as a result of the accident. He said that the Claimant could only rely on the medical report of Dr. Ferdinand who had examined her shortly after the accident. On the other hand, the Claimant's attorney submitted that based on the chronology of events, the only inference to be drawn was that on a balance of probabilities there was a nexus between the accident and the injuries as set out in the MRI report.

23. In determining which argument should be upheld, I considered first the evidence relating to the Claimant's position before the accident, immediately after and then following the MRI report.

24. The only indication of the Claimant's position before the accident is the reference in the MRI report of the Claimant having suffered neck pain for 5 years before presenting. Dr. Ameeta Varma was not called as a witness and I therefore sought to give the words of her report their ordinary meaning. I concluded that she was told by the Claimant that she had been experiencing neck pain for some five years prior to the visit. Any neck pain which was pre-existing at the time of the accident would be relevant to this assessment and the failure of the Claimant to disclose such a material fact or alternatively to dispel any notion of a pre-existing condition raised doubts as to her forthrightness and candor.

25. Apart from the possibility of a pre-existing condition raised by the history given in the MRI report, there is a gap in the medical evidence between the examination carried out the day after the accident by Dr. Ferdinand, and the Claimant's visit to Dr. Alexander, some six months later. The Claimant said she was in severe pain throughout that period but she felt that, with the use of Cataflam, she was managing the pain well. A friend eventually advised her to visit Dr. Alexander, who like Dr. Ferdinand, was a general practitioner.

26. The MRI was done on February 6, 2012 some seven months after the accident. It revealed the full extent of the Claimant's cervical spine illness.

27. On August 17, 2012, Dr. Adam found neck strain with left C6 nerve root involvement from herniated disc which according to him could be seen on the MRI scan. The tests that Dr. Adam himself conducted gave normal results. According to his own evidence, he had no scientific basis for linking the accident to the injury found. No evidence was adduced from Dr. Adam as to the likely causes of the injury revealed in the MRI report nor did he explain the findings of the report. Had he done so, this might have assisted in determining whether the Claimant in fact had a pre-existing condition.

28. Neither the MRI report, nor the medical reports of Dr. Adam and Dr. Alexander made a valid connection between the accident and the Claimant's cervical spine illness. To my mind, this link was critical to the Claimant's case as she had to satisfy the court that her condition

resulted from the accident and not from some pre-existing or other cause. It is well known that certain spinal injuries may occur without trauma or accident. The evidence before me did not rule out other causes of cervical spine injury such as degeneration due to age or repetitive movements.

29. At the time of the accident, the Claimant would have been in business as an anesthetist for over 10 years. She said that her job required a lot of bending and maintaining positions. She also noted that her pain was most severe on Saturday nights which was her busiest day at work. The nature of the Claimant's job was not ruled out as a causative or contributing factor to the onset of her cervical spinal illness.

30. In summary, I found that no sufficient nexus had been shown between the accident and the Claimant's cervical spine illness for the following reasons:
 1. The Claimant's main complaints after the accident were pains to the left shoulder and left anterior chest wall. She had moderate neck pains.

 2. The Claimant did not follow up with Dr. Ferdinand after her first visit. It should reasonably be expected that if her neck injury had worsened without reason that she would consult him again so that the matter could be investigated further.

 3. The MRI report referred to a history of neck pain for at least 5 years indicating that Claimant had suffered neck pain since 2007 i.e. a long time before the accident.

4. The Claimant did not disclose a history of neck pain to the court and did not in any way dispel the suspicion that she might have had a pre-existing cervical spine illness.
5. The MRI report was put into evidence without analysis of its findings by the maker of the report. The report of itself did not indicate any cause for the medical findings.
6. The opinion expressed by Dr. Adam that the spinal injury resulted from the accident was based on what the Claimant told him, not on any scientific evidence.
7. Finally, other causes of cervical spinal illness such as degeneration due to age or repetitive movements were not ruled out by the evidence before the court.

MY ASSESSMENT

31. I turn now to the assessment of damages under the following heads:
- 1) General damages (pain and suffering)
 - 2) General damages (pecuniary losses)
 - 3) Special damages.

GENERAL DAMAGES (PAIN AND SUFFERING)

32. The relevant principles for assessing general damages, in a personal injuries claim were set out in Cornilliac v. St. Louis (1966) 7 WIR 491 by Wooding CJ. They are:
- i. The nature and extent of the injuries sustained;

- ii. The nature and gravity of the resulting physical disability;
- iii. The pain and suffering which had to be endured;
- iv. The loss of amenities suffered; and
- v. The extent to which the plaintiff's pecuniary prospects have been materially affected.

The nature and extent of the injuries sustained

33. The Claimant indicated that it was a violent collision which pushed her vehicle about 6 feet forward. At the time of the accident, her upper body went forward suddenly with a jerking sensation although she was wearing a seatbelt. When she visited Dr. Ferdinand the following day, her main complaint was shoulder and chest pain. His examination revealed painful but full movements of the left shoulder and tenderness over the anterior chest wall. There was no restriction of the neck movements but there were neck pains of moderate severity.

The nature and gravity of the resulting physical disability

34. The shoulder and chest pains which resulted from the accident appeared to have resolved themselves satisfactorily. The Claimant's ongoing excruciating neck pain which comes and goes with twinges like a sharp shooting pain along her neck, back, hands and legs have not been shown to have been caused by the accident.

The pain and suffering which had to be endured

35. Immediately after the accident, the Claimant suffered shoulder and chest pain after the accident and moderate neck pain. For this pain she took Cataflam. She said that the pain only reduced when she went to sleep but she was unable to sleep because of work. As a result

she became quite irritable. It is unclear how long the pain from the accident lasted.

The loss of amenities suffered

36. It is clear that the Claimant would have been much inconvenienced after the accident. For instance, she had to rent a vehicle to take her daughter to school and to get to work. However she did not elaborate on other aspects of the loss of amenities.

The extent to which the plaintiff's pecuniary prospects have been materially affected

37. The Claimant is self employed so while initially she might have sustained some losses, one could not conclude that her pecuniary prospects had been adversely affected by the accident.

Comparable cases

38. Claimant cited four cases which dealt with C-spine injuries. Since no nexus was shown between the Claimant's spinal condition and the accident, I found these cases to be not useful.

39. The defendants' authorities were more relevant to the circumstances of this case. These were as follows:

Hector v Bhagoutie HCA S1115 of 2000

Wylie Wylie and Titus v Sorzano HCA S733 of 1992

Shahleem Mohammed v AG CV2010-4096

40. Having regard to the foregoing cases and other similar cases in this jurisdiction involving minor injuries, I awarded general damages in the sum of \$30,000.00.

GENERAL DAMAGES (PECUNIARY)

41. It was not shown that the Claimant's injuries resulting from the accident had any ongoing adverse effect on her ability to work. Similarly, it was not shown that she would require further medical treatment for those injuries. Having regard to those findings, I made no award for future loss of earnings or for future surgery or physiotherapy.

SPECIAL DAMAGES

42. Certain items of special damages were agreed between the parties in the sum of \$21,840.

43. The outstanding items for decision by the Court were as follows:

Consultation with Dr. Mencia \$400.00

Physiotherapy \$10,290.00 and continuing

Medication \$5,000.00 and continuing

Loss of earnings from July 19, 2011 to April 10, 2015
and con. \$288,000.00

44. Having regard to my findings on the evidence as set out above, I ruled as follows:

Consultation with Dr. Mencia

45. Disallowed since Dr. Mencia was an orthopaedic surgeon, who was not involved in treating the Claimant for any relevant injury.

Physiotherapy

46. Disallowed since this was not shown to be relevant to the injury sustained in the accident.

Medication

47. The Claimant took painkillers after the accident for relief. This is supported by the medical report of Dr. Ferdinand who prescribed Cataflam. There are no receipts but this appears to be a reasonable expense and it is allowed in the sum of \$5,000.00.

Loss of earnings from July 19, 2011 to April 10, 2015 and con.

48. The Claimant was self employed and she produced her work diary. She lost approximately \$300 a day since the accident. Based on the injuries sustained as set out in the report of Dr. Ferdinand, I allowed this claim for a period of 3 months in an amount of \$18,000.00.

49. Total special damages, inclusive of the agreed sum, was therefore \$44,840.00.

THE ORDER

50. The court ruled as follows:

1. General damages are assessed in the sum of \$30,000.00 with interest at the rate of 6% per annum from April 20, 2015 to today
2. Special damages are assessed in the sum of \$44,840.00 with interest at the rate of 3% per annum from July 18, 2011 to today.
3. Costs on the prescribed scale.

Dated this 23rd day of November, 2016

Master P. Sobion Awai