

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2012/0238

BETWEEN:

SYLVIAN LAURENT

Claimant

and

SIMON ANTHONY CUFFY

Defendant

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Singoalla Blomqvist-Williams for the claimant

Mr. David Bruney for the defendant

2015: October 1;
December 1.

JUDGMENT

[1] **ACTIE, M.:** This is an assessment of damages arising out of a motor vehicle accident which occurred on 30th October 2009.

[2] On 3rd July 2015 the parties at trial entered into a consent order for judgment in favour of the claimant on liability with damages to be assessed. The assessment of damages was scheduled for the 1st October 2015 with directions for the parties to file and serve submissions in support. The claimant complied however the defendant failed to file within the time as directed by the court. The defendant filed his submissions on 30th October 2015, two days before the date scheduled for the

assessment. The submissions were brought to my attention on the morning of the assessment on 1st October 2015. I note the late filing was done without the leave of the court neither did the defendant make an application for an extension of time. The court frowns on the practice whereby parties flippantly file submissions outside the time stipulated in court orders without making a formal application for an extension of time. This blatant disregard of court orders should be deprecated. In the circumstances I will not make any reference to the defendant's submissions as it is clear that he did not wish to participate in the assessment of damages. Accordingly the assessment shall be determined on the claimant's submissions.

Background

- [3] The circumstances giving rise to the assessment of damages are as follows. The claimant, 41 years old at the time of the accident, was the driver of a passenger bus. On 30th October 2009 while plying her designated route she had an accident with a tractor truck driven by the defendant. According to the evidence the defendant was driving his tractor truck with a wooden trailer attached on which an excavator was being transported. The tractor truck while navigating a corner collided with the claimant's vehicle.
- [4] It is the claimant's evidence that although her bus came to a stop the tractor truck continued to move up the hill forcibly ripping off the front right side of the bus specifically the lower end on the driver's side trapping and crushing the claimant's leg. Attempts made by the passengers to remove the claimant from the vehicle proved futile. Due to the smashed condition of the bus the claimant remained trapped and helpless inside the bus for over 45 minutes. The claimant was eventually extricated by emergency fire service officers using heavy equipment to cut through the bus. The claimant was taken to the Princess Margaret Hospital where she underwent immediate surgery and remained hospitalized for 6 weeks.

Nature and extent of injuries

- [5] The medical report of Dr. Julian De Armas, Orthopaedic Surgeon, dated 17th July 2015, outlines the claimant's injuries. The claimant suffered a fractured right foot with an external laceration medial dorsal with visible fracture of the metatarsal; open fracture-dislocation Lisfranc grade 111-B. Surgical debridement was done with K- wire pinning of the fracture. On January 27, 2010, one week after surgery, the claimant developed an active infection in the right foot and had to undergo another surgical debridement. On 15th February 2010 K wires were removed from the claimant's right foot. The claimant underwent osteotomy of the right metatarsal bone plus bone grafting using AO plates and 3.5mm with 4 AO 3.5 mm screws. The claimant continued her treatments at the outpatient department until August 19, 2010. The claimant underwent further surgery on 8th September 2011 for recurrent infection. The infection was eventually controlled 2 years after the accident.
- [6] On June 4, 2014, Dr. De Armas performed further surgery on the claimant to remove the plates and screws. The doctor avers that the surgery was uneventful as the x-ray revealed a right flat foot rigid with metatarso adductus posttraumatic with severe osteoarthritis of the lisfranc joint. The prognosis is that the claimant's risk of osteomyelitis is permanent. The doctor opined that if the bone infection (osteomyelitis) re-occurs more surgeries will be needed which in some cases can lead to amputation of the extremity.

Pain and suffering

- [7] The claimant's states that she experienced excruciating pain as her leg was being crushed by the forceful impact and felt her leg was being ripped apart during the movement of the trailer truck. The claimant states that her right hand was trapped and she could barely breathe as her stomach was pressed between the steering wheel and the dashboard. The claimant avers that she was rendered helpless and was in great terror of eminent death as she lay trapped in the vehicle covered with blood. At the hospital the claimant was advised to consent to the amputation of

her leg which she refused. The claimant spoke of the trauma and fear of the prospect of losing a leg.

Loss of amenities

- [8] Dr. De Armas explained that the claimant will continue to experience discomfort and pain in her right foot despite all the surgeries done. The claimant was advised to refrain from many activities such as standing for more than 30 minutes, walking or driving long distances, jogging or running. The claimant avers that she is now unable to perform household chores as she can no longer perform any activity which exerts pressure on her right knee. She is now unable to earn as a bus driver which was her main source of income.

General Damages

- [10] The claimant seeks general damages under the usual principles set out by Sir Hugh Wooding, CJ in the seminal case of **Cornilliac v St. Louis**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 endured; (iv) the loss of amenities, if any; and (iv) the extent to which pecuniary prospects are affected. These limbs have been considered against the backdrop of the evidence presented to determine the appropriate award as well as other guiding principles on assessments.

- [11] The nature and extent of the claimant's injuries as outlined above are quite extensive. An award of damages for pain and suffering is incapable of exact estimation and an assessment must necessarily be a matter of degree based on the facts of each case. Lord Hope of Craighead in **Wells v Wells**² states:

“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 cases as represents the Court's basic estimate of the plaintiff's damage”.

¹ (1965) 7 WIR 491

² [1998] 3 All ER 481

[12] The claimant submitted several cases for guidance namely:

- (1) **Avaline O' Garro etal v Neil Ross**³ where the court in 2012 awarded \$100,000.00 for pain and suffering and \$40,000.00 for loss of amenities. The claimant 30 years at the time of a motor vehicle accident which resulted in a fractured acetabulum and dislocated right hip. Her leg was rotated and flexed by the examining doctor. The claimant was hospitalized for one month. The claimant walked with a cane and wore a knee brace to keep her the knee in place. The medical report indicated that the claimant had improved in terms of the pain and fracture of her right hip but with a slight limp. The doctor diagnosed probable future complications like avascular necrosis and post traumatic arthritis of the hip.

Counsel is of the view that the claimant should be awarded an award of higher scale on the basis that the claimant underwent 5 surgeries and substantially greater number of surgical procedures than the claimant in **Avaline O'Garro** case.

- (2) **Marcel Fevrier etal v Bruno Cancham et al**⁴ the court in 2002 awarded the 2nd defendant aged 25, \$150,000.00 for pain and suffering and loss of amenities for fractured right femur. She underwent surgery and was incapacitated for 6 months. She had chronic joint pains and there was a 1 inch shortening of her right limb with a 10% partial disability. Counsel for the claimant is of the view that a higher amount should be granted to the claimant who underwent 5 surgeries a substantially more procedures than the claimant in Marcel Fevrier's case

- (3) **Gerald Khoury v Keithley George et al**⁵ - the claimant 43 years suffered severe deformity of the left leg and ankle. He spent four (4) days in

³ SVG HCV2004/329

⁴ SLUHCV 1989/0313 delivered on 28th March 2002

⁵ ANU HCV199/0249

hospital in Antigua and due to the severity of his injuries was recommended to seek further treatment. He travelled to USA for further medical care where he had further surgical open reduction and internal fixation where two metal plates were put in his ankle and fixed by 14 screws. He developed osteoporosis of the ankle which restricted his mobility as he was unable to walk fast afterwards. The court on 23rd April 2004 awarded \$120,000.00 as general damages.

[13] I am reminded that the court in an assessment of damages should strive for a measure of uniformity of awards as is reasonably practicable, as the damages awarded should be in keeping with comparable awards made in the jurisdiction. I am aware of the decision in **Gemma Clarke v Robert Nicholas**⁶ emanating from the Commonwealth of Dominica where the court in 2009 made an award in the sum of \$120,000.00 for pain and suffering and loss of amenities. The claimant 27 years at the time of the accident suffered a compound fracture of the lateral Condyle to her right leg and underwent surgery on the same day with open reduction and internal fixation along with debridement of the soft tissue. The claimant underwent 34 surgical procedures and was detained in hospital in both Dominica and Martinique for a total period of 12 months and continued treatment as an outpatient for about one year.

[14] The claimant at bar seeks an award of \$165,000.00 for pain and suffering and loss of amenities. It is accepted that no two cases of persons sustaining personal injuries are exactly alike The court must always try as far as is possible to maintain consistency in awards involving similar injuries in order to arrive at a fair money value as redress for the claimant's injuries. I have considered the nature and extent of the injuries, pain and suffering and the loss of amenities experienced by the claimant and the authorities cited by the claimant. I note the claimant in **Gemma Clarke v Robert Nicholas** suffered somewhat similar injuries was hospitalized for 12 months and underwent 34 surgical procedures unlike the

⁶ DOMHCV2004/0268

claimant in this case who was hospitalized for 6 weeks. However I take into consideration that the claimant at bar underwent 5 surgical procedures after the initial discharge. I also take into consideration that the award in **Gemma Clarke** was made in 2009. Considering the rate of inflation since the award I would accordingly award the sum of \$70,000.00 being for pain and suffering and \$40,000.00 for loss of amenities.

Loss of Future Earnings

- [15] The claimant seeks an award of \$100,000.00 for loss of earning capacity using a multiplicand of \$14,285 based on the average \$90.00 a day as stated in the claimant's witness statement with a multiplier of 7 years or in the alternative a nominal award of \$25,000.00.
- [16] Pecuniary loss generally forms the principal head of damage in personal injury actions. It consists primarily of pre-trial earnings and prospective loss of earnings commonly called loss of future earnings. As **McGregor on Damages 18th Edition**⁷:
- “the function of the pecuniary heads of loss is to ensure that the claimant recovers, subject to the rules of remoteness and mitigation, full compensation for the loss that he has suffered”.
- [17] The general method of assessment is the well-known multiplier/multiplicand method applied by taking the amount which the claimant has been prevented by injury from earning in the future (multiplicand) and multiplying it by the number of years during which he was expected to earn it (multiplier). To reach a figure for the award of a lump sum, the normal method of assessment which is used by the courts, is first to calculate, as accurately as possible, the net annual loss suffered, which is usually based on an average of the claimant's pre-accident “take-home” pay. This is to be used as the multiplicand.

⁷Paragraph 35-056.

[18] The claimant asserts that her earning capacity has been severely impacted since the accident and resulting injuries. The claimant states that she was a bus driver earning an average of \$80.00 to \$150.00 a day. The court notes that the claimant has not furnished any palpable evidence to substantiate the amount claimed under this head. The medical report reveals that the claimant will always experience discomfort and pain in her right foot and was advised to refrain from driving long distances or standing for more than 30 minutes. These restrictions will definitely impact the claimant's ability to continue driving a public bus which was her main source of income. The failure to present the proof of earnings in support of the amount claim under this head however does not shut out the claimant from compensation.

[19] The Court of Appeal in **Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton Lona Eileen Bufton**⁸ held that the failure of the claimant or counsel to provide evidence of value does not mean, however that the court is inescapably driven to refuse to award any amount for an undoubted loss. The Privy Council in **Greer v Alston's Engineering Sales and Services Ltd**⁹ quoting from **McGregor on Damages**¹⁰states:

“Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.”

Nominal damages in this context did not mean small damages but meant damages that were substantial provided they were not out of scale.

[20] I am of the view that the amount of \$25,000.00 claimed as a nominal sum is not out of scale having regards to the medical evidence, the nature of the injuries

⁸ ANUHC VAP 2004/0022.

⁹ [2003] UKPC 46

¹⁰ 13th Ed at para 295

sustained and authorities cited. According a nominal award of \$25,000.00 is made for loss of future earnings.

Future medical care

- [21] The claimant relying on the authority of **Gemma Clarke v Robert Nicholas** seeks an award in the sum of \$3,2240.00 for future medical treatment. The medical evidence of Dr. Julian De Armas states the claimant will always experience discomfort and pain in her right foot and the risk of osteomyelitis is permanent despite the numerous surgical procedures. The doctor opined that if the bone infection reoccurs more surgery will be needed and in some cases such infection can lead to amputation. The medical evidence did not give an estimate of the costs of future care if necessary. Accordingly I award the sum of \$20,000.00 as a nominal sum for future medical care.

Special Damages

- [22] The claimant claims the sum of \$9,235.00. It is well-established principles that special damages must be pleaded and proved see **British Transport v Gourley**¹¹ and **Heerallal v Hack Brothers (Construction) Ltd**¹².
- [23] The claimant claimed for domestic help and assistance given by two persons. Vernie Laurent in her witness statement states that she assisted and provided domestic assistance to the claimant from December 2009 to June 2009; August 2010 to November 2010 and from December 2010 to January 2011 totalling 396 days. It is the evidence that she took care of the claimant's house during the period of illness and produced an invoice totalling payment of \$3,000.00 for her services.
- [24] Trevor Baron, in his witness summary and oral testimony, states that he assisted the claimant by driving her to the hospital for her numerous medical visits and the

¹¹ (1953) 3 All ER 803

¹² (1977) 24 WIR 117

outpatient clinic to dress her wounds. The witness provided an invoice totalling \$1,500.00 for the taxi service provided during the period.

[25] The claimant's claim for \$9,235.0 for special damages is itemized with supporting invoices to substantiate the amount pleaded. A review of invoices revealed duplicity in some of the amounts claimed which I have disallowed. A calculation of the receipts in support amounts to \$8,954.00 and not the \$9,235.00 as claimed. Accordingly an award is made for special damages in the sum of \$8,954.00.

Conclusion

[26] In summary I make the following awards to the claimant:

- (1) Special damages in the sum of \$8,954.00.
- (2) General Damages in the sum of \$110,000.00 being \$70,000.00 for pain and suffering and \$40,000.00 loss of amenities.
- (3) Loss of Future Earnings \$25,000.00.
- (4) I award interest on the global sum at the rate of 5% from the date of judgment to the date of payment in full.
- (5) I award prescribed costs in the sum of in the sum of \$10,796.55 pursuant to CPR 65.5 appendix C.

Agnes Actie
Master