

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2013/0965

BETWEEN:

MARY ANDERSON

Claimant

and

(1) KENSON DONACIEN
(2) LESTER CHARLES

Defendants

APPEARANCES :

Mrs. Lydia Faisal of Counsel for the Claimant

Mrs. Esther Greene-Ernest of Counsel for the Defendants

2014: 11th July

5th, 11th August

DECISION ON ASSESSMENT OF DAMAGES

[1] TAYLOR-ALEXANDER. M; Judgment in these proceedings has been entered in default, for damages, for the injury, loss and damage suffered by the claimant as a result of a road accident. Judgment was entered against both defendants. These damages now stand to be assessed.

[2] The assessment of damages came on for hearing on the 11th of July 2014, and after considering the pleadings, the written submissions of the parties and their oral submissions of the parties, I have assessed damages as follows:—

Special Damages

[3] This includes all the items of damage capable of more or less precise calculation, and in this case it comprises medical and other expenses and loss of earnings to the date of filing of the claim. The following were submitted as incurred loss:—

- i) **Medical and Miscellaneous Expenses.** This includes the hospital bills and expenses incurred at St. Jude's Hospital in the amount of \$10,622.03. The total award agreed by the parties is for the sum \$11,552.03, which I award.
- ii) **Loss of Earnings:** The parties are agreed on the daily rate of \$42.63, as the income that the claimant had earned immediately prior to the accident. It is also agreed that it is to be applied from the date of accident being 25th December 2010 to 7th January 2012, for a total of 22 days per month, a total sum of \$24,853.82. From this sum is to be discounted the sum of \$10,791.60 being salary paid by the employer during the period under consideration and \$13,300.56 being sums paid out by the National Insurance Corporation in relation to statutory insurance. Following these discounts, the claimant is entitled to the balance being the sum of \$761.66.

General Damages

[4] Our courts have directed the award of general damages under five heads outlined in **Cornilliac v St. Louis** (1964) 7WIR 491 at 492 and approved in **Alphonso and Others v Deodat Ramnath** (1965) 7 WIR 491 . These are stated to be (a) the nature and extent of the injuries suffered; (b) the nature and gravity of the resulting

physical injury; (c)the pain and suffering which had to be endured;(d) the loss of amenities suffered; and; (e)the extent to which consequentially the claimant's pecuniary prospects have been materially affected. I have given due consideration to these guidelines in the determination of an appropriate award.

- [5] There is filed with the claimant's affidavit the report of Dr. Dabgue, Consultant Orthopaedic Surgeon. It is dated three years post injury, and it records the claimant's medical history from the 25th December 2010, when she first attended the St. Jude's Hospital. At the date of report she had reached maximum medical improvement. According to Dr. Dagbue the claimant suffered with a comminuted fracture of the mid-shaft of the left femur; comminuted fracture of the distal 1/3 of the right femur; blunt soft tissue injury to the right ankle and neck and a type 111 sprain of the right acrimo-clavicular joint. She was hospitalized for approximately two weeks, during which time she was treated with skeletal traction and the insertion of permanent steinman pins in both lower limbs. On the 29th December 2010 she underwent open reduction and internal fixation of both fractures. The claimant avers that as a result of the accident her right shoulder is deformed, as the end of her right collar bone sticks out clearly beneath the skin. She avers that she now walks with a pronounced and awkward limp. Walking long distances is challenging, and she is now unable to run at all. She has had to have physical therapy to improve her gait. According to the report of Dr. Dagbue, the claimant will have a permanent limp in walking for the rest of her life although her walk may improve with some gait training. She suffers with deformity of the right shoulder which has compromised her ability to lift heavy objects. Surgery will improve her shoulder.
- [6] The claimant had a period of temporary total disability during a period of 54 weeks when she was unable to ambulate properly. She was discharged from the hospital after 10 days with follow up treatment in the out-patient clinic which she continued to attend as of the February 2013. Despite her therapy she will to continue to have pain in her legs after standing for a prolonged period. She continues with joint dislocation of the collar bone and shoulder blade joint. She is now unemployed

and fears she will have difficulty securing employment due to the effect of her injuries.

- [7] The parties were of considerable assistance in providing the court with authorities to direct an appropriate award. I have considered the cases provided by the claimant, In particular, **Sherma Mathurin v Rain Forest Skyrides** SLUHCV2008/0551 a decision of Georges J (Ag) where an award was made of \$150,000.00 for pain suffering and loss of amenities, for similar type injuries, but where the court had given particular consideration to the effect of the injury on the claimant's daily life. In **Lincoln Carty v Lionel Patrick** a 2009 decision of St. Kitts and Nevis, where Belle J awarded a sum of \$175,000.00 for pain suffering and loss of amenities to a claimant whose injuries included a fracture of the right femur and of the pubis ramous, fractures of ribs, permanent dislocation of joint in the sternum, cervical neck strain, other lacerations and contusions. The claimant suffers with prolonged and severe migraines His right leg is now shorter than the left and he is reduced to using a cane. He suffers with post-traumatic stress disorder. The defendant on the other hand relied on **Pigott v Veleloma Potter** ANUHCV 2010/0423 concerning a claimant who suffers with a severely comminuted fracture of the right femur, a 1.25 lower limb shortening; 15 degree of angulation /mal-union at the fracture site of the injured femur. There is overall 45% permanent physical impairment of the right lower extremity and 18% whole person impairment. A total award of \$50,000.00 was made for pain suffering and loss of amenities In **Ryan Richard v Michael François** GDAHCV2010/0156, an award was made of \$80,000.00 for a claimant whose injuries in the main were of a comminuted mid shaft fracture, permanent limp and deformity. The cases are all similar in the nature of the injuries suffered and the region in which an award can be made, each has its marked factual differences. I consider the circumstances of this case to most closely resemble **Sherma Mathurin v Rain Forest Skyrides**. Having considered the particular circumstances of this case and applied my discretion thereto, I award the claimant the sum of \$150,000.00 as a total sum for her pain suffering and loss of amenities.

The extent to which pecuniary prospects were affected

- [8] I have considered the rival submissions of counsels for the parties. It is undisputed that the claimant was employed as a housekeeper at a hotel at the time of the accident, and that she no longer holds that position. It is her evidence that she was relieved from work due to the difficulties she faces resulting from the accident. Although her clinical condition is now stable and X rays show a complete healing of the fractures, she suffers from persistent dislocation of the right acromioclavicular joint, which results in pain whenever she lifts anything heavy. The claimant avers that she has been left with visible deformity from the accident. She will continue to have a limp for the rest of her life, and she has a prominent projecting lateral end of the right clavicle both of which she states compromise her future employment.
- [9] Dr. Dagbue confirms that the claimant will most likely have pain in both thighs when she stands for prolonged periods which he says will compromise her in choosing jobs that require her to stand for prolonged periods. She has a combined whole person impairment of 14%. The claimant is now a 41 year old female. She is unskilled and she is unemployed. Her lack of skill limits her in the availability of employment. No doubt, her deformity will present her with additional challenges in the labour market and in an industry that is sensitive to anything unconventional. I have no difficulty concluding that she has been disadvantaged in the labour market. The question for my consideration is whether she is incapable of earning a living at all or whether she capable of working but with decided disadvantage in the labour market, in which case this court would have to consider an award to mitigate such disadvantage. No doubt she suffers from some mobility challenges and until her shoulder is healed she will have difficulty lifting heavy objects which will present challenges as a housekeeper. But I note that there is no further deterioration of her medical condition, and likely improvement in her shoulder. I am therefore of the view that the claimant's assessment of her inability to secure work is unreasonable. There is always factual uncertainty that undergirds such claims,

which makes the fairness of assessment of loss difficult. At best a rigorous examination of the medical evidence and of the evidence presented is the court's best guide. Having done so, I award a sum of \$55,095.60 being a sum in consideration of the claimant's now disadvantage in the labour market. The sum was arrived at considering a multiplier of 14 as submitted by the defendant and considering a deduction of 35% in the claimant's former annual wages.

Future Surgery

[10] This has been agreed in the sum of \$7,965.76, and I so award.

Nursing Care

[11] The claimant avers that her husband was forced to leave his job to care for her and on that basis he claims the sum of \$130.00 daily, for the assistance he provided. That fact that the assistance was provided by a family member does not diminish the value of what was given, however I prefer the approach of the defendants in assessing an appropriate award, being to average what is a reasonable monthly sum that is paid for nursing care and to consider the deduction for the fact that such assistance was provided by a family member. I have considered a sum of \$50.00 as the average daily wage for domestic care. Monthly at 7 days a week, this equates to \$1400.00. The parties are agreed that these sums are to be paid at 100% for 54 weeks and at 50% for 26 weeks for a total of \$15,912.50.

Conclusion

[12] The following is a summary of the awards I have made:—

For special damages the sum of \$12,313.69, with sum will carry interest at the rate of 3% per annum from the 25th December 2010 to the date of judgment and at the rate of 6% per annum from the date of judgment to the date of payment in full.

For general damages, for pain suffering and loss of amenities, the sum of \$150,000.00. \$15,912.50 for nursing care and the sum of \$7,965.76 for future surgery, for a total award of \$173,878.26, together with interest thereon at the rate of 6% per annum from the date of judgment to the date of payment in full.

For disadvantage in the labour market the sum of \$55,095.60 on which I make no award for interest.

Conduct of the Assessment

[12] Both Mrs. Lydia Faisal and Mrs. Esther Greene-Ernest provided tremendous assistance to the court during this assessment both in the knowledge of the file and in the application of relevant legal principles and case law. Undoubtedly, their assistance resulted in the speedy conclusion of this assessment. Their participation and thorough preparedness should stand as guidance to other legal practitioners in the manner in which such assessments should be conducted.

V. GEORGIS TAYLOR-ALEXANDER

HIGH COURT MASTER