THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA

CLAIM NO. AXAHCV2013/0101

BETWEEN: ANDREA LISANDO

Claimant

and

(1) BERNARD RICHARDSON
(2) LORNA GUMBS SCOTT

Defendants

APPEARANCES :

Mrs. Keisha Carty of Counsel for the Claimant
Ms. Tara Carter of Counsel for the Defendants

2014: September 30th
December 16th, 29th

DECISION ON ASSESSMENT OF DAMAGES

[1] TAYLOR-ALEXANDER, M.: Judgment was entered in default, in this suit against the two defendants for the injury, loss and damage suffered by the claimant as a result of a road accident. The damages have now come on for assessment.

[2] The parties have agreed the special damages in the sum of $115,000.00. The assessment continues in relation to the claim for general damages, and the claim for future loss of earnings.

Brief Facts

[3] The claimant was injured in a vehicular accident on the 19th May 2013, which was caused by the 1st and 2nd defendants as driver and owner respectively of a motor jeep P9102. The claimant suffered the following injuries:—

(a) Mild head injury with frontal hematoma;

(b) Blunt chest and abdominal trauma;

(c) Dislocated right hip;

(d) Soft tissue injury;

(e) Fracture of the right tibial bone with lateral meniscus tear.

[4] These injuries are supported by the various medical reports filed by the claimant including the reports of :—

(a) Dr. Vonetta George dated the 31st May and 4th September 2013;

(b) Dr. Jean Francois Bartoli dated the 13th June 2013;

(c) Dr. Duane Hendrickson dated the 4th, 5th and 16th July 2013 and 20th October 2013.

Claimant's evidence on assessment

[5] The claimant was born on the 4th of August 1961 and is 52 years of age. She was admitted to hospital for her injuries and was treated and discharged on the 22nd of May 2013 on strict bed rest and with follow up appointments to the outpatient clinic. The claimant states that while in hospital she suffered severe pain in her knee and hip, requiring her to wear special stockings and a hot and cold patch. She states that even after discharge from the hospital she could not walk and she continued in tremendous pain. She was forced to travel to St. Maarten to do an MRI of her knee. Dr. Bartoli, who examined the MRI, reported a lateral split depression tibial fracture type II of the right knee and moderate posterior conflict of the right ankle caused by a posterior trigonum bone. On reviewing the results of the MRI her primary doctor, Dr. George suggested that she try to walk with

crutches in the meantime and that she see a specialist. Dr. Duane Hendrickson in St. Kitts was the closest specialist to Anguilla and on 2nd July 2013 she travelled to St Kitts to undergo consultation, assessment and surgery. Surgery was performed on the 4th of July 2013 to undertake a partial menisectomy of the lateral meniscus and to perform partial synovectomy, to treat the effect of rheumatoid arthritis.The claimant used a right crutch for six weeks following surgery and she was ordered to take glucosamine and chondroitin sulphate in doses of 1500mg a day for three months to facilitate the healing of the knee. She was also directed to a nutritionist for weight loss management. That was in relation to osteoarthritis changes in her knee. Dr. Hendrickson the orthopedic surgeon concluded that a period of four months from surgery would be required for recovery as physiotherapy treatment had to play a major role in her rehabilitation.

[6] When she was examined on the 20th October 2013, by Dr. Hendrickson, the claimant had made mild progress. Her therapy treatment was changed; incorporating water aerobics and she was directed to see a chiropractor once a week during that period.

[7] Up until August 2014, and despite the surgery and a year of physiotherapy, the claimant has remained in pain. Dr. Hendrickson the orthopedic surgeon who attended to the claimant has now recommended a further MRI with a view to doing hip and ligament replacement surgery.

[8] The claimant avers that she has worked in the hospitality industry for most of her life. She says the traffic accident has impacted and diminished her life. Following the accident she was unable to work until the 4th of February 2014. Her employment with Ce Blue Resort as its liaison officer was compromised. She avers that her duties required her to co-ordinate with Government Departments in order to secure permits, licences and other such permissions for the hotel. She also supervised operations, trained employees and ensured the smooth running of the business as agent for the main investor. Her work she avers, required her to be up and about; on the road; running errands; walking around on property and

helping where she could to ensure physical tasks were completed. For this she received a monthly salary of US$2,500.00. Her injuries have left her incapacitated to perform the functions that she previously did, and she was forced to take sick leave for which she has not be paid.

[9] The claimant states that she was forced to resign from the Ce Blue Resort on 31st January 2014, and commence seasonal employment from 1st December 2014. She is now employed by Crocus Bay Limited as the Food and Beverage Manager. Her hours are from 10:00am to 1:00pm and 5:00pm to 8:00pm. She says that she is now seasonally employed from October to March. This she says she was forced to do because of the injury to her knee and the continuous pain she suffers. She claims to have been financially disadvantaged as her starting wage is now US$10.00 an hour, compared to US$25.00 in her former position. It should be noted that both the former employer whom she refers to as Ce blue and current employer Crocus Bay are one and the same as Crocus Bay Trades as the Ce Blue Resort.

[10] In her personal life, she says that she has also been affected. She has difficulty picking up her granddaughter, doing gardening which she liked, dancing, exercising and walking. She must use a cushion for sitting, she uses a cane for walking; she is unable to drive for very long and she finds foreplay and sexual activity to be very painful. As a consequence of the change in her lifestyle, she has become depressed, unmotivated and frustrated.

Evidence of Dr. Hendrickson

[11] He is a Cuban trained graduate who for six years was a general practitioner. In the last two years he has been trained and practices as an orthopedic surgeon in St. Kitts at the J. N. France Hospital. He first saw the claimant, in July 2013. When she was referred as a patient, He performed arthroscopic surgery, to confirm the diagnosis of Dr. Bartoli and Dr. George. Following his review of a MRI and after giving her a physical exam, Dr. Hendrickson confirmed the need

for a partial meniscetomy. According to his evidence he was able to ascertain from the arthroscopic surgery that the extension of the knee joint cavity was normal, that there was some disruption to cartilage. There was no exposed bone, but there were gaps in the cartilage, which gaps he said are frequently caused by age and trauma. In this case, there was reactive synovitis an inflammation of the lining of the knee, which suggested to him that it was as a result of trauma. The ACL, one of the major ligaments in a knee, was intact, and there was no deterioration to the cartilage in the knee bones. Overall he was satisfied that the ligaments in the knee were normal. He found signs of arthritis within the patellar femoral and he observed a recent tear of the lateral meniscus that is a soft tissue that is within the femur and the tibia, that act as a cushion. It is divided into two, the anterior horn and the posterior horn. The tear within the posterior horn was a partial tear. He also observed a lateral split depressed tibial fracture. He proceeded to repair the lateral meniscus tear.

[12] On cross examination he stated that he had never met the claimant before the day that he performed arthroscopic surgery and repair to the tissue. Nor had he seen any comparable MRI's. He could not confirm whether the tear had existed prior to the accident, but he states that had it been from age, there would have been certain changes to the inside of the knee. Additional notes from his physical exam, namely that the claimant had reported to him that she had had buckling of the knee, confirmed that it was as a result of trauma. He stated that it was usual to leave a partial tear of the meniscus, as it tends to heal on its own, without surgical intervention, although he noted that that was not always the case. Whether there is surgical intervention depends on the clinical physical exam of the patient and what is revealed by the MRI. That procedure he said has a success rate, of 90 to 95 percent. He confirmed that there are some tears of the meniscus, that are worsened by surgical intervention and there are complications to having such operation. In the case of the claimant he said that surgery was necessary as her symptoms and her clinical manifestation, indicated there was a need for surgery. In particular the patient was unable to

bear weight; she had a buckling sensation while walking or even standing, she also had difficulty in flexing the knee backwards, and swelling of the knee. He did not agree that his intervention was unsuccessful. He stated that there can be complications following the procedure, and the claimant has had complications, such that she has not improved and has even regressed.

[13] Dr. Hendrickson stated that as there has been no improvement from surgery, ligament and hip replacement surgery is a certainty, although he says this must be confirmed by an MRI which the patient has not yet done. On cross examination he admitted that an MRI would provide conclusive proof of whether replacement surgery was necessary, but that his observations of continuing instability in the joint makes his conclusions reasoned. He agreed nevertheless that his were speculative guesses.

Assessment of the evidence of Dr. Hendrickson

[14] There was no challenge by the defendants to the claimant's evidence of her loss of amenities as a result of the injuries. There was some implication that the present continuing pain and deteriorating health of the claimant may well have been caused by the surgery which has exacerbated the condition.

[15] I have difficulty agreeing with the conclusions of Dr. Hendrickson that the surgery was successful. By his own evidence, the patient's condition regressed after surgery and her pain up to one year following the surgery continues. There has been no further MRI to determine the success of the surgery he performed to the lateral meniscus, although the indicators are that her condition has not improved. Despite this, I am unable to conclude that it was the surgery that caused a worsening of the patient's condition. This may have been alluded to by the defendants, but no rebuttal evidence was advanced to contradict the findings and conclusions of Dr. Hendrickson. In any event and in so far as the defendants imply that the intervention by Dr. Hendrickson may have exacerbated

the claimant's condition, this was neither pleaded nor supported by the evidence. I therefore find that the patients deteriorating condition and her continuing discomfort was as a result of the accident she sustained arising from the defendants' negligence.

General Damages

[16] A defendant is liable for damages flowing directly from his negligence and a court is charged with the obligation as nearly as possible to restore the party injured to the position he would have been in had the injury not occurred. This was the view of Lord Blackburn in Livingstone v Rawyards Coal Company [1880] HL.

"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 for which he is now getting his compensation or reparation."

[17] In assessing general damages I am reminded of the guidelines restated and approved by our Court of Appeal in Alphonso and Others v Deodat Ramnath[1] *namely* (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.

[18] The claimant has relied on the following authorities, which she says are comparable to her case, whether it be because of similarity of injury, the extent of

[1] (1965) 7 WIR 491

the pain she endured or the loss of daily functions she suffered. Ronald Fraser v Joe Dalrimple ANUHCV2004/0513; Wadadli Cats Limited v Frances Chapman Civil Appeal No.16 of 2004; Oscar Frederick v Liat (1974) Ltd ANUHCV2007/0391; Cletus Dolor v Alcide Antoine et al SLUHCV2001/0555; Aubrey Smith v Calvert Fleming et al Claim No.AXAHCV0050/2008. These cases she says support her claim of 80,000 - $100,000 for pain and suffering and $150,000.00 for loss of amenities.

[19] The defendants challenge an award to the claimant based on these authorities, and in particular submit that in Dalrimple where the award made was of $85,000 for pain and suffering and $65,000 for loss of amenities, the injury was more severe and loss to the claimant greater. The claimant in Dalrimple fell from a moving truck, hitting the pavement with his left foot first. He suffered a severely comminuted fracture of his left ankle and lower 1/3 of his leg; fracture of the left medial malleolus of the left tibia; severely comminuted fracture of lower end fibula; a lateral dislocation of the left ankle and a severely contaminated compound wound with neuro-vascular compromise. Both his leg and ankle were operated on. His injury was categorized as severe and he was hospitalized for several weeks. Several pins were placed in his leg and ankle to assit him in walking again. He was bedridden for five months. He later required further surgery to fuse the ankle joints, and his doctor reported that he had full disability of his lower extremities. His doctor reported that even after surgery and rehabilitation he will be unable to return to his employment or even to work as a labourer again. The defendants submit that an award to the claimant should be more in keeping with Monica Lansiquot v Geest PLC where an award was made of $40,000 for pain and suffering and $20,000 for loss of amenities.

[20] I have also considered the case of Lincoln Carty v Lionel Patrick Saint Christopher and Nevis Claim Number 54 of 1998 where in 2009 the High Court in St. Kitts awarded the Claimant $175,000 for pain and suffering and loss of amenities for a fracture of the right femur, fractures of the inferior pubic ramous

(pelvis), fractures of the right 3rd and 8th ribs posteriorly, laceration and contusion of the right knee, contusion of sciatic nerve in the right leg, permanent dislocation of joint in the sternum, bruising and laceration of front left rib cage and cervical strain (neck), resulting in continuous pain and discomfort, including severe and prolonged migraine headaches. The claimant underwent surgery, during which a steel rod was placed in his femur, he remained hospitalised for 32 days and, on his release from hospital, he remained home for 6 months. Twelve months after the first surgery the claimant underwent a second surgical procedure to remove the steel rod and was away from work for about 6 weeks. His right leg is now shorter than the left; he has received physical therapy treatment and chiropractic care and has been seen by many health care professionals. He is no longer able to be involved in sports, which he was very involved in prior to his injuries, he is forced to use a cane because his right knee buckles on a regular basis, he suffered post traumatic stress, severe bouts of depression, his relationships both at work and at home have suffered as a result of the difficulty of dealing with his pain and his lack of sex drive has caused much strain in his relationship with his wife.

[21] I have considered the case law and the submissions of the parties, and the particulars of loss of the claimant. In my view the case of Dalrimple suggests to me that an award in that range would be excessive and I agree with the defendant that the injury and loss far exceeded that of the claimant in this case, and is unsupported by the medical evidence. The case of Monica Lansiquot, is on the lower end given the claimant's agony following the injury and continuing. The award sought is in the range of what was given in Lincoln Carty, but the injury suffered in that case was significantly greater, with the disability being permanent.

[22] There are naturally disparities in the facts and circumstances of the cases relied on, with the circumstances of the present case. Truthfully, comparable awards are

difficult to achieve, each case being distinguishable on its facts. In Wells v Wells (1998) 3 AER 481 Lord Hope of Craighead observed that:—

> "The amount of the 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"

[23] Our Court of Appeal cited similar observations in CCCA Limited v Julius Jeffrey C.A. No. 10 of 2003, per Gordon JA:—

> "…it is, in my view, a function of the law, as far as possible, to be predictable, given the infinite variety of the affairs of human beings. In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge's discretion".

[24] In my view a total award of $108,000 is an appropriate award in this case, being $48,000 for pain and suffering and $60,000 for loss of amenities.

Future Medical Care

[25] Following surgery in St. Kitts to repair the lateral meniscus tear, the claimant continued to be pain about her knee and later extending to her hip. Dr. Hendrickson reported that her progress and recovery were slow and after a period

of over one year, he assessed the claimant as regressing and concluded that immediate surgical intervention may be required. He suspects osteonecrosis, to be confirmed by an MRI. He concludes that both hip replacement and ligament replacement surgery may be required. He recommends that if the MRI confirms his diagnosis there should be immediate surgical intervention.

[26] Dr. Hendrickson has provided a range for the costs of the surgeries being between EC$220,000.00 to EC$240,000.00, and the costs of travel to Puerto Rico for the MRI and possible surgery is US$1300.00, but indicates that the extent of the surgeries depends on the severity of the injuries. He states that the sum he has proposed is based on the assumption that that in one year the costs of the surgery would have doubled. It was also based on an assessment of what he thought was the cause of her complaint and not of a confirmation of what is required.

[27] The defendants treat Dr. Hendrickson's evidence on the basis and the degree of future medical care with justified skepticism. His conclusions as to the claimant's medical prognosis are based on supposition and not from fact. The fact that Dr. Hendrickson has ordered an MRI establishes that he is uncertain as to the present diagnosis of the claimant's condition. This makes the assessment of this head arduous.

[28] The defendants' posture under this head and in the circumstances of the assumptions made as to future care is to suggest that that claim should fail entirely. In my view it would be unjust to deny the claimant relief entirely for damages resulting from the accident, where her doctor suggests that the indictors she exhibits, of her continuing discomfort suggests that she requires replacement surgery. This would also be contrary to the principle espoused in Livingstone v Rawyards Coal Company. It is also unfair to order the defendants to pay for a surgery that may not be needed. Although the purpose of an assessment is to bring finality to these proceedings, this is a case where an order is required that does justice to both parties. In the circumstances I award the claimant the costs of

hip and ligament replacement surgery, to be proven by an MRI and by invoices of the cost of the surgery from a medical facility in the reasonable contemplation of the parties, to be done within the next two years, up to an amount of $220,000.00, inclusive of travel costs. All costs are to be justified to the defendants. Although Dr. Hendrickson gave evidence that this sum may have increased over a period of one year, his conclusions were without a cogent basis for this increase. I find no reason to increase the amount beyond the sum of $220,000.00.

Future loss of earnings

[29] The claimant was 51 years old at the time of the accident, with a remaining working life of 14 years. She claimed to have been making a salary of US$2500.00 monthly, a sum which was confirmed in a letter from a director of her employer. The claimant avers that she was unable to continue in that employment which required her to be constantly active, and was forced to assume other employment with the same company but in a less strenuous position and for a lesser salary. Her current employment is seasonal from December to March, and at a monthly reduction of US$1200 of her previous salary.

[30] Other than the letter from the director of the company there was no record from the claimant to verify the salary she had made. Her only evidence of her income "AL21", as at June 3, 2013 being US$2,500.00, is a letter signed by Thomas Montrel Cohen whom she says is a director of Crocus Bay Development. The letter from the director was not on the company letterhead, although it easily could have been, and was signed by a person whom the claimant says was a director of the company. The letter was issued by a company registered as Sound Advice, which the claimant in her evidence stated is affiliated to Crocus Bay and which Thomas Montrel Cohen is a director of. That he was a director, was not verified by other means, although that too could have been easily verified. The claimant averred that she did not ask her employer for a record of payment, and she chose not to pay social security, neither did her employer pay social security on her

behalf, although it is a statutory requirement. As such there could be no record from the social security department of her earnings. She stated that despite her position being relatively senior, she has no written terms of contract. She did not pay the mandatory income stabilisation levy (SL) which was introduced in 2010. As such there was also no record from that authority of her monthly income.

[31] On cross examination Dr. Hendrickson confirmed that in his reports he never indicated that the claimant is incapable of working nor has he indicated that she needed to quit her job. The claimant stated that she never received a recommendation from her doctors to resign from work, but she knows her body, and she was incapable of doing it. She states that Dr. Hendrickson did warn her about strenuous work, and she is in a lot of pain and has difficulty sleeping. She states that her quality of life has changed.

[32] The claimant states that given the sick leave granted by Dr Hendrickson, she is expected to lose further income in the sum of US$1,875.00.

[33] Given my earlier award for replacement surgery, there would be no need for me to consider a multiplier beyond a period of 2 years during which time the claimant is to obtain the replacement surgery if it is needed. But beyond that, I face challenges in the evidence before me. In his evidence on cross examination Dr. Hendrickson was quite firm in indicating that he never stated that the claimant should leave her present employment, although his medical opinion confirmed that the claimant was in continuing discomfort. I am also satisfied that on the evidence before me there is evidence of the claimant's continuing pain and discomfort and I have no difficulty concluding that continuing any work in her present condition presents some difficulty for the claimant. That however is insufficient to move me toward an award. The claimant's obligation in proving her case is to clearly give evidence of the amount of her loss. See Mc Gregor on Damages (17th ed) at page 21. Her proof of her previous income is grossly deficient, and I am unconvinced that there has been any loss in income. I am also not satisfied of any

loss of wages as a result of the claimant taking sick leave. This is a provable loss for which proof is required. I therefore find that the claimant has not proven her claim for loss of future earnings, and I make no award under this head.

Summary

[35] A summary of the assessed loss and damage is as follows: —

Special damages have been agreed and allowed. General damages for pain and suffering = $48,000 and for loss of amenities is $60,000. Future medical care is awarded up to the sum of $220,000 inclusive of travel to be paid on proof of the need and costs of the surgery. Finally no award is made for future loss of earnings.

V. GEORGIS TAYLOR-ALEXANDER
HIGH COURT MASTER