IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2003/ 0821

BETWEEN:

ALLISON CANAII

Claimant

AND

(1) LEONARD MALZAIRE
(2) JOHN BAPTISTE MATHURIN

Defendants

Appearances:

Ms. Beverley Downes for Claimant
Mr. Dexter Theodore for Defendants

……..
2007: February 1
April 2
May 2
……..

# JUDGMENT ON ASSESSMENT OF DAMAGES

Mason J

[1] On 14th July 2006, this Court gave judgment for the Claimant with respect to an accident which occurred on 5th April 2002 and in which the Claimant was severely injured. The Court determined that the accident was caused by the negligence of the 2nd Defendant who permitted to be left on the Vieux Fort/Micoud Highway around 7:30 p.m. without appropriate illumination, the disabled truck owned by the first Defendant.

[2] Counsel were invited to seek to agree on the level of damages to be awarded or in the alternative, to make written submissions, which second choice was ultimately preferred.

[3] Both Counsel in their submissions adverted to the case of Cornilliac v St. Louis (1965) 7 W!R 491 in which the factors which the court must bear in mind when determining assessment of damages are set out. These factors are:

> *(1) the nature and extent of the injuries sustained*
>
> **(2)** *the nature and gravity of the resulting physical disability*
>
> *(3) pain and suffering endured*
>
> *(4) loss of amenities*
>
> *(5) the extent to which the Claimant's pecuniary prospects have been materially affected*

[4] The first two (2) factors are to be found in the medical report which was produced and accepted in evidence. That report prepared by Dr. N. A. Dagbue, Orthopaedic Surgeon, states:

> *(The Claimant) sustained injury to the forehead, left ankle and neck …….*
>
> *(The Claimant) …. was fully assessed by the surgical and orthopaedic teams both clinically and radiologically, confirming the following injuries:*
>
> - *Laceration to the forehead*

- *Pneumomediastinum from laceration trachea*
- *Open comminuted type II fracture of the left distal tibia*

*He was managed surgically by both the surgical and the orthopaedic teams. He had a tracheostomy and debridement of open ankle fracture on April 5, 2002. He also had an open reduction and internal fixation of the left ankle with bone grafting on April 12, 2002.*

*The report continues:*

*(The Claimant's) recovery up till his last visit to the clinic has been satisfactory, considering the severity of his injury.*

*At present, he has limitation of flexion and extension of the ankle, and a limp which may improve further with physiotherapy, which he is undergoing.*

*In the future, with the severity of his injury and amount of recovery so far, it is expected that he will develop post-traumatic osteo-arthritis of the ankle, which may finally necessitate fusion of the ankle.*

Pain and Suffering

[5] The argument for the Claimant is in the main speculative: that the Claimant would certainly have suffered severe pain as a result of the accident.

[6] This is refuted by Counsel for the Defendants who argues that because the Claimant lost consciousness when the accident occurred, it is logical to assume that he would not have felt any pain and when he was resuscitated by the doctors at the hospital , they would no doubt have ensured that he was under pain killers.

[7] I found the argument regarding unconsciousness to be an attractive one, one which also found favour with the House of Lords in the case of Shepherd v H. West and Anor (1964) AC 326 where the facts are totally dissimilar to the case at bar and therefore need not be recounted. Suffice it to say that the House of Lords determined that where an injured person does not suffer pain because of unconsciousness he is not entitled to be compensated for that period of unconsciousness.

[8] I reproduced here at some length the relevant part of the judgment of Lord Devlin in light of the fact that it speaks to aspects which this court will need to consider for the present case and also because the speech contains precepts which continue to be followed in personal injury claims:

> *"The case raises a fundamental question on the nature of damages for personal injury. There must be compensation for medical expenses*

*incurred and for loss of earnings during recovery: these are easily qualified, whether as special or as general damage. Then there is compensation for pain and suffering both physical and mental. This is at large. It is compensation for pain and suffering actually experienced. Loss of consciousness, however caused, whether by the injury itself or produced by drugs or anaesthetics, means that physical pain is not experienced and so has not to be compensated for; and this must be true also of mental pain. Then there is or may be a temporary or permanent loss of a limb, organ or faculty. Whether it is the limb itself that is lost or the use of it is immaterial. What is to be compensated for is the loss of use and the deprivation thereby occasioned. This deprivation may bring with it three consequences. First, it may result in loss of earnings and they can be calculated. Secondly, it may put the victim to expense in that he has to pay others for doing what he formerly did for himself; and that also can be calculated. Thirdly, it produces loss of enjoyment, loss of amenities as it is sometimes called, a diminution in the full pleasure of living. This is incalculable and at large. This deprivation with its large consequences is something that is personal to the victim. You do not, for instance, put an arbitrary value on the loss of a limb, as is commonly done in an accident insurance policy. You must ascertain the use to which the limb would have been put, so as to ascertain what it is of which the victim has actually been deprived.*

*What has to be considered in the present case is the method of compensation for the third of these consequences, loss of employment or*

*pleasure. There is here an almost total loss of use of all the faculties or limbs, but compensation under this head must be assessed in the same way as it would be for a partial loss of a single limb or faculty. The degree is different, but not the principle.*

*There are two ways in which this loss of employment can be considered. It can be said that from beginning to end it is really all mental suffering. Loss of enjoyment is experienced in the mind and nowhere else. It may start with acute distress at the inability to use a limb in games or exercise as before or just in getting about, and may end with a nagging sense of frustration. If this is the true, then total unconsciousness as in Wise v Kaye (31) relieves all mental suffering, and nothing can be recovered for a deprivation which is not being experienced.*

*The other way to look on the deprivation of a limb is as the loss of a personal asset, something in the nature of property. A limb can be put both to profitable use and to pleasurable use. In so far as it is put to profitable use, the loss is compensated for by calculating loss of earnings and not by assessing mental pain. On the same principle, it can be said, a sum must be assessed for loss of pleasurable use irrespective of whether there is mental suffering or not. It used at one time to be thought that damages could not be given for the loss of use of property that was not profit-earning, but that idea has not survived The Greta Holme (32) and The Merliana (33).*

[9] Thus it can be concluded that while the Court is not expected to compensate the Claimant for pain and suffering while unconscious, he has yet to be compensated for other pain and suffering he experienced whether mental or physical and this despite the suggestion from Counsel for the Defendants that he was under pain killers.

[10] Counsel for the Claimant asserts that the Claimant continues to suffer inconvenience and will suffer the pain of osteo-arthritis in the future as well as the pain of the likely operation to fuse the ankle. This Counsel for the Defendants rejects on the ground that this is no certainty and it was only an expectation on the part of one (1) doctor, an expectation which this court has to accept.

[11] The medical report referred to the severity of the Claimant's injuries which have left him with some disability. While pain killers would have most likely reduced the physical suffering which the Claimant had to undergo it is improbable therefore that he did not experience some measure of resulting pain, both mental and physical.

[12] I am prepared to accept, in the absence of alternative opinion or evidence to the contrary, the prognosis of the orthopaedic surgeon that the Claimant will have some resulting disability. He will most likely develop osteo-arthritis which may necessitate the Claimant undergoing a surgical procedure for fusion of the ankle.

Loss of Amenities

[13] Counsel for the Defendants contends that the Claimant's loss of amenities include lack of but not restriction of mobility, that the medical report indicates that his limbs may improve, that there is no medical evidence to suggest that the Claimant will have to use a walking stick for the rest of his life. Counsel's coup de grâce is that the Claimant is 53 years old and his age alone would have curtailed certain activities that younger persons would engage in.

[14] While the Court is not prepared to rule on the merits or demerits of such a general and unsupported claim, it is prepared to accept the evidence as revealed: that the Claimant's physical activity will be some what curtailed whether it is accompanying his wife to the shops or enjoying his night out of dancing; that he is forced to use a walking stick at an earlier age than would normally be expected whether or not this is temporary, that he is faced with the socially inhibiting and unattractive circumstance of slurred speech; and that previous to the accident, the Claimant appeared to enjoy good health. In my view the possibility of having to undergo surgery to fuse his ankle coupled with future osteo-arthritis impacts further on the Claimant's loss of amenities.

[15] I wish at this juncture to record my gratitude to Counsel for the legal authorities which they cited in their submissions. I have given careful consideration to each one and while not reproducing them in this judgment, I have made them the basis for my eventual award together with the above quoted speech by Lord Devlin in the Shepherd case.

[16] In coming to the decision, I have also noted the description by the Orthopaedic Surgeon of the injuries as severe, the satisfactory recovery of the Claimant, the Claimant's resulting disability and the prognosis of the Orthopaedic Surgeon. From these – the legal authorities and the Surgeon's prognosis - I have deduced that our case should be considered as being in the mid to lower – but not the lowest – category with respect to personal injury awards.

[17] In the premises I make an award of $30,000.00 for pain and suffering and $20,000.00 for loss of amenities.

Loss of Pecuniary Prospects

[18] Evidence is usually required to show how far the Claimant's earning capacity will be adversely affected by his disability. It is understood that this will depend to a large extent on the nature of his employment. For example, the Claimant being a taxi driver will of necessity require use of "good" lower limbs to continue to ply his trade for as stated by Lord Devlin, it is not an arbitrary valuation but an ascertainment of the use to which the limbs are put.

[19] According to the medical report, while he has made a satisfactory recovery, and while physiotherapy will help to improve his condition, the Claimant will suffer some diminution in his capacity to properly pursue this sphere of activity. He has given in evidence in fact that he now must employ a driver to undertake his duties and again quoting Lord Devlin, it is an added expense to which the Claimant has been put to pay for something which he

formerly did for himself. I therefore do not accept Counsel for the Defendants' argument that the Claimant's income derived from employing a driver could result in more than what the Claimant would earn when he drove his own vehicle.

[20] Lord Oliver of Aylmerton in the 1988 House of Lords case of Hodgson v Trapp states:

> *"The underlying principle regarding damages is that they are compensatory. They are not designed to put the Plaintiff in a better financial position than that which he would otherwise have been in if the accident had not occurred. At the same time the principle of a once-for-all award necessarily involves an assessment both of the probable duration and extent of the financial disadvantage resulting from the accident which the plaintiff will suffer in the future and of the present advantage which will occur to him from payment in the present of a capital sum which he would not otherwise have and which represents his future income loss. In the making of that assessment account also has to be taken of a number of unpredictable contingencies".*

[21] This principle was echoed by our Court of Appeal in Alphonse v Deodat Ramnauth Civil Appeal No. 1 of 1996 BVI when it was determining the multiplier:

> *"In determining the multiplier a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many*

*contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his usual working life but for the accident".*

[22] It is stated in Mc Gregor on Damages 17th edition at paragraph 35-081 that the starting point in the calculation of the multiplier is the number of years that it is anticipated the Claimant's disability will last and that the calculation falls to be made as from the date of trial. The calculation of how long the Claimant's disability is likely to last may require medical testimony, the latest data at the time of trial being taken. If the medical testimony establishes that the injury is permanent, although not involving a shortening of the Claimant's expectation of life it becomes necessary to assess the expectation of the Claimant's working life: op.cit. 35-082.

[23] The Claimant was 48 years old at the time of the accident and 52 years old at the date of trial in July, 2006, having been born on the 22nd December 1953. No evidence has been led that before the accident the Claimant had any apparent or revealed incapacities. It is thus safe to assume that he would have an "ascertainable statistical life expectancy".

[24] Thus taking into account that the Claimant was in normal health and being self employed, he would have more likely than not continued in employment until age 65 rather than 60 as suggested by Counsel for the Defendants. He would therefore have had at least another 13 years of working life ahead of him. See the case of Alphonse v Ramnauth

(supra) in which the injured man was 45 years old and the Court of Appeal applied a working life expectancy of 65 years and gave a multiplier of 12.

[25] Having perused and considered the authorities, I am satisfied that an appropriate multiplier is 10.

[26] With respect to the multiplicand, the Court will follow the principle set out in the case of Cook Cookson v Knowles (1979) AC 556 and referred to in the case of Fenton Auguste v Francis Neptume Civil Appeal No. 6 of 1996:

> *"For the purpose of arriving at the multiplicand, the basis should be in the least amount the respondent would have been earning if he had continued without being injured".*

[27] In the absence of any documented evidence of his earnings and having regard to the argument of Counsel for the Defendants that had the Claimant been earning $3,000.00 per month he would have been obligated to file income tax returns, but also being aware of the general income of taxi drivers on the island (income tax filing obligations notwithstanding). I am satisfied that a multiplicand of $400.00 is reasonable. Using a multiplier of 10 and a multiplicand of 400, award for loss of pecuniary prospects will therefore be $40,000.00.

Future Medical Care

[28] Counsel for the Claimant contends that in light of the inevitable onset of osteo arthritis and the future operation to fuse the ankle, an award of $10,000.00 should be included under this head to cover these costs. Counsel for the Defendants rebuts this by saying that the doctor did not categorically state that the ankle fusion was inevitable but that it "may" be required. He suggests an award of $1,000.00 for medication since osteo arthritis was likely.

[29] While it is true that no definitive indication has been given regarding fusion of the ankle, it is clear that osteo – arthritis will develop. Weighing that reality together with an examination of the invoices exhibited for previous hospital care in which medication was listed, I consider that an award of $2,500.00 for future medical care is reasonable.

Special Damages

[30] These are "exceptional in character and therefore they must be claimed specially and proved strictly". They consist of out-of-pocket expenses and loss of earnings incurred down to the date of trial and are generally capable of substantially exact calculation": British Transport Commission v Gourley (1956) AC 185.

[31] The Claimant claims the sum of $12,582.22 which includes $1,575.00 for loss of use of vehicle, a sum which Counsel for the Defendants counters at $1,050.00. Since neither has indicated how their respective figure was arrived at, and it being the duty of the Claimant

to "specially and strictly", prove, I am obliged to accept the Defendants' figure of $1,050.00.

[32] The Court having been satisfied by the production of other expenses specifically itemized and supported by appropriate invoices, a total of $10,807.00 will be allowed under this head.

Interest

[33] This is to be computed as follows:

1) 6% per annum for general damages with effect from the date of service of the claim - 14th November 2003 – to the date of judgment – 14th July 2006
2) 3% per annum for special damages from the date of the accident – 5th April 2002 – to the date of judgment – 14th July 2006

[34) Summary

General Damages

| | | |
|---|---|---|
| - | pain and suffering | $30,000.00 |
| - | loss of amenities | $20,000.00 |
| - | loss of future earnings | $40,000.00 |
| - | future medical care | $ 2,500.00 |
| | | ---------- |
| | | $92,500.00 |
| | | ========= |

Special Damages

| | | |
|---|---|---|
| - | medical expenses | $10,807.22 |
| - | police report | 200.00 |
| - | loss of use of vehicle | 1,050.00 |
| | | --- |
| | | $12,057.22 |
| | | ========= |

[35} Total damages awarded $104,557.22 together with interest as indicated.

ORDER

1) The Claimant is hereby awarded as general damages the sum of $92,500 together with interest at the rate of 6% per annum from 14th November 2003 to 14th July 2006
2) The Claimant is hereby awarded as special damages the sum of $12,957.22 together with interest at the rate of 3% per annum from 5th April 2002 to 14th July 2006.

3) Costs will be prescribed in accordance with Part 65 CPR 2000.

SANDRA MASON Q.C.

High Court Judge