

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV2014/0230

BETWEEN:

KIM RUSSELL ROMNEY

Claimant

and

JOHN CHINNERY

Defendant

Before:

Eddy Ventose

Master [AG.]

Appearances:

Ms. Marie Lou Creque for the Claimant

Ms. Valerie Gordon for the Defendant

2016: November 28

2017: January 12

JUDGMENT

1. **VENTOSE, M. [AG.]:** The subject matter of the claim is damages for personal injuries but the matter before the court is one for assessment of damages following the entering of judgment on admissions in favour of the Claimant by the court on 21 January 2015 with damages to be assessed. Both the Claimant and Defendant have filed submissions and authorities on the assessment of damages as ordered by the court on 21 January 2015.

Background Facts

2. The background facts as outlined in the statement of case of the Claimant, Ms. Kim Russell Romney, are as follows. On 4 September 2014, the Claimant claimed against the Defendant damages for injuries, pain and suffering and loss of amenities caused by the negligence of the Defendant in failing safely to operate his motor vehicle resulting in an accident that took place on 30 January 2012.
3. The Claimant was 53 years at the time of the accident and is employed with the Government of the Virgin Islands as an administrative officer/case manager with the Department of Public Prosecutions. On 30 January 2012, the Claimant was travelling in her motor vehicle approximately 20-25 feet behind the Defendant in his motor vehicle. The Claimant's vehicle was hit from behind by the Defendant's vehicle. The Claimant avers that the collision was solely caused by the negligence of the Defendant and that as a result she suffered injuries and damage to the vehicle.
4. As a result of the accident the Claimant obtained the following injuries: (1) C3-C4 minimal left posterolateral disc bulge without stenosis; (2) C4-C5 mild left posterolateral disc bulge without stenosis; (3) C5-C6 mild to moderate right posterolateral disc with herniation with mild lateral recess stenosis, affecting the exiting right C6 root; (4) C6-C7 moderate circumferential disc bulge with right posterolateral prominence with borderline central stenosis without cord involvement. Mild bilateral recess stenosis; (5) questionable ill-defined area of hypodensity at

upper brainstem at the level of quadrigeminal plate near midline; and (6) right upper extremity weakness. Dr. Nagy Darwish, an orthopaedic surgeon, referred the Claimant on 13 February 2012 to a cervical spinal surgeon in Puerto Rico. In Puerto Rico the Claimant was treated with cervical epidural steroid injections and referred for physiotherapy by Dr. Lopez Diez in his report dated 27 April 2012. The physiotherapist, Dr. Tania Medley, reported that the Claimant had: (1) limited passive/active range of motion in the cervical spine; (2) significant muscle spasm in the deep and superficial cervical muscles, and upper Trapezius muscle on the right; and (3) facet joint swelling on the right upper cervical spine.

5. Dr. Janice Victor, a consultant with Virgin Islands Pain Management Associates, in St. Thomas, Virgin Islands, subsequently treated the Claimant for pain management, but the Claimant continued to suffer from loss of range of motion in her neck and was in constant pain in her arms. The Claimant was then referred to Dr. Alexander Lenard at St. Mary's Medical Centre and Good Samaritan Hospital in Florida, U.S.A., who recommended surgical intervention. The surgery took place on 4 September 2012 and the following procedures were completed: (1) Anterior C5-C6 decompression and fusion; (2) Anterior C6 decompression and fusion; (3) Application of a C5-C7 plate; (4) Placement of a C5-C6 interbody device; (5) Placement of a C6-C7 interbody device; (6) Use of a locally harvested morselized autograft; (7) use of allograft; and (8) Interpretation of fluoroscopy. The Claimant was hospitalized for five (5) days.
6. The Claimant also saw Dr. Jeffrey Chase, an orthopaedic surgeon, at the request of the Defendant through his legal Counsel to provide an independent review of the Claimant's medical condition. This visit took place on 14 September 2013 and Dr. Chase recommended that the Claimant get some X-ray testing and an MRI scan.
7. At her post-operative visit with Dr. J. Gardner of Comprehensive Orthopaedic Global, St. Thomas, on 14 September 2012 the Claimant was advised to continue physiotherapy and pain control management treatment. The Claimant continued to visit Dr. Tania Medley, the physiotherapist, and Dr. Alexander Lenard for continued

medical attention. The Claimant then developed symptoms of acute pain in her throat, hoarseness and could not speak. The Claimant then visited Dr. Lenard who diagnosed her with cervicalgia and recommended that she visit an ENT specialist, Dr. Adam Shapiro. On 16 September 2013 the Claimant then saw Dr. Joseph Smolarz of Virgin Islands Ear, Nose and Throat, St. Thomas, Virgin Islands, who determined that her vocal chords has been affected by the accident and recommended surgery. Dr. Smolarz recommended that the Claimant see Dr. Michael Bove in Chicago, U.S.A., because he was of the opinion that she had forms of dysphonia and dysthagia.

Special Damages

8. It is now a well-established principle that special damages must be specifically pleaded and proved. Where the Claimant does not provide evidence of loss, the court may award nominal damages. The Claimant claims the sum of US\$47,708.56 as special damages for medical expenses and for traveling, meals, lodging, legal and administrative expenses. The Claimant is not entitled to legal fees of US\$13,160.24 as special damages. Any amount for legal expenses will be determined in accordance with the CPR on completion of the assessment of damages.

9. The Claimants claims the sum of US\$12,600.00 for three loans, the first loan of US\$7,500.00 from her employers; second loan of US\$3,600.00 from a bank in the U.S.A. and the third loan of US\$1,500.00 from her mother. The Claimant also claims the sum of US\$8,000.00 for using the maximum limit on two credit cards (one with a maximum limit of US\$1,500.00 and a US\$6,500.00 limit on another). Counsel for the Defendant objects to these sums being claimed as special damages, stating that the Claimant has not provided any documentary evidence to substantiate the sums she claims were loaned to her. In addition, Counsel for the Defendant states that the Claimant did not provide any evidence to substantiate the credit card payments and that the Claimant did not prove that exceeding the credit limit on the cards relates directly to payments made for medical and health related purposes. Counsel claims that if these amounts were awarded to the Claimant she would be overcompensated.

10. The Claimant did not adduce evidence to show exactly what items/services were purchased with the credit cards or with the sums advanced from the three loans. In any event, at the hearing Counsel for the Claimant conceded that there would be double counting of these amounts as any items purchased or services paid for using monies from the loans or the credit cards will be accounted for in the amount claimed as special damages. The concession was in my view properly made. Consequently, the Claimant is not entitled to US\$12,600.00 for the three loans or US\$8,000.00 for the use of the credit cards.

11. The Defendant states that not all the special damages, as contained in Schedule I and II of the statement of claim, should be awarded to the Claimant. The amount of US\$378.30 for Hoja de Tramite is duplicated. The Defendant states that the following items are listed but no evidence is provided to prove that they were actually provided to the Claimant:

(1) VIP Virgin Pain Management	5,106.00
(2) Anaesthesiology Consultants	3,848.50
(3) Wellness PTS	490.00
(4) Penn Medical Centre	390.00
(5) Comprehensive Orthopaedic Global	627.40
(6) Bougainvillea Clinic	420.00
(7) Eureka Medical Centre	380.00
(8) B and F Medical Centre	20.00
Total	10,861.90

12. The fact that the Claimant does not provide documentary evidence to substantiate these amounts claimed does not mean that she is not entitled to an award for these. A nominal sum of US\$8,000.00 is awarded for these items.

13. The Claimant also claims the sum of US\$8,000.00 for loss of a motor vessel sold and the sum of US\$10,500.00 for loss of income for seven (7) months for her husband, Mr. Leon Romney. The Claimant avers that it was often on the direction of medical practitioners who provided much of the Claimant's treatment that she did not operate a motor vehicle because it would worsen her condition. The Claimant also avers that even when she took public transportation she was directed to have someone with her in the event of any adverse effects of any sedation medication she was given. Consequently, the Claimant states that she was compelled to have her husband accompany her to and from the medical visits abroad.

14. No documentary evidence was submitted as proof of the sale of the vessel and, in any event, there would need to be evidence of a direct correlation between the sale and a particular item purchased or services provided to the Claimant relating to her injuries and/or medical treatment and not already covered by the Schedule of Expenses for it to be awarded. This amount claimed is therefore not allowed. Similarly no proof of the actual loss suffered by her husband who accompanied her during the trips for medical treatment was provided. A nominal amount for loss of income is awarded in the sum of US\$5,000.00.

15. The Claimant claims a total sum of US\$47,708.56. From this must be subtracted the duplicated amount of US\$378.30. In addition, the Claimant claimed a total of US\$10,861.90 for which no receipts were provided and the nominal amount awarded is US\$8,000.00. This means that the sum of US\$2,861.90 (US\$10,861.90 minus US\$8,000.00) must be subtracted from the total amount claimed. In addition, US\$13,160.24 claimed for legal fees must also be subtracted. The total amount awarded for special damages is therefore US\$31,308.12.

Loss of earnings

16. The Claimant claims the sum of US\$1,508.07 for loss of income because she was put on half pay at work for five (5) weeks while seeking medical attention and recovering from her injuries. In addition, the Claimant claims the loss of 56 vacation days used

as sick days in the sum of US\$6,756.17. The Defendant does not dispute this but takes issue with the sum of US\$2,000.00 claimed for loss of personal effects sold. I agree because any items/services purchased with the proceeds of the person effects sold can be recovered as special damages. The Claimant is not entitled to US\$2,000.00 for loss of personal effects sold but is entitled to US\$8,264.24 (US\$1,508.07 + US\$6,756.17) for loss of earnings.

17. The Claimant is therefore awarded the following sums as special damages: (1) US\$5,000.00; (2) US\$31,308.12; and US\$8,264.24, totalling US\$44, 572.36.

General Damages

18. The *locus classicus* on general damages for personal injuries is the decision of Chief Justice Sir Hugh Wooding in *Cornilliac v St Louis* (1965) 7 WIR 491 in which he stated that:

[T]he several considerations which [a] learned judge [must] bear in mind when making his assessment [are] as follows: (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 had to be endured; (iv) the loss of amenities suffered, and (v) the extent to which, consequentially, the appellant's pecuniary prospects have been materially affected.

19. It has been stated that general damages are damages which will be presumed to be a natural or probable consequence of the wrong complained of; with the result that the claimant is required only to assert that such has been suffered (*Charles v Corridon* (SVGHCV 2002/0506 dated 3 June 2014).

The nature and extent of the injuries sustained

20. The Claimant suffered the following injuries as a result of the accident: (1) C3-C4 minimal left posterolateral disc bulge without stenosis; (2) C4-C5 mild left posterolateral disc bulge without stenosis; (3) C5-C6 mild to moderate right

posterolateral disc with herniation with mild lateral recess stenosis, affecting the exiting right C6 root; (4) C6-C7 moderate circumferential disc bulge with right posterolateral prominence with borderline central stenosis without cord involvement. Mild bilateral recess stenosis; (5) questionable ill-defined area of hypodensity at upper brainstem at the level of quadrigeminal plate near midline; and (6) right upper extremity weakness. In addition, the physiotherapist, Dr. Tania Medley, reported that the Claimant had: (1) limited passive/active range of motion in the cervical spine; (2) significant muscle spasm in the deep and superficial cervical muscles, and upper Trapezius muscle on the right; and (3) facet joint swelling on the right upper cervical spine.

The nature and gravity of the resulting physical disability

21. Dr. Alexander Lenard avers that he saw the Claimant after the surgery and he was concerned with the rapid deterioration of the disc space above where he performed the surgery which led him to encourage her to do further surgery. Dr. Lenard avers that on 11 September 2015 he noted that the Claimant had brisk lower extremity reflexes and her upper extremity reflexes were absent and that there was a global weakness to her bilateral upper extremities with it being worse on the right than the left. Dr. Lenard states that he determined that the Claimant was deteriorating with adjacent segment disease. On 10 November 2015, Dr. Lenard performed surgery on the Claimant and completed the following procedures: (1) removed the C5-7 plate; (2) explored the prior fusion and decompressed and fused the C4-5 anterior; (3) applied C4-5 plate; (4) placed interbody device at C4-5; and (5) harvested local morselized autograft.

22. Dr Lenard states that it is likely that the Claimant will need further medical and surgical intervention, continuing that:

to explain and state the extent to which he believes that further intervention is required and the associated timelines and costs, projected medical issues that the

Claimant has, including speech issues, ability to turn, likelihood of early onset of arthritis etc. would require several pages in itself.

The pain and suffering which had to be endured

23. The Claimant avers that she suffered from a loss of range of motion in her neck and was in constant pain, radiating down her arms. The Claimant's condition worsened and she had to undergo surgery on 4 September 2012 and was hospitalized for five (5) days. The Claimant also avers that even after the surgery she continued to experience discomfort and pain. The Claimant also underwent surgery on 11 September 2015. The Claimant's husband, Leon Romney, avers that the Claimant has been in immense pain throughout the period and that her life has changed drastically since the accident.

The loss of amenities suffered

24. The Claimant avers that since the accident she has not travelled to the United Kingdom nor has she been able to garden or do basic household chores due to limited range of motion in her neck and the weakness of her hands. The Claimant also avers that she suffers pain when she drives and cannot do so for long periods of time. Because of the diminished ability to twist her neck and body in a manner that would allow her properly to manoeuvre her vehicle in unfamiliar areas, the Claimant states that she only drives on main and familiar roadways and that she has to rely heavily on her husband for transportation. The Claimant avers that she cannot lift heavy items exceeding ten (10) pounds and that sometimes she has to use both hands to hold a carton of milk. The Claimant also avers that she now has to seek assistance at grocery stores with her grocery bags and boxes.
25. The Claimant states that when she did not travel to the United Kingdom, she would spend her summer vacation at home gardening and attending to general household decoration and repair projects which she cannot now do. The Claimant avers that the pain in her neck and arms has adversely affected her intimate relationship with her husband and that she often loses her voice due to the swelling in the region of her

vocal chords as a result of the recommended surgery to her neck. The Claimant also avers that because of the surgery she now has a metal rod in her neck and cannot go through security metal detectors. In addition, the Claimant states that she now wears a medical alert bracelet each day and has done so since the surgery. The Claimant also avers that she has to rely on her husband to perform intimate tasks and that it was only in December 2015 that she was able to perform bathroom duties on her own. The Claimant states that the side effects of the medication for the pain were also unbearable.

26. Mr. Romney also avers that before the accident, he and his wife would travel to the United Kingdom for three (3) weeks in the summer but they have not travelled since the accident. Mr. Romney states that the Claimant has limited mobility and that he performs almost all her chores. Mr. Romney also states that since the Claimant is often in pain their sexual intimacy has significantly decreased to the point where they have not had sexual relations since 2014. He claims that he has had to bathe his wife and perform intimate and personal duties for her.

The Submissions

27. The Counsel for the Claimant submits that the Claimant suffered severe injuries and had complications to her voice and mobility as a direct result of the accident. Counsel also submits that the Claimant: (1) now wears a medical bracelet and has plates in her neck; (2) underwent physiotherapy to teach her how to walk again, and to enter and alight from vehicles; (3) lost her voice as a direct result of the surgeries; and (4) had to use a walker to learn to walk again. Counsel for the Claimant states that the Claimant's lifestyle changed dramatically and that the Claimant, who was previously independent, now has to rely on her husband to do many things for her. Counsel for the Claimant suggests that an award of US\$45,000.00 should be made for general damages.
28. In *Forbes v Morillo* (BVICVAP 2005/008 dated 20 February 2006), the Court of Appeal upheld an award of \$40,000.00 for pain and suffering where, as a result of a

motor vehicular collision, the Claimant suffered from a posterior subligamentous disc protrusion at the L5S1 level associated with radial annulus tear posteriorly and adhesive capsulitis of her left shoulder, and complained of hearing loss in her left ear. As a result of her injuries the claimant in that case was unable to perform many of the activities involved in her employment as a caregiver: she could not raise or extend her left arm, lift moderately heavy objects, or do certain types of housework, such as mopping, and could only do others, such as dishwashing, with difficulty; and she could not sit or stand for long periods of time.

29. In *Smith v Flemming and White* (AXAHCV 2008/0050 dated 27 May 2011) the trial judge stated that the claimant's chronic degenerative disease/injury was exacerbated by the injuries which he suffered as a consequence of the accident and that over the ensuing months, the pain intensified and he was unable to do much without experiencing great pain. The trial judge stated that notwithstanding treatment the claimant continued to be afflicted by pain and this hampered his ability to work, garden, sit or even sleep at times and he was unable to enjoy conjugal relationship with his wife. The court awarded the sum of US\$25,000.00 for pain and suffering US\$20,000.00 for loss of amenities of life.

30. Counsel for the Defendant submits that *Forbes v Morillo* and *Tortola Yacht Services Limited v Baptiste* (BVIHCVAP 2008/016 dated 22 June 2009) both demonstrate that where a person is disabled or permanently impaired the likely award for similar injuries is between US\$40,000.00 to US\$45,000.00. Counsel for the Defendant submits that in the case at bar there is no medical evidence that the Claimant is disabled by the injuries she sustained or that she is permanently disabled. In *Tortola Yacht Services Limited v Baptiste*, the trial judge accepted the medical evidence of a 20% whole body impairment of the Claimant. A 2007 medical report evaluated the claimant's permanent disability resulting from the injuries at 20%, and a 2001 report put the disability status as 25% impairment of his whole person. The Court of Appeal in *Tortola Yacht Services Limited v Baptiste* did not interfere with the sum of US\$45,000.00 awarded by the trial judge. In *Forbes v Morillo*, the claimant's overall

impairment as a result of her injuries was assessed at 19% whole body impairment, justifying an award of US\$45,000.00.

31. There is merit to the point made by Counsel for the Defendant that although the Claimant has undergone two surgeries, there was no finding by any medical practitioner of any percentage of whole body impairment or of permanent disability. The cases cited by Counsel for the Claimant are distinguishable from the case at bar for that reason. The pain and suffering and loss of amenities experienced by the Claimant in *Hatchet v First Caribbean International Bank* (BVIHCV 2006/0227 dated 29 November 2007) comes close to those of the Claimant in the case at bar for which the trial judge awarded US\$20,000.00 for general damages.
32. Taking into account all the circumstances, including the factors outlined in *Cornilliac v St Louis* and discussed above, the Claimant is entitled to damages for pain and suffering in the sum of US\$10,000.00 and for loss of amenities the sum of US\$15,000.00.

Future medical expenses

33. The Claimant avers that Dr. Lenard medically advised her that there was a rapid deterioration in the vertebra where the original surgery was done and that there might be a need for further surgery within six (6) months to one (1) year. In his witness statement filed on 14 January 2016, Dr. Lenard avers that it is likely that the Claimant will need further medical and surgical intervention but to explain the basis "would require several pages in itself".
34. Counsel for the Claimant cited the case of *Forbes v Morillo* (BVICAP 2005/008 dated 20 February 2006) where the Court of Appeal considered the global sum of \$20,000.00 as acceptable for the cost of future medical expenses awarded by the trial judge. However, in that case, the award was based on recommendations made by a medical practitioner for future treatments of the claimant. In the case at bar, the Claimant has undergone various treatments recommended by medical practitioners

over the years. In any event, Dr. Lenard has been treating the Claimant for over four (4) years and had performed two surgeries on the Claimant. It seems to me that his judgement (notwithstanding the limitation above) was based on his many years of treating, monitoring and evaluating the Claimant. Dr. Lenard's opinion on the need for future medical treatment of the Claimant is therefore accepted.

35. Counsel for the Claimant states that it is uncertain at this stage but the Claimant is expected to have at least one further surgery, which would be in Florida and that an award of US\$15,540.00 should be awarded. Taking into account the real possibility of further medical treatment, an award of US\$15,540.00 for future medical expenses is therefore justified.
36. The total award for general damages: (1) US\$10,000.00 - pain and suffering; (2) US\$15,000.00 - loss of amenities; and (3) \$15, 540.00 - future medical expenses. The total awarded under this head is US\$45, 540.00.

Conclusion

37. Nagico Insurance Company Limited, the Defendant's insurer, paid the sum of US\$25,000.00 to the Claimant. In addition, the Defendant has paid a total of US\$12,800.00 to the Claimant. Both of these amounts must be subtracted from the total award payable to the Claimant.
38. IT IS HEREBY ORDERED as follows:
 - (1) The Claimant is awarded special damages in the sum of US\$44, 572.36.
 - (2) The Claimant is awarded general damages in the sum of US\$45, 540.00.
 - (3) The total award of damages is US\$90,112.36 less US\$37,800.00 (US\$12,800.00 + US\$25,000.00), which amounts to US\$52,312.36.
 - (4) The Claimant is entitled to prescribed costs based on the total award of damages of US\$52,312.36.

39. The Claimant is entitled to interest on the sum of US\$52,312.36 at a rate of 5% from the date of assessment until payment.

40. I wish to thank Counsel for the parties for their submissions and authorities.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Eddy Ventose
Master [AG.]