

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

VIRGIN ISLANDS

CLAIM NO. BVIIHCV2011/0262

BETWEEN:

DIEPAK PAUL

Claimant

AND

DOUGLAS BLYDEN

Defendant

Before:

Master Charlesworth Tabor (Ag.)

Appearances:

Mr. Menelek Miller for the Claimant

Mr. Stephen Daniels for the Defendant

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2012: September 24
November 28
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RULING

- [1] **TABOR, M (Ag.):** On 28th November, 2011 judgment in default was entered for the claimant with damages to be assessed. The claimant sought to recover special damages of \$44,295.09; general damages for pain and suffering and loss of amenities of \$80,000.00; pecuniary losses of \$41,037.09; loss of earnings from May 2011 to June 2012 of \$340,000.00; interest on special damages at a rate of 2½% per annum from the date of injury to the date of judgment; on general damages at a rate of 5% per annum from the date of service of the statement of claim to the date of judgment; on the judgment at a rate of 5% from the date of the entry thereof to the date of payment and costs.

Background Facts

- [2] The claimant is a 56 year old male who is an accountant by profession. On 24th April, 2011 the claimant sustained injuries when the defendant, while driving his vehicle, ran into the claimant when he was just about to step onto a sidewalk. After the police investigation into the accident the defendant was charged with driving without due care and attention.
- [3] The claimant filed a claim on 12th October, 2011 seeking general and special damages. This claim was served on the defendant on 17th October, 2011. The defendant failed to file an acknowledgement of service or defence and judgment in default was entered against him on 28th November, 2011.
- [4] On 22nd May, 2012 Master Lanns ordered that the claimant file and serve affidavit evidence and legal submissions with authorities on or before 31st May, 2012. The defendant was ordered to file submissions on costs on or before 31st May, 2012 if necessary pursuant to Part 12.13 (b) of the Civil Procedure Rules 2000. The assessment of damages was fixed for 19th June, 2012 but was heard on 24th September, 2012.

Special Damages

- [5] Special damages consist of expenses and loss of earnings that a claimant faces as a result of an injury. These must be specifically pleaded and proven in order to be recoverable. This is a well-established principle and as Lord Diplock noted in **Ilkew v Samuels (1963) 1 WLR 991** at 1006:

Special damages in the sense of 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 damages which has been pleaded and, of course proved.

- [6] In the statement of claim, the claimant claimed special damages in the sum of \$44,295.09 comprised as follows:

Medication	\$1,567.09
Physiotherapy	\$2,570.00
Surgery – Bougainvillea Clinic	\$31,213.00
Peebles Hospital	\$1,967.00
Replacement Glasses	\$495.00
Wheelchair	\$80.00
Eureka Medical – scan	\$650.00
Loss of Income – May through August	\$5,848.00
Total	\$44,295.09

- [7] The claimant's evidence before the court is contained in two affidavits sworn and filed 22nd February, 2012 and 14th May 2012 respectively. Although the claimant deposes in his first affidavit that a wheelchair was purchased, no receipt was submitted to support this and

therefore no award can be made for this expense. With respect to the travel expense for the claimant and family to relocate to Canada, the claimant deposed in his second affidavit that the combined cost for tickets and shipping amounted to \$2,495.00. However, this amount could not be allowed since the defendant should not be held responsible for the relocation costs of the claimant.

- [8] The claimant's claim for \$31,213.00 for surgery and \$1,967.00 for hospitalization have been substantiated. However, the claim of \$1,567.09 for medication and the claim of \$2,570.00 for physiotherapy have not been fully substantiated. In the case of the former, the receipts that have been submitted amounted to \$721.77; and in that of the latter, the receipts amounted to \$1,470.00. These two amounts will instead be awarded. The amount of \$495.00 for the replacement glasses will also be awarded.
- [9] An amount of \$5,848.00 is claimed by the claimant for loss of income for the period May through August, 2011. This item has presented some difficulty for assessment since no evidence is provided on the amount that was paid by Social Security to the claimant which could be used to facilitate the calculation. In addition, the claimant's termination letter indicates that this was effective from 30th June, 2011 so it is unclear how loss of income could be claimed for the months of July and August, 2011. Given the lack of clarity surrounding this head and the absence of evidence to facilitate calculation, I will not make any award under this head.

General Damages

- [10] The principles that are used in the assessment of general damages for personal injuries are well-established. In the landmark case of **Cornilliac v St. Louis (1965) 7 WIR 491**, it was stated that the factors which should be taken into account when assessing damages are (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured; (iv) the loss of amenities suffered and (v) the extent to which pecuniary prospects have been affected. In the instant case Sir Hugh Wooding CJ noted that it is not the practice to quantify damages separately under each head. However, each head was to be taken into account in arriving at a final quantification of the award.

The nature and extent of the injuries sustained

- [11] In paragraph 6 of the statement of claim the injuries suffered by the claimant as a result of the accident are listed as (i) pre-prosthetic fracture of the left femoral stem; (ii) severe external rotation of the left leg; (iii) displacement of the left femoral prosthesis; (iv) osteoarthritic changes around both hips; (v) lacerations to the right forehead and above left eyebrow; (vi) abrasion to both knees and (vii) laceration to the face.
- [12] According to Dr. Christopher Roberts, the claimant was admitted to the Peebles Hospital on 24th April, 2011. He was given analgesics and antibiotics and his wounds were sutured and after being reviewed was discharged home on medication. On the evening of the 25th April, 2012 the claimant was readmitted to the hospital because of excruciating pain and episodes of unconsciousness. He was hospitalized for seven days and it was then that the

fracture to the left femoral stem, extreme rotation of the left leg and displacement of the left femoral prosthesis were identified. On 30th May, 2011 the claimant was hospitalized for a further eight days following surgery as a result of the need for total revision of the left hip implant.

- [13] Dr. Darwish in his report on 22nd June, 2011 indicated that he reviewed the claimant on 20th June, 2011 and he was doing well and walking independently with good length. More physiotherapy was advised and Dr. Darwish predicted that in another two to three months the claimant should be very happy and mobilizing independently.

The nature and gravity of the resulting physical disability

- [14] Following the accident the claimant was unable to perform any domestic tasks. He could not bathe, feed or dress himself and required assistance with his personal hygiene for a period of five weeks. A week after surgery the claimant was only able to ambulate with the aid of a walker and was unable to put full weight on the left leg for a period of five months. The claimant was also required to undergo physiotherapy for a period of three months after his surgery on 30th May, 2011 and from since September, 2011 once per month.
- [15] The claimant deposed in his affidavit of 22nd February, 2012 that he has attempted to find alternative employment but without success since he was told unofficially that because of his physical condition other candidates were preferred. In his second affidavit of 14th May, 2012 the claimant further deposed that on a regular visit to Dr. Darwish in December, 2011 he was informed that the injury to his hip has still not healed and that it may never heal. As a consequence, the claimant was issued with a disability certificate and declared physically unable to work as of 1st October, 2011.

Pain suffering and loss of amenities

- [16] With respect to this head of general damages, it is instructive to note the observation of Lord Hope of Craighead in **Wells v Wells (1998) 3 AER 481** that:

The amount of the award to be made for pain, suffering and 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.

It is undeniable from the evidence that the claimant experienced severe pain and suffering from the accident and post-surgery. It is also very clear that his life following the accident has been negatively affected.

- [17] While the claimant had pre-existing physical issues from previous accidents, counsel for the claimant has submitted that a defendant must take his claimant as he finds him (**Smith v Leech Bain & Co. (1962) 2 QB 405**), and that if a claimant is suffering from a known medical condition when a tort is inflicted on him causing some other injury, the damages recoverable will be limited to the consequential effects of the tortious injury (**Kemp and Kemp para. 3-019**).

[18] Counsel for the claimant cited several English and West Indian cases to provide a comparator for an appropriate quantum for pain and suffering and loss of amenities. An average of the award for pain and suffering and loss of amenities in five of the cases¹ cited is \$76,698.00 ranging from \$46,000.00 for less serious injuries to \$132,217.00 in the more serious cases. In the **Heidi Binder v Patrick McVey et al** case from the British Virgin Islands which involved some serious injuries including a fractured pelvis, an award of \$100,000.00 was given by Justice Hariprashad-Charles. In the present case, counsel for the claimant has submitted that an award of \$80,000.00 would be appropriate. I am of the view that \$80,000.00 is a fair and reasonable sum for pain and suffering and loss of amenities.

Loss of future earnings/loss of earning capacity

[19] I have already disallowed the loss of earnings of \$5,848.00 from May to August, 2011 since no evidence was provided which could facilitate this calculation. With respect to the claimant's loss of earnings from September, 2011 to June, 2012 the sum of \$42,000.00 will be awarded.

[20] In terms of the assessment of future loss of earnings, it is necessary to determine a multiplicand and a multiplier. Based on the claimant's monthly salary of \$4,200.00, the multiplicand to be used in assessing future loss of earnings would be \$50,400.00. Based on the Ogden Table the appropriate multiplier to be utilized in this case would be 8.69. Applying the method approved by the Court of Appeal in **Ramnath v Martin Alphonso**, counsel for the claimant submitted that the multiplier should be reduced by one quarter to take into account the vicissitudes of life. Utilizing this method the multiplier to be used in assessing future loss of earnings would be 6.5. Applying this multiplier to the multiplicand of \$50,400.00, the future loss of earnings would amount to \$327,600.00.

Summary of Damages

[21] The breakdown of the damages that are awarded to the claimant is as follows:

(a) Special damages

Medication	\$721.77
Physiotherapy	\$1,470.00
Surgery – Bougainvillea Clinic	\$31,213.00
Peebles Hospital	\$1,967.00
Replacement Glasses	\$495.00
Eureka Medical	\$650.00
Total	\$36,516.77

¹ *Moses v County Durham HA et al* (Kemp H1-003), *Oake v Biddlecombe* (Kemp H1-011), *Fradgley v Pontefract Hospitals NHS Trust* (Kemp H1-018), *Marrot vKrygiler* (Kemp G2-015) and *Heidi Binder v Patrick McVey* (Unreported ECSC BVI)

(b) General damages		
Pain, suffering and loss of amenities		\$80,000.00
Loss of earnings		\$42,000.00
Future loss of earnings		\$327,600.00
Total		\$449,600.00

Costs

[22] The defendant is entitled to be heard on costs and counsel for the defendant has filed submissions in that regard. Counsel for the claimant has also filed submissions on costs for professional fees and disbursements incurred by the claimant amounting to \$23,500.50. Counsel for the defendant did not oppose the schedule of costs submitted by the claimant and therefore an award of costs of \$23,500.50 is made to the claimant.

Conclusion

[23] For the reasons set out above it is ordered that the claimant is awarded the following sums:

- (i) General damages (a) pain, suffering and loss of amenities of \$80,000.00; (b) loss of earnings of \$42,000.00 and (c) future loss of earnings of \$327,000.00. Sub-total of \$449,600.00
- (ii) Special damages of \$36,516.77
- (iii) Total damages award of \$486,116.77
- (iv) Interest on special damages at 2½% per annum from the date of the accident to the date of entry of default judgment
- (v) Interest on general damages at 5% per annum from the date of service of the statement of claim to the date of entry of default judgment
- (vi) Interest on the whole of the principal judgment award at 5% per annum from the date of entering this judgment to full satisfaction
- (vii) Costs of \$23,500.50

Charlesworth Tabor
Master (Ag.)