

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT VINCENT

CLAIM NO. SVGHCV2009/0359

BETWEEN:

KAREN JOHN

CLAIMANT

AND

DAVID DIBIQUE

DEFENDANT

Appearances:

Mr. Duane Daniel of Counsel for the Claimant

The Defendant absent and unrepresented

2014: March 20th

Reissued: April 8th 2014

DECISION

- [1] **TAYLOR-ALEXANDER M:** This is a most unfortunate incident dramatized by the shooting of the claimant who at the time was a 22 year old female bartender and a mother of a young child. The defendant was an intoxicated patron at Fun City in Kingstown, St. Vincent where the claimant worked, who recklessly discharged a firearm at the bar, shooting the claimant in the right side of

her chest paralysing her right and dominant arm which had to be amputated at the position of the shoulder. The defendant was criminally prosecuted and convicted and he pleaded guilty to wounding with intent and unlawful use of a firearm. Judgment in these proceedings was entered for the claimant on a claim filed on the 2nd November 2009, upon which the court on 6th March 2012 ordered:—

- “ a. *Judgment is entered for the Claimant.*
- b. *The Defendant shall pay the Claimant special damages claimed and general damages for the injury suffered.*
- c. *The damages shall be assessed on the application of the Claimant, such application to be made within three months.*
- d. *The defendant shall pay the claimant interest on the sum assessed at the rate of six (6) per cent per annum from the date of assessment until final payment.*
- e. *The defendant shall pay the claimant's costs as prescribed in Part 65 of CPR 2000.*”

[3] Damages for the injury loss and damage sustained by the claimant are now to be assessed.

Issues

[4] The claimant sues for special damages including loss of earnings; future pecuniary loss; future medical care; pain suffering and loss of amenities, a total claim of \$585,135.77. I am required to assess her entitlement to awards under these heads of damages and where I find she is entitled, to determine an appropriate award.

[3] The defendant was not in attendance at the date of assessment. He was present on the 9th December 2013 when directions were given for him to file submissions and authorities within 21 days and ahead of the hearing of the assessment of damages. The defendant had in the past, been represented by a number of counsels. Mr. Jomo Thomas who had placed himself formally on the record withdrew on the 13th January 2011. The defendant by his choice, is without

representation. He has failed to comply with the order of Master Actie to file his submissions and the natural assumption I have drawn, is that he has no interest in participating in the assessment.

- [4] A defendant is liable for damages flowing directly from his negligence and the obligation of the court on assessment is to attempt as nearly as possible to restore the party injured to the position she would have been in, had the injury not occurred. The objective was stated thus by Lord Blackburn in **Livingstone v Rawyards Coal Company** [1880] HL. He said:—

“I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong or which he is now getting his compensation or reparation.”

- [5] Damages are awarded under the heads of general and special damages. Lord Goddard in **British Transport Commission v Gourley** 1955 3 AER page 796 explained its application thus:—

“In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and if the injuries suffered are such as to lead to continuing or permanent disability compensation for loss of earning power in the future.”

General Damages

- [6] The claimant suffered a fractured right clavicle and injuries to the subclavian artery and brachial artery with a large aneurysm communicating with the subclavian/brachial vein. Venous grafting was necessary to harvest the saphenous vein from her right thigh, to regenerate her arm. This surgery was ultimately unsuccessful. The claimant underwent a total of five surgeries of which two were for

amputations. The period following the shooting was medically traumatic and reciting the medical evidence is important.

Medical Evidence/ Dr H Dougan Consultant Surgeon

- [7] The claimant was first attended to by Dr Dougan. He found that the claimant suffered a gunshot wound to her right neck with injury to the subclavian vessels and the brachial plexus. According to his report she was treated and was hospitalised for eight days during which time she was given rapid fluid infusion and transfusion of two unit packs of red blood cells and was observed in the ICU. She was thereafter flown to Trinidad accompanied by medical personnel for further observation and for several life-saving surgeries and intended at saving her right arm. Despite these efforts the arm suffered from lack of circulation and turned black, forcing its amputation below the elbow to prevent mortality and morbidity of her arm. In time there was chronic swelling of the stump with necrosis and dehiscence of the wound, due to disturbance in circulation of the arm as a result of the injury. Further surgical operation resulted in total amputation of the right arm up to the shoulder.

Dr Celestine Ragoonanan, FRCS, Vascular Surgeon Trinidad

- [8] Dr Ragoonanan found that on presentation, on the 7th January 2007, the claimant's whole right arm up to the level of the shoulder was paralysed. The whole arm from the level of the shoulder was also swollen. There was loss of sensation from below the elbow. All pulses in the arm were absent and this arm was cooler than her left.
- [9] A CXR revealed a displaced fracture of the mid clavicle and a bullet lodged just below the glenoid. An Angiogram was therefore performed and this revealed a very complex injury. It appeared that the 3rd part of the subclavian artery/1st part of the brachial artery was disrupted with a large false aneurysm which communicated with the subclavian/brachial vein. The main presenting clinical problem was an expanding aneurysm and the viability of the upper limb brachial plexus injury. A neurosurgeon was consulted with respect of her brachial plexus and he advised exploration in two months if there were no signs of recovery. Preparation for exploration of her injury was commenced. The objectives of the operation were to exclude and obliterate the aneurysm and to

restore circulation to her arm. Full informed consent was practiced and loss of the limb among other things was cited as a probable complication. Both mother and daughter were fully informed of this. There was some delay in procuring blood for her operation as the patient had no blood donors.

- [10] On the 13th of January 2007 surgery was undertaken to effectively isolate the 'false aneurysm'. The next day the arm failed to warm up and it was thought that there might be an embolic clot/thrombosis to the vessels of the arm and forearm. I.V. heparin was commenced at therapeutic doses. On the 15th of January, the vessels of the arm were explored via the antecubital fossa. No appreciable clot was retrieved using a size 3 forgathy's but high resistance to flow was encountered. The next day, the whole wound was re explored and the grafts examined. Postoperatively she was fully anti-coagulated and maintained on the IV antibiotics. The forearm however still appeared ischaemic and on 17th January 2007 her distal anastomosis was explored. It appeared that there was distal resistance to flow and perhaps there was widespread distal microvascular thrombosis. As a security, a reversed LSV graft harvested from her left thigh was fashioned from a good distal brachial artery. The graft was obviously patent to the bifurcation of this artery. In spite of all this her forearm failed to warm up although her arm appeared fully perfused. On 19th of January 2007, under local anaesthesia, her forearm vessels were again embolectomized.
- [11] Over the course of the next few days her distal forearm behaved erratically with respect to perfusion. Eventually the forearm started to show irreversible ischaemic signs. This was extremely distressing to the patient and not unexpectedly there appeared to be some inappropriate behaviour. At that point a psychiatrist was consulted and he commenced some appropriate treatment. She became toxic and the antibiotic regimen was changed to high doses IV elequine. On the 6th of Feb 2007 she underwent a guillotine below elbow amputation for spreading infection and generalized sepsis. Post op intransite gel and iodine were utilized for wound management.
- [12] There was some recovery of motor and sensor function of the arm and stump. The surgical wounds were practically all healed on discharge. The bullet remains at the inferior edge of the glenoid. The doctors feel there is no need to retrieve the bullet as it may never present any problems. This was fully explained to the patient and her mother. The failure to restore perfusion of

the forearm could have been due to embolisation/thrombosis of the small vessels of her forearm. The source of embolic material could have arisen her traumatic aneurysm.

Dr. Charles Woods Consultant Orthopaedic Surgeon

- [13] Dr. Woods attended to the claimant in 2008 after she developed chronic swelling of the stump, with necrosis and dehiscence of the wound. The limb was also painful. He recommended that the stump be resected at a higher level. Naturally the claimant was initially resistant to this and refused surgery. However as it became clear that there were no other options available she agreed to have the procedure done. Amputation of the right arm at the shoulder was performed on the 3rd April 2008. There were no complications after surgery and the patient was discharged after an uneventful hospital stay. The claimant recuperated well after her surgery and had no severe problems with the stump of her arm, apart from some hypersensitivity. Dr Woods found that the claimant would benefit from the fitting of a prosthetic right upper limb, which would have to be performed overseas as such services are not available in St. Vincent. In Dr Woods' opinion the claimant has sustained much physical and psychological trauma, as well as permanent disability due to her injury and the resultant loss of her right arm. Her future employability and social interaction would also be severely negatively impacted.

General considerations of the Evidence

The narratives of the doctors are indicative of the traumatic experience this young lady endured from the night of the incident and through the nightmare of her clinical evaluations and surgeries. She has had to endure the pain and discomfort of being without her arm and having to grow accustomed to unnaturally doing with one arm what she naturally was meant to do with two. She will again go through pain and discomfort and readjustment when she is fitted with a prosthetic limb.

Loss of Amenities

- [14] The claimant, who I observed to be of athletic build, is now 29 years old. She avers that she was in robust health prior to the accident. She worked as a bartender up to the night of the accident and due to her injuries she has been unemployed and she avers to being unable to pursue any form of gainful employment. She finds it difficult to do her domestic chores and caring for herself and her

now two young children is a challenge. She can no longer pick up her children in her arms and is limited in the way she can play and interact with them.

[15] She continues emotionally distressed, her self-esteem affected, as she feels that she is now unattractive to the opposite sex. Prior to the incident she was a regular on the karaoke scene. Her confidence has been so affected, her inability to gesticulate as well, such that she shies away from participation that hitherto had brought her pleasure. She was a netballer and had an active social life both of which she has stopped as a result of her injuries.

[16] In assessing general damages I am reminded of the guidelines in **Cornilliac v St. Louis**¹ and settled as the applicable principles for the assessment of awards in our jurisdiction in **Alphonso and Others v Deodat Ramnath**² (i) the nature and extent of the injuries sustained (ii) the nature and gravity of the resulting physical disability (iii) the pain and suffering which she had to endure and is enduring (iv) the loss of amenities suffered and (v) the extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

[17] The Judicial Studies Board's (now Judicial College's) personal injury guidelines place amputation of one arm in the range of an award of £52,500.00—£75,000.00, equivalent to ECC \$232,810.00—\$332,587.00. I have also considered the authorities provided by the claimant of SVGHCV2012/0029 **Dwight Mayers v Carl Williams and Shell Antilles and Guianas Limited and Omar Wilson v VCG Holdings Limited** 4996 of 2010 by the High Court of Jamaica both of which involve injury to the party's right and dominant hand. In Omar there was amputation at the location below the elbow. I have also considered the award I made in **Davis Balcombe v Vaughn Lowman** SVGHCV2006/0375 where an award of \$115,000.00 was made for the amputation of a right arm at an area above the elbow.

[18] There is no comparison in these cases with the loss suffered by the claimant in this current case as regards the impact on her home life, lifestyle, working life and social life, for which a greater award must be considered.

¹ 1(1965) 3 All ER 109

² (1965) 7 WIR 491

[19] I am reminded of the dicta of Lord Hope of Craighead in the House of Lords decision of **Wells v Wells** [1998] 3 ALL ER 481 where he stated thus:

"The amount of an award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the plaintiff's general damages".

[20] I have considered the age of the claimant, that she was only 22 at the time of the injury and had just begun her young adult life. I am reminded of the traumatic period following the injury in her attempts to save her life and arm, the pain and suffering she endured and was aware of was immense. I have given particular weight to the reports of the medical practitioners that detail the number and difficulties of the surgery and their own views as to the seriousness of the injury and the particular traumatic impact of the surgeries on the claimant and the sudden appreciation in the last surgery of the guillotine of her entire limb. She suffered a serious injury with resultant serious permanent disability, and the impact on her life has been tremendous and continues. In John Munkman's treatise on "Damages for Personal Injury and Death " the authors acknowledge at page 127 that young persons would generally attract a higher award, and in estimating damages for the loss of pleasures of life, youth and age are important considerations. I feel compelled to make a separate award for pain and suffering and for loss of amenities given the impact of the injury on the rest of the claimant's life.

[21] I award the sum of \$110,000.00 for pain and suffering and the sum of \$120,000.00 for loss of amenities for a total award of \$230,000.00.

Special Damages

[22] The decision of Thom J in these proceedings has removed the determination of special damages from my remit. The court having awarded the claimant her special damages in full. In the circumstances the claimant is awarded her special damages in the sum of \$118,105.77

Pre-Trial and Prospective Loss of Earnings

- [24] The claimant is entitled to damages for the loss of her earning capacity resulting from her injury³.
- [25] At the time of the accident she avers that she was employed at a monthly salary of \$680.00. No evidence was provided of any salary slips, income tax returns, social security deductions or the like to substantiate her claim that she was gainfully employed, but so too I have no reason not to accept her evidence of the fact of her employment and her salary. She has not stated that she has lost her job but the assumption is made. She claims as pecuniary loss the sum of \$23,210.00 for the period January 2007 to the end of October 2009, the period immediately preceding the filing of her claim for damages and thereafter to the date of judgment. For prospective loss she submits that an appropriate multiplier to be used is 16 although the claimant is a 29-year-old woman and assuming a notional retirement age of 60, she has a remaining working life of 31 years. She submits that an appropriate multiplicand is her annual salary of \$8,160.
- [26] There is no doubt that this incident will have a lifelong impact on the claimant and that the quality of her life has been significantly diminished. I cannot however appreciate that she is incapable of a healthy productive life in which she is able to further herself and improve her life and obtain employment. I appreciate that the claimant may suffer from issues of self-esteem but that too she will in time have to overcome and to resume a life of normalcy. I have granted the claimant's loss of salary up to the date of the filing of the claim in the sum claimed of \$33,320.99 and from filing for a further period of two years at her annual salary, during which time the claimant ought to have been making the adjustments in her lifestyle so as to cope with the long term impact of the injury.
- [27] As to the claimant's prospective loss I have given considerable thought to whether the more appropriate award should be one for loss of future earnings or whether a more appropriate award should be for handicap in the labour market. Historically the later award was considered more appropriate where the person injured continued in their employment or even at a higher salary but with a strong likelihood that if they were to lose their employment they would most certainly be disadvantaged in the labour market. In the more recent decisions in **In Cooke v Consolidated Industries** [1977] I.C.R. 635 Browne L.J.at page 640 said this:

³ Mc Gregor on Damages 17th ed at page [1196] Para 35-047

"In my view, it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge said: looking ahead as best I can with the information before me, I expect that the plaintiff will obtain employment pretty well immediately. ." The judge turned out to be quite right, because he did In Moeliker 's case at p. 261 of the report in [1976] ICR, 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial is in employment." On second thoughts, I realise that is wrong. That was what I said but on second thoughts I realised that I was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally, "and that appears at [1977 1 All ER 9, 15."

[28] Clearly the claimant's earning capacity has diminished but there is no reason for me to conclude that the claimant is unable to resume some semblance of normalcy despite her obvious handicap. She is under an obligation to do so, as no award will compensate her enough for her not to try. This is not a case for an award of prospective loss of earning. Instead I am prepared to consider as a more appropriate award her handicap in the labour market. Such an award may be granted where there is a substantial as oppose to a negligible risk of disadvantage. See **Moeliker v Reyrolle & Co** [1977] 1 WLR 132. I am satisfied of that fact.

[29] Awards for handicap in the labour market have not traditionally been significant and have been without an identified methodology. In the exercise of my discretion I must consider that the claimant is not to be disadvantaged by too rigid an application of the principles of the award. Having considered all of the evidence and guided by the case law I have read, I have awarded the claimant her full annual salary for a further period 5 years as a sum representing her handicap in the labour market. While I am of the view that five years after the injury the more appropriate award would be to reduce the award of a full salary and I was inclined to reduce the claimant's award in the second five years to 50% of her salary, I hesitated to do so as her own claim did not account for any increases to her salary over the years. Her salary at 22 was a basic salary at a time when she had just entered the labour market. More than likely than not, her salary would have increased during the period under review. For those reasons I have left the application of her salary untouched. The award therefore is in the sum of $\$650 \times 12 \times 5 = \$39,000.00$.

Future Medical Care

- [30] It is clear from the unchallenged medical evidence that the claimant will be faced with future medical expenses. The report of Dr Woods is instructive. The claimant has cost the prosthetic limb in the sum of \$40,650.00 which is the sum I award for future medical care.

Summary of award

- [31] The claimant is entitled to the following relief:- Special Damages of \$118,105.77; Pain suffering and loss of amenities \$230,000.00 of which \$120,000 is for loss of amenities; Future medical care \$40,650.00; and handicap in the labour market of \$39,000.00 for a total award of \$ 427,755.77

Interest and costs

- [32] Interest is awarded on special damages at the rate of 4.5% from the date of injury to the date of 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 the date of judgment and at the rate of 6% from the date of judgment to the date of payment in full. There is no application on prospective loss of earnings.
- [33] The defendant is to bear the prescribed costs of the claim up to an including the assessment in the sum of \$51,525.50.

**V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT MASTER**