

**THE EASTERN CARIBBEAN SUPREME COURT  
ANTIGUA & BARBUDA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. ANUHCV 2007/0294**

**BETWEEN:**

**YVONNE FRANCIS**

Claimant

and

**JOSEPH ANTHONY BANCROFT PESTAINA  
As Lawful Attorney for KATHLEEN AUDREY PESTAINA**

Defendant

**Appearances:**

Mr. Hugh Marshall and with him Ms. Kerna Benjamin for the claimant  
Mr. Kendrickson Kentish for the defendant

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2013: September 05

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**JUDGMENT**

[1] **HENRY, J.:** By Claim Form filed 23<sup>rd</sup> May 2007, the claimant seeks damages allegedly arising as a result of the negligence of the defendant. The Statement of Claim alleges that the defendant was at all material times the owner and registered proprietor of the premises situated on Saint Mary's Street which houses PC's Bookshop. The claim states that on the 23<sup>rd</sup> February 2006, Ms Francis was struck in the face and knocked into the gutter by a falling object, which she later observed to be

the wooden exterior door which gives access into and from the upstairs of the premises. Ms Francis, as a result of the impact, sustained certain injuries.

[2] A Consent Order dated 23<sup>rd</sup> October 2012 was entered against the defendant on the issue of liability. Thereafter the matter was set down for assessment of general damages.

[3] At the Assessment hearing, Ms Francis relied on her evidence in chief as contained in her affidavit filed on 28 February 2013. The defendant declined cross-examination and no further witnesses were called on her behalf. The defence called no witnesses.

[4] Both parties rely on their written submissions:

[5] **The Claimant's Evidence**

In her affidavit, Ms. Francis recounts the events of 23<sup>rd</sup> February 2006. According to her, at approximately 10:30 am as she walked along the sidewalk on the right side of St Mary's Street facing west, as she approached the entrance of PC's Bookstore, she felt a severe blow to her face. She was knocked into the gutter. Stunned by the blow to her head, she recounts that she opened her eyes but could see nothing. She heard a voice advising her not to move. She states that she laid where she was for a while and when she opened her eyes again she could see.

[6] Her evidence is that she observed her bag scattered around her. Her broken spectacles were in the gutter and the door which leads to the upstairs part of the building was lying next to her across the sidewalk. Ms Francis recalls that she was assisted to her feet by one Barbara Martin, an employee of the Bookstore, and a gentleman known to her as Steve Michael. She was helped to her feet and assisted into the bookstore.

[7] Her evidence is that shortly thereafter she spoke to Mr. Pestaina who then took her to Dr. Ravi's Office, where she was examined. The report of Dr. Ravi was admitted without objection into evidence.

[8] According to the report Ms Francis sustained the following injuries:

- a) A hematoma on the left side of her forehead about 3 inches in diameter with superficial abrasions.
- b) Subconjunctival Haemorrhaging
- c) Soft tissue swelling as revealed by a CT scan of the brain.

- [9] Ms Francis was placed on sick leave from 23<sup>rd</sup> February to 11<sup>th</sup> April 2006. During that period she was seen by Dr. Ravi on 24<sup>th</sup> February 2006 and 20<sup>th</sup> March 2006. When examined by the doctor on 11<sup>th</sup> April 2006, the doctor noted that her condition had improved but a small hematoma was still present on her forehead and there was still evidence of swelling and hemorrhage around the left eye. Dr Ravi also noted that Ms. Francis complained of headaches.
- [10] Ms Francis was also examined by Dr. Alvin Edwards, an Ophthalmologist on 23<sup>rd</sup> Feb. 2006. Dr. Edward's report was exhibited. According to his report:
- "She had a large haematoma (swelling containing blood) on the left side of her forehead and a bruise on her upper left cheek. However, the eye appeared normal.
- She was diagnosed with heamatoma of the forehead secondary to trauma and was given a course of antibiotics prophylactic ally. She was followed over the next few weeks and the heamatoma resolved with some tenderness remaining in the area and discoloration of the overlying skin."
- [11] Ms Francis observed the condition of her face in a mirror for the first time at Dr. Edwards' office. Ms. Francis described her face as follows:
- "My face was swollen and severely disfigured with a hematoma the size of a cricket ball above my left eye".
- [12] Ms. Francis attended a photo studio later that day and had photographs taken. Copies were exhibited. Additional photos were taken on 20<sup>th</sup> March 2006 and 29<sup>th</sup> March as well as 12<sup>th</sup> April 2006 and 24<sup>th</sup> April 2006.
- [13] She also noted that the headaches, which began after the incident, continued to plague her up to the date of her affidavit on 28<sup>th</sup> February 2013.
- [14] Ms. Francis claims special damages of \$13,668.89, which has not been contested by the defendant. It is left to the court to determine the quantum of general damages.

## The Law

- [15] While special damages consist of out of pocket expenses and loss of earnings, general damages are those implied by the law and include compensation for pain and suffering and permanent disability if any and loss of earning power<sup>1</sup>.
- [16] The legal principles concerning assessment of general damages are well established and have been succinctly set out in the well known and often cited case of **Cornilliac v St. Louis**<sup>2</sup>. There Sir Hugh Wooding CJ enunciated the several considerations which a trial judge must bear in mind when making an assessment. They include:
- (1) The nature and extent of the injuries sustained;
  - (2) The nature and gravity of the resulting physical disability;
  - (3) The pain and suffering which had to be endured;
  - (4) The loss of amenities suffered;
  - (5) The extent to which, consequentially, the appellant's pecuniary prospects have naturally affected.

## Special Damages

- [17] In paragraph 3 of the claim the following Special Damages are listed:

Medical Expenses	\$ 3,438.89
Loss of Earnings	\$10,230.00
Total	\$13,668.89

- [18] The special damages were largely unchallenged. Ms. Francis who gave evidence was not cross-examined at all. However in their written submissions, defendant raises the point that no information was given by Ms Francis as to whether she has claimed on any applicable insurance policy. Further with respect to the sum claimed for loss of earnings, defendant questioned whether the sum was subject to taxation.
- [19] I am satisfied that the sums claimed for special damages have been well documented by the claimant. In the absence of any evidence from the defendant, the sums claimed are awarded.

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<sup>1</sup> British Transport Commission v. Gourley [1956] AC 186, 206 per Lord Goddard.

<sup>2</sup> (1965) 7 WIR 491.

## GENERAL DAMAGES

[20] On the issue of the quantum of general damages, Counsel for the defendant submits that the court ought to have regard to cases from this jurisdiction. In fact his submission is that it would be inappropriate to consider awards from England or Trinidad & Tobago because the difference in money is so wide. Counsel refers the court to the judgment of Georges J in the case of **Francis v. Maynes**<sup>3</sup>.

[21] In the **Francis** case, Georges J noted that the Privy Counsel had given some guidance in the case of **Tong v. Li Ping Sum**<sup>4</sup>, an appeal from Hong Kong. There the Board indicated that a court should in general have regard only to awards in the same jurisdiction or in a neighboring locality where the relevant conditions are similar.

[22] Georges J., in **Francis** concluded:

"The court in the OECS can in my view confidently rely on awards in the region and in neighboring commonwealth Caribbean jurisdictions which are fairly widely reported."

A conclusion this court can embrace.

### Nature and Extent of Injuries

[23] The court accepts the injuries as set out in the medical certificate of Dr. Ravi; the 3 main injuries being the 3 inch hematoma with abrasions, subconjunctival bleeding and soft tissue swelling. The court will also take into consideration the length of time it took for Ms. Francis' injuries to heal. At the time of Dr. Ravi's last examination on 12<sup>th</sup> May 2006, signs of a small hematoma were still visible. They can also be seen in the photographs. There was also still evidence of swelling and hemorrhage around the left eye. The court also accepts the treatment as set out in the medical certificate of Dr. Edwards.

[24] There was no evidence of permanent disability. The disfigurement to the face was not permanent. However, there was temporary disfigurement in the form of discoloration and swelling. These were eventually resolved in about 2 – 3 months.

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<sup>3</sup> ANUHCV 1992/414.

<sup>4</sup> (1985) WLR 396.

### **Pain and Suffering**

- [25] The court considers under this heading the pain at the time of the initial injury when Ms Francis describes receiving a "severe" blow to the face which knocked her into the gutter.
- [26] In addition, there is evidence in the medical report of Dr. Ravi that Ms. Francis complained of headaches. Ms. Francis's evidence, which the court accepts, is that the headaches continued until the date of the affidavit.

### **Other Factors**

- [27] There is no mention in Ms. Francis' evidence of loss of amenities. None will be presumed, other than the minor inconvenience endured during the period of her treatment.
- [28] There was also no evidence that pecuniary prospects have been materially affected.
- [29] Even though the injuries were to the face above the eye area, they were never characterized as life threatening. The injuries were mostly soft tissue injuries, which were resolved in a matter of weeks.
- [30] I have considered the following cases: **Rosabel Chambers by her mother and next friend Linda Chambers et al v. Gooding**<sup>5</sup> where the claimant sustained a lacerated wound to the lower left leg and other soft tissue injuries as a result of the negligence of the defendant. There was no permanent defect, no loss of amenities or impairment of pecuniary prospects. General damages of \$6,000.00 were awarded.  
Adjustments will be made for the fact that this is a 1998 case. In addition, even though both cases involve soft tissue injuries, the present case involve injuries to the head and face, far more sensitive parts of the body.
- [31] In **Kariyana Abdul v Michael Anthony**<sup>6</sup> the claimant suffered an injury to her right shoulder resulted in gross deformity to her shoulder; there was a complete separation of the clavicle joint, with severe pain and tenderness. She was unable to complete routine tasks previously undertaken. She was awarded \$14,000.00 in 2003.

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<sup>5</sup> St. Vincent & the Grenadines Suit No 113 of 1991 (delivered 30<sup>th</sup> March 1998).

<sup>6</sup> GDAHCV 1990/0124.

[32] Counsel for the claimant suggests that reasonable general damages in this matter should be in the region of \$40,000.00. They rely on the case of **Herbert v Greater London Council**<sup>7</sup>. There the claimant was awarded £7,000.00 for general damages for the injuries sustained when a heavy door fell on his head. Mr. Herbert's injuries as set out in the judgment were as follows:

“... as a result of the accident he was unconscious. He then went to the hospital. In the hospital his injuries were examined and they were a fracture of the right frontal and front parietal regions of the head and the floor of the anterior fosse of the head. There was a fracture of one transverse process of the right vertebra C7. When he was operated on it was found that there was a tear in the dural. So that the injuries that he suffered at that time were serious. He did not have to stay in the hospital for very long, he was released on the 5<sup>th</sup> May, that is to say, some six weeks after the accident.”

[33] The judgment also indicated that as a result of the damage, Mr. Herbert lost his sense of smell in the right nostril; he had an affect in his right eye which produced a slight squint and as a result of the damage there were depressions in his skull at the front of the head. Further, the injuries also resulted in a 15% - 20% chance of developing epilepsy.

[34] I have already expressed my preference for consideration of regional cases in these matters, where they are available. However, even if the court were to consider the **Herbert** case, clearly the injuries in that case were far more serious than in the instant case.

[35] Taking all factors into consideration, I would award general damages of \$13,000.00

#### **Interest**

[36] Ms. Francis is entitled to an award of interest both on the general damages and on the special damages. With respect to general damages interest is awarded at the rate of 5% per annum from the date of issue of the claim form to the date of judgment. In respect of the special damages interest is awarded at the rate of 2.5% per annum from the date of the accident to the date of judgment.

[37] Interest on the global sum is also awarded at the statutory rate of 5% per annum from the date of judgment until payment.

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<sup>7</sup> UK COURT OF APPEAL (CIVIL DIVISION) (delivered 21<sup>st</sup> October 1981)

### **Cost**

[38] The matter had been originally set down for trial on 23<sup>rd</sup> October 2012. On the day of trial, the defendant consented to judgment being entered against him on the issue of liability only. Accordingly 80% of the prescribed cost is awarded to Ms Francis.

### **Conclusion**

[39] Judgment is granted in favor of Ms Francis against the defendant as follows:

- (1) Special damages of \$13,668.89 also General Damages of \$13,000.00 for a total of \$26,668.89
- (2) Interest on the amount awarded as special damages at the rate of 2.5 % from the date of the accident to the date of judgment. Interest on the sum awarded as general damages at the rate of 5% from the date of issue of the claim form to date of judgment. Interest on the global sum from the date of judgment to payment at the rate of 5% per annum.
- (3) Cost to the claimant is 80% of the prescribed cost.

  
**CLARE HENRY**  
High Court Judge  
Antigua & Barbuda