**AINA**

**V.**

**WEST AFRICAN DRUG CO.LTD**

HIGH COURT OF LAGOS

5TH JULY, 1971

SUIT NO. LD/299/70.

**LEX (1971) - LD/299/70.**

**OTHER CITATIONS**

3PLR/1971/9 (HC)

**BEFORE HIS LORDSHIP:**

TAYLOR C.J.,

**BETWEEN**

DR. K.A. AINA

MISS A. ADEBAMIRO

**AND**

WEST AFRICAN DRUG CO. LTD.

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT & PERSONAL INJURIES LAW: Highway/Motor Vehicle accident – Proof of Negligence – Damages – Determination of general and special damages – When need for corroboration of some claims would be required – Damages for shock and psychological trauma – Relevant considerations

TRANSPORTATION AND INFRASTRUCTURE LAW - TRAFFIC AND MOTOR VEHICLE: Highway accident through collision – Proof of negligence – Where vehicle travelling at speed enters wrong lane – Admission of negligence – How treated by Court

EMPLOYMENT AND LABOUR LAW: Loss of salary and bonuses due to motor accident – Whether recoverable against party responsible for accident – How determined

HEALTHCARE AND LAW:- Healthcare and tort claims – Claim arising from aggravated injuries and other health conditions arising from motor accident – Measure of damages – How determined – Cost of healthcare pursuant thereto – Reimbursables - Duty of plaintiff to plead special and general damages – Effect of failure thereto - Medical billing without receipts – Attitude of court thereto

CHILDREN AND WOMEN LAW: - Young Women and Justice administration - Motor Accident – Life-long injury induced by negligent driver – Attitude of Court to low claim of general damages made by young woman due to poor appreciation of the serious nature of injury suffered on her future – Duty of counsel and court thereto

**PRACTICE AND PROCEDURE ISSUES**

JUDGMENT AND ORDER - DAMAGES **–** SPECIAL DAMAGES – GENERAL DAMAGES – General principle for assessment of damages – Factors to consider in making an award – Whether Plaintiff can receive a higher award without an amendment of claim

PLEADINGS - AMENDMENT OF PLEADINGS – Proper time to make an application for amendment of pleadings – When Court should grant an application to amend pleadings

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The 1st plaintiff is a registered medical practitioner and the owner of a Peugeot saloon car No. LJ 3799 and the 2nd plaintiff was at the material time a nurse in the employment of the former. On the 21st October, 1969 they were both travelling in the 1st plaintiff’s car to Lagos and were being driven by one Ayodele Joseph Oluborode, the 1st plaintiff’s driver. The 2nd plaintiff sat in front with the driver while the 1st plaintiff sat at the back.

The defendants’ vehicle travelling at speed and being in the wrong lane collided with that of the Plaintiffs. The issue of negligence originally denied in the statement of defence was conceded at the hearing leaving only the matter of damages as the contested issue. The defendants did not call evidence in rebuttal of the evidence led by the plaintiffs and their witnesses.

DECISION OF COURT

1. Judgment ordered per writ of Plaintiff regarding quantum of damages proved for 1st, 2nd and 3rd Defedant.

2. Attempt by Counsel for 2nd plaintiff to amend pleading after final address was ordered and concluded for 1st plaintiff is refused.

**MAIN JUDGMENT**

**TAYLOR, C.J.:-**

The 1st plaintiff is a registered medical practitioner and the owner of a Peugeot saloon car No. LJ 3799 and the 2nd plaintiff was at the material time a nurse in the employment of the former. On the 21st October, 1969 they were both travelling in the 1st plaintiff’s car to Lagos and were being driven by one Ayodele Joseph Oluborode, the 1st plaintiff’s driver. The 2nd plaintiff sat in front with the driver while the 1st plaintiff sat at the back.

While the plaintiffs were travelling along Carter Bridge on the outer lane in Lagos direction, the defendants’ vehicle No. HPE 158C which was travelling in the opposite direction along the said bridge and originally on the outer lane, swerved out into the lane in which the 1st plaintiff’s vehicle was travelling and collided with the latter. The defendants’ vehicle was travelling at speed and being in the wrong lane was undoubtedly on that score alone at fault. The issue of negligence originally denied in the statement of defence was conceded at the hearing leaving only the matter of damages as the contested issue. I find on the evidence led by the plaintiffs and their witnesses that negligence was fully proved by the evidence in particular of the plaintiffs’ driver and the sketch plan exhibit “A”.

I now pass on to the only contested matter, i.e. to what damages are the plaintiffs entitled? In this respect I will take the claims of each plaintiff separately. The 1st plaintiff claims the sum of £3,550 as special and general damages. On the matter of special damages he claims the sum of £2,000 as the market value at the material time of his car, a Peugeot 404 No. LJ 3799. On his evidence the car was purchased in 1964. He did not say how much he paid for it at that time though his expert witness Mr. Bashiru Adenuga P.W.6. stated that at the time of the accident the value of a new Peugeot 404 was £1,300. There is evidence that a new Peugeot was unobtainable at the time owing to the civil war raging in Nigeria and that the cost of second-hand cars had shot up at an alarming figure. He placed the value of this particular car at £1,500 at the time of the accident in view of the facts stated above. The defendants did not call evidence in rebuttal of the evidence led by the plaintiffs and their witnesses. During the course of the cross-examination of the 1st plaintiff, learned Counsel for the defendant was able to elicit from the said plaintiff the fact that he had already received the sum of £425 from his insurers in respect of the claim on the car. There is evidence that the car was insured at only £450 but we are here concerned with the market value and not the insurance value. There was further evidence led by the 1st plaintiff that the smaller Peugeot 204 with 11,000 miles on the clock, with an engine not in as sound a condition as that of the 1st plaintiff, was purchased by him twenty days after the accident for £1,375. This evidence was also unchallenged. Taking all these into account I do award the 1st plaintiff on this head the sum of £1,500 less £425 already received by him from his insurers i.e. £1,075.

On the second head of special damages the 1st plaintiff claims the sum of £400 for the loss of use of his car for twenty days subsequent to the accident. This claim is based on alleged expenditure on taxis etc. Not a single witness was called by him in support of this fact that he used taxis so extensively on twenty days at the rate of £20 per day. Even here I must take into account the fact that he also gave evidence that he did not use taxis all the time because friends were in the habit of lending him their cars. I find this figure of £20 per day extremely high in view of this evidence and the lack of supporting evidence from any independent witness. I have no doubt however that the 1st plaintiff did on occasion use taxis for conveying him about his business but not to the tune of £400.

I must however within the principle I stated in Ubani Ukoma v. Nicol (1962) 1 All N.L.R. make a reasonable estimation and on this I assess his loss for the 20 days at £5 per day and award him £100.

On the third head the 1st plaintiff claims the sum of £400 as loss of earning during his period of incapacity which he put at four days after the accident. His evidence on this issue was that:-

“I suffered minor abrasions on my leg and contusion or sprain on my back. I was treated at the General Hospital. I am in private practice. I was unable to work for four days.... For the four days I would say I lost £400 as a private practitioner running a hospital by himself.”

I take it that his Hospital was not closed down for those four days that he alleges he was unable to work and during which the 2nd plaintiff was certainly an admitted patient at the General Hospital. At least the 1st plaintiff did not say that was the position in which case I would have expected evidence from another nurse or whoever was responsible for the running of the Hospital during his alleged absence. Then again there is the evidence of Dr. Ashiru who said that:-

“I saw Dr. Aina first. He was rather shocked. The impact of the accident had made him jittery, tremulous. There was no overt evidence of external bodily injuries. I treated him.”

As against this is the evidence of the 1st plaintiff that:-

“I did have abrasions and contusions at the back. I did not make this complaint to Dr. Ashiru. He did not treat me for the abrasions and contusions. He did not treat me personally.”

This is a little conflicting. In the absence of evidence corroborating the 1st plaintiff on this head that he did in fact absent himself from Hospital for four days, bearing in mind that I have already on his own claim made an award of £5 per day for use of taxis for 20 days after the accident, I find great difficulty in making an award on this head and it is accordingly disallowed.

I now come to the final head of general damages for shock, pain and suffering. I have no doubt at all from the evidence before me that as a result of the accident he did suffer from shock and had some pain. I accept the evidence of Dr. Ashiru that the accident made him jittery and tremulous but I do not believe that this situation lasted for as long as he claims and more so in view of my findings as to whether he absented himself from his Hospital or not.

In the case of British Transport Commission v. Gourley (1955) 3 A.E.R. 796, Lord Reid said at page 808 that:-

“The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered, and will probably suffer, as a result of the wrong done to him for which the defendant is responsible.”

Further in the case of H. West & Son, Ltd. v. Shephard (1963) 2 A.E.R. 625 Lord Pearce said at p. 643 that:-

“The practice of the courts hitherto has been to treat bodily injury as a deprivation which in itself entitles a plaintiff to substantial damages according to its gravity. In Phillips v. London & South Western Ry. Co. Cockburn C.J., in enumerating the heads of damage which the injury must take into account and in respect of which a plaintiff is entitled to compensation said:

‘These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure or to lessen the amount of injury; the pecuniary loss ... If there is a particular injury to the nervous system, that also increases the assessment ...

Having taken into account the comparatively minor injury to the 1st plaintiff bearing in mind the impairment for a short while of the nervous system I think an award of £350 on this head would be ample and I so award this sum. In all therefore the 1st plaintiff is entitled to judgment for the total sum of £1,525.

The case for the 2nd plaintiff presents a little difficulty because of the belated application for an amendment of the claim for general damages to read £3,000 instead of £650. I shall however come to that a little later on.

She claims in all the sum of £850 whereof £650 is for general damages and £200 for special damages. There are only two items of special damages. The first is a claim for £100 being cost of medical treatment. That this young girl of roughly 18 at the time of the accident suffered severe injury which will continue to rear its head in some shape or form probably for the rest of her life is duly deposed to by the evidence of Dr. Ashiru which I accept without any hesitation. That evidence was that:-

“I saw the 2nd plaintiff lying on a bed in Casualty wriggling in pain, sweating profusely and she was blue in the lips. She was short of breath. Externally there were lacerations behind the right ear. At the junction of the right temple there was a scar above the ear. There was a laceration on the back part of the right hand. There was diminished breathing sound on the left side of the chest ... She would have residual impairment of her physical condition as a result of the accident. The impairment could be lifelong. By diminished breathing sound I meant she had a collapse of the left lung for which she was surgically treated. She had an operation … It involved putting a tube into the chest cavity to get rid of the blood and air that had caused the collapse.

She will get pain at the left side of her chest at various periods of her life and her breathing or intake of air in that lung is permanently affected. To some degree her activity will be affected. She will have to rest more than is usual ... Pregnant women are expected to have breathing difficulties. Hers will be more pronounced if and when she becomes pregnant.”

I have quoted this evidence in extenso because it is most relevant on the issue of whether an amendment should or should not be granted with which I shall later deal. The evidence of this medical expert is that on the question of his fees for the six months he treated the 2nd plaintiff after her discharge from the General Hospital, he charged her £40 for the drugs supplied and £60 for professional fees. It is true that no receipts were given and to my shock and amazement this member of the medical profession stated quite unabashed that he did not make it a practice to give receipts to patients for private treatment. I do believe he was speaking the truth and I accept his evidence on this point in preference to that of the 2nd plaintiff whose evidence on some matters was of a most hazy nature. She said that she paid £5-3s-9d for treatment at the General Hospital and £60 to Dr. Ashiru. When asked the total of the sum she paid to Dr. Ashiru she proceeded to deduct the former from the latter. During this exercise she also mentioned sotto voce paying Dr. Ashiru £40. When she was asked to repeat how much she paid Dr. Ashiru in all so that I could record same, she proceeded as aforesaid to make a deduction. The 2nd plaintiff came into the witness box with the usual giggle of a teenager and when asked how much she claimed as damages, said in examination-in-chief:-

“I want £200 for the injuries I received. I claim as per writ of summons.”

In cross-examination she answered with the typical giggle of her age that:-

“I claim about £350. If I can get more I would like more”.

I have no doubt that this young and attractive girl was unaware of the serious nature of her illness or what the future has in store for her. I am on the evidence of Dr. Ashiru awarding her the sum of £100 as medical expenses.

On her claim for loss of salary or loss of earnings she claims £100. In her evidence she said that her monthly salary was £16-10s-0d and that she was an out-patient of Dr. Ashiru for six months during which time she was unable to work and also lost a bonus of £1 given to the other employees of the 1st plaintiff. This comes to a total of £100. The 1st plaintiff supports her evidence as to her salary though no mention was made one way or the other as to the bonus. I find this head of special damage proved and award her the sum of £100.

I now come to the only part of this case that presents any difficulty. Should I or should I not allow her to amend her claim for general damages to read £3,000 instead of £650. There can be no doubt at all from the evidence of Dr. Ashiru that this girl has suffered substantially as a result of the accident and that she will not be able to lead a normal, healthy and vigorous life. She will be for a long time if not for ever hampered by shortened breathing. She is therefore entitled to substantial damages and in my view to damages much in excess of £650. That however is all she claimed in her writ and her oral evidence claims even less though at one stage learned Counsel was able to get from her the words. “I claim as per my writ” or some such words.

Dr. Ashiru on whose evidence this claim for amendment is based was the first witness to give evidence and one would have expected the application to have been made then. The 2nd plaintiff was the fourth witness to give evidence and again one would have expected the application for amendment if not made earlier to be made then, but it was not. Two more witnesses gave evidence before the plaintiffs closed their case and even then the application was not forthcoming. The defence then closed their case without calling evidence. Learned Counsel for the defence sought and obtained leave to amend the defence to which no objection was raised. Learned Counsel for the plaintiffs then addressed the Court and after concluding the address on the 1st plaintiff on the items of special damages, sought leave to amend the claim of the 2nd plaintiff in the manner afore-stated. I gave no ruling but heard Mr. Coker in reply and said I would incorporate my ruling in my judgment. I should mention that Mr. Coker for the defendants stated that he would seek to call evidence if the amendment was allowed.

Order XXXIII is wide enough to cover an application made at any stage of the proceedings. In the case of James v. Smith (1891) 1 Ch. 384 at 389 wherein the plaintiff gave evidence and the point of law raised in the pleadings was argued before the defence gave evidence, it transpired that the defendant had pleaded s. 4 of the Statute of Frauds instead of s. 7 and sought amendment accordingly. Kekewich J. at p. 389 after hearing the defence refused to allow the amendment stating inter alia that:-

“I have said frequently, and I repeat it, that there is no Judge on the Bench who is more willing to allow amendments even at the last moment than I, provided there is no surprise; but I think I should be going too far if I were to allow it in this action, and it would be introducing a laxity which I ought not to introduce. A party relies on a particular section of the statute, and when he finds the authorities to be against him he says, `I should like to reply on something else.’ To sanction that would, it seems to me, make pleading even more loose than it is at present, and I think I ought not to allow that amendment.”

In the case of Loufti v. C. Czarnikow Ltd. (1952) 2 A.E.R. 823 Sellars J. held that:

“Whilst it was indicated in the course of the case, and before counsel for the plaintiff finally addressed the court, that some amendment might be asked for, no formal amendment was submitted until after both learned counsel had addressed me. I entirely accept the submission for the defendants that that is very late, and that the court should be reluctant to grant amendments at such a late stage unless there is very good ground and strong justification for so doing. Applying those principles to the proposed amendment of the reply, I disallow it.”

In the head note to the case the editor states the following proposition of law:-

“Unless there is very good ground and strong justification for so doing, the court should be reluctant to grant amendments of the pleadings after the close of the case but before judgment, even though it has been indicated in the course of the hearing that some amendment might be asked for.

Such an amendment may be allowed:

(1) Where the matter involved has been raised in the course of the trial and counsel has addressed the court on it, since it will be merely incorporating in the pleadings that which has emerged in the course of the case as an issue between the parties;

(2) Where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence that it is a matter in controversy and the amendment will enable the court to arrive at the view, if he thinks fit, that what is pleaded is a correct interpretation of the facts.”

Finally, though in Divorce proceedings and on a matter triable by a jury, in Beckett v. Beckett do Jones (1901) p. 85 the facts are stated thus:-

“Upon the trial of a petition by the husband for dissolution of his marriage on the ground of his wife’s adultery with the co-respondent, the jury assessed the damages at £400, which was a larger sum than had been claimed in the petition.”

Though I sit as a judge and jury I am not unaware of the elementary rule of practice that though a plaintiff may be awarded less than his claim, he cannot be awarded more without an amendment of his claim. I am of the view that the principles stated and set out in the case of Loufti v. Czarnikow Ltd. are sound and that I ought to follow them in this case, more so in view of the circumstances in which the amendment is sought to which I have earlier made reference. The 2nd plaintiff has no one to blame but herself for this is not a case where the claim for general damages is left at large or a case where the amendment sought is contained in the evidence of the plaintiffs and the witnesses called in support. At the highest the evidence of the 2nd plaintiff was no more than a claim as per her writ of summons, i.e. the writ in its unamended state. This is not in my view a case in which I should allow such an amendment and it is accordingly refused.

On the head of general damages I therefore award the 2nd plaintiff the full claim of £650.

There will be judgment for the 1st plaintiff therefore for the sum of £1,525 and for the 2nd plaintiff for the sum of £850. I further order that the sum due to the 2nd plaintiff be paid into Court and that a written application be made for payment out in due course.

The plaintiffs are entitled to their costs and I shall hear the parties.

Application refused.