

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2009/0147

BETWEEN:

Troy Barthelmy

Claimant

and

John Neptune

Defendant

Appearances:

Ms. Diana Thomas of Counsel for the Claimant

The Defendant in person

2014: March 20th

DECISION ON ASSESSMENT

[1] **TAYLOR-ALEXANDER, M:** Troy Barthelmy a watersports manager, scuba diver, instructor and trainer had his ambitions to excel in his field of endeavor, thwarted, when at 8:15 am on friday the 25th of January 2008, his motor vehicle was struck in a head on collision by a vehicle being driven by John Neptune. Judgment having been summarily entered for the claimant it is now beyond dispute that the accident was caused by the negligence of John Neptune.

[2] The claimant lost consciousness for a few minutes as a result of the impact and when he came to, he realized that he could not move and that his right leg was badly damaged from the hip down and it had unnaturally twisted from left to right. He was in excruciating pain and was incapable of freeing himself from the damaged vehicle. Eventually the paramedics removed him from the vehicle all the

while he drifted into and out of consciousness as his body tried coping with the intensity of the pain. The claimant states that even the drive to the hospital was traumatic for him as due to the extent of the damage and the intensity of the pain he felt, any sudden movements of the vehicle increased the intensity of the pain he felt.

- [3] He was attended to by Dr. Horatius Jeffers orthopedic surgeon whose report of the management of the claimant states that the claimant sustained a fracture of the posterior wall of the right acetabular (hip socket). He required open reduction and internal fixation of the right acetabular fracture with plate and screws. At the time of his report weeks after the accident Dr. Jeffers found the hip fracture to be healing satisfactorily although full and unrestricted employment activity was not recommended for a period of 8 months post injury.
- [4] The claimant was forced to undertake rehabilitative physiotherapy and required clinical evaluation to assess for residual impairment and to determine the degree of impairment on work and leisure activities. Dr. Jeffers found that while most persons are able to return to their pre injury employment, about 42% of persons involved in leisure activities, usually require leisure activity modification.
- [5] The claimant avers that the injury has had a severe impact on his recreational activities. He is an avid diver and has received frequent training to improve his skills in that regard. He is a certified diver and had become an instructor and a trainer. Since the accident he is incapable of diving as he develops severe cramping in the hip area. He was constrained in his ability to play with his young son and twins for some time after they were born. He was unable to assist his wife who at the time was pregnant and who had gone into premature labour shortly after the accident. His sex life has been affected by the hip injury which has restricted his range of movements and he is constantly cramping which prevents him from reaching a climax. He avers that he was also a keen sports person who jogged, played lawn tennis, table tennis, football, beach volleyball and

basketball. He is no longer able to carry on any sporting activity that involves running, jumping, kicking or bending. He claims to have suffered depression as a result of all that happened.

- [6] The claimant is entitled to be compensated for the injuries he sustained and the loss and damage occasioned him. The following are the awards made following the assessment of this court of the claimant's injury loss and damage, recoverable under heads of general and special damages.

Special Damages

- [7] Despite the proficiency with which the affidavit evidence and submissions on assessment were presented by the claimant's current counsel who was not the original counsel on record, this could not overcome the deficiencies of the manner in which the claim was initially pleaded with deficiencies in pleading and particularizing of the claimant's loss up to the date of the filing of the claim. In fact the claimant had only pleaded pecuniary loss of \$4530.00 of which the sum of \$1600.00 represented follow up medicals and \$1050.00 was for other transportation expenses. In preparation for the hearing of the assessment of damages the claimant filed a number of affidavits, which in meticulous detail set out the pecuniary losses he in fact incurred together with loss of income each with supporting exhibits detailing his invoices and or receipts.

- [8] Unfortunately, unlike general damages where the law presumes the loss suffered to be the natural or probable consequence of the defendant's act, special damages are of a different species and those damages cannot be presumed to be the consequence of the defendant's act. It must therefore always be explicitly claimed on the pleadings and subsequently proven to be as a result of the defendant's conduct.¹

¹ See Odgers "Principles of pleading and Practice"

- [9] The directions for the hearing of the assessment was given by this court on the 26th November 2012, directing the defendant to be served and inviting his response by affidavit and submissions in one month on the 24th December 2013. This was before SRO No. 3 of 2013. The date for the hearing of the assessment was fixed for the 16th January 2013 but was subsequently heard on the 6th March 2013. The defendant was in attendance he then having just under four months' notice of the hearing and the documents filed in support of assessment. The defendant was unrepresented at the hearing but was himself in attendance at the proceedings and was invited by the court to cross examine the claimant and to ask any questions or to seek clarification of the proceedings. The affidavits of the claimant filed, detailed an augmented claim for damages, to which no objection was taken.
- [10] In **(1) Stephen Davis Whalley (2) Paul Whalley (3) Mary Elizabeth Ann Bingham v (1) PF Developments Ltd (2) Christine Thomason** (2013) CA Civ (Unrep) Lewison L.J. in his dicta stated that where no prejudice had been caused to the defendants as they were on notice of the exact nature of the claim and knew the remedies sought, the statement ought to stand as a statement of loss without the need for any further amendments to the pleadings.
- [11] Judgment having been entered with damages to be determined and the defendant having had notice of the assessment and having had possession of the evidence and submissions in support of the assessment for well over four months he had been put on notice of the damages sought and the award he was to have contended with.
- [12] The claimant averred to have suffered the following losses proven by evidence on affidavit and verified by receipts. Otherwise, in relation to claims unaided by receipts I have concluded that these services were necessary and related to the injury suffered and for which a reasonable expense can be inferred.

- (a) Rental of bed and commode — \$1,054.00
- (b) Costs of Surgery and treatment in January 2008 —\$25,936.85. Costs of surgery in March 2012 — \$7532.20
- (c) Costs of second medical report — \$500.00

The claimant's evidence is that these particular expenses were met by his employer, and in reliance on the principle espoused in **Hunt v Severs** [1994] 2 A.C .350, the court is not entitled to discount the sums as these are adventitious benefits, which for policy reasons are not to be regarded as diminishing the claimant's loss. Although the principle is often relied on in cases regarding the provision of voluntary care services, it can similarly be extended to a case such as this as an exception to the principle of double recovery. I therefore allow these costs in the sum of \$33,969.05

(d) Nursing home care is allowed under the same principle espoused in **Hunt v Severs** for home care provided by the parents. I allow the care for a period of 6 months in 2008 and by the common law wife of the claimant for a period of 3 months in 2012. Despite the claimant's claim that a rate of \$800.00 should be applied, I have considered other awards made in this jurisdiction and with knowledge of the market rate I have applied the rate of EC\$500.00 per month as fair and just, for a total award of \$4500.00.

(e) Loss of Earnings —The claimant was unable to work for 11 months during which time he was in receipt of his full salary. The claimant submits that the payment by the employer was gratuitously made and the claimant is still entitled to recovery. I have disallowed this head in its entirety in so far as the claimant relied on the principle in **Hunt v Severs** to support its claim for an award. The exception in **Severs** is specifically to "fruits of benevolence". An employer is obligated to continue to pay the emoluments of an employee who is away from work on legitimate illness unless these payments are met by

some sort of national health service or insurance scheme. The employer in this instance is not a benevolent third party.

- [13] In **Hunt v. Severs** the House of Lords rejected the broad *res inter alios acta* principle espoused in *Donnelly v. Joyce* [1974] Q.B. 454 and Lord Bridge of Harwich whose reasoning I endorse cited, at p. 360, the passage from the judgment of Megaw L.J. and said:

"With respect, I do not find this reasoning convincing. I accept that the basis of a plaintiff's claim for damages may consist in his need for services but I cannot accept that the question from what source that need has been met is irrelevant. If an injured plaintiff is treated in hospital as a private patient he is entitled to recover the cost of that treatment. But if he receives free treatment under the National Health Service, his need has been met without cost to him and he cannot claim the cost of the treatment from the tortfeasor. So it cannot, I think, be right to say that in all cases the plaintiff's loss is 'for the purpose of damages . . . the proper and reasonable cost of supplying [his] needs.'"

- [14] The total award I have made for special damages is in the sum of \$38,469.00

General Damages

- [15] In assessing damages under this head, the principles in **Cornilliac v St. Louis** (1965) 7 WIR. 491 and accepted by this court 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.

- [16] The claimant states that a reasonable award for the injury he sustained is \$160,000.00 of which 90,000.00 should be allocated to pain and suffering. The claimant relies on the authorities of:—

- (a) **Keithley George et al v Gerald Khoury Antigua and Barbuda Civil Appeal No 19 of 2004**_the Court of Appeal confirmed an award by the trial judge of \$120,000 to the respondent for pain and suffering and loss of amenities for shock and severe pain, multiple bruises and swelling of left ankle and leg, severely comminuted and crushed intra-articular fracture of the lower ends of the tibia and fibula, bruising and operation scars to left ankle.
- (b) **Sherma Mathurin and Rain Forest Sky Rides SLUHCV2008/0551** where the claimant was awarded \$150,000.00 for pain and suffering and loss of amenities. She suffered a displaced intra-articular open fracture of the low end of the right tibia, with a fracture of the fibula. She required immediate surgery which required the restoring of the joint alignment and the internal fixation of plates and screws along with bone grafting of the fracture. Post injury she could not take long walks or run or place any pressure on her ankle. Love making was frustrating as she was limited to a single position and could no longer play with her children.
- (c) **Ronald Fraser v Joe Dalrimple ANUHCV2004/0513**. The claimant a truck driver, married man and father of four children fell from a moving truck, hitting the pavement with his left foot first. He suffered a severely comminuted fracture of left ankle and lower 1/3 of leg; fracture of the left medial malleolus of left tibia.; severely comminuted fracture of lower end fibula; lateral dislocation of left ankle/tibio talar dislocation with lateral shift of talus with ankle diastases; severely contaminated compound wound with neuro-vascular compromise. He was hospitalized for several weeks. The injury was very severe and he was not able to walk for several months. Several pins were placed in his leg to try to assist in mending the ankle and leg. He remained bedridden for five months, after which he began to move around his home and his yard with the aid of a crutch. He had to undergo physiotherapy. He needed to have further surgery on his ankle as it was not healing; the ankle joint had

to be fused. He was in constant pain and could not walk without assistance. He was unable to work since the accident and has not been able to participate with his wife and children in various family activities which he had previously enjoyed. He has full disability of the lower left extremity. His doctors indicated that even if surgery is successful there is significant risk that he will develop osteo-arthritis in the ankle joint. He is required to take pain relievers daily to alleviate the pain and discomfort. He was in 2010 awarded the following:- general damages for pain and suffering in the sum of \$85,000; general damages for loss of amenities in the sum of \$65,000; general damages for future medical expenses in the sum of \$10,000, general damages for loss of future earnings in the sum of \$102,960.

- [17] Having read the evidence of the claimant, the case law provided and cognisant of the guidelines provided in **Cornilliac v St. Louis**, I award the claimant the sum of \$150,000.00 as general damages of which \$70,000 is for loss of amenities.

General Damages —Future Nursing Care

- [18] It is clear from the unchallenged medical evidence that the claimant will be faced with future medical expenses. Dr. Jeffers concluded that Mr. Barthelmy injuries were consistent with blunt trauma of a severe degree. He concluded that approximately 65% of persons with such injuries are expected to have a good to excellent result in terms of long term hip function following surgical repair and this was the anticipated outcome of Mr. Barthelmy. He formed the opinion that there is a 40 to 56% incidence of arthrosis of the hip which may not become apparent until after three to four years. If arthrosis develops and became disabling, hip replacement surgery would be necessary for relief of pain and to enhance ambulation. In the claimant case he required follow up surgery in the period three years following the injury given the incidence of arthrosis. The medical conclusions of Dr. Jeffers respecting the need for hip replacement surgery is that there is a 24% likelihood that this would be required within 10 years given the particularly young age of the claimant. I accept the costs of the hip replacement

surgery and revision of \$75,000.00. I am content to value the mere chance of on-going or future injury where as in this case there is a realistic possibility, not merest speculation. Given the uncertainty of these future damages, it is more equitable to base them on probabilities than to deny them altogether or award them in full. I therefore award a sum of \$55,000.00 inclusively for future medical care.

General Damages — Handicap in the labour market

- [14] The claimant's submits that his employment is based entirely on his ability to engage in physical activity. He continues in employment as a water sports manager although his activities are now restricted to land based activities that are not strenuous. He states that if he loses his current employment he may not be unable to find commensurate employment more so as he will no longer be able to rely on his skills as a professional diver. He testifies to being constantly fearful of losing his job because he is no longer as productive, and demonstrates how he has been affected in the labour market by his injury. His claim is made under this head on the basis that he may not be able to sustain permanence in his current employment and if terminated there is a strong likelihood that he will be unable to contract employment in keeping with his training and speciality. I am required to consider the impact of the claimant's depreciated value in the labour market. The claimant submits that he is entitled to an award of \$717,631.20 calculated at a multiplier of 12 and at a multiplicand of $\$4983.55 \times 12 = \$59,802.60$.
- [15] No doubt the injury has handicapped his future employability and his ability to sustain himself. That he continues in employment I am sure is in no small measure due to the reputation that he has built with his employers prior to his injury, but he is clearly incapable of continuing as a trained diver and instructor and were he to lose his job with the current employer his lifestyle would be impacted. The extent to which he would be impacted is difficult to measure. Damages are awarded usually in compensation and are not to be viewed as unjust enrichment or as an

opportunity to punish the defendant. The manner in which an award is made should be reflective of this. Determining an appropriate award under these circumstances is arduous. The claimant has suffered no diminution in his earnings. He has been elevated to the status of management which may well mean that he acts more in a supervisory capacity and less as the one doing the actual dives and other watersports. I pause to acknowledge that employment in that industry begins to diminish after a certain age and certainly well before what would be a normal retirement age unless one has ascended to a supervisory and management role. Where as in this case the claimant continues in the same salary as formerly and there is no perceived disadvantage in the labour market I find that an award based on loss of earning capacity using the methodology of multiplier and multiplicand to be arbitrary.

[16] I prefer the route of an award reflecting the claimant's handicap in the labour market. An award under this head is usually made where a claimant has continued to work with his same employer and at the same rate of pay, but with an accepted handicap for which his employability is at risk. In **Moeliker v Reyrolle & Co** [1977] 1 WLR 132 the UK Court of Appeal emphasised the need to show a substantial as oppose to a negligible risk of disadvantage. I am satisfied that given the level of training and commitment that had been made by the claimant to his field, and the fact that he is now severely restricted in his ability to conduct these activities that there is a real risk that he will be affected in the labour market.

[17] These awards have not traditionally been significant and has been without an identified methodology. I feel compelled to ensure that the claimant is not disadvantaged for what we are unable to foresee and as such I am cautious not to be too conservative in my consideration of an appropriate award. Despite this, I have awarded the claimant the costs of hip replacement surgery, which surgery should resolve the current difficulties the claimant faces and which compromise him in the labour market. In the circumstances I award the claimant his annual salary x1 being \$59,802.60 as an award for his handicap in the labour market.

Summary of award

- [18] The claimant is entitled to the following relief:- Special Damages \$\$33,969.05; Pain suffering and loss of amenities \$150,000.00 of which \$70,000 is for loss of amenities; Future medical care \$55,000.00; Loss of earning capacity \$59,802.60 for a total award of \$298,771.65.

Interest and costs

- [19] Interest is award on special damages at the rate of 3% from the date of injury to judgment and at the rate of 6% from judgment to payment in full and on General damages at the rate of 3 % from service of the claim form to judgment and at the rate of 6% from judgment to payment in full.
- [20] The defendant is to bear the prescribed costs of the claim up to an including the assessment of damages in a sum equal to 60% of the prescribed costs on the damages awarded.

V. GEORGIS TAYLOR-ALEXANDER
High Court Master