

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV1997/0240

BETWEEN:

LAURA MARROCCO

Claimant

AND

THE ATTORNEY GENERAL OF ANTIGUA & BARBUDA

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Ms Tracey Benn for the Claimant

Mrs. Carla Brookes-Harris for the Defendant

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2006: February 28<sup>th</sup>, May 16<sup>th</sup>  
October 24<sup>th</sup>  
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JUDGMENT

[1] **MATHURIN, M:** On the 24<sup>th</sup> January 1997, the Claimant (Mrs. Marrocco) who was 67 at the time, was sightseeing at Shirley Heights in English Harbor when she fell backwards off a steep drop about 4 feet below the level of the path where she was walking. The issue of the liability of the Defendant was determined before Joseph-Olivetti J. on the 14<sup>th</sup> April 2005 and it was found that the Government was wholly liable for the accident and had to pay to Mrs. Marrocco damages to be assessed. The parties agreed to do the assessment by way of written representations and all witness statements and submissions were filed by the 19<sup>th</sup> May 2006.

**Special Damages**

[2] Ms Marrocco is claiming the sum of EC \$12,183.14 as special damages. This amount is broken down as follows;

(a)	Halliburton Hospital	625.00
(b)	Adelin Medical Centre	4298.00
(c)	Barrymore Hotel	261.90
(d)	Airfare to Rhode Island	2110.73
(e)	Adaptive commode	161.97
(f)	Carey Limousine NY Inc	2834.54
(g)	Walker with adaptive device	1890.00
(h)	Custom fabricated arm state with thumb	283.50
	<b>Total</b>	<b>12,183.14</b>

- [3] Counsel for the defendant has agreed the special damages claimed in relation to items (b) and (d) which relate to the bill for Adelin Medical Centre and the airfare but challenges all the other items listed. Counsel submits that based on the authority of Hayward and another v Pullinger & Partners Ltd (1950) 1 KBD 581 and Ilkiw v Samuels (1963) 1 WLR 991 wherein it is established that special damages which are generally capable of exact calculation have to be specifically pleaded and proven. A quotation of Diplock J in Ilkew v Samuels (supra) is ample support for this proposition.

*"Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized... it is plain law... that one can recover in an action only special damage which has been pleaded, and, of course, proved."*

In the absence therefore of any proof, I am limited to a consideration of the special damages which are supported by evidence.

- [4] There is no supporting documentation for items (a), (c), (e) and (g) and as such these items will be disallowed. In Ms Marracco's affidavit of 9<sup>th</sup> May 2006 at paragraph 17, she swore that the cost of the custom fabricated arm stat with thumb was met by Medicare and as such this amount will also be disallowed (item (h)).
- [5] The only outstanding issue is the cost of the limousine from New York to Rhode Island in the amount of \$2,835.54. Counsel for the Defendant submits that this is an unreasonable expense and that the Claimant should have instead availed herself of transportation by air, which would have been cheaper. Ms Marracco's description of her journey by air is graphic in her affidavit. She states *"I was transported from Antigua... by airplane using American Airlines. It was such a very distressing, painful and uncomfortable trip... I had to board the planes through the cargo section ... even though two, three seats were assigned to me, it was still so uncomfortable and painful even though I was given painkillers... From New York to Rhode Island, I had to be transported via a limousine because it was the only spacious and comfortable vehicle to accommodate me having to be in a lying position with my arm and leg sticking out from being in the cast."*
- [6] I have no difficulty in awarding the cost of the limousine to Ms Marracco. It is clear that this presented her with a certain amount of comfort in circumstances where further travel by air proved distressing, painful and uncomfortable. In summary, special damages are

awarded by agreement in the sum of \$6,408.73 in addition to the sum of \$2,835.54 which represents the cost of the limousine. This amounts to a total of \$9244.27.

## General Damages

- [7] On the question of general damages, the law is settled. The case of Cornilliac v St Louis (1965) 7 WIR 491 is the locus classicus on this point and Wooding CJ set out the considerations to be borne in mind in assessing general damages;
- (a) The nature and extent of the injuries sustained
  - (b) The nature and gravity of the resulting physical disability
  - (c) The pain and suffering experienced
  - (d) The loss of amenities if any
  - (e) The extent to which pecuniary prospects are affected
- [8] Further, applying the principles in Heeralall v Hack Bros. (1977) 15 WIR 117, the law expects an award of fair compensation, fair to Ms Marrocco for what has happened to her through the negligence of the defendant and fair for the defendant to pay for such negligence. Such damages cannot be perfect compensation, but it will be fair compensation for her injuries and for the social, economic and domestic consequences to her.
- [9] Ms Marrocco sustained a fracture to her intra-articular right upper end tibia and fractures of the right distal radius and distal ulna. She returned to Rhode Island in the United States where she was treated by Dr Steven Graff and undertook additional examinations which confirmed a traverse fracture and bycondylar non-displaced tibia plateau fracture of the right knee. Ms Marrocco was hospitalized in Rhode Island and was eventually transferred to a rehabilitation centre to improve and strengthen the function of her arm and leg. She stayed there for two and a half months. Ms Marracco states during rehab, she could bear no weight on her right side, she had to be fitted with a hinged knee brace that she describes was extremely uncomfortable and painful. After being discharged, she states that she had to use a walker for six months. She states that because of her injuries, she is no longer able to perform certain activities for any length of time without experiencing pain and discomfort.
- [10] Counsel for the Claimant has submitted several medical reports in support. On the 1<sup>st</sup> February 2007, in support of the injuries alleged, Dr Graff isolated her injuries to the right wrist and right proximal tibia. Upon her discharge from St Josephs Hospital, she continued a regular regime of visits for treatment of the injuries and by April 1997, the reports of her recovery were very optimistic
- "X-Rays of the wrist show complete healing... The ulna fracture is completely healed."* See Report dated April 11, 1997
- "X-Rays today demonstrate complete healing of the tibia fracture"* See Report dated June 10, 1997
- [11] It is clear however that Ms Marrocco was still experiencing various degrees of pain because in August 1997 she was cautioned against using too much Advil for pain. The

subsequent visits to the various doctors who treated her recorded her complaints of pain but noted that they did not merit surgical intervention and the pain in her wrist seemed to act up when she went bowling. See Report dated October 7, 1997

- [12] On the 6<sup>th</sup> January 1998, almost one year after the accident, Dr Graff's impressions were as follows;

*"One year status post the above listed injuries to her right wrist and right knee. She has ongoing pain primarily from her distal ulna fracture of the right wrist with forearm rotation. Her right knee has been doing fairly well and has been checked by Dr Feldman and she feels that it needs no further follow-up at this time."*

- [13] The latter reports submitted focus mainly on pain in Ms Marrocco's hand, primarily from carpal tunnel syndrome, a condition which she seems to have had from before the accident and which Dr Graff states could have been exacerbated by the fall. See Report dated April 11, 1997. In fact in 2001, the condition was diagnosed and treated in both hands. See Reports dated July 11, 2001 to December 6, 2002.

- [14] Ms Marrocco states that since the accident she relies on her left hand to do some activities because of the pain in her right hand. There is no indication of this in the medical reports which indicate that by October 1997 around the house activities did not bother her but it was only bowling but by February 1999, she was able to bowl 3 times a week for a number of months in a row. There is no medical evidence of her being unable to write despite the several doctors' visits where this would have been disclosed.

- [15] The later and final reports indicate right lateral epicondylitis brought on and worsened by bowling, right cubital tunnel syndrome, right ring finger volar retinacular ganglion and left tenosynovitis and pain in the right medial elbow. None of these symptoms are diagnosed as being related to the injuries from the accident. See affidavit of Dr Graff filed 30<sup>th</sup> May 2005. Whereas I accept that Ms Marrocco's injuries have been the source of a considerable amount of pain and discomfort, I am persuaded that some of the limitations endured by the Claimant today may not be from the accident but by the normal functioning of the body as times passes.

- [16] I have had regard to the evidence and medical reports of the claimant and submissions of both counsel. I am guided by the Court of Appeal in the case of **CCAA Limited v Julius Jeffrey** Civil Appeal No 10 of 2003 St Vincent;

*"I am aware of the school of thought advanced before us that a trial judge may take into account damages awarded in comparable cases, but is in no way bound to. I believe that that school of thought has served its time and has been replaced by the more modern school as expressed in **Wells v Wells** (1998) 3 AER 481 (a House of Lords decision) wherein Lord Hope of Craighead observed that;*

*"The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the Court's best estimate of the plaintiff's general damages"*

*Thus, to summarise, I accept that the trial judge must exercise his discretion based on the evidence before him, but that discretion must be curtailed by attempting to achieve consistency in awards with the jurisdiction of this court."*

- [17] I have noted the authorities that the parties have submitted in support of their submissions. Counsel for the Claimant Ms Tracey Benn has referred me to the following

Hoffman v Sofaer (1982) 1 WLR 1350

Mackrell v Patel Kemp and Kemp; Quantum of Damages

Patel v Edwards Kemp and Kemp; Quantum of Damages

Bernard Warner v Eustace Coates and Kevin Peters v Eustace Coates Civil appeals

No ANUHCv1996/0237 and ANUHCv1997/0377

Wadadli Cats Limited v Frances Chapman Civil Appeal No 16 of 2004 Antigua

Keithly George v Gerald Khoury Civil Appeal No 19 of 2004 Antigua

- [18] Counsel in the Attorney General's Chambers, Mrs. Carla Harris-Brookes referred me to the following

Hayward and another v Pullinger & Partners Ltd (1950) 1 KBD 581

H. West & Son v Shephard (1964) AC327

Mitchell v Mulholland and another (1972) 1 QB 65

Housecroft v Burnett (1986) 1 AER 332

Lim v Camden Health Authority (1979) 2 AER 910

Shawn Harrigan v Melvin Pickering No 51 of 2000 BVI

Peterson Cheddi v Regis Martyr SLUHCV1996/0715

Ann Henry v Arlene Martin and Neil Martin Civil Suit No 268 of 1994 Antigua

- [19] In all the circumstances, I am of the opinion that an award under the head of pain and suffering and loss of amenities in the sum of EC\$50,000.00 will suffice to compensate the Claimant.
- [20] Interest is awarded to a claimant in a personal injuries case on the sum awarded for general damages. Interest is awarded to a claimant in a personal injuries case on the sum awarded for general damages for pain and suffering and loss of amenities prior to Judgment. Interest on this sum is calculated from the date of the service of the claim form to the date of judgment at the rate of a short-term investment. After judgment, the claimant is entitled to the full amount awarded at the statutory rate of 5%.
- [21] Costs in this claim are to be assessed as prescribed under Part 65.5(1) of the Civil Procedure Rules 2000. The damages to be awarded are EC\$60,000.00 for pain and suffering and loss of amenities and special damages of EC\$9,244.27 which amounts to EC\$69,244.27.
- [22] In keeping with Appendix B, costs are calculated in the sum of EC\$17,848.85 as the claim concluded after trial of the issue of liability.

## Summary of Order

[23] In summary, the following is the order on the assessment of damages:-

1. The defendant will pay the sum of EC\$60,000.00 as the global award for general damages for pain and suffering and loss of amenities to the claimant.
2. The defendant will pay, in addition, the sum of \$9,244.27 as special damages
3. The defendant will pay interest at the rate of 3% on the sum of EC\$9,244.27 from the date of service of the claim (12<sup>th</sup> December 1997) to date of the hearing of the assessment (16<sup>th</sup> May 2006)
4. The defendant will pay interest on the total judgment sum of EC\$69,244.27 at the rate of 5% per annum from today's date until payment.
5. The defendant will pay Ms Marrocco's prescribed costs in these proceedings in the sum of \$17,848.85.

**Cheryl Mathurin**  
Master