

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2011/0837

BETWEEN:

HOWELL FONTENELLE

Claimant

and

JN. BAPTISTE MARVILLE

Defendant

On Written Submissions:

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Winston Hinkson for the Claimant

2017: December 12.

Decision on Assessment

- [1] **CENAC-PHULGENCE J:** The claimant suffered injuries as a result of an attack on him by the defendant on 19th October 2009 with a hoe. He filed a claim against the defendant on 5th August 2011 for personal injuries and secured a judgment in default of acknowledgement of service on 24th October 2012 for an amount to be decided by the court. On 20th February 2017, the claimant filed an application for assessment of damages supported by affidavit and a witness statement. Legal submissions were also filed by the claimant on 20th February 2017.

- [2] The application for assessment was served with the application and accompanying documents on the defendant on 30th August 2017 as evidenced by affidavit of service filed on 7th September 2017. The defendant did not respond to the application and has filed no evidence in opposition thereto. The defendant was informed of the hearing date of 12th December 2017 by letter served on him after having been served on 3rd December 2017 with a notice of hearing which incorrectly stated the hearing date as 10th December 2017. The Court is satisfied that Mr. Marville was aware of the application for assessment and also of the hearing date.
- [3] The claimant was born on 28th April 1962 and was 47 years at the date of the assault. His occupation was carpentry and more particularly tiling.
- [4] The claimant has pleaded special damages of \$625.00 which have been proven by receipts which accompany his application and I therefore award the sum of **\$625.00** as special damages.
- [5] In assessing general damages, I am guided by the well-known case of **Cornilliac v St. Louis** (1965) 7 WIR 491 which sets out the considerations which must be borne in mind by the court when assessing general damages. Those considerations are:
- (a) the nature and extent of the injuries sustained;
 - (b) the nature and gravity of the resulting physical disability
 - (c) the loss of amenities, if any; and
 - (d) the extent to which, consequentially, pecuniary prospects are affected.

The nature and extent of the injuries

- [6] According to the medical report of Dr. J. D. Ogunlusi dated 14th February 2011, the claimant's injuries were (a) 5 cm oblique laceration on the dorsum (back of hand) of right wrist involving the capsule (joint) of the wrist, (b) extensor tendon

laceration to the 2nd, 3rd and 4th fingers (index, middle and ring), (c) 5 cm superficial lacerations on the mid-ventral surface of the left forearm and (d) open fracture of the left radius. The claimant was referred for orthopedic review.

[7] The report from Dr. Richardson St. Rose, the Orthopedic Surgeon stated that the extensors (**extensors** are skeletal muscles, and have a unique function in the body relating to joint movement) to the thumb, 2nd, 3rd and 4th fingers and the abductor to the thumb were all severed. He stated that these were repaired under general anesthesia on 22nd October 2009. The claimant was discharged from hospital on 23rd October 2009 and followed up at the outpatient clinic. Dr. Richardson stated in the report that the plaster cast that immobilized the wrist and the fingers would have remained 3 weeks after surgery.

[8] The claimant does not give any evidence of the pain and suffering he experienced but he does state that he still suffers pain. He does not elaborate.

The nature and gravity of the resulting physical disability

[9] As a result of the injuries, the claimant would suffer a temporary partial disability of 70% over 3 months during which period he would be unable to work. Dr. Richardson stated that the claimant would suffer a permanent disability of 20% because of anticipated stiffness.

Loss of amenities

[10] The claimant has not provided any evidence as to how the injuries he sustained impacted his day to day functioning or his life as a whole.

The extent to which, consequentially, pecuniary prospects are affected.

[11] In his affidavit, the claimant states that as a result of the injuries he sustained he was unable to fulfil his contract obligations as a tiler with Mr. Kevin Jean valued at \$4,200.00. He exhibited a letter dated 9th November 2009 from Mr. Jean which

confirms that the claimant was employed by Mr. Jean to provide services as a tiler at a total cost of \$4,200.00. Mr. Jean in the letter states that

‘Although he has commenced the requisite tasks, to date, he has been unable to engage in further labour as he is constrained by his physical injury. In addition, his subsequent engagement for the other levels of the residential is not possible as his condition inhibits his ability to undertake the extensive work tiling. As a result of his physical injury, I have no choice but to contract other tilers to complete my residence...’

[12] The claimant states that he lost earnings of \$41,428.57 from 19th October 2009 to January 2011 when he was able to resume work. This figure is made up of loss of earnings from October to December 2009 of \$9,428.57 and for 2010 of \$48,000.00. The figure of \$48,000.00 was reduced by 1/3 to \$32,000.00 the claimant states in his affidavit to take into account the uncertainty of consistent employment. The figures submitted are calculated at \$2,000.00 a fortnight.

[13] The claimant states that he has not been able to return to full employment although he resumed less work in January 2011. He exhibited a letter from Top Stone Fabrication Ltd. dated 5th November 2009 which certified that he was a contracted employee of Top Stone from March 2005 as a tiler and/or carpenter. When contracted the letters states he earned a minimum of \$200.00 per day. They went further to state that due to his injuries they were unable to contract the claimant for any jobs presently until he was healed.

Assessment

[14] In assessing general damages, the court must have regard to recent comparable awards in its own and other jurisdictions with comparable social and economic circumstances to assist in arriving at the quantum of damages which is to be regarded as fair compensation to the claimant. As was stated by Lord Diplock in **Wright v British Railways Board**, [1983] 2 All ER 698 at 699:

“... non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, **the**

figure must be ‘basically a conventional figure derived from experience and from awards in comparable cases.’ (my emphasis)

- [15] In the case of **Wells v Wells**, [1998] 3 All ER 481 at 507 Lord Hope of Craighead observed as follows:

“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 best estimate of the plaintiff’s general damages.**” (my emphasis)

- [16] The approach is therefore to look at comparable cases in making an assessment of damages. In the United Kingdom, the Judicial Studies Board (“the Board”) has provided guidelines to assist in the assessment of damages and achieving a measure of consistency in awards in personal injuries claims.

General Damages-Quantum

- [17] Counsel for the claimant submits a global figure of \$80,000.00 as the amount that should be awarded to the claimant. He has not however indicated how this figure should be apportioned and so the Court is left to carry out that assessment.

Pain and Suffering

- [18] Counsel for the claimant has referred to the following cases from Trinidad and Tobago:

- (a) **Paragg v Bharath**- In this case the second defendant was a carpenter. He lost consciousness and was off work for 6 months. He spent two weeks in hospital and his injuries were irregular lacerations to his little finger, lacerations to the base of his ring finger, large laceration over ulna aspect of forearm. There was no residual disability in this case.

The award was TT\$15,000 in 1970 and increased to \$92,437.00 in 2002, equivalent to EC\$87,471.36. Counsel suggests that in 2017, the award should be EC\$95,000.00. The EC equivalent of the 2002 award is actually EC\$36,760.12.

- (b) **Harper v Ramdeen**-The plaintiff in this case was a taxi driver, a steel bender and pipe fitter. He suffered a compound fracture of the right elbow joint with a comminuted fracture of the upper ulna bone of the forearm. He was hospitalized for 3 weeks and had a plaster cast for 3 1/2 months. The residual effect of the injury was significant restriction in the movement of the plaintiff's right elbow which was confined to 90 to 135 degrees the normal range being from 150 to 180 degrees.

The award was TT\$18,000.00 and was updated in 2002 to \$43,746.00=EC\$19,824.54. Counsel suggests that in 2017, the award should be EC\$50,000.00. The EC equivalent of the 2002 award is actually EC\$17,396.80.

- (c) **Lied v Cannings Industries Ltd.**- I did not find this case particularly helpful in the circumstances of this case.

- (d) **Dookie v Deosaran**- The injuries suffered in this case was a compound comminuted fracture of the upper end of the ulna involving the articulate part of the ulna and the elbow joint. The plaintiff had to undergo two operations, has persistent infections and had to be hospitalized for two 4 week periods.

The award was TT\$11,000.00 and was updated in 2002 to \$171,638.00=EC\$78,017.27. Counsel suggests that in 2017, the award should be EC\$90,000.00. The EC equivalent of the 2002 award is actually EC\$68,256.58.

[19] I have noted that counsel's calculations of the EC equivalents have been incorrect and I have factored this into my assessment.

[20] The Judicial Studies Board Guidelines for the Assessment of General Damages in Personal Injuries states that the hands are cosmetically and functionally the most important component parts of the upper limbs. In cases of injuries to multiple digits, the overall extent of pain, suffering and loss of amenity should be considered. I have considered the suggested awards in the guidelines for the injuries suffered by the claimant and have found that an average award would be in the region of £11,000 - £15,000.00 which is equivalent to a range of EC\$38,500.00 - EC\$52,622.97.

[21] I think that an award of **\$40,000.00** for pain and suffering is reasonable in the circumstances of this case as the claimant has some level of permanent disability, being 20%. However, his period of hospitalization cannot be compared to the cases to which counsel referred which ranged from two weeks to eight weeks. The claimant was hospitalized for one day and discharged to the outpatient clinic. There is also no indication as to how his injuries have affected his day to day living if at all.

Pecuniary Loss

[22] The claimant has submitted evidence of the contract which he lost as a result of the injuries and this has not been contested by the defendant. The sum of **EC\$4,200.00** is therefore awarded.

[23] In relation to loss of income for the period October 2009 - January 2011, the evidence provided by the claimant is that he would have received \$200.00 a day from Top Stone if he was employed. The claimant submits a figure of \$9,428.57 which would be a reasonable figure taking into account a \$200.00 per day pay rate. But this figure must be discounted by 1/2 to taking into account the fact that

the claimant would not have been employed every day but worked when contracted and there is uncertainty as to whether he would have been employed for the entire period. It is also discounted in light of the contract amount of \$4,200.00 which but for his injuries he would have earned during this period and which he is awarded. The figure for the period October - December 2009 is therefore **EC\$4,714.29**.

- [24] In relation to loss of income for 2010, the claimant submits a figure of \$48,000.00. However, the claimant would not have worked every day of the year as I am certain he may not have worked on Sundays. The figure is therefore discounted by 14 days to account for Saturdays and Sundays which would result in a figure of EC\$46,000.00. I accept the claimant's reduction of this figure by 1/3 to take into account the uncertainty of his employment which would result in a figure of **EC\$30,666.67**. The total award for pecuniary loss is **EC\$39,580.96**.

Conclusion

- [25] The claimant is awarded a total of damages assessed in the following amounts:
- (1) A total of \$80,205.96 as special and general damages comprised as follows:
 - (a) Special damages of **EC\$625.00** plus interest at the rate of 3% from the date of the attack, 19th October 2009 to the date of judgment on assessment, 12th December 2017.
 - (b) General damages in the sum of **EC\$40,000.00** for pain and suffering plus interest at the rate of 6% per annum from the date of service of the claim, 14th August 2011 to the date of assessment, December 2017.
 - (c) General damages for pecuniary loss in the sum of **EC\$39,580.96**.
 - (2) Interest on the global award of damages being **EC\$80,205.96** at the rate of 6% per annum from the date of judgment, 12th December 2017 to the date of payment.

(3) Prescribed costs to the claimant in the sum of **EC\$7,218.53** (being 60% of \$12,030.89) pursuant to Appendix C of CPR 65.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar