

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

SAINT LUCIA

Claim No: SLUHCV2009/0746

Between:

Dr. Wezenet Tewodros

Claimant

and

[1] Dr. Ganendra Malik

[2] Dr. Sangita Malik

Defendants

Appearances:

Ms. Maureen John of Counsel for the Claimant

Mr. Dexter Theodore of Counsel for the Defendant

2011: September 22nd.

2012: April 16th May 7th

MASTER V. GEORGIS TAYLOR-ALEXANDER

DECISION ON ASSESSMENT

[1] By Order of the Master Charles Tabor (Ag) dated the 11th July 2011 the parties to these proceedings were required to file and serve evidence in support of quantum of damages and submissions with authorities.

[2] On reviewing this file I am satisfied that although judgment has not been entered it was the agreed intention of the parties that there be judgment for the claimant on the issue of liability, which prompted the Master to give directions for the determination of the issue of quantum. This court therefore gives judgment for the claimant on the issue of liability and now proceeds to assess damages.

ASSESSMENT OF DAMAGES

Brief facts

[3] The claimant suffered injury loss and damage while a front seat passenger of vehicle registration number PC9975 owned by the first named defendant and driven by the second named defendant. It was pleaded that the second named defendant so negligently drove or controlled the motor vehicle that she collided with motor omnibus registration number M239 travelling in the opposite direction.

[4] The claimant in support of her claim has relied on the police accident report which concluded that the second named defendant was at fault for the accident. The report informed that the second named defendant had been prosecuted in relation to that accident for driving without due care and attention.

[5] The defence filed admitted the liability of the second named defendant, but denied the joint liability of the defendants alleging that the claimant caused or contributed to her injury by failing to wear a seatbelt or taking any other steps to protect herself from injury when driving along the road. The claimant in reply denied that she failed to take precautionary steps to protect herself and stated she was in fact wearing her seatbelt at the time of the accident.

[6] As a result of the accident, the claimant was hospitalised from the 3rd of November 2007 to the 24th of December 2007. She suffered temporary total disability for a period of two months and temporary partial disability of one year.

[7] It is appropriate to record at this time, that the defendants having accepted liability without qualification are taken to have abandoned the issues of separate liability of the defendants and of

contribution by the claimant, and I have therefore focused solely on the assessment of the quantum of damages.

Quantum of Damages

[8] In an action for personal injuries damages are quantified under the heads of special and general damages.

[9] Special damages are quantifiable damages which a claimant has already spent as a result of the loss and damage suffered. It is capable of substantially exact calculation. It must be specially pleaded and proved¹. This was the view of Lord Diplock in *Ilkew v Samuels* [1963] 1 WLR 991 by which I am guided:

"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."

[10] Following on from that direction, I set out first what are the settled special damages which have been proven and for which I give approval:-

(a) Loss of earnings for the month of December 2007	=\$7098.45
(b) hospital fee unpaid by the insurers	=\$ 148.00
(c) physical therapy supplies	=\$ 35.00
(d) bath seat	=\$ 200.00
(e) medical reports	=\$ 450.00
(f) visit to Dr.Jeffers	=\$ 180.00

\$ 8111.45

¹ Mc Gregor on Damages Seventeenth Edition paragraph [22] 1-033

[11] Pursuant to an order of the court dated 10th February 2011, the claimant incurred the cost of her airfare from St. Marteen to St. Lucia, in the sum of \$1718.60, which costs are to be borne by the defendants.

[12] The following claims for special damages are challenged by the defendants:-

Housekeeping Assistance:

[13] Both counsels agree that a court can make an award which includes provision for household services which the claimant's injuries have incapacitated her from doing and for which the claimant is forced to obtain assistance. Counsel for the defendants argues that the claimant is obligated to establish that the need for those services arose solely out of the injury in relation to which damages are requested.

[14] The claimant's presentation of the evidence in support of this award simply entailed briefly pleading for housekeeping assistance for 10 months under her particulars of special damages and attaching the receipts of two persons who provided that assistance, without justification of why such assistance was needed and justification for the period it was needed. This made the determination of an award under this head arduous.

[15] The determination of an award for the loss of household services is always a difficult determination and as such it is incumbent on the claimant to plead sufficiently and provide proof which assists the court in making an appropriate award. Precise proof may be impossible, but if a basis for reasonable ascertainment of the amount of damages has been established, the court will make the assessment as best it can.

[16] The duration and type of assistance may differ according to the nature of the injury and the period of incapacity. Evidence of assistance to the court include the specific tasks the claimant can no longer accomplish or only with assistance; the type of replacement required; relying on the medical evidence, the number of days she needed the assistance; evidence of the average cost of employing household labour/ or assistance in the area where the claimant resides. Those details were not pleaded.

[17] Dr. Dagbue in his report of the 29th January 2008 stated that the claimant was hospitalised from the 3rd November 2007 to the 24th December 2007 after which she would require follow up care in an orthopaedic clinic. At the date of Dr. Dagbue's report the claimant was still attending follow up care. At the date of the report, Dr. Dagbue found that the claimant was ambulating non weight bearing with crutches. In his report dated the 23rd April 2009, Dr. Dagbue concluded that the claimant had a temporary total disability of two months and temporary partial disability of one year.

[18] The claimant claims the sum of \$3400.00 for housekeeping assistance for the periods 25th December 2007 to the 29th February 2008 at a rate of approximately \$450 per month and the 24th December 2008 to the 24th October 2009 at a rate of \$250.00 per month. It is unclear from the evidence why the period from the 29th February 2008 to the 24th December 2008 is unaccounted for. I have no doubt concluding that as a consequence of her injuries the claimant was unable to do some things for herself and would have had to have someone else do them for her, this is so particularly from the 24th December 2007 – 24th February 2008 during the period of temporary total disability. I can find no justification however for the claim for household expenses for the period 24th December 2008 to the 24th October 2009, which period was out of the period of temporary partial and total disability.

[19] I allow the sum of \$900 for household assistance from the 24th of December 2007 to the 29th of February 2008.

Police Report

[20] The sum of \$200.00 was claimed for a police report, and a receipt was provided to substantiate this claim. It is the usual fee charged and in view of fact that the report and receipt form part of the record, this sum is allowed.

Transportation to and from work

[21] The claimant claims transportation expenses to get from her home to work for the period February 2008 to May 2008 and then from June 2008 to September 2008. The defendants contest this

expense as an unusual and remote expense not ordinarily made in a claim for special damages arising from personal injury. I disagree with the submissions of the defendants.

[22] When a court is assessing damages for pecuniary loss the general principle is that the court should award the injured party such a sum of money as will put her in the same position as if she had not sustained the injuries².

[23] The claimant was totally disabled for a temporary period of two months from the 24th December 2007 to the end of February 2008 and her mobility was consequently compromised. A claim for transportation expended to get to and from work supported by receipt is not unreasonable or remote. The difficulty I encounter is in the determination of the period for which it should be allowed.

[24] Dr. Dagbue's medical report dated the 29th of January 2008, under the rubric 'Stability of Medical Condition' concludes that the claimant is expected to improve over the next four to six months with rehabilitation. I therefore determine that a claim for the month of February 2008 up to and including the month of July 2008 would be consistent with Dr. Dagbue's conclusions on the mobility of the claimant. I therefore award the sum of \$93.75 per month (being an average of the costs the claimant claims to have incurred for transportation per month) for six months for a total award of \$562.50.

Costs of travel to Saint Lucia for trial

[25] Counsel for the parties clarified that that no costs were incurred for travel to Saint Lucia for trial as there has been no trial. No award is allowed under this item.

Clothing costs

[26] This was pleaded and the court accepts that it is an item for which proof would be challenging. Given the circumstances of the accident it is not unlikely that the claimant's clothes would be ruined in the accident or in her subsequent hospitalization. An award of \$100.00 is therefore allowed for damaged clothing.

² See the dicta Lord Blackburn in *Livingston v. Rawyards Coal Co* (1880) 5 App. Cas. 25.

Advertisement of claim, service of claim, Filing of the claim.

[27] Where as in this case fixed costs are not applicable, Part 65.5(1) Civil Procedure Rules (CPR) provides for prescribed costs to apply. Part 65.7 (1) of the CPR provides that an award of prescribed costs include all work that is required to prepare the proceedings for trial. Part 65.7(2) provides for those costs that are specifically excluded. I am of the view that the costs incurred in the advertisement of the claim, service of the claim and filing of the claim are included in prescribed costs and does not justify a separate award.

General Damages

[28] The concept of full compensation which is central to the assessment of damages for pecuniary loss, is not possible when a court is assessing the level of damages to be awarded for a claimant's non-pecuniary loss. The best that a court can do is to put a monetary value upon the deprivation which the injured person has suffered and to arrive at a fair estimate taking into account all relevant considerations. Per Earl Jowitt in British Transport Commission v. Gourley [1956] A.C. 185³.

[29] Wooding CJ in the locus classicus Cornilliac v St. Louis (1965) 7 WIR provided the relevant considerations to be borne in mind when making such an estimate namely:-

- [a] the nature and extent of the injuries suffered
- [b] the nature and gravity of the resulting physical injury
- [c] the pain and suffering which had to be endured
- [d] the loss of amenities suffered; and
- [e] the extent to which consequentially the claimant's pecuniary prospects have been materially affected.

³ See also McGregor on Damages, 16th Edition, paragraph [1558].

[a] **Nature and extent of injuries suffered**

[30] The claimant who was 53 years old at the time of the accident and a lecturer at a local university college suffered injury to the head, chest and pelvic area. She suffered loss of consciousness, multiple lacerations to the forehead, mild cerebral concussion, comminuted fracture of the right acetabulum, multiple fractured ribs; 2nd and 3rd on the left side and 2nd to 6th on the right side. Her injuries were described to be consistent with blunt force trauma of a moderate to severe degree sustained in a motor vehicular accident.

[31] She was taken to the emergency department of St. Jude's hospital. There was a history of loss of consciousness for an undetermined duration. She was resuscitated in the emergency room as she came in, in shock. A skeletal traction was applied in the surgical ward.

[b] **The nature and gravity of the resulting physical injury**

The reports of Dr. Dagbue and Witness Statement of Dr, Horatius Jeffers refers:

[32] Dr. Dagbue: Dr. Dagbue provided two reports in which he stated that the claimant was managed non operatively in traction and was discharged from the surgical ward over 7 weeks later for follow up care in the orthopedic clinic. Three months after the accident the claimant was ambulating non weight bearing, with crutches. On the 24th of December 2007 the claimant was found on examination to have pain in her right hip after sitting for about one hour; pain in her right hip after standing for prolonged periods of time , or walking long distances; healed scars from lacerations to the forehead which may improve with plastic surgery; 0-100 degree of right hip flexion; 0-10 right hip internal and external rotation; right lower limb shortening of 1 cm; loss of joint space in the right hip with evidence of avascular necrosis of the head of the right femur. She recovered well from her injuries and is not expected to suffer sudden incapacitation from her condition. She is likely to develop post traumatic osteoarthritis of the right hip and progressive avascular necrosis of the head of the right femur, that would require total hip replacement surgery.

[33] Dr. Horatius Jeffers: Dr Jeffers examined the claimant three years and five months post management, at which time her injuries were deemed to meet maximal medical improvement for the purpose of impairment assessment and disability evaluation with regard to employment.

- [34] Dr. Jeffers concluded that the multiple rib fractures were found to have healed soundly and do not represent any on-going or residual functional impairment. The soft tissue injuries to the scalp and face in the form of lacerations have healed with some scarring. The healed scars do not represent any functional impairment to the skin of the upper eyelid or forehead, and is not expected to do so in the future. The scars have not healed with keloid formation but the presence of the scars represents a cosmetic defect to some degree.
- [35] The fracture/subluxation of the right hip has healed with some 0.49 centimeters of shortening of the right femur and consequently of the right lower extremity. This is a direct consequence of the healed right hip socket fracture/acetabular fracture and the secondary development of osteonecrosis of the right femoral head which gives rise to an impairment for the performance of average daily living (ADL) of 0%. Post hip replacement surgery it should represent no functional impairment.
- [36] The right hip fracture has given rise to restriction in right hip range of motion with restriction of abduction to 25 degrees, flexion of 10 to 110 degrees, internal and external rotation limitation of the terminal 20 to 30 degrees of these movements.. This restriction of right hip range of motion constitutes an impairment in average daily living (ADL) of 8%. The right hip joint has undergone a process of arthrosis secondary to the fracture resulting from the injury, and constitutes a whole person impairment in performance of ADL of 10%
- [37] Total whole person dependency consequent on the accident and its impact on performance at the time of report, of ADL is 17%, and given the presence of degenerative arthrosis of the right hip, with a normal life expectancy it is very likely that the claimant will develop progressive arthrosis of the right hip over the next 3 to 7 years, resulting in significant impairment of ADL above and beyond the 17% quoted above. Hip replacement surgery is therefore required.

[c] **The pain and suffering which had to be endured**

- [38] The claimant experienced intense pain and drifted in and out of consciousness. She was hospitalized for 52 days. She was managed with traction, and used crutches and a wheelchair for sometime during which period her mobility was compromised. It is acknowledged by the defendants that the claimant would have suffered pain during her period of temporary total

disability, and her period of partial disability, and that she will likely suffer pain for sometime after her hip replacement surgery.

[d] **The loss of amenities**

[39] The claimant claimed to have enjoyed long walks prior to the accident. She is a lecturer having lectured at Sparten School of Medicine and is currently at Trinity School of Medicine in Saint Vincent. Her ability to stand for long periods has been compromised by her injuries. Dr Jeffers advises that special arrangements/considerations now have to be made for the claimant in the execution of her employment namely, reducing the distance between lecture halls, and the consideration of lectures being delivered via mobile/internet facilities; venues need to be arranged to reduce the need for stairs/ elevation between venues. This would continue post hip replacement surgery during the period of rehabilitation. The need for such precautions are not normally required post hip replacement surgery, and Dr. Jeffers advises that this may be a reason for the surgery to take place earlier than the in the range given.

[e] **Pecuniary prospects**

[40] The claimant continues in employment, requiring special arrangements for her lecturers. This Dr. Jeffers advises can continue but it may be compromised if hip replacement surgery is not undertaken in the range given.

[f] **Future Medical Care**

[41] It is clear from the unchallenged medical evidence that the claimant will be faced with future medical expenses. Both parties readily agree with the medical conclusions of Dr. Jeffers respecting the need for hip replacement surgery. Dr. Jeffers estimates the initial hip replacement surgery to costs \$39,026.00 and the revision surgery to costs a further \$66,969.00.

[g] **Loss of Future Earning Capacity**

[42] The claimant alleges that as a result of her injury and the pain felt after prolonged periods on her feet there is a probability that her job prospects may be affected, and continuing in her current employment may be difficulty. The claimant in fact returned to work after two months following the accident and has continued in employment. The prospect of an award for future loss of earning in

my view given that the claimant is in continuous employment and with impending hip surgery designed to improve average daily living makes the consideration of an award too remote to allow.

Analysis of Award

[43] Damages for pain and suffering and loss of amenities are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. The United Kingdom judicial studies board has established guidelines to achieve consistency in personal injury claims valuations. These guidelines offer assistance in categorising an injury which I have found helpful. According to the guidelines a fracture of the acetabulum leading to degenerative changes and leg instability requiring an osteotomy and the likelihood of hip replacement surgery in the future; the fracture of an arthritic femur or hip necessitating hip replacement; or a fracture resulting in a hip replacement which is only partially successful so that there is a clear risk of the need for revision surgery, are ordinarily categorised as severe injuries. Cases where there are specific sequelae of exceptional severity ordinarily call for a higher award.

[44] In our jurisdiction the assessing of general damages for pain and suffering and loss of amenities in a personal injury case, requires the court to seek by an award to put the claimant in the position that she would have been in had she not sustained the injury to her person and the best way to do this is by seeking approximate awards made for similar type serious injuries by courts within this and relevant jurisdictions.

I have considered the following authorities, helpfully provided by counsel for the parties:-

Sealy v Stewart May 26, 1972 DD p 85, a woman aged 54 at the time of the accident suffered from a fracture of the acetabulum which healed but caused osteoarthritis of the left hip, which at the time of trial continued to cause pain. There was limitation of abduction of the hip. She also suffered lacerations that left inconspicuous facial scars. She was awarded TT\$115,353.00 adjusted to November 2002.

Miller v Montes de Oca- July 11 1975 DD p 13 The claimant was a 34 year old university lecturer. He suffered fractures of the left acetabulum and damages to ribs on the right side, he also suffered

a 6 inch laceration to his forehead and a 1 1/2 inch laceration of the side of his mouth , and multiple lacerations and abrasions of his neck and right arm, fourth and fifth finger of the left hand. He was concussed and lost consciousness. He was hospitalized for three weeks and used crutches for two and a half months. His permanent partial disability was assessed at 2% a year and a half later. He was awarded TT\$199884.00 adjusted to November 2002.

Heidi Binder v Patrick Mcvey BVIHCV2005/0006 the claimant suffered the following injuries namely (i) concussive head injury; (ii) frequent headaches; (iii) 5 cm laceration to her head; (iv) 3 cm laceration to her right ankle; (v) soft tissue injury to left chest wall; (vi) chest pains and tenderness of chest wall; (vii) difficulty in breathing; (viii) fractured pelvis; (ix) minimally displaced fracture to inferior and superior rami of left pubic bones; (x) undisplaced fracture of the right pubic superior ramus; (xi) long crack of the left ilium; (xii) mild separation of the right sacro-iliac joint; (xiii) 5cm longitudinal laceration of the left labia majora with slowly expanding haematoma; (xiv) spinal tenderness; (xv) tenderness over left chest wall; (xvi) tenderness of left iliac wing; (xvii) inflammation of thoracic spine; (xviii) spinal trauma which has left her spine "curved"; (xix) chronic back pain; (xx) severe insomnia; (xxi) cognitive dysfunction; (xxii) chronic pelvic pain; (xxiii) discomfort urinating and (xxiv) sexual dysfunction. She enjoyed swimming, boating, diving, dancing, hiking and running. She used to roller blade and play soccer. She is no longer able to enjoy these activities because of the pain which persists. The accepted overall percentage of disability was 31 %. The claimant was granted a global sum for general damages for pain and suffering and loss of amenities of \$100,000.

Sherma Mathurin and Rain Forest Sky Rides SLUHCV2008/0551 where the claimant was awarded \$150,000.00 for pain and suffering and loss of amenities. She suffered a displaced untra-articular open fracture of the low end of the right tibia, with a fracture of the fibula. She required immediate surgery which required the restoring of the joint alignment and the internal fixation of plates and screws along with bone grafting of the fracture.. Post injury she cannot take long walks or run or place any pressure on her ankle. Love making is frustrating as she is limited to a single position and she can no longer play with her children.

Ronald Fraser v Joe Dalrimple ANUHCV2004/0513. the claimant a truck driver, married man and father of four children fell from a moving truck, hitting the pavement with his left foot first. He

suffered a severely comminuted fracture of left ankle and lower 1/3 of leg; fracture of the left medial malleolus of left tibia.; severely comminuted fracture of lower end fibula; lateral dislocation of left ankle/tibio talar dislocation with lateral shift of talus with ankle diastases; severely contaminated compound wound with neuro-vascular compromise. He was hospitalized for several weeks. The injury was very severe and he was not able to walk for several months. Several pins were placed in his leg to try to assist in mending the ankle and leg. He remained bedridden for five months, after which he began to move around his home and his yard with the aid of a crutch. He has had to undergo physiotherapy. He needed to have further surgery on his ankle as it was not healing; the ankle joint had to be fused. He was in constant pain and could not walk without assistance. He was unable to work since the accident and has not been able to participate with his wife and children in various family activities which he had previously enjoyed. He has full disability of the lower left extremity. His doctors indicated that even if surgery is successful there is significant risk that he will develop osteo-arthritis in the ankle joint. He is required to take pain relievers daily to alleviate the pain and discomfort. He was in 2010 awarded the following:- general damages for pain and suffering in the sum of \$85,000; general damages for loss of amenities in the sum of \$65,000; general damages for future medical expenses in the sum of \$10,000, general damages for loss of future earnings in the sum of \$102,960.

Keithley George et al v Gerald Khoury Antigua and Barbuda Civil Appeal No 19 of 2004 the Court of Appeal confirmed an award by the trial judge of \$120,000 to the respondent for pain and suffering and loss of amenities for shock and severe pain, multiple bruises and swelling of left ankle and leg, severely comminuted and crushed intra-articular fracture of the lower ends of the tibia and fibula, bruising and operation scars to left ankle.

Lincoln Carty v Lionel Patrick Saint Christopher and Nevis Claim Number 54 of 1998 where in 2009 the High Court in St. Kitts awarded the Claimant \$175,000 for pain and suffering and loss of amenities for a fracture of the right femur, fractures of the inferior pubic ramous (pelvis), fractures of the right 3rd and 8th ribs posteriorly, laceration and contusion of the right knee, contusion of sciatic nerve in the right leg, permanent dislocation of joint in the sternum, bruising and laceration of front left rib cage and cervical strain (neck), resulting in continuous pain and discomfort, including severe and prolonged migraine headaches. The claimant underwent surgery, during which a steel rod was placed in his femur, he remained hospitalised for 32 days and, on his

release from hospital, he remained home for 6 months. Twelve months after the first surgery the claimant underwent a second surgical procedure to remove the steel rod and was away from work for about 6 weeks. His right leg is now shorter than the left; he has received physical therapy treatment and chiropractic care and has been seen by many health care professionals. He is no longer able to be involved in sports, which he was very involved in prior to his injuries, he is forced to use a cane because his right knee buckles on a regular basis, he suffered post traumatic stress, severe bouts of depression, his relationships both at work and at home have suffered as result of the difficulty of dealing with his pain and his lack of sex drive has caused much strain in his relationship with his wife.

[45] I was mindful as I followed the existing practice of comparison and adjustments, to bear in mind that this approach is not flawless and that each case must be assessed on its own peculiar facts. Thus, I considered the comparison table provided by the claimant in her submissions and both the similarities and the distinguishing features of comparative cases were taken into account. Although no two cases are precisely the same, justice requires that there is consistency between awards.

[46] I have considered the particular circumstances of this case, the nature and extent of the injuries sustained by the claimant, the nature and gravity of her resulting physical disability, the pain and suffering which she had to endure, the loss of amenities suffered by her and the extent to which her pecuniary prospects have been affected, I have considered these in light of the submissions and authorities of both counsel and having given consideration to the comparable awards. I award the claimant \$75,000 for pain and suffering, \$30,000 for loss of amenities and \$112,243.87 for future medical care for total general damages of \$217,243.87. I make no award for loss of future earnings. Special damages are awarded in the sum of \$ 11,592.55.

[47] Guided by the decision in Martin Alphonso et al v. Deodat Ramnath BVI Civil Appeal No. 1 of 2006 the court awards interest to the claimant on the amounts awarded for pain and suffering and loss of amenities at the rate of 6% per annum from 25th August 2009, and on special damages at the rate of 6% from the 3rd November 2007. I make no award of interest on future medical expenses.

[48] I award prescribed costs on the global figure of \$228,836.42.

[47] It remains only for me to thank both counsel for the invaluable assistance provided to this court, I am especially grateful for the incisive comparative analysis of the existing case law provided by counsel for the claimant which was particularly useful in my assessment of the case law.

**V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT MASTER**