

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO: ANUHCV1999/0249

BETWEEN:

GERALD KHOURY

Plaintiff

and

KEITHLEY GEORGE
FRANCIS TRADING AGENCY LIMITED

Defendants

Appearances:

Dr. Errol Cort with Sharon Cort of Cort & Associates for the Claimant
Justin Simon of Simon Rodgers Murdoch for the Defendants

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2004: March 9th, 16th
April 23rd
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Judgment on Assessment of Damages

(Negligence - Road traffic accident - personal injuries- assessment of damages)

- [1] **Joseph-Olivetti J:** A moped is not the safest form of conveyance in these islands and no doubt Mr. Gerald Khoury, the Plaintiff can testify to this as on 28th August, 1996, he was hit by a van whilst he was in a stationary position on his moped on the side of the road on Lower North Street, St. John's Antigua and sustained serious injury to his left ankle. The van was driven by the First Defendant, Kirthley George (called Keithly) in the Writ of Summons, who was acting in the course of his employment with the Second Defendant. Mr. Khoury filed suit in August 1999 and many years

later on the 14th July, 2003 interlocutory judgment for damages to be assessed was entered by consent at a case management conference before Master Mathurin. The court is now concerned with the assessment of damages.

[2] At the hearing in Chambers, Mr. Khoury relied on his witness statements of 4th and 6th March, 2003 and his affidavit filed 6th October, 2003 and the several reports of Dr. K.K. Singh, Dr. Hobeika and the physiotherapist, Mr. Patrick Matthews and the invoices disclosed in the Claimant's trial bundle No.3. Dr. Singh testified at the hearing but the cross-examination of Mr. Matthews was dispensed with by the Defendants late in the day. The Defendants relied on the affidavit of Harry Hobson filed 2nd March, 2004. Mr. Hobson is the claims manager of Anjo Insurances, the local agents for United Insurance Company Limited, of Barbados, the insurers of the Second Defendant.

[3] At the close of the hearing the court reserved judgment and directed that both counsel file additional written submissions on or before the 16th March, 2004 they having filed submissions earlier without the benefit of hearing the cross-examination of the witnesses. Those submissions were duly lodged.

[4] The principles governing the assessment of general damages for personal injuries are well settled, **Cornilliac v. St. Louis [1964] 14**

W.I.R.491 being the leading authority in this jurisdiction. The court must award fair and reasonable compensation taking into consideration the pain, suffering and loss of amenities endured, the nature and extent of the injuries, the impact on the claimant's pecuniary prospects and the resulting physical disability

[5] The medical evidence established that the principal injury Mr Khoury sustained was a severe deformity of the left leg and ankle with crepitation and abnormal mobility. He was hospitalized immediately after the accident and his symptoms on presentation were, feeble pulsations in the left foot and toes distal to the fracture site and intermittent loss of sensations in the left lower limb, severely comminuted (crushed) intra-articular fracture of left fibia and fibula involving lower one- third of the diaphysis and articulating surface of the ankle joint.

[6] Mr. Khoury spent four days at the Holberton hospital in Antigua where closed reduction of the fracture was attempted. More than once under general anesthetic and the leg was put in a cast to keep the fracture fragment close to anatomical alignment. He was discharged with the recommendation that he seek further medical assistance abroad because of the severity of the injury and the non-availability of the necessary medical expertise on the island at the time. He traveled to the United States of America, on the 9th September, 1996 to the St. Luke's Hospital in

New York, United States of America ("USA") as recommended by Dr Joseph John, the surgeon at the hospital under whose temporary care he was as the orthopaedic surgeon Dr. Singh who initiated his treatment had to leave the State on an emergency. He went by air ambulance and returned first-class on the 9th October, 1996.

[7] In the USA he had further surgical procedures namely open reduction and internal fixation whereby two metal plates were put in his ankle and fixed by around 14 screws. He was hospitalised for 10 days then attended as an out-patient. He wore a cast for 4 weeks. He was non-weight bearing for about 10 weeks and this was a painful process, he then graduated to the use of a cane. He has developed osteoarthritis of the ankle due to the injury. His mobility is very restricted now and he cannot play lawn tennis which he once enjoyed or walk fast or do any exercise which involves jumping and landing. He even has difficulty getting in and out of his sports car. At the time of the accident he was 43 years old; he is now 51.

[8] Mr. Khoury testified that he still has pain frequently and that when the pain gets unbearable he goes to physiotherapy. Mr. Matthews in his report suggests that he will need therapy on a regular basis for the rest of his life. This is supported by Dr. Singh who was of the opinion that he should attend therapy twice a week for the rest of his life.

[9] Counsel for Mr. Khoury submitted that the severity of the injury warrants an award in the region of \$500,00.00 for general damages for pain, suffering and loss of amenities. In support of this submission counsel relied on several cases from the United Kingdom cited in *Kemp and Kemp* 1977 edn Vol. 3 but none from this jurisdiction or from jurisdictions with similar social and economic climates. On the other hand the Defendants suggested a figure of \$50,000.00 and cited authorities from Trinidad and Tobago in the Lawyer, January, 1995, cases from the United Kingdom cited in *Kemp and Kemp* and the case of **Auguste v. Neptune** [1997] **56 W.I.R. 229** a case from St. Lucia in which \$200,000.00 was awarded as general damages for pain and suffering and loss of amenities for a young man who was rendered a paraplegic, as illustrative of the top award given in this jurisdiction. However, this no longer holds true as this court awarded \$250,000.00 in the case of **Rosetta Mayers v. Deep Bay Development Ltd** ANUHCV No.241 of1993 (reflex sympathetic dystrophy syndrome a chronic degenerative pain condition) and Mitchell J. awarded \$570,000.00 in the recent case of **Frances Chapman v Wadadli Cats** **ANU No. 84 of 999** (concussion, head injuries).No doubt these reflect the awareness that awards for general damages must be in line with contemporary thinking of what is fair and reasonable having regard to the more advanced knowledge available to the courts of the effects of personal injuries on an injured person's life.

[10] Compensation must as far as possible put a claimant in the same position he would have been in had the accident not occurred and the court is entitled to look at recent comparable awards in its own and other jurisdictions with a similar social and economic climate to determine the proper level of general damages under this head. The injury suffered by Mr. Khoury is no doubt at the top end of any scale for ankle injuries but it does not to my mind warrant an award as contended for by his counsel as the injury does not equate to injuries of the utmost severity as would attract such an award. There is no evidence that Mr. Khoury's life expectancy has been shortened, or that his basic functions are so impaired and he has been rendered wholly disabled. However, his partially disabled relates to an important area of his body and the doctor described his injuries severe, his mobility is noticeably affected now, he suffers frequent pain and there is every indication that his osteoarthritis will worsen. The prognosis is that he needs two further operations which would require hospitalization for a period of time and would result in further pain and suffering and he has to attend physiotherapy for the rest of his life a painful and inconvenient process in itself as he testified. I am of the view that in all the circumstances an award of \$120,000.00 is fair and reasonable under this head.

Loss of future earnings.

[11] Mr Khoury claims loss of future earnings of \$1,50000 a month for the rest of his life. He is a self-employed businessman engaged in the steel ,

lumber and building materials trade and apart from managing his business he sometimes drove a fork lift which he can no longer do. His ability to conduct his business cannot be said to be affected except in so far as he is unable to drive the fork-lift and when he is absent as a result of having to attend therapy or is in too much pain to attend at his workplace. He gave no evidence of how his profits and consequently his salary would be diminished save that it is clear that he has to engage a fork-lift driver to replace him in that role. On the basis that it is reasonable that he could have been expected to drive his forklift until the age of 65 that is for 14 years he should be compensated for that projected expense. However, he is getting this money in advance and therefore the usual adjustments have to be made for such payments and I think that an adjustment to 10 years is fair. The wages currently paid are \$400.00 per week and therefore the award is \$208,000.00.

Future Medical Expense

- [12] Mr. Khoury will need continuing therapy, further surgery and will have to wear special shoes. No evidence was given of the costs of the shoes and as the price of such aids is not common knowledge no award can be made for that. The evidence of Dr Singh is that he can now perform the two operations here at the Adelin Medical Clinic at a cost which is vastly less than having it done by the same doctor in the USA. I am mindful that Dr. Singh said that doctors prefer that the original doctor remove the plates but that if that doctor is dead or not available then someone else

will have to perform the procedures .There is therefore no medical reason for Mr. Khoury to return to the USA at the Defendants' expense to have these procedures done as he has a duty to mitigate his loss and it would be unreasonable for him to do so. I therefore award the total sum of \$65,000.00 for the two surgical procedures and \$U.S 2,000.00 or \$ 5,400.00 being the E.C. dollar equivalent for the necessary hardware. In addition he will be entitled to some nursing care for the seven weeks being the time anticipated for both procedures and recovery and the sum of \$42,000.00 is awarded based on a rate of \$200.00 for an eight -hour day . See rates claimed at page 30 of core bundle 3.

[13] Mr. Khoury is also to have therapist fees for continuing care. The evidence is that a session is \$100.00 and that he needs two per week for the rest of his life which amounts to \$10,400.00 per year. I agree that a multiplier of 14 is reasonable and award \$145,600.00 . The total award under this head is therefore \$258,000.00.

Special Damages including past medical expenses.

[14] This claim for \$125,416.15 is fully itemized in trial bundle 3 ages 3&4 and includes the costs of the air ambulance, the first class air fares and the treatment in the U.S.A. which were the principal items disputed. Having heard the medical evidence and Mr. Khoury I am satisfied that the disputed costs were reasonably incurred. The medical procedures Mr. Khoury needed were not available here and Dr. John recommended the U SA hospital. In the circumstances I do not think that it would have been

reasonable to require Mr. Khoury in his condition to first source the region to ascertain whether the care he required was available before embarking for the USA. The life of his leg was at stake. Likewise I accept the explanation of the precariousness of his condition and that the commercial airlines refused to take him and that he was compelled to hire an air ambulance and that on his return journey he could not be accommodated in commercial class with the cast. I therefore hold that those expenses were reasonably incurred and the Defendants who has the onus to prove otherwise have not done so..

- [15] Accordingly, Mr. Khoury is to have his special damages claimed plus the cost of the two medical witnesses attending at the assessment. This is \$800.00 as per letter from Dr. Singh dated 26th January ,2004 which was admitted by consent at the hearing and marked "k.S.1" and in the absence of a specific costs for Mr. Matthews but bearing in mind that his attendance was dispensed with near the conclusion of the matter and Defence counsel properly accepted that he will have to be paid I will award \$500.00 as not unreasonable for nigh on three hours in attendance. In addition further costs of \$ 30,200.00 were claimed for further physiotherapy from December 1998 to date of assessment and \$592.00 for supplying the Defendants with x-rays and a compact disc for consideration of its medical expert in Barbados. The respective invoices were admitted by consent and marked "Add.G.K.1' and "Add. G.K.2". The total award under this head is therefore \$157,508.15

Interest

[16] Mr. Khoury claims interest on special damages of 14% as he gave evidence that he had to use his business overdraft to fund his medical care abroad and that it was cheaper than organizing a separate loan.. In the circumstances he is entitled to interest on special damages at that rate which is a departure from the normal rate but I am satisfied that the court has a discretion as to both the rate and the period under the Eastern Caribbean Supreme Court Act and that I can properly make such an award in the instant case.

[17] In keeping with the authorities cited of **Alphonso and Others v. Deodath Ramnath (1997) 56 WIR 183** and **Jefford v. Gee (1970)2 Q.B. 130**. he is also entitled to interest on all awards of general damages save those in respect of loss of future earnings and prospective medical costs from the date of the filing of the writ (27th July,1999) to date of judgment, 23rd April, 2004.

Conclusion

[18] In conclusion for the reasons advanced I give judgment for the Plaintiff as follows: -

- (1) General damages for pain, suffering and loss of amenities of.\$120,000.000 with interest at the rate of 5 per cent per annum from date of filing of

writ, 27th July, 1999, to date of judgment, 23 April, 2004;

- (2) Special damages of \$157,508.15 with interest at the rate of 14 per cent per annum from 27th July, 1999 to 23 April, 2004;
- (3) Loss of future earnings of \$208,000.00
- (4) Costs of future medical care of \$258,000.00.
- (5) Prescribed costs in accordance with CPR 2000 Part 65.5

Rita Joseph-Olivetti
High Court Judge