

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

[CIVIL]

SUIT NO. DOMHCV2011/0350

BETWEEN:

SAFIYA SHILLINGFORD	Claimant
and	
ROSEAU CITY COUNCIL	Defendant

Appearances:

Mrs. Heather Felix-Evans and Mr. Jeffrey Douglas-Murdoch, Counsel for the Claimant
Mr. Stephen K. Isidore and Mr. Christopher Forde of Isidore and Associates,
Counsel for the Defendant

2013: October 23rd
2014: March 11th

JUDGMENT

- [1] **THOMAS, J. [Ag.]:** This is a claim for personal injuries by the claimant, Safiya Shillingford, in which the following remedies are sought: special damages in the sum of \$1467.63, general damages, interest on all sums awarded at the statutory or appropriate rate of interest; legal practitioner's cost; and any further and other relief as the court deems fit.
- [2] In the Re-Amended Statement of Claim the claimant contends that on 1st November 2008, at approximately 7:00 p.m., she was in the Roseau Roman Catholic Cemetery participating in the lighting of the graves, an annual Roman Catholic event, when she fell into an open grave which was more than 6 feet deep.
- [3] The claimant contends that her belief is that the accident was caused as a result of the negligence of the defendant, its servants and/or agents who:
- a) failed to cover the open grave to prevent or avoid visitors to the cemetery falling into it;

- b) taking into account the event that would be taking place at the cemetery on the evening of 1st November, failed to place and/or maintain appropriate and sufficient warning at or close to the open grave to alert visitors of its presence;
- c) failed to cordon off the open grave to prevent visitors to the cemetery from accessing and thus falling into it;
- d) failed to ensure that the person(s) who dug the open grave into which the Claimant fell had taken appropriate and/or effective action to:
 - (i) cover said grave so as to prevent or avoid visitors to the cemetery falling into it;
 - (ii) place and/or maintain appropriate and sufficient warning at or close to the open grave to alert visitors of its presence;
 - (iii) cordon off the grave to prevent visitors to the cemetery from accessing and thus falling into it;
- e) failed in all the circumstances to discharge the common law duty of care.

[4] It is the claimant's further contention that by reason of acts of the defendant she suffered and continues to suffer pain, injury, loss and damage.

Defence

[5] In its re-amended defence the defendant makes no admission as to the averments in paragraph 1 of the re-amended statement of claim but admits paragraph 2.

At paragraph 3 of the re-amended defence the defendant's averments are directed at the procedure followed by the family of a deceased person. According to the averments: where notice is given to the council of a burial, the councils on duty is to ensure that the depth of the grave is strictly complied with; the digging of graves in the Roseau Roman Catholic Cemetery is vested in independent grave diggers or sextons; the defendant only becomes involved in grave digging where the family is unable to retain the services of an independent grave digger.

[6] At paragraph 4 to 7 of the re-amended defence the averments are: a denial of paragraph 4 of the re-amended statement of claim; inability to admit the circumstances of the claimant's fall or the condition of the grave site as alleged; denial of negligence or breach of statutory duty as alleged; further, or in the alternative, an express denial of the claimant's fall, if ever it took place and the circumstances of which are not admitted, was caused by the alleged or any negligence and/or

breach of statutory duty on the part of the defendant or its agents; denial of the particulars of negligence as set out in the re-amended statement of claim.

[7] At paragraph 10 of the re-amended defence the particulars of injuries claimed to have been caused by the claimant in paragraph 7 of the re-amended statement of claim were as a result of the defendant's negligence. It is further pleaded that and/or in the alternative that such injuries, loss and damage as the claimant may prove at the trial, if any, were sustained as a result of the fall, were wholly caused or, in the alternative, contributed to by the claimant's own negligence. In this regard certain particulars of negligence are pleaded.

[8] Finally, the defendant avers that: it neither agrees nor disputes but has no knowledge of the matters or the prognosis contained in the claimant's medical report; it neither agrees or disputes but has no knowledge of the items included in the claimant's schedule of special damages.

Reply to re-amended defence

[9] At paragraph 2 of the reply the claimant denies that any so-called 'independent grave diggers/sextons' exercise responsibility or exclusive control over the digging of graves in the Roseau Catholic Cemetery. Further, that every family requesting burial for a deceased person in the Roseau Roman Catholic Cemetery is specifically referred to the Roseau City Council and a specific written notice of the request for burial is forwarded from the Roman Catholic Church to the Roseau City Council.

[10] Evidence

Safiya Shillingford

In her evidence in chief Safiya Shillingford testified that she was born on 13th May 1983 and went on to detail the circumstances of her presence at the Roseau Catholic Cemetery on 1st November 2008, at around 7:00 or 7:30 when it was dark. According to her, the purpose was to visit the graves of her dad's parents, her grand parents, and that as they approached the grave she suddenly fell into a big hole.

[11] It is the claimant's further evidence that the open grave had no precautionary markings or warning signs around it to alert persons of its presence or prevent people from falling into it. The witness went on to say that it was not visible as an open grave until she had fallen into it.

[12] Under cross-examination Safiya Shillingford gave evidence that on her visits to Dominica she visited the cemetery twice. She went on to say that the cemetery is big and the graves are sometimes a foot-apart, and denied that one had to jump between the graves.

[13] In further testimony the witness said that on the night in question it was dark; that she has walked in the dark before, that in such circumstances one has to be more careful; that on the night in question she was not careless and reckless. At a later stage in the cross examination the witness said that she has a duty to herself to walk carefully.

Eric Shillingford

[14] In his witness statement Eric Shillingford gave evidence of his activity at the Roseau Catholic Cemetery on the night of 1st November 2008, where he went with other members of his family including his daughter, Safiya Shillingford.

[15] The witness also testified as to how he knew that his daughter had fallen into the grave and of his efforts to assist her out of the grave.

[16] Under cross-examination the witness gave testimony of the dark conditions at the cemetery and the layout of the graves, and having to walk between graves and doing so carefully. In further testimony the witness said that on the night in question there were candles lit on the graves and where there was none it was either an unlighted grave or a footpath.

Cyrella Shillingford

[17] Cyrella Shillingford in her witness statement deposes that she is the mother and that she was also at the cemetery with her daughter at about 7:00 or 7:30 p.m. when it was dark. It is her further evidence that as she and her daughter approached her father- in- law's grave the claimant suddenly disappeared, at which time the claimant disappeared and had fallen into a grave next to her father- in- law's grave.

[18] Under cross-examination the witness gave further testimony as to the manner in which she was walking in the dark, being careful. The witness added that if she came across a hole she would

avoid it. She continued: "when walking between graves I would walk carefully and move so when it is dark-I would look to see where I put my foot in the cemetery." The witness however disagreed that when you enter a cemetery you will know where to walk.

Angus Benjamin

[19] According to Angus Benjamin, he is the City Clerk of the Roseau City Council and is "very familiar with the policies, practices and procedures of the Council among other things." The witness explained that there are no Bye-laws in place regarding cemeteries and as such customary practices and policies have been utilized over the years as it relates to cemeteries and graves.

[20] Angus Benjamin testified further that quite often family members ask the Council to undertake the digging of the grave at which time the Council by hiring "independent grave diggers (sextons) who are available at the relevant time to dig the grave." According to Benjamin, the independent grave diggers are not employees of the Council.

[21] In relation to the grave in issue, Benjamin's evidence is that on 1st November 2008, the Council had no record of a request on that day or prior for the digging of a grave. It is also his evidence that in his 30 years at the Council he has never witnessed the digging of graves the day before or days before the burial by grave diggers engaged by the Council.

[22] Under cross-examination Benjamin was questioned about his position at the Roseau City Council and burials done by the Council and the circumstances in which they are done.

[23] The cross-examination gave rise to the following practices in evidence in their essential form: he takes charge of the day to day operation and reports to the Council; the staff reports to him as Chief Executive Officer; he can approve payments up to \$1000.00 and the Board of the Council approves above that figure; he has held the position of Chief Executive Officer from 2003; a requisition asks the Council for a grave and states the date of the proposed date and times of the burial; the Council has 6 to 7 burials per week and no more than 2 per day; if the Council is engaged to dig the grave; it is a \$600.00 fee; but the Council gets no money when another person digs; a requisition is not a request; the Roseau City Council engages independent grave diggers

with 4 to 5 being engaged in a year; 1 or 2 diggers would dig a grave depending on whether a bigger hole is required; the grave diggers are paid fortnightly \$200.00, if one person or \$100.00 each if more than one person per grave; he was not aware of any arrangement between the Council and any other person or authority to dig graves; of the 3 cemeteries in Roseau, the Roman Catholic is the largest; he was not a signatory to any agreement between the Roman Catholic Church and the Council to take exclusive rights for all burials; there is no agreement with respect to charges for the digging of graves; and of the 6 to 7 burials per week the Council would dig 4 to 5 graves per week.

[24] The cross-examination next centered on certain correspondence regarding the incident. According to Benjamin, the Council did not respond to either of the letters. He went on to testify that the letters were sent prior to the filing of the claim; and that the Roseau City Council never informed the claimant that it was not solely responsible for the digging of graves.

[25] In the context of Clayton Hector being a grave digger for the Council, Benjamin testified: that the said Clayton Hector is paid fortnightly; then gave details of the pay slip.

[26] Angus Benjamin was next cross-examined on the Council's log book which he said he could not retrieve, but he did indicate what this book would have enabled him to ascertain.

[27] The next area of cross-examination was the income and expenditure of the Council. According to Benjamin: the Council has monthly provisions of income and expenditure; included is an amount for wages, cemeteries and burials; the projected revenue of the Council for October 2008 was \$70,000.00.

[28] In re-examination Angus Benjamin testified that Clayton Hector does not get benefits and gratuity benefits after 10 years. Such benefits are confined to employees of the Council.

Eddison Alleyne

[29] In his witness statement Eddison Alleyne says he is now employed by the Council for 33 years, and now holds the post of City Overseer. It is also his evidence that part of his duties is to visit graves to ensure compliance.

[30] The witness also gives details as to the procedure for the digging of graves in the Roseau cemeteries, and when the Council is asked to undertake the digging of graves.

[31] Under cross-examination Edison Alleyne testified that the Council gets \$600.00 for the digging of a grave. He also said he knows Clayton Hector who does not dig graves for the Council and is not an employee of the Council.

Issues

[32] The issues for determination are:

1. Whether the grave into which the claimant is alleged to have fallen into on the night of 1st November 2008, was under the control, authority and responsibility of the defendant.
2. Whether the defendant owed a duty of care to the claimant; and whether the Council is liable for the action of the grave diggers in the course of their duties.
3. Whether the injuries claimed by the claimant are attributable to the claimant falling into an open grave, as alleged, at the Roseau Catholic Cemetery on November 1, 2008.
4. Whether the claimant is entitled to the damages claimed and whether the claimant is liable for contributory negligence.

Issue No. 1

Whether the grave into which the claimant is alleged to have fallen into on the night of 1st November 2008, was under the control, authority and responsibility of the defendant.

[33] The Roseau City Council owes its existence to an Act of Parliament, being the Roseau City Council Act¹. Under that Act the Council is empowered to make Bye-Laws respecting cemeteries and graves in the city of Roseau. However, no such Bye-Laws have been made thus far, but it is beyond doubt that the Roseau City Council (hereinafter referred to as "the Council") is involved in

¹ Cap. 25:01 (Revised Laws of the Commonwealth of Dominica)

graves in cemeteries in the City of Roseau. This is the evidence of the City Clerk/CEO of the Council. But the extent of the Council's involvement is central to the entire case.

Submissions

[34] The claimant's case is premised on the responsibility of the defendant for the digging of the grave in issue and graves in general in the city of Roseau. Part of the submission in this regard is as follows:

"In the absence of any other authority that has control over digging of graves in the Roseau Roman Catholic Cemetery, the only office claiming to dig graves in the cemetery is the Defendant Council. The Defendant has never disproved the assertion that it was responsible for the grave which the claimant fell into."

[35] It must be common ground that there is no legal basis upon which the action of the Council rests in relation to the digging of graves in the Roseau Roman Catholic Cemetery. In the circumstances the determination must come from circumstantial evidence.

[36] The involvement of the Council is articulated by Angus Benjamin, who "acts as Chief Executive Officer". According to Benjamin, given the absence of Bye-Laws "customary practices and policies have been utilized over the years as it relates to cemeteries and graves."²

[37] The Chief Executive Officer gives further evidence at paragraphs 6 and 7 of his witness statement as follows:

"6. The practice that I am aware of which is being followed for the burial of a deceased person involves the family member first obtaining the death certificate of the deceased from the Registry of Births and Deaths located on the Dame Eugenia Boulevard, Roseau. Upon receipt of the birth certificate, the family member takes the death certificate to the relevant church authority which would be a Priest or a Pastor depending on the religious denomination of the deceased or where the deceased family decides to have conduct of the funeral service and burial.

7. Thereafter the Priest or Pastor would give the deceased family a requisition for the digging of the grave. At this juncture the family can do one of two things; bring the requisition to the Council and ask that the Council undertake the digging of the grave or merely inform them that the family has secured its own grave digger and that the digging of the grave will take place at a set time and day."

² Paragraph 5 of Angus Benjamin's witness statement

[38] Angus Benjamin's evidence is supported by that of Eddison Alleyne who says in his witness statement that from the time of his appointment as Receivable Clerk to present he has become "very familiar with the policies, practices and procedures under which the Council operates with respect to the digging of graves."

[39] Given the modified denials by the defendant, the court must now look at a number of events that are circumstantial in nature as follows: Eric Shillingford's evidence as to his prior dealings with the Council in terms of burials; the legal basis of the \$600.00 charged for burials by the Council; the provision in the budget for cemeteries and graves; the basis upon which the independent grave diggers are authorized to dig graves in the Roseau Roman Catholic Cemetery; and, whether the independent grave diggers are independent as averred by the defendant.

Eric Shillingford's evidence

[40] In commenting on the evidence of Angus Benjamin identified at paragraph 9 of his witness statement, Eric Shillingford gave details of his prior dealings with the Council in terms of burials as follows: "I buried my father, I paid money to the Council for three burials and the graves were dug by the Council. The graves were dug the day before the burial. I went to the cemetery to measure the graves to ensure that there were no mistakes."

The legal basis of the \$600.00 fee.

[41] There is evidence which the court accepts that no Bye-Laws were made by the Council. This the court accepts as being a fact. At the same time, the Council being a public authority, all of its actions are based on statute, regulations or Bye-Laws. There is no evidence of the legal basis of the \$600.00 fee for burials. And given the fact that the payments to grave diggers are less than \$1000.00 it follows that Angus Benjamin, who acts as Chief Executive Officer would be intimately involved in the same given his authority to approve payments not exceeding \$1000.00.

Revenues and expenses relating to cemeteries and burials

[42] In the **Official Gazette**, Thursday November 06, 2008 the Council's statement of revenue for the month of August shows an estimate of \$70,000.00 for cemeteries and burials, projection for August of \$5839.00, and year to date of \$11,249.25.

[43] Also in the **Official Gazette**, Thursday November 13, 2008 the Roseau City Council Statement of Expenditure for the month of September 2008 shows provisions for expenses, at paragraphs 25 and 26, in relation to cemeteries and burials.

Independent grave diggers/sextons

[44] The defendant contends that the independent grave diggers have sole responsibility for the digging of graves at the Roseau Roman Catholic Cemetery without giving a legal or other basis for this proposition. The fact that the cemetery belongs to the Roman Catholic Church itself begs the question.

Independent grave diggers or employees

[45] The defendant has introduced into the pleadings and by extension the evidence that the proposition of independent grave diggers employed by the Council from time to time. The distinction between a contract for service and a contract of service is summarized thus³:

"In one case the master can order or require what is to be done, while on the other he can not only order or require what is to be done but how it is to be done."

[46] In short, under a contract of service the master has an element of control of the servant. This would not be the case in relation to an independent contractor. Consequently questions of taxes and statutory deductions would fall on the independent contractor to satisfy the relevant law. However, there is evidence of the 'independent grave diggers' pay slips with deductions by the Council which would contradict the very legal basis of an independent contractor. And the fact that the independent grave diggers provide their own tools does not help.

Conclusion

[48] The issue examined above reveal that: for the Council grave digging and cemeteries are both a source of revenue and expenditure; Eric Shillingford gave un-contradicted evidence that he dealt with the Council on three prior occasions concerning burials and that the graves were dug the day before; the deductions made by the Council from the wages of grave diggers which would render them servants rather than independent contractors; and the absence of any authority to show that he independent grave diggers are authorized to dig graves at the Roseau Catholic Cemetery.

³ Per Hilbery J. in *Collins v Herts County Council* (1947) KB 598,615

[49] On behalf of the defendant it is submitted that the only instruction given to the independent grave diggers is the depth of the graves and further that the digging of a grave the day before the burial is wholly inconsistent with the practices and procedures of the Roseau City Council as sextons "contracted" to dig the graves on the day of the burial and not the day before.

[50] These submissions, in the view of the court; cannot contradict the matters identified above, for example that there are two heads of revenue and expenditure in terms of burials and cemeteries. In actual fact the projected revenue of \$70,000.00 for 2008-2009 translates to mean 116 burials for the year. But it is of some interest to note that although the Chief Executive Officer of the Council in giving his evidence in 2013 says that the Council does 5 to 6 burials per week, this would mean, using the 5 per week, 260 burials per year and maximum gross revenue of \$156,000.00.

[51] Therefore, based on the circumstantial evidence, it is the conclusion of the court that the grave into which the claimant is alleged to have fallen into, on the night of November 1, 2008 was under the control, authority and responsibility of the defendant.

Issue No. 2

Whether the defendant

(a) owed a duty of care to the claimant; and

(b) is liable for acts of the grave diggers in the course of their duties.

[52] This issue brings into focus the law of negligence, involving a duty of care, breach of that duty and resulting danger. It is also centered on vicarious liability.

Submissions

[53] Learned counsel for the claimant in detailed submissions on the tort of negligence. What learned counsel has submitted are extracts from the relevant aspects of the law of negligence⁴ seeking to show that the tort was committed by the defendant.

⁴ Among the authorities cited and examined by learned counsel for the claimant are: Halsbury's Laws of England 4th ed Reissue, vol. 33 at para. 601, *Donoghue v Stevenson* (1932) AC 562, *Ilkew v Samuels et al* (1963) 1 ALL ER 879, 890, *Blyth v Birmingham Water Works Co.* (1856) 11 Exch 781; *Corporation of Glasgow and others* (1943) 2 ALL ER 40, 48, *Wagon Mound (No. 1)* (1961) 1 ALL ER 404; *Cassidy v Ministry of Health* (1951) 1 ALL ER 574.

[54] There are no submissions specifically on duty of care and vicarious liability, the general contention being that the claimant has not made out a case of negligence against the defendant.

The law

[55] The basic law of negligence is stated in the celebrated case of **Donoghue v Stevenson**⁵ in which Lord Atkin ruled as follows:

“The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer’s question, who is my neighbor? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. who, then, in law is my neighbor? The answer seems to be –persons who are so closely and directly affected when I am directing my mind to the acts or omissions which are called into question.”

[56] This proposition hardly requires a debate given the context of 1st November, 2008. The evidence being that on this night annually in Dominica graves are lit with candles by the family of deceased persons. Therefore, it is reasonably foreseeable the acts of the defendant would be likely to injure persons who came to the Roman Catholic Cemetery, especially given the certainty of the date and time. And equally the presence of an open grave on the night in question would put the claimant, a person who would be closely and directly affected by the act of the defendant.

[57] The law is made even clearer by Lord Hobhouse in **Anthony Perrette v Simon Collins** when he said that:

“Where the plaintiff belongs to a class which either is or sought to be within the contemplation of the defendant and the defendant by reason of his involvement in an activity which gives him a measure of control over and responsibility for a situation which if dangerous, will be liable to injure the plaintiff, the defendant is liable if as a result of his unreasonable lack of care he causes a situation to exist which does in fact cause the plaintiff injury. Once this proximity exists, it ceases to be material what form the unreasonable conduct takes.:

[58] In plain terms, the defendant owed the claimant a duty of care as it was reasonably foreseeable that persons like the claimant would come to the cemetery on the night of November 01, 2008 and fall into an open grave.

⁵ [1932] AC 562

Vicarious liability

- [59] The general rule respecting vicarious liability is that an employer is responsible for the actions of his employee in the course of their duties under a contract of employment⁶. According to Lord Styr it is a principle of strict liability but not infinitely extendable⁷.
- [60] The court has already determined that the grave diggers are employees of the Council, and that the grave in issue was dug by grave diggers employed by the Council in the course of practices and procedures of the Council in this regard. Indeed, there is no evidence that any other person or authority digs graves at the Roseau Roman Catholic Cemetery. This would render the defendant vicariously liable for the acts of their servants, being the grave diggers.

Issue No. 3

Whether the injuries claimed by the claimant are attributable to the claimant falling into a grave, as alleged, at the Roseau Catholic Cemetery, and whether the defendant is in breach of his duty of care.

- [61] The claimant's evidence that she fell into an open grave on the night of November 01, 2008 is uncontradicted. Indeed, it is corroborated by her mother's evidence who was close to her at the time. Also un-contradicted is the evidence of her father, Eric Shillingford who testified that he pulled her from a grave that was at least 6 feet deep. The depth of the grave is in alignment with the evidence of the defendant's two witnesses, Angus Benjamin and Eddison Alleyne. According to them, the grave must be 6 feet deep and Alleyne testified that this depth is checked by him on each occasion in order to ensure compliance with the law.
- [62] In terms of injury, the claimant's evidence is that after she was pulled from the grave there was a pain in her left knee. This is reflected in the report⁸ of Dr. Julian De Armas which indicates that he saw her at the Casualty Department on 1st November, 2008. According to Dr. De Armas' report the claimant's left knee was subject to a physical examination ("Decrease range of movement, Intra articular fluid noted-Hemarthrosis, Increase temperature left knee"). It was also subject to Radiology- x-ray left knee: fracture Tibial Plateau (central) area."

⁶ See: Clinton Bernard v Attorney General of Jamaica PC Appeal No. 30/2003

⁷ Ibid at paras 21-23

⁸ Trial bundle No. 3 at page 61

[63] Also in evidence in relation to the claimant is a document from Barking Hospital⁹. It is dated "22/12/2008". In the main it states: "LEFT KNEE There is an undisplaced fracture noticed in the posterior lateral aspect of the proximal end of the left tibia which extends to the articular surface of the knee joint. No previous xray available for comparison. Orthopaedic review is advised."

[64] Under cross-examination there was an assumption or acceptance of the injury since the claimant was questioned extensively as to how and where she walked on the night in question. One of the propositions put to the claimant was that she was careless and reckless. This was denied by the claimant. The result of all this is that there is no evidence to contradict the claimant's evidence that she was injured when she fell into the open grave.

[65] Accordingly, it is the determination of the court that the claimant's injuries are attributable to the claimant falling into an open grave at the Roseau Roman Catholic Cemetery on the night of November 01, 2008. This in turn would give rise to a breach of the duty of care owed by the defendant to the claimant. This consummates the allegation by the claimant that the defendant was negligent.

Issue No. 4

Whether the claimant is entitled to the damages claimed and whether the claimant is liable for contributory negligence.

[66] In the law of negligence the defendant is liable for all damages reasonably flowing from the breach of the duty of care; so long as the damages are not too remote¹⁰.

Submissions

[67] After discussing a number of authorities, the submissions on behalf of the claimant are as follows:

"63. In the premises, taking into account what the claimant has suffered and continues to suffer pain due to the injury being centered around the knee joint, the tibia having been fractured with life long discomfort predictably expected and her policing duties possibly being curtailed due to stress in excessive foot patrolling, and the fact that she had to have surgery and suffer the inconvenience of wearing a cast for a few weeks, we find it reasonable in the circumstances that the

⁹ Trial bundle No. 3 at page 60

¹⁰ See: McGregor on Damages (14th ed) at paras 76-85

claimant should be awarded general damages of \$17,000.00 for pain and suffering and \$23,000.00 for loss of amenities. Special damages were summed up to be \$812.25 and are also hereby claimed.”

[68] As far as the defendant is concerned negligence was not established, and, as such, by implication, the question of damages does not arise.

Special damages

[69] The claimant's re-amended statement of claim special damages are pleaded in the amount of \$1467.63.

As required by law, special damages must not only be pleaded but also proven¹¹. To this end, the claimant has put into evidence a number of receipts¹², based on which the court awards \$1344.63 in special damages.

General damages

[70] Based on the seminal case of **Cornilliac v St Louis**¹³ the claimant is entitled to damages which should take into account: the nature and extent of the injuries, the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; loss of amenities; and the extent to which the claimant's pecuniary prospects have been affected.

[71] There is not a great deal of evidence which would lead to the foregoing heads of general damages as such and the court must be guided solely by the opinion of Dr. Julian De Armas in his report dated 24th September, 2009. This is his opinion:

“I had the opportunity to examine Miss Shillingford again on 24th September 2009, 10 months after her accident. She is still complaining of pain left knee also she is unable to totally flex her left knee (lost 25° of flexion). I explained to her that due to the characteristic of her fracture she is likely to suffer from Traumatic Osteoarthritis left knee. In the future she will experience pain in her left knee for life. If it is aggravating and impairing her life style, surgery can be done (Arthroscopy) in order to relieve her pain.”

[72] Of significance in this context is the part of the medical opinion that speaks to the injury impairing her life style and surgery will relieve the pain, as distinct from termination or end the pain.

¹¹ See: *Perestrello E. Compania v United Paint Co Ltd* (1969) 3 ALL ER 478

¹² Trial bundle No. 3 at pages 35 to 55

¹³ [1964] 7 WIR 491

[73] Other factors in the equation is the fact that the claimant was 23 years old at the time of the incident and is now 28 years old. More importantly, the claimant indicated in her evidence that she is to put on hold her application for a job as a Police Community Support Officer in England but she later continued after doing a physical, including running and succeeded. According to her the job involves foot patrol for at least five hours per day which is painful.

[74] In terms of loss of amenities, the claimant's evidence is that prior to her injury she jogged at least five hours per week which is now down to once per week, with both knees hurting.

Quantum

[75] In **Danny Bramble v William Danny & Key Properties Ltd.**¹⁴ the claimant was awarded \$50,000.00 in general damages in 2003 with respect to injury to knee and lower back which aggravated his existing degenerative joint disease. He had considerable pain and had to recuperate in bed from his injuries.

[76] There was an award of \$20,000.00 in general damages as a result of fractures of end of the tibia and ankle (lateral and medial malleole) with resulting pain and residual swelling and discomfort at the ankle¹⁵.

[73] In **Eugene Teague v Claxton Ralph**¹⁶, the claimant a motor cycle rider was awarded \$40,000.00 in general damages for pain and suffering and loss of amenities. Importantly, however, the claimant had to undergo surgery in order to insert a plate in one leg.

[74] In **Jennifer Prescott v Alrick Parris and John Primus**¹⁷, as a result of being struck by a motor car, the claimant suffered with pain in the knee, difficulty in getting up, recurrent incidents of knee giving way and inability to run. The claimant at the time of the accident was 36 years old and the mother of 2 children.

¹⁴ Civil Suit No. ANUHCv199/0160

¹⁵ Lawrence Raymond v Lester Oscar Joseph. Civil suit No. 289 of 1994 (Dominica)

¹⁶ Claim No. ANUHCv2007/0417

¹⁷ Claim No. SLUHCv2009/0814

[75] The injuries were serious in the result that the learned judge on June 13, 2013 made the following awards: future medical care \$45,000.00, loss of future earnings \$20,000.00, pain and suffering \$60,000.00 and loss of amenities \$25,000.00.

[76] Before arriving at the quantum, the dictum of Lord Hope of Craighead in **Wells v Wells** ¹⁸ with respect to award of damages for pain and suffering and loss of amenities is helpful. This is what he said:

“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 case as represents the court’s best estimate of the plaintiff’s damages.”

[77] Accordingly, considering the claimant’s age, her present occupation which involves at least 5 hours of foot patrol when on duty, the opinion of the orthopedic surgeon as to future pain, the claimant’s inability to jog as frequently as before, plus the awards cited above, the award to the claimant is \$35,000.00 for pain and suffering and \$10,000.00 for loss of amenities.

Contributory negligence

[78] The submissions on behalf of the defendant seek to place some contribution to the incident on the claimant. These are the submissions:

“19. In her Witness Summary Safiya Shillingford stated that on November 1st 2008, before attending to the cemetery she went on a whale watching trip. Under cross-examination Safiya Shillingford accepted that it was a dark night. She accepted that November 1st, 2008 was close to one of the shortest days of the year and therefore at between the hours of 7 -7:30pm it would have been very dark. She accepted that she ought to be more careful walking in a dark place than an illuminated place. She also accepted that in the cemetery there were raised graves and tombstones.

20. The Defendant submits that in the circumstances that is after a whale watching trip, going to an unfamiliar cemetery, that she had only been to twice before, in a dark night Safiya Shillingford ought to have exercised extra caution walking through the cemetery that night. Instead she walked ahead of the family group to seek out the grave of her grandfather. She was not very careful in walking through the cemetery that night which contributed to the occurrence of the accident.”

¹⁸ [1998] 3 ALL ER 481

[79] Contributory negligence only arises where it is shown that the person failed to take reasonable care of herself in the particular circumstances. As Lord Denning said in **Jones v Livox Quarries Ltd**¹⁹:

“A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself: and in his reckonings he must take into account the possibility of others being careless.”

[80] The context is November 1, 2008 at 7:00 to 7:30 p.m. where, in a predominantly Catholic country, people light graves with candles. Then the question must be whether the claimant could reasonably foresee that the Council would have an open grave where: there is little leeway between footpath and graves; there is no illumination or warnings and where many people are expected to come. The answer must be in the negative. In any event, the claimant did testify both in chief and in cross examination that she walked carefully. And whale watching has no bearing on the matter.

[81] In the result the award remains as is as there is no contributory negligence on the part of the claimant.

Interest

[82] The court awards interest to the claimant on the special damages at the rate of 4% per annum from November 01, 2008 to the date of the trial. On the general damages the claimant is awarded interest at the rate of 3% per annum from the date of the service of the claim form to the date of the trial. And after judgment the statutory rate of 5% will apply.

Costs

[83] The defendant must pay the claimant prescribed costs.

Order

[84] IT IS HEREBY ORDERED AND DECLARED as follows:

1. Based on circumstantial evidence, the grave into which the claimant is alleged to have fallen into on the night of November 01, 2008 was under the control, authority and responsibility of the defendant.

¹⁹ [1952] 2 QB 608

2. The defendant owed a duty of care to the claimant as it was reasonably foreseeable that the claimant would be injured by its acts on the night of November 01, 2008; and the defendant is vicariously liable for the acts of the grave diggers who dug the grave prior to the night of November 01, 2008.
3. The defendant is liable for the claimant's injuries consequent on the claimant falling into the open grave on the night of November 01, 2008.
4. The defendant was in breach of the duty of care owed to the claimant and is liable for damages, and accordingly the claimant is awarded \$1,344.63 as special damages, and general damages for pain and suffering and loss of amenities in the amount of \$45,000.00.
5. There was no contributory negligence on the part of the claimant.
6. Interest on the special damages will be at the rate of 4% from November 01, 2008 to October 23, 2013; and interest on the general damages will be at the rate of 3% from the date of the service of the claim form to the 23rd October, 2013. After judgment the statutory rate of 5% shall apply.
7. Costs to the claimant must be prescribed costs.

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Errol L. Thomas
High Court Judge (Ag.)