12-04-02

IN THE CAYMAN ISLANDS COURT OF APPEAL

Civil Appeal No. 15 of 2000
(Grand Court No. 594 of 1997)

BETWEEN:

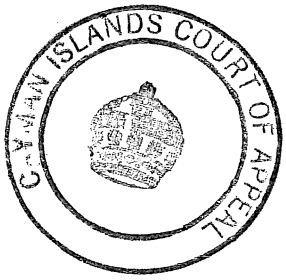
MARCI ANN HYDES

Appellant

- and -

GERI EBANKS

Respondent



BEFORE: The Rt. Hon. Mr. Justice E. Zacca, P.C., President
The Hon. Mr. Justice I. Rowe, J.A.
The Hon. Mr. Justice M. Taylor, J.A.

Norman Hill Q.C. instructed by Delroy Murray of Samson Murray Jackson for the appellant.
Ward Sykes of Hunter and Hunter for the respondent.

Heard: November 27th, 29th and 30th 2001 Released: April 12th 2002

REASONS FOR JUDGMENT

ZACCA, P.

On November 30th 2001, we allowed this appeal in part and promised to put our reasons into writing. This we now do.

The plaintiff's action arose out of a motor vehicle accident in July 1996 whereby she received injuries commonly referred to as whiplash injuries. The plaintiff's vehicle was struck very forcefully from behind twice by a vehicle driven by the defendant. The first strike was forceful enough to sever the bolts of the driver's seat from the chassis, pushing the plaintiff with the seat with great force to the left and forward. The second strike was also with force enough to again push her sideways and forward. However, she

was not wearing a seatbelt with which her vehicle was equipped. The trial took place in August 2000.

The findings of the trial judge have not been challenged except for the quantum of damages awarded under certain heads of damages.

The plaintiff experienced uncontrollable or physiological tremors immediately after and during several months following the accident. When first examined by Dr. Caroline Quartly, Professor of Physical Medicine and Rehabilitation, after the accident, the plaintiff was suffering from pain to the upper fibres of the trapezious or shoulder muscles. She also had pain to the posterior aspects of the left shoulder and upper arm and parathesias (pins and needles) in the outer three fingers of the left hand, as well as lower back pain. The plaintiff had never experienced these symptoms before.

However she had a pre-existing degenerative condition as a result of the aging process involving the narrowing of the spine in the joint through which the nerve roots and the spinal cord pass in the area of third and fourth cervical vertebrae of the neck.

The medical evidence and findings may be best described by quoting from the decision of the learned Chief Justice, at page 4:

> "The effect of the strain upon the neck resulting from the whiplash injury acting upon this pre-existing condition has been to hamper the bio-mechanical functions of the ligaments and joints of the neck resulting in increased

pressure upon the nerve roots and spinal cord. This is the cause of the recurring pain earlier described. The whiplash injuries have rendered and made the plaintiff more prone to this becoming a chronic condition."

At page 5:

> Dr. Quartly emphasized the significance of the relationship between the trauma of the whiplash injury to the onset of the pain and the subsequent possible deterioration in the bio-mechanical functions of the neck. She testified that by contrast with the condition of the plaintiff it is very common to find people in their 60's and 70's with extensive degenerative changes shown on x-rays who are functioning normally – such as narrowing of the disc spaces, exuberant bone and osteophytic projections. In her opinion, had the accident not occurred, there is absolutely no reason to expect that the plaintiff would be in a different condition."

At page 6:

> "I find that although the degenerative condition of the cervical structure of the plaintiffs neck was not as a result of the accident, it pre-disposed her to her present condition; described by Dr. Quartly as a chronic non-restorative pain pattern. In this case, this means that the defendant becomes liable in respect of the onset of the complications. This involves the pre-disposition to chronic referred pain now being experienced by the plaintiff, the foreseeable expectations for the future and, in particular, the likely limitations upon her ability to work.
>
> The doctor testified that the plaintiff had attained her maximum level of medical rehabilitation some two years ago, a level she has maintained until now.
>
> She described the plaintiff as having been able to achieve this because she is an extremely compliant patient who has assiduously followed her regime of treatment. This has included extensive physiotherapy, medication, reduced working hours, the need to maintain a suitable ergonomic environment at work (to minimize the strain on the ligaments and the joints of the neck), special exercises and

> avoiding physical activities in which she frequently participated – such as deep sea fishing, snorkeling and diving. The pain will continue and become exacerbated unless the plaintiff continues to pay close attention to this regime. She is regarded as being always at risk for developing a chronic non-restorative pain pattern. This could involve an inability to get restorative sleep which could result in a down-ward spiral of increased vulnerability to trauma and even depression. At present, she describes a constant numbness, not the pronounced referred pain associated with the nerve roots being compromised."

The trial judge made the following awards:

(1)	General damages		$ 30,000.00
(2)	Special damages		
	(a)	medical expenses pre-trial	$ 18,515.00
	(b)	car rental	$ 1,457.00
	(c)	loss of earnings pre-trial	$ 83,350.00
	(d)	household help pre-trial	$ 4,600.00
(3)	Future losses		
	(a)	future loss of income	$203,401.00
	(b)	future household help	$ 11,500.00
	(c)	future cost of care	$ 7,400.00
(4)	"Smith and Manchester" damages		$ 15,000.00
			$375,223.00
Less 10% for contributory negligence			$ 37,522.00
			$337,701.00

The following grounds of appeal were relied upon:

(1) That the learned judge erred in awarding the plaintiff the sum of C.I.$30,000.00 for pain and suffering and loss of amenities given the nature of the injury sustained by the plaintiff.

(2) That the learned trial judge erred in law and principle in applying multiples of 10 and 5 when calculating the plaintiff's loss of future earnings and pension contributions.

(3) That the learned trial judge erred in law and principle in holding that the plaintiff would have received an increase in her rate of salary of 10% over 10 years and adding the sum so calculated to her future loss of earnings.

(4) That the learned trial judge erred in law and in fact in awarding the sum of C.I.$11,500.00 to the plaintiff under the heading of future costs of household help.

(5) That the learned trial judge erred in law and in fact in making an award of C.I.$15,000.00 to the plaintiff under the *Smith v. Manchester* heading.

There was also before us a respondent's notice contending that the decision of the trial judge should be varied as follows:

(1) That the finding of the Honourable Chief Justice that the plaintiff respondent contributed to the damages to the extent of ten per cent be reversed.

(2) That there be no finding of contributory negligence on the part of the plaintiff respondent.

(3) That the finding of the Honourable Chief Justice that the plaintiff respondent would have worked only to age 65 at her pre-accident rate of work be reversed.

(4) That the plaintiff respondent would work at her pre-accident level of work and income to the age of 75 or, alternatively, her life expectancy.

(5) That the multiplier to be applied to her future loss of income claim be 17.55 as opposed to a multiplier of 10 as applied by the Honourable Chief Justice.

(6) That the future loss of income damages be increased accordingly.

(i) General Damages

The plaintiff was 55 years old at the time of the trial. The learned trial judge found that she was socially and physically very active prior to the accident. However she now had to forgo any physical activity that could aggravate her condition. She had difficulty sleeping, and suffers from a dull pain. Her sexual relationship with her partner has been

affected. Dr. Quartly's evidence was that she was at her maximum medical recovery but that she will continue to suffer from a limitation of movement and a level of pain which will be permanent. There was a possibility of sleep disorder and depression.

The trial judge held that her case was to be regarded as one of severe whiplash injury resulting in continuing pain and a significant loss of amenities.

Relying on the case of *Camus v. Williams* (Kemp and Kemp 1995 Ed.), a whiplash injury case, the trial judge awarded the plaintiff the sum of C.I.$30,000.00. In so doing the trial judge held that the plaintiff's loss of amenities was more severe than in the case of *Camus v. Williams* and that there was a risk of a worsening of the plaintiff's condition.

Mr. Hill for the appellant argued that the award of $30,000.00 was inordinately high. He referred the court to the 1999 Judicial Studies Board guidelines. He submitted that the plaintiff's injuries fell into the classification of moderate and not severe. He argued that the second part of this classification would apply. It was his opinion that the plaintiff's case was similar to the *Camus* case where the sum of £13,750.00 was awarded. This would be about C.I.$20,000.00.

The trial judge was not be in error in holding that the plaintiff's loss of amenities was more severe than in the *Camus* case, and that there was a risk of a worsening of her condition.

We therefore see no reason for interfering with the award of C.I.$30,000.00 for general damages. It cannot be said to be inordinately high.

(ii) Loss of Future Earnings

Mr. Hill submitted that the multiplier of 10 years was on the high side and that the trial judge should have used a multiplier of 5 and 3. Mr. Sykes for the respondent argued that the trial judge should have used a multiplier of 17.55 as the respondent's working age would be up to 75 years.

The trial judge held that the plaintiff would likely have maintained her pre-accident level of work and level of income to age 65. Pension contributions from her employer would cease at age 60.

When assessing damages for future loss of earnings the court should fix the award by assuming that the plaintiff will invest her damages. *Wells v. Wells* [1998] 3 All ER 481.

The plaintiff was employed in the tourism business which is subject to many variables.

In assessing the future loss of earnings the trial judge said:

> "Notwithstanding her declared need to maximize her income, I do not think it reasonable to assume she would have maintained that level of intense work beyond age 65. This is all the more reasonable having regard to her active, recreational and sociable life style which she declared she and her partner had every intention to pursue. I regard her as likely to have maintained her pre-accident level of work and level of income to age 65."

We can see no reason for varying the decision of the trial judge and would hold that it was open to the trial judge to use a multiplier of 10.

In assessing the damages under this head, the trial judge held that the plaintiff's future earnings would be increased by 10 per cent over the projected period of 10 years.

Mr. Hill submitted that there was no evidence before the court to support such a finding. We agree with this submission and find that the trial judge ought not to have awarded any sum for increase of salary. The amount awarded was varied to $189,060.00 to reflect our decision.

(iii) Future Cost of Household Help

The trial judge held that as a result of her injuries the plaintiff would require to have household help and made an award of $11,500.00 based on a 10 year calculation. There was evidence before the Court to support this award and it was open to the trial judge to accept this evidence and to make the award which he did.

(iv) *Smith v. Manchester* Damages

Mr. Hill submitted that the plaintiff was fully compensated under the award for future loss of earnings and that this was not a case for any award under the Smith v. Manchester principle. The trial judge made an award of $15,000.00 under this head.

In *Moeliker v. Reynolle & Co. Ltd.* [1977] 1 All ER 9, Brown L.J. at page 15 stated:

> "Smith's case is merely an example of an award of damages under a head which has long been recognised – a plaintiff's loss of earning capacity where as a result of his injury his chances in the future of getting into the labour market work (or work as well paid as before the accident) have been diminished by his injury – a risk that he may not get an equally paid job."

In *Page v. Enfield & Harringey Area Health Authority* (1975) C.A. No. 213, May 14th 1975, Wolff L.J. (as he then was) said:

> "Each case has to be looked at on its own particular facts … The variety of facts which can be taken into account mean that it is very difficult to get any guidance in relation to a particular case from the citation of authorities dealing with other cases."

We extract the following principles from the case of *Smith v. Manchester* 1974 K.I.R. 1 and other cases following:

(1) If plaintiff on a balance of probabilities is likely to lose job for whatever reason, and is less likely to obtain a comparable new job, he is entitled to a *Smith v. Manchester* award.

(2) If plaintiff was unemployed and remained unemployed, he could get a *Smith v. Manchester* award if he could show that his inability and not economic conditions were the cause or a potential cause of failure to get a job.

(3) A weakening of plaintiff's competitive position in the open labour market – what are plaintiff's chances of gaining employment in the open labour market.

(4) No annual sum is to be used in the assessment.

(5) No multiplicand and multiplier number of years to be used.

(6) The judge is to look at the weakness "in the round" and give an estimate.

(7) There must be a real or substantial risk – as opposed to a "speculative or fanciful risk".

(8) If the court comes to the conclusion that there is no substantial or real risk of plaintiff losing his present job in the rest of his working life, no damages should be awarded under this head.

(9) A slight risk is a real risk within the meaning of real or substantial risk. *Wren v. North Eastern Electricity Board* (unreported)

(10) Damages must be speculative and "plucked out of the air" by the judge.

(11) If risk is negligible or fanciful (which will be rare) no award is to be made.

(12) If risk is real or substantial, the award should not be taken as derisory.

(13) Awards should be in "hundreds of pounds".

(14) There must be evidence. If no evidence there is no basis for an award.

In making his award under this head the learned trial judge at page 15 stated:

> "However, the risk increases with age, and I must recognize the probability that in her more advanced years her debilitating condition could worsen so as to make work unbearable. If that were to occur at any significant period of time before age 65 (the age at which I treat the plaintiff as likely to have retired in any event) the loss to her could be very substantial. I award the sum of

> $15,000.00 now as compensation for that risk in the future."

The medical evidence was that the plaintiff had attained her maximum level of medical rehabilitation in 1998, a level which she had maintained after the stage of trial. However, the pain will continue and the plaintiff is always at risk for developing a chronic non-restorative pain pattern which could lead to depression.

The plaintiff's evidence was that on returning to work, she was only able to work from 7 a.m. to 12:30 p.m., five days per week. Prior to her accident she worked six days per week, 7 a.m. to 6 p.m. The probability is that if she lost her job, there would be a weakening of the plaintiff's position in the open labour market. She can only work part-time and this might be a factor in whether she can gain future employment. Her condition could worsen and this would also be a factor in any future employment.

We are of the opinion that the evidence showed a real and substantial risk of the plaintiff's chances of getting into the labour market in the future or getting work as well paid as before the accident, have been diminished as a result of her injuries.

The learned trial judge was correct in holding that the plaintiff was entitled to an award under this head. However we are of the view that having regard to all the circumstances of this case, the award is too high and we would vary the award to one of $7,500.00.

(v) Respondent's Notice

Having held that the trial judge was correct in holding that a multiplier of 10 was reasonable, we find no merit in the respondent's submission that the multiplier ought to be 17.55.

(v) Contributory Negligence

Mr. Sykes submitted that wearing a seatbelt would not have contributed to a lessening of the plaintiff's injuries because of the force of the collision which severed the driver's seat from the chassis of the vehicle.

The learned trial judge at page 16 of his judgment said:

> "Given all a court must now notice about the effectiveness of seatbelts, I feel constrained to conclude that on a balance of probabilities they could have lessened the severity of the whiplash injury."

In *Froom v. Butcher* [1976] 1 Q. B. 286, a case in which it was held that the failure to wear a seatbelt would amount to contributory negligence Lord Denning M.R. at page 292 noted:

> "The question is not what was the cause of the accident. It is rather what was the cause of the damage. In most accidents on the road the bad driving which causes the accident, also causes the ensuing damage. But in seatbelt

> cases the cause of the accident is one thing, the cause of damage is another. The accident is caused by the bad driving. The damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seatbelt. If the plaintiff is to blame in not wearing a seatbelt, the damage is in fact the result of his own fault. He must bear some share of responsibility for the damage and his damages fall to be reduced to such extent as the court thinks just and equitable."

In the Cayman Islands cars are to be fitted with seatbelts. A driver or passenger in the front seat is obliged by law to wear a seatbelt.

Lord Denning, at page 296, concluded:

> "Everyone knows, or ought to know, that when he goes out in a car he should fasten the seatbelt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens – and the injuries would have been prevented or lessened if he had worn it – then his damages should be reduced."

Lord Denning suggested that in a case where the wearing of a seatbelt would have prevented the injuries, the damages might be reduced by 25 per cent. However, where the wearing of a seatbelt would have lessened the injuries the damages might be reduced by 15 per cent.

The learned trial judge held that the wearing of the seatbelt would have lessened the severity of the whiplash injury.

He concluded that the damages awarded to the plaintiff should be reduced by ten per cent on the basis that her failure to wear the seatbelt contributed to the damage.

This court would be reluctant to interfere with the apportionment made by the judge unless his judgment disclosed an error of fact or a misdirection in law.

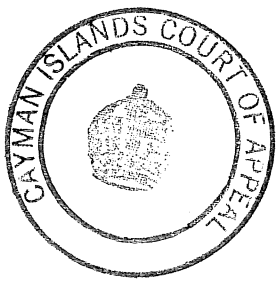
We are unable to see an error of fact or a misdirection in law.

The respondent's notice was therefore dismissed.

It was for these reasons why the court allowed the appeal in part by varying the awards for future losses to $189,060.00 and the *Smith v. Manchester* award to $7,500.00 The judgment was accordingly varied to $318,044.00.

The appellant is to have 50 per cent of the costs of appeal to be taxed if not agreed. No order as to costs was made on the cross-appeal.

Zacca, P.



Rowe, J.A.

Taylor, J.A.