

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

Claim No: SLUHCV2011/0073

Between:

- (1) Peter Cherry
- (2) Vincent Cherry
- (3) St. Omer Joseph
- (4) Marianne St. Marthe aka Maria St.Marthe
- (5) Chaquille Joseph by his next friend Lisa Joseph
- (6) Edella Joseph
- (7) Lisa Joseph
- (8) Vincent Felicien the administrator of the Estate of Joseph Felicien
- (9) Moses Phillip
- (10) Adrian Estophile

Claimants

And

- (1) Trevor Trim
- (2) The Estate of Bruno Mariette

Defendants

Appearances:

Leandra Verneuil of Counsel for the Claimant

2013: September 24th
2013: October 8th 31st

ASSESSMENT OF DAMAGES AFTER JUDGMENT IN DEFAULT

- [1] **TAYLOR-ALEXANDER, M.:** This assessment of damages is made pursuant to Part 16.2 of CPR 2000 and following the entry of a judgment in default of acknowledgement of service dated the 11th July 2011. Submissions both written and oral were received from the claimants, to assist in the calculation of an appropriate award.

Background Facts

- [2] The first and second named claimants were the owners of a Toyota Hiace Minibus Registration No M709, and the third to tenth claimants were at the relevant time passengers for hire on that bus with the permission of the first named claimant.
- [3] A Nissan Sentra registration number PD4368 owned by the First Named Defendant, but at the time driven by the Second Defendant collided with the Toyota Hiace as it drove along the Richfond /Dennerly Highway heading towards the town of Vieux Fort in the south of the island. The accident was caused by the negligence of the second defendant.
- [4] The claimants include a person who was a minor at the time of the accident. The accident resulted in the tragic death of Joseph Felicien and his action is brought by his administrator Vincent Felicien for the benefit of his estate and for his dependents.

Basis for the award

- [5] Damages for personal injury are awarded pursuant to Article 985 and 986 of the Civil Code of the Revised Laws of Saint Lucia Cap 4.01 (the Civil Code) and additionally for injury resulting in death pursuant to Article 609 and 988 (3) for the benefit of the estate and the dependents of the decease. These provisions provide as follows:—

985 *“Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.”*

986 *"He is responsible for damage caused not only by himself, but by persons under his control and by things under his care....."*

988 (2) *"Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his injury thereby, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony."*

(3) *Every such action shall be for the benefit of the wife or husband, and every parent and child of the person whose death has been caused, but notwithstanding anything contained in this Code with regard to prescription, no such action shall be commenced at any time later than three years after the death of such deceased person.*

(4).....

(5) *In every action such damages proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action is brought may be awarded, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the parties for whose benefit the action is brought in such shares as the Court may direct....."*

Article 609 (1) and (2):—

"On the death of any person after the commencement of this chapter, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his succession.... (2) Where a cause of action survives as aforesaid for the benefit of the succession of the deceased person the damages recoverable for the benefit of the succession of that person—where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to

his succession consequent on his death, except that a sum in respect of funeral expenses may be included."

- [6] Guidance on the entitlement to recover damages is provided by the English common law which pursuant to Article 917A augments the statutory provisions of the Civil Code relating to torts. The authors of Mc Gregor on Damages Seventeenth Edition explain that the principle of compensation payable on any award for personal injury is to compensate all financial and material losses incurred, such as loss of business profits or expenses of medical treatment termed pecuniary losses and losses that do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings termed non pecuniary loss. Pecuniary loss or special damages as it is usually termed are quantifiable damages which a claimant has already spent as a result of the loss and damage suffered. It is capable of arithmetic calculation. It must be specially pleaded and proved¹. This was the view of Lord Diplock in *Iikew 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."

- [7] General damages are non-quantifiable loss flowing as a direct result of the injury sustained but requires determination of an award of a sum of money which will put the party who has been injured in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation." Per Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

Claimants' quantifiable loss:

- [8] Although there was extensive documentation provided on the hearing of the assessment, very few of the documents were submitted with the claim or with the affidavits filed on assessment and consequently many items of damage claimed were not proven.

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

[9] Based on the pleadings, the application for assessment, submissions and documents submitted in support of the pleaded heads of damage and after hearing counsel for the claimants, the court awards the following claimants special damages:—

(a) Damages to the Toyota Hiace

According to the estimate of repairs, the Toyota Hiace was extensively damaged and was written off. The first and second named claimants plead loss of \$65,250.00, which includes a police report. I am satisfied based on the documentary support including receipts, the insurance settlement work sheet, cheque requisitions and garage towing receipt that Vincent Cherry and Peter Cherry as the joint owners of the vehicle are entitled to the sum claimed of \$65,250.00.

(b) Peter Cherry

Medical Consultation /Visit to the Doctor

The first named claimant as part of his particulars of special damage pleaded expenses for a medical report and medical examinations in the sum of \$150.00. I allow the sum of \$100.00 which is proven.

(c) St. Omer Joseph

Of the sum claimed for his medical report and examinations in the sum of \$130.00 I award the sum of \$100.00 which has been proven. The third named claimant also claimed the sum of \$136.80 for 4 days of sick leave. The claimant as a contributor to the National Insurance Corporation (NIC) was entitled to be paid his salary shortfall by the corporation. I accept Mr. Joseph's oral testimony that he did not receive payment from the NIC though his contributions were in fact paid it. His counsel submits that as it is loss he has incurred and it flows directly from the accident, the claimant is entitled to be compensated. I agree and award the sum of \$136.80 and \$100.00 for a total award to the third named claimant of \$ 236.80.

(d) Marianna St. Marthe

I find the fourth named claimant's claim of \$90.00 for medical expenses has been satisfied and I so award.

(e) Chaquille Joseph and Edella Joseph

The fifth and sixth named claimants pleaded loss by way of costs incurred for medical reports, hospital admission fees, and drugs for a total of \$90.00 each and of which \$50.00 each was proven, which I so award.

(f) Lisa Joseph

The seventh claimant as part of her particulars of special damage pleaded loss by way of costs incurred for a medical report and examinations, x-rays, prescription and hospital bills in the sum of \$1893.00. I have allowed the sum of \$50.00 for the medical report of Dr. Richardson St. Rose, as although there was no evidence of payment it is expected that there would be a reasonable payout for the medical report and I find the sum of \$50.00 to be most reasonable. The other heads claimed were not proven and the sum claimed is discounted by the heads not proven. I have further discounted the sum claimed for loss of earnings due to sick leave as in the claimant's own oral evidence on assessment she acknowledged receiving 60% of her salary from the National Insurance Corporation (NIC) during her period of illness. I therefore award this claimant the sum of \$667.50, being the sum of \$50 and the sum of \$617.50 her salary unpaid by the NIC.

(g) Moise Phillip

Of his pleaded special damages of \$90.00, I find on the documents attached to the claim the sum of \$70 to have been proven and I so award.

(h) Adrian Estophile

The tenth named claimant claimed special damages of \$90.00 for which I find only the sum of \$50.00 has been proven for the costs of obtaining a medical report. I therefore award the sum of \$50.00 in respect of his special damages.

(i) Joseph Felicien

A claim was made for three days of hospitalization at Victoria Hospital totaling \$170.00. There was an emergency CT scan performed at Tapion Hospital on the 9th February 2012 at a cost of \$1600.00, and funeral expenses totaling \$6546.00 and 530.00 all of which are supported and consequently awarded for a total of \$8676.00.

General Damages

[10] In assessing damages under this head, the principles stated by the Court of Appeal of Trinidad and Tobago in **Cornilliac v St. Louis (1965) 7 WIR** and regularly applied by our court in many cases as the factors which are to be taken into account in assessing general damages under this head 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 endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects.

[11] Not all of the claimants submitted for awards of general damages. Claims were received from the following persons:—

(a) Peter Cherry

Peter Cherry was 36 years old at the date of the accident. He suffered a fracture of his upper leg near his hip. He was admitted to the hospital on the 9th February 2008 and was discharged on the 12th February 2008. The report issued by Dr. Richardson St. Rose on the 16th April 2008 and 24th February 2012 states that he suffered a temporary partial disability of 70% over a six month period and permanent partial disability of 7% . He used crutches until the 2nd of May 2008, but for short periods and distances. He claims that his work as a driver continues to be occasionally affected by his injuries.

Counsel for this claimant submits that the sum of \$30,000.00 be awarded as general damages. She relies on the following authorities to support his claim:—

(i) **Mandissa Jacob v Boniface Romulus SLUHCV2006/0457** in 2010 a 20 year old who suffered abrasions to the left side of the face, forehead, back of right elbow, left hand and back of left shoulder; contusion to the lower rib cage; comminuted fracture of the mid shaft of the humerus; traction neuropia of the left median nerve, was awarded \$60,000.00. After seven months post injury the claimant's injuries could not be deemed to have reached Maximum Medical Improvement for the purpose of impairment assessment and disability evaluation with regard to employment, although the abrasions to the face back and limbs had healed and did not present any functional deficit.

(ii) **Lawrence Raymond v Lester Oscar Joseph (2000):—**

These injuries were of a 60 year old man who was struck down by a car and was hospitalised for four days. He sustained two fractures at the end of the tibia and ankle and a small laceration between the toes, a plaster of paris was applied to the fractures and after six months he was fully healed of his injuries. He was awarded \$20,000.00 for his pain, suffering and loss of amenities.

(iii) Additionally, I have also considered the case of **Laura Marrocco v The Attorney General of Antigua and Barbuda Claim Number ANUHCV0240** decided in 2007

where a 67 year old female fractured her right distal radius and distal ulna and a traverse fracture and bicondylar non-displaced tibia plateau fracture of the right knee. Ms Marrocco was hospitalized in Rhode Island and was eventually transferred to a rehabilitation centre to improve and strengthen the function of her arm and leg. She stayed there for two and a half months. She could bear no weight on her right side, she had to be fitted with a hinged knee brace that she describes was extremely uncomfortable and painful. After being discharged, she had to use a walker for six months. She states that because of her injuries, she is no longer able to perform certain activities for any length of time without experiencing pain and discomfort. She was awarded \$60,000.00.

[12] I have considered the authorities, each distinguishable by the pain and suffering and amenities lost and permanence or not of the injuries sustained by those claimants. I have considered the age, the medical history and medical report of the first claimant and award the sum of \$24,000.00 in general damages.

(b) St.Omer Joseph

St. Omer Joseph was 50 at the time of the accident. He was sitting on the left hand side on the back seat of the bus. He was hospitalized complaining of pain to the right thigh and right hip. He was treated, discharged and given analgesics. He was away from work for a total of 4 days and suffered mild tenderness to his right hip and right thigh.

His counsel submits that the sum of \$2500.00 in general damages be awarded to this claimant. She relies on case law extracted from Daly's on Damages of **Jamurat v Aziz Ahamad Ltd** Case No 1414/74 where an award of TT\$1464.00 adjusted to November 2002 was given to a claimant who suffered minor swelling and tenderness and **Sullivan v Herbert** Case No 579/71 where a claimant who suffered a swollen forearm was awarded the sum of TT1648.00 adjusted to November 2002. An award of \$2000.00 is in my view a comparable award for the injuries he sustained.

(c) Marianna St. Marthe

Ms. St. Marthe was sitting in the second seat behind the driver's seat. She was 62 years old at the time of the accident. The reports issued by Dr. Richardson St. Rose on the 7th April 2008, states that she sustained a 3 cm laceration to the anterior surfaces of her right leg . There was no swelling, no tendon or muscle injury and no fractures. Her counsel submits that the sum of \$3500.00 be awarded for general damages. She again relies on case law extracted from Daly's on Damages of **Maharaj v Khan** case number 520/73 where a claimant suffered laceration of the scalp and in 1985 was awarded TT\$1650.00 and **Bacchus v Ramkisson** case number 2299/74 where a claimant who suffered multiple abrasions to his back was awarded of TT\$3690 adjusted to November 2002. I make an award in the sum of \$2500.00, in relation to this claimant.

(d) Edella Joseph

She suffered point tenderness to lumber spine and left lower abdominal tenderness. X –ray and urinalysis were normal/negative. She complained of neck pains, pains in the right arm and right leg, right waist and lumbar region. She vomited on two occasions immediately following the accident. Although this claimant had a medical history of a fall from a tree one week prior to the accident, there is no dispute that her injuries emanated from the vehicular accident and this issue requires no further investigation.

Her counsel submits that the sum of \$5000.00 would be a fair award. She relies on the earlier quoted authority extracted from Daly's on damages of **Jamurat v Aziz Ahamad Ltd** and submits that the claimant was away from school for an extended period of two months during a critical period of the school year. Unfortunately there is no evidence before me of the effect on her performance at school. Having compared the provided authority I award the sum of \$2000.00 in general damages.

(e) Chaquille Joseph

This claimant was 3 years old at the time of the accident and according to the medical report he had a laceration to the right side of the head and some swelling to the right leg. There was a reported episode of vomiting. X-Rays showed no fractures but he was admitted for observation for a period of three days.

Counsel for the claimants submitted that on the authority of **Maharaj v Khan** Case No. 520/73 a Trinidad high court case where an award of \$1650.00, was made for injury to the scalp and forearm and **Sullivan and Herbert** Case No. 579/71 where an award of \$1648.00 was made for a swollen forearm, and **Bruno v Joseph** Case No. 2070/77 where the claimant suffered lacerations to the forehead and right knee and was compensated in the sum of TT\$3780.00

On the basis of these authorities counsel submits that general damages be paid in the sum of \$2500.00. I find no quarrel with the reasoning of counsel and the supporting authorities suggest that that award is reasonable. It is so awarded.

(f) Lisa Joseph

Counsel for this claimant submits that she was diagnosed on the 29th February 2008 with a fracture of the cervical spine. I have however reviewed the only medical report submitted with the claim which report dated the 16th April 2008 concludes that the patient's injuries were a neck injury consisting of a ligamentous strain that produced much pain and discomfort. She was treated with a cervical collar. No late complications were anticipated. During her injury she was hospitalized for three days and was an outpatient for three weeks. She was unable to work for four weeks. She continues to complain of back and neck pain.

This claimant relies on the following authorities of **Rogers v The Attorney General of Trinidad and Tobago (no citation provided)** where for a whiplash injury an award now updated of TT\$64,265.00 was made, and **Mohamed v Sackoor (no citation provided)** where an award now updated of TT\$86,766.00 was made to a claimant who suffered a whiplash injury and had to wear a neck brace for some time; She also relied on **Celia Hatchette v First Caribbean International Bank** BVIHCV2006/0227. where an award of US\$20,000.00 was

made to a claimant who suffered a strain of the cervical spine muscle and lumbar muscle and undisplaced fracture of the lumbar vertebrae; and **David Saunders v Grace Rhymer** St. Kitts high court claim 2001/0041 where a sum of \$14,000.00 was awarded for a whiplash injury; **Martha Le Blanc v Augustus Thomas and John Le Blanc** DOMHCV2009/0296 where the claimant was awarded \$16,000.00 for a traumatic disc prolapsed of the c5 and c6 cervical vertebrae.

I am satisfied that the injury suffered by the claimant is not comparable to the injuries sustained by the claimants in the cases cited perhaps with the exception of **David Saunders v Grace Rhymer**. For my part an award of \$8000.00 is fair compensation for the injuries sustained.

(g) Moise Phillip

Moise Phillip was 74 at the time of the accident. He was diagnosed with soft tissue injuries and multiple abrasions. His counsel relied on a comparative authority of **Goddard and Mohammed** High Court Case No. 1071/73 where an award of TT\$2776.00 was made for multiple abrasions of the knees and ankle, and **Tokai v Gordon** Case No. 1542/84 where a claimant with minor abrasions was awarded TT\$506.00. I award the sum of \$800.00 in general damages.

(h) Adrian Estophile

This defendant was 24 years old at the time of the accident. The medical report of Dr. Bourdillon Dagana dated the 31st March 2008 states that he suffered with a bloody face, bruised bridge of nose and a bruise on the right knee.

The claimant relies on case law from Daly's on damages namely **Bruno v Joseph** Case No. 2070/77 where an award of \$600.00 was made to this defendant who suffered bruises to his forehead and right knee. This award updated to 2002 resulted in an award of \$3780.00 and in **Goddard and Mohammed** where an award of \$250 was made in 1974 to a defendant who suffered abrasions to the

knees and ankle. This award updated to 2002 is in the sum of \$2776.00. The claimant's injuries can be classed as minor injuries for which I award the sum of \$2000.00.

Damages payable on the death of Joseph Felicien

[13] **Claim for the benefit of the estate. Article 609 (1) and (2) of the Civil Code.** Joseph Felicien suffered massive brain injury and inter-cerebral damage. The evidence of Vincent Felicien in his affidavit of the 23rd January 2012 is that Joseph Felicien survived the accident for a period of three days during which time he was hospitalized at Victoria Hospital. He succumbed to his injuries and his post mortem reflects that he died of Blunt force trauma. It was also reflected as a cause of death that the defendant suffered with heart disease.

[14] In **Veronica Auguste v Tyrone Maynard et al** SLUHCV1984/0440 recently deceased Matthew J helpfully explained that while damages under this head had traditionally been limited to a small conventional award for loss of expectation of life, the current approach adopted by our courts following the landmark decisions of **Pickett v British Rail Engineering Limited** 1979 1 AER 774 and **Gammell v Wilson** 1980 2 AER 557 is to allow recovery for future earnings for the "lost years".

[15] The following are the heads of damage considered:-

Loss of expectation of life

[16] This is a conventional award which continues as a permitted award under Article 609. Our courts have almost standardized the award, but in more recent cases accommodation has been made for inflation. In **Plummer et al v Conway Bay Ltd** SLUHCV2000/1041 the sum of \$3000.00 was awarded under this head. I can find no justification for departure from the awards of the high court of this jurisdiction and I award the sum of \$3000.00 under this head.

Funeral expenses

[17] This was earlier awarded under the head of special damages.

Loss of earnings for the lost years

- [18] The calculation of an award under this head is based on the number of years which this claimant could have expected to work had the accident not occurred and the estate is to be compensated for the income which would have been earned during the lost years less an allowance for those expenditures which the deceased would have spent on himself. This issue in this case raises some difficulty both in terms of a multiplier and a multiplicand. The deceased had retired and had been receiving a pension from the NIC but had been reemployed as a gardener at a Sandals hotel. No evidence of his employment or the income he received was provided. There was similarly no evidence or submission of what part of his salary was spent on himself. Although I took guidance from **Plummer et al v Conway Bay Ltd** which provided that where there is insufficient or no evidence of the deceased's living expenses the multiplicand should be assessed as a percentage of the Deceased's net earnings, it did little to relieve my difficulties. The lack of evidence makes an award under this head arbitrary and such no award is made.

Other pecuniary loss

- [19] This has been dealt with earlier under the heads of special damages.

Pain suffering and loss of amenities

- [20] Counsel submitted a sum of \$50,000.00 for pain suffering and loss of amenities. The injuries sustained resulted in the death of the deceased. The heads of damage claimed under article 609 (1) and (2) have been historically limited to (1) loss of expectation of life (2) funeral expenses (3) loss or earnings for the lost years. See the dicta of Matthew J in **Veronica Auguste v Tyrone Maynard et al** (*ante*). Reference is also made to the cases of **Bertha Compton v The Attorney General** SLUHCV 2000/0031, **Felix Andrina George v Eagle Air Services** Privy Council Appeal No 1 of 2007 and **Plummer et al v Conway Bay Ltd** SLUHCV2000/ 1041.
- [21] I can find no justification for excluding an award for pain suffering and loss of amenities, under Article 988(2) and 609 (1) and (2), and under the reception provision of Article 917(A) of the Civil Code which extends to this jurisdiction the law of England for the time

being applicable to torts committed in the United Kingdom. Counsel has submitted a claim for an award of \$50,000.00 for pain and suffering. I find the award to be reasonably assessed and I so award.

The Dependency Claim

- [22] The deceased was a married man and on his death he left his lawful wife Marie Felicien, his son Vincent Felicien, Anthony Willie, Aurelien, Joseph Aurelien, Davis Aurelien, Joyce Aurelien and Atkinson Aurelien all of whom survived the deceased and are still living. All the children were of the age of majority, and are not provided for under this award. Counsel submits that a multiplier of 7 is appropriate, given the age of the deceased. The deceased received a monthly pension of \$609.26 of which it has been submitted that 2/3 was spent on his family. The claim is for $2/3 \times 696.26 = \$406.17 \times 7 \times 12 = \34118.28 as the total award for monies spent for the dependency action.
- [23] No evidence is given as to the age of the wife of the deceased or the state of her health. By way of direction for the future conduct of such assessments, I think evidence of a marriage certificate, of life and evidence of age and medical history is important under this head.
- [24] I have faithfully considered the claim submitted, I question whether a man who was retired and his children grown would have made such a generous contribution in his twilight years when the contributions to his home would have decreased by the coming of age of his children and the plateauing of his life. I note as well that he suffered from heart disease which was a contributing factor in his death This is relevant in the determination of a multiplier. I have assumed that his wife was of an age approximate to the deceased and that her dependency would have continued until his or her death. Based on those considerations I am more inclined to an award at a multiplier of 4 of $\frac{1}{2}$ of his pension for an award of $\$609.26 / 2 \times 12 \times 4 = \underline{\$ 14,622.24}$.

Summary of awards

[25] In conclusion the following awards are made for claimants 1 and 3 to 10:—

Name	Special Damages	General Damages
Peter Cherry	\$100.00	\$24,000.00
St. Omer Joseph	\$ 236.80	\$2000.00
Marianne St. Marthe	\$90.00	\$2500.00
Chaquille Joseph	\$50.00	\$2500.00
Edella Joseph	\$50.00	\$2000.00
Lisa Joseph	\$667.50	\$8000.00
Moise Phillip	\$70.00	\$800.00
Adrian Estophile	\$50.00	\$1500.00

Interest

[26] Interest is awarded on all the awards of special damages from the 8th February 2008 to the date of judgment at the rate of 3% per annum and from the date of judgment at the rate of 6% per annum to payment if full and on general damages at the rate of 6% per annum from the date of judgment and continuing to date of payment in full.

[27] **Summary of award for Joseph Felicien:—**

(a) Loss of expectation of life = \$ 3,000.00

- (b) Pain and suffering \$50,000.00
- (c) Funeral expenses \$ 7,076.00
- (d) The Dependency Claim awarded in the sum of \$14,622.24
- (e) Other Special Damages \$1600.00

[28] I further award interest on the award of special damages and on the funeral expenses at the rate of 3% per cent per annum to the date of judgment and thereafter at the rate of 6% on the total award to date of payment in full.

Costs

[29] Prescribed costs are allowed at 60% on each of the awards made to the claimants.

V. Georgis Taylor-Alexander

High Court Master