

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2006/0130

BETWEEN:

DENROY BAPTISTE

Claimant

AND

TORTOLA YACHT SERVICES LIMITED

Defendant

Appearances:

John Carrington of Todman & Co. for the Claimant

Tana'ania Small-Davis of Farara Kerins for the Defendant

2008: January 29th, April 24th, 28th
and May 28th

JUDGMENT

(Personal injuries – compensation – 42 year old man involved in accident at work – injury to back and shoulder, degenerative disc disease- quantum of general damages

Practice and Procedure – ‘without prejudice’ correspondence exchanged between claimant’s counsel and defendant’s insurers – whether defendant entitled to rely on such correspondence at trial to support allegations that claim had been settled – principles governing use of ‘without prejudice’ communications

Contract – whether ‘without prejudice’ correspondence evidence a settlement agreement)

[1] **Joseph-Olivetti, J.:** This is a claim for damages for personal injuries arising from an accident in the work place. On 29th May 2000 Mr. Denroy Baptiste was employed as a painter with the Defendant, Tortola Yacht Services Ltd (“TYS”) at Wickhams Cay. He suffered injuries when a rope on which he had been pulling on to assist in lifting a boat out of the water broke and he was thrown into the water on his back. He is now seeking compensation for his injuries. In defence, TYS says first that the claim was settled prior to suit or alternatively that they are not liable and/or that Mr. Baptiste contributed to his accident.

[2] I now turn to the first and primary issue raised by TYS which is whether or not the claim had been settled. TYS sought to rely on two letters to establish a settlement

agreement. Issue was taken at trial as to the admissibility of these documents on the basis that they were made 'without prejudice' and perforce were inadmissible.

[3] However, Mr. Carrington's objections could not withstand the formidable torrent of authorities¹ relied on by Mrs. Small-Davis. This was to the effect that "without prejudice" communications could be relied on to establish a concluded agreement arising therefrom or for the purpose of deciding whether such an agreement had indeed been reached and the letters were admitted. For completion and as the admission of the letters was crucial to the defence I will visit the main authorities on which I based my decision to admit the letters.

[4] The principal case is **Tomlin v. Standard Telephones & Cables Ltd.**² where Danckwerts L.J. said referring to dicta of Lindley L.J. in *Walker v. Wilsher* (1889) 23 Q.B.D. 335:-

"In the course of his judgment, however, Lindley L.J. said, at p. 337:

"What is the meaning of the words "without prejudice"? I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one."

That statement of Lindley L.J. is of great authority and seems to me to apply exactly to the present case if, in fact, there was a binding agreement, or an agreement intended to be binding, reached between the parties, and, accordingly, it seems to me that not only was the court entitled to look at the letters, though they were described as "without

¹ *Tomlin v Standard Telephones and Cables Ltd* [1969] 1 W.L.R. 1378
Walker v Wilsher (1889)LR 23 Q.B.D. 335
Rush & Tompkins ltd v Greater London Council and Another [1989] A.C. 1280
South Shropshire District Council v Amos [1986] 1 W.L.R. 1271
Unilever Plc. V The Procter & Gamble Co. [2000] 1 W.L.R. 2436
Brown v Rice [2008] F.S.R. 3
Harford v Birmingham City Council (1993) 66 P. & C.R. 468
Luchtmansingh v Grostate [2000] C.L.Y. 621
Twintec Limited v GSE Building and Civil Engineering Ltd [2003] EWHC 605
Baris Ltd v Kajima Construction Europe (UK) Ltd [2006] EWHC 31
Conlon v Conlons Ltd [1952] 2 All ER 462

² [1969] 1 W.L.R. 1378

prejudice,” but it is quite possible (and, in fact, the intention of the parties was) that there was a binding agreement contained in that correspondence. This disposes of the first point.”...

From those cases it seems to me that the principle which emerges is that the court will protect, and ought to protect, so far as it can, in the public interest, “without prejudice” negotiations because they are very helpful to the disposal of claims without the necessity for litigating in court, and therefore, nothing should be done to make more difficult or more hazardous negotiations under the umbrella of “without prejudice.” I am well aware, coming from the Division from which I do come that letters get headed “without prejudice” in the most absurd circumstances, but these letters, in my judgment, are not letters headed “Without prejudice” unnecessarily or meaninglessly. They are plainly “without prejudice” letters, and therefore, the court, in my judgment, should be very slow to lift the umbrella of “without prejudice” unless the case is absolutely plain.”

[5] And, see also **Halsbury’s Laws of England Vol. 17** at page 152:-

“213. Limits of the rule. The contents of a communication made “without prejudice” are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached, and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are not otherwise admissible. Thus they cannot be used as admissions, or as acknowledgements to prevent a debt from coming statute-barred, or, normally, for the purpose of deciding the question of costs, or to show malice, although it has been held that they may be admitted to prove matters not connected with the merits of the dispute.

The consent of both parties to the dispute is required for the privilege to be waived, even if there has been only one communication.” (Emphasis added)

[6] Save with one exception I accept the evidence of Mr. Graham Wickens, the Adjuster for TYS ‘ insurance company, Royal and Alliance Insurance (Puerto Rico) Inc. as to the circumstances in which these letters were written. That is, that the first letter

dated 19th November 2001 from Mr. Baptiste's solicitors, McW Todman & Co. was in response to a letter of 2nd February 2001 from Caribbean Adjusters Ltd (this letter was not produced) and that the second dated 11th October 2005 from McW Todman & Co to Caribbean Insurers Ltd was a follow up to a telephone conversation between the writer, Ms. Melanie Williams of Mc W. Todman & Co. and not Mr. Wickens as he testified but to the addressee, Ms. Bernadine Thomas (of Caribbean Insurers Ltd).had it been otherwise in my view it would not have been addressed specifically to her.

[7] The first letter, admitted as "GW 1" is written by Mr. Hayden St. Clair Douglas. The letter on its face is a quantification of the claim for loss and damage suffered by Mr. Baptiste as a result of the said accident. It set out the background to the claim and detailed the injuries sustained and made reference to various cases.³ Finally, Mr. St. Clair Douglas claimed:-

"\$12,000.00 as general damages
\$ 5,500.00 cost of reconstructive surgery
\$ 1,653.80 special damages
\$ 2,798.07 costs
\$21,951.87"

[8] The letter of 11th October 2005 (four years later) admitted as "GW 2" is brief and is set out hereunder in full:-

"Further to our telephone conversation of 6 October, I confirm that my client has instructed us that he is now prepared to accept your offer to settle this matter, by paying the sum of \$20,422.80, inclusive of legal costs.

I also confirm that our client has not received any payments form his former employers for the injuries which he sustained as a result of their negligence and failure to provide a proper work environment.

We look forward to the receipt of your further correspondence in relation to this matter."

³ Mr. Douglas also submitted several medical reports. However, in the margin of the letter there is a note ostensibly signed by the addressee, Mrs. Jacqueline Newton to the effect that the reports were not received on the 20th November, the date the letter itself was received.

[9] Can these letters be said to amount to a binding contract or evidence of settlement without more? First, I note the length of time which has elapsed between the two letters. Next I see that one was sent to Caribbean Adjusters Limited and the other to Caribbean Insurers Limited. No explanation has been given by TYS as to whether or not the addressees are in fact the same entity, but in all the circumstances it seems so. The second letter bears no reference to the first and specifically the figures are different though not significantly so. It refers to a telephone conversation of 6th October with the addressee. Mr. Wickens in his witness statement said that he spoke to Ms. Williams on the 6th October 2005 and she told him that her client had agreed to accept the sum of \$29,422.80 inclusive of costs and that she wrote to that effect on the 11th October 2005. Did he make this offer to her prior to 6th October so that she had her client's instructions when she spoke to him on the 6th October? And, if he made the offer why did she not direct her confirmatory letter to him? It also raises the question whether that sum was to be in full and final settlement of the entire claim. I find that the offer was made prior to the second letter, not by Mr. Wickens but by Ms. Thomas.

[10] Furthermore, the second paragraph raises the clear inference that this offer was in some way conditional upon whether Mr. Baptiste had received any payments from his employer for his injuries and if so how was that to be dealt with. And, the last sentence of the letter clearly anticipated further correspondence between the parties. We have seen none.

[11] Mr. Wickens explained that they had discussed whether Mr. Baptiste had received any payments from his employer as that would have impacted on his offer. He testified that he subsequently learnt that Mr. Baptiste had been paid the difference between his wages and what he received from Social Security in respect of his earnings and that the intention of the parties was to set off those sums paid by the employer from the sum of \$20,422.80 agreed on. Based on that he made no payments to Mr. Baptiste as Mr. Baptiste had already received more than \$20,422.80 from TYS. Yet, Mr. Wickens did not see fit to correspond with McW Todman to explain this course of action and to obtain McW Todman's confirmation that they accepted that full and final payment on behalf of their client had been made by way of this set off.

[12] Further, Mr. Baptiste did not sign the usual release which Mr. Wickens referred to in para 8 of his witness statement as a formal agreement to settle the matter. The accepted practice, of which we can take judicial notice, is that if an insurer settles a claim, on payment it requires the payee to sign a release acknowledging payment in full and final satisfaction of the claim.

[13] The only reasonable conclusion that can be drawn from the correspondence and the evidence of Mr. Wickens is that no final and binding agreement was concluded between Mr. Wicken's company on behalf of TYS and Mr. Baptiste's solicitors on behalf of Mr. Baptiste. What is more TYS cannot rely on payments made on account of loss of wages prior to Ms. Williams accepting the offer of settlement in satisfaction of the offer unless that had been specifically agreed. Curiously if that were so It would also mean that Mr. Baptiste would only receive damages for loss of wages and no compensation for his injuries .On the evidence I cannot find that this was so agreed. I accept that Mr. Baptiste received payments from Social Security in respect of his loss of earnings and that TYS made up the difference by paying him \$21,854.83. I note too that he has only claimed loss of earnings from March 2006 to the filing of the claim.⁴

[14] I now turn to the issue of liability. I note that TYS in its written submissions conceded liability and in my view rightly so having regard to the evidence. I therefore find that TYS was wholly liable for the accident. Now to the issue of damages.

Legal Principles - Assessment of General Damages

[15] The legal principles governing the assessment of damages are well established and the locus classicus on this is **Cornilliac v St. Louis**⁵, a case from the Trinidad and Tobago Court of Appeal which has been followed in this jurisdiction. See **Alphonso and Others v Deodat Ramnath**.⁶ In that case, Sir Hugh Wooding CJ listed the main factors to be taken into account in assessing general damages for personal injuries as (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the

⁴ Apparently he was a guest of HM Prison during the period March 2004 to March 2006. He has not claimed loss of wages for the period of his incarceration.

⁵ (1965) 7 WIR 491

⁶ (1997) 56 WIR 183

resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects

The Nature and Extent of the Injuries Sustained

[16] Mr. Baptiste was born on 8th November 1965. He was 35 at the date of injury and is now 42 years old. Prior to the accident he worked as a boat painter but has been unable to continue in this line of work as a result of the injuries he sustained in the accident. He has since found sporadic employment as a driver and a handyman.

[17] Mr. Baptiste first visited Peebles Hospital for dislocation to his shoulder He was treated by the emergency room doctor and discharged. However, as a result of continuing symptoms he was subsequently referred to several other doctors including Dr. Davies at Peebles Hospital, Dr. Hugo Caesar, an orthopaedic surgeon in St. Thomas and Dr. James Nelson for neurological evaluation.

[18] Dr. Caesar attended the trial and gave oral evidence as to the nature and extent of Mr. Baptiste injuries. Counsel for TYS made valiant efforts to establish that there was no causal connection between the degenerative disc disease suffered by Mr. Baptiste and the injuries sustained in the accident in that Mr. Baptiste was described as 'obese' and Dr. Caesar had agreed that the degenerative disc disease happens for the most part in everyone due to age. However, I accept the doctor's evidence that Mr. Baptiste had no history of degenerative disc disease and that in this case the accident was the cause of all his injuries. I therefore find that the injuries he suffered which were detailed in Dr. Caesar's report are as follows:- (i) Temporary loss of feeling and ability to move his right arm immediately after the accident, (ii) Hills Sachs lesion to right humeral head, (iii) Labral tear in right shoulder, (iv) Continuous pain in right shoulder and back, (v) Radicular syndrome involving radicular pain, paresthesias and/or weakness in both upper extremities and left lower extremity, (vi) Dorsal and lumbosacral strain and sprain, (vii) Compression fracture of T12 and mild compression fracture of L1 discs, (viii) Bulging and/or herniated discs at levels C4-5; C5-6; C6-7; L4-5 and L5-S, (ix) Multiple levels of cervical and lumbar spinal stenosis, (x) Traction injury to brachial plexus on the right, (xi) Right index finger spasm and (xii) Bicipital tendonitis.

The Nature and Gravity of the Resulting Physical Disability

[19] Dr. Caesar's prognosis is that Mr. Baptiste's condition will deteriorate in the future due to his degenerative disc disease resulting in limited mobility. He did not recommend surgery for that condition. However, he did recommend surgery for the tear to the labrum. Dr. Caesar evaluated the permanent disability resulting from all the injuries as a 20% whole body impairment. He testified and I accept his evidence that if the surgery is successful this would reduce his overall disability to 18% in the short term and in the long term (10-15 years) to a much higher figure but he did not indicate any figure. Dr. Caesar also testified that degenerative arthritis could result from constant rubbing of the cartilage.

[20] The medical report of Dr. James Nelson confirms that the injuries suffered by Mr. Baptiste have limited his lifestyle. He states 'this patient has sustained a 25% impairment of the whole person. He should avoid prolonged sitting or standing as well as lifting, bending, squatting, crawling, pushing or pulling. He should also avoid stooping or twisting. As a result of his cervical and lumbar disc problems, he should not lift over 10lbs. He will not be able to return to his previous line of work and will need vocational rehabilitation'.

[21] In the final analysis the reality is that Mr. Baptiste suffered serious injuries such that he is now limited in carrying out his normal activities and is unable to continue in his employment as a painter and there is the real possibility that his condition will worsen.

The Pain and Suffering and Loss of Amenities and the impact on the claimant's pecuniary prospects

[22] I accept Mr. Baptiste's testimony that he suffered severe pain in his back, shoulder and thighs for the first year after the incident and thereafter suffers from occasional pain for about 3 days a week. He said that he only gets relief when he takes his medication and that even when on medication he continues to suffer pain so much so that it usually wakes him up from his sleep.

[23] The medical reports of Drs. Caesar and Nelson and the evidence of Dr. Caesar indicate that Mr. Baptiste experienced and is still experiencing chronic pain and discomfort in his shoulders, neck, back and thighs. I have no doubt that Mr. Baptiste

has suffered a great deal of pain and is still suffering from some degree of pain and discomfort. And will not be entirely free of pain in the future.

[24] Mr. Baptiste's testified that he was an avid basketball player before the accident and that since the accident he is unable to play basketball because of his physical limitations. He also spoke of his pride and enjoyment in his job as a painter of vessels, which he is no longer able to perform. Mr. Baptiste's evidence was not challenged on cross-examination. I note that Mr. Baptiste has only been able to work intermittently as a truck driver and handyman because of the limitations on his physical abilities resulting from the injury. Without doubt, this loss of congenial employment can be taken into consideration by the Courts in an award of general damages.

Quantum of General Damages

[25] Mr. Carrington submitted that an award in the sum of \$50,000.00 is appropriate for general damages. In support of this submission counsel relied in the main on the local case of **Morillo v Forbes**.⁷

[26] In **Morillo**, the claimant, aged 50 suffered muscle spasms in her cervical thoracic and lumbo-sacral spine; tenderness in the chest around the costo-chondral joint; inflammation in the left shoulder, biceps, tendon and rotator cuff and was awarded general damages in the sum of \$40,000 for pain suffering and loss of amenities where there was whole body impairment of 19%. Mr. Baptiste's injuries were more serious than those suffered by **Morillo** and his level of impairment is slightly higher now but expected to be reduced if he undergoes surgery for the shoulder impairment. This would then bring him in the range of **Morillo**.

[27] Mrs. Small-Davis relied on a number of cases⁸ and submits that an award reasonable for pain suffering and loss of amenities should be in the range of \$15,000 to \$20,000. However, I am of the view that those cases are not on a par with this case.

[28] Any compensation awarded is meant to put a claimant in the same position he would have been in had the accident not occurred. In doing so the court is guided by awards

⁷ BVIHCV 2003/0005

⁸ Donohoe v Sai Automotive (2002)

Maloney v Peterborough City Council (2002)

O'Brien v Royal Society for Mentally Handicapped Children (2000)

Jones v Morgan (2000)

Ulbrano v Morillo

for comparable injuries in its and other jurisdictions having similar social and economic conditions.

[29] The injuries suffered by Mr. Baptiste, to my mind, are serious as Mr. Baptiste is partially disabled as a result and he will remain so. He will require further medical attention in the form of therapy, injections and surgery to alleviate his pain and discomfort. He will never make a complete recovery as the surgery recommended is only in relation to his shoulder and not for the degenerative disc disease.

[30] I have considered all the authorities cited and the respective submissions and I have take into consideration the matters to be regarded as per the **Cornilliac**. In all the circumstances, in my judgment an award of US\$45,000.00 will represent fair and reasonable compensation for the injuries sustained by Mr. Baptiste.

Future Medical Expenses

[31] I accept Dr. Caesar's evidence that he would recommend surgery for Mr. Baptiste's shoulder which would increase its strength, relieve pain and increase his ability to reach and do over the shoulder movements. He estimated the medical fees for such surgery are: -

Surgeon's fees (\$6,875 plus 25% to reflect current rates)	\$8,593.75
Anesthesiologist (\$700 - \$900 for approximately 3 hours) ⁹	\$2,400.00
Hospital (3 - 4 times surgeon's fees)	<u>\$30,078.12</u>
Total	\$41,071.87

These figures have not been challenged. The court will therefore award the sum of \$41,071.87. For the avoidance of doubt no interest is payable on this sum.

Special Damages

[32] Mr. Baptiste claims special damages. I accept his evidence that he incurred the following expenses¹⁰:-

⁹ Median figure of \$800 per hour applied.

¹⁰ See para. 13 – Denroy Baptiste's Witness Statement and Exhibit DB1 - 3

Water taxi	\$ 300.00
Initial orthofoam	\$ 295.00
Medication	\$ 192.00
Medical consultations	\$1,568.00
Traveling expenses to attend doctor in St. Thomas	\$ 616.00
Medical procedures	<u>\$1,298.80</u>
Total	\$4,269.80

The court will award Mr. Baptiste the full sum of \$4,269.80.

Loss of Future earnings

[33] Mr. Baptiste claims loss of future earnings. Mr. Carrington submits that he is entitled to an award under this head as on the evidence he would be unable to earn the same level of earnings he enjoyed prior to the accident. I find that damages under this head are recoverable. The evidence undoubtedly establishes that Mr. Baptiste will suffer loss of future earnings as a result of the injuries he sustained and this loss can easily be calculated.

[34] The courts have evolved a particular method for assessing loss of future earnings, or in other words, for arriving at the amount which a claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimants present annual earnings less the amount, if any, which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in the annual earnings, the so-called contingencies of life, and the incidence of inflation and taxation. See **McGregor on Damages** para. 1564.

[35] The guidance given by the Court of Appeal (Singh JA) in **Alphonso v Deodat Ramnath** in determining the multiplier is also pertinent:- **“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 normal working life but for the accident.” I note in that case a multiplier of 12 was used for a 42 year old male.

[36] Currently, Mr. Baptiste suffers from a 20% overall disability and as a result of his injuries he has been unable to continue in his chosen employment as a painter. The corrective surgery to the shoulder will alleviate his condition somewhat and reduce his overall disability but he will still continue to suffer from the degenerative disc disease. Accordingly, his earning capacity has been seriously diminished and he is entitled to compensation for that loss.

[37] Mr. Baptiste’s evidence is that at present a painter receives a base salary of \$400 - \$480 per week. He says further that he now earns \$90.00 per day as a driver and that he works 3- 4 days per week. In calculating Mr. Baptiste’s loss of future income the Court will apply the median of those figures. It can be taken that he would have a normal working life of 65 years. Mr. Baptiste is now 42, and he has an expected working life of 23 years. Allowing for early receipt and the real possibility that if he has surgery he will be in a better position to find means of increasing his earning capacity I will use a multiplier of 12. My calculations therefore are as follows: -

\$22,880.00 (current yearly salary of a painter - \$440.00 x 52 weeks) less
\$14,040.00 (present salary - \$90.00 at 3 days per week = \$270.00 x 52 weeks) =
\$8,840.00 (annual loss of income) x12 (multiplier) = \$106,080.00 discounted by 20%
for the vicissitudes of life e.g. an early demise = \$84,864.00.

[38] Mr. Carrington submits that in addition Mr. Baptiste should be compensated for loss of earning capacity. I find, as submitted by Mrs. Small-Davis that this is not a case where the claimant is at a substantial risk of becoming unemployed and that it is only in such circumstances that such an award is made. **See Smith v Manchester (1974) 17 K.I.R., C.A.** Accordingly no award is made under this head.

[39] In addition, Mr. Baptiste is to recover the costs of Dr. Caesar’s attendance as follows:-

Dr. Caesar's fees for attendance at trial	\$3,000.00
Medical Report	<u>\$1,500.00</u>
	\$4,500.00

[40] In summary, for the foregoing reasons the court orders as follows:-

Tortola Yacht Services Limited do pay to Mr. Baptiste the sum of \$179,705.67 as damages made up as follows:-

- (1) \$45,000.00 - general damages for pain and suffering and loss of amenities
- (2) \$4,269.80 - special damages
- (3) \$84,864.00 - loss of future earnings
- (4) \$41,071.87 - future medical expenses
- (5) Interest on general damages at the rate of 5% per annum from 19th June, 2006 (the date of service of the claim) until judgment.
- (6) Interest on special damages from 19th June, 2006 at the rate of 2½% per annum until judgment. For the avoidance of doubt there is no award of pre judgment interest on the awards for future medical expense and loss of future earnings.
- (7) \$4,500.00, Dr. Caesars's costs.
- (8) Mr. Baptiste is to have his costs in accordance with CPR Part 65.5.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands