**EASTERN CARIBBEAN SUPREME COURT**
**SAINT LUCIA**

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

**Claim Number: SLUHCV2017/0280**
**Between**

**Bonny Alexander**

Claimant

AND

**1. Stanislaus Smith**
**2. James Enterprises Limited**

Defendants

**Before:** Ms. Agnes Actie Master

**Appearances:** Mrs. Lydia Faisal with Mrs Cynthia Combie-Martyr of counsel for the claimant
Ms. Diana Thomas of counsel for the defendants

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2017: October 19
December 20
2018 : March 9

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*Assessment of damages- general damages- loss of future earnings- Contributory negligence– whether award should be discounted for failure to wear seat belt.*

## JUDGMENT

1. On the unfortunate night of March 12, 2016 at about 8.50 p.m, Bonny Alexander was a front seat passenger of a Suzuki motorcar traveling towards Mon Repos. A motor pickup owned by the

second defendant and driven by the first defendant collided with the said Suzuki motorcar. Bonny Alexander who was not wearing a seat belt, was thrown out of the car on impact and became entrapped in a nearby tree. He was retrieved by emergency personnel and taken to the St. Jude's hospital. Mr. Alexander obtained judgment in default of defence and the matter now comes on for the assessment of damages.

## General Damages

2. The claimant claims general damages for pain and suffering and loss of amenities in the sum of $220,000.000.00.

3. The principles for compensation for general damages are well known and set out by Wooding CJ in the landmark decision of **Cornilliac v St Louis**[1] namely (1) the nature and extent of injuries suffered; (2) Nature and gravity of the resulting physical disability; (3) Pain and suffering endured; (4) Loss of Amenities; (5) extent to which the claimant's pecuniary prospects have been affected.

## THE NATURE AND EXTENT OF INJURIES SUFFERED

4. Mr. Alexander was admitted at the St Jude's Hospital and underwent several surgical procedures. Dr. Burt who was the first to examine him at the hospital assessed his injuries as multiple and life threatening comprising of :-

    - Multiple left rib fractures ( 2 to 11 ribs) with associated hemo-pneumothorax
    - Comminuted left femur fracture
    - Blunt abdominal trauma
    - Head and facial trauma
    - Mandibular fracture
    - Right first metacarpal fracture

5. Mr. Alexander remained stable during the first few hours of admission but developed increased abdominal pain as a result of the abdominal trauma. On March 13, 2015, he underwent a splenectomy, a surgical removal of the spleen. An insertion of a Steinman pin for stabilization of the femur fracture and left tube thoracotomy (insertion of a chest tube) was made for drainage of hemo-pneumothorax. On March 27, 2015, he underwent surgical repair of the femur and right

[1] Cornilliac v St Louis (1965) 7 WIR 491.

metacarpal with plate and screws. He was discharged from hospital on March 31, 2015, (after 19 days), with follow up evaluation in the out-patient clinic.

6. Due to the facial injuries, he was referred to Dr C. A. Phillips-Jordan, Consultant Oral & Maxillofacial Surgeon who conducted an oral examination on April 16, 2015. In a medical report dated April 28, 2016, Dr Jordon-Phillips states that the Intra-oral examination was difficult to perform due to the claimant's inability to open his mouth. The report states that there was an indication of some level of healing, albeit in the incorrect position. On May 5, 2015, the claimant was readmitted for surgical intervention where the mandible fracture was reopened for fixation and resetting to its normal position. He was discharged on May 9, 2015, with weekly follow ups for change of elastic bands, adjustments and physiotherapy in order to regain normal function of the jaw. On August 12, 2015, he was discharged from clinic after all appliances were removed.

**NATURE AND GRAVITY OF THE RESULTING PHYSICAL DISABILITY**

7. Mr. Alexander, a security officer, was unable to work from the date of accident until April 4, 2016. He returned to work light duties and commenced normal regular duties on July 4, 2016. He walks with a slight limp and continues with pain in the left thigh, when he walks long distances or does strenuous activities.

**Pain and suffering**

8. Mr. Alexander suffered life threatening injuries with constant pain. He underwent multiple surgical interventions and extensive physiotherapy. He still complains with pain off and on in his left thigh.

**Loss of Amenities**

9. Mr. Alexander can perform most activities but with pain whenever he stands for prolonged periods or lifts heavy items. He is unable to run or jump for the rest of his life. The claimant contends that he is no longer able to pursue his interest to join the British Army or the Police Force due to his injuries.

**Analysis**

10. The purpose of compensation in personal injury cases is to try to put the injured party back in the position he or she was in before the injuries occurred. The assessment of damages is not a precise calculation as the aim is to provide reasonable compensation for the pain and suffering and loss of amenities. The court must strive for consistency by using comparative cases tailored to the specific facts of the individual 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".

11. In keeping with this principle, the claimant provided the court with the following authorities as comparatives to justify the suggested award of $220,000.00:-.

    1. **Dr. Wezenet Tewodros v Dr Ganedra Mark et al**[3] - the claimant, 53 years, lecturer at a local university sustained injuries in a motor vehicular accident. She experienced loss of consciousness for an undetermined duration and suffered injuries to the head, chest and pelvic area. She had multiple lacerations to the forehead, mild cerebral concussion, comminuted fracture of the right acetabulum with multiple fractured ribs. The claimant was hospitalized for 52 days. She was managed with traction, used crutches and a wheelchair for some time. Her mobility was compromised as she was unable to stand for long periods. The court in 2012 awarded the sum of $75,000.00 for pain and suffering and $30,000.00 for loss of amenities.

    2. **Dawn Noel v Don John[4]:-** The claimant, 24 years old, was a front seat passenger in the motor vehicle which collided with a wall. She was diagnosed with (i) facial laceration approximately 15 cm long in the right Zygomatic region; (ii) laceration to right lower lip approximately 10 cm long; (3) intraoral laceration of approximately 20 cm in the right cheek; (iv) commuted fracture of the right maxilla-malar complex and (v) comminuted fracture of the right anterior region of the mandible or jaw bone. She was hospitalized for eight (8) days and underwent emergency surgery for fixation with plate and screws of the mandible fracture and the right maxilla malar region. She underwent three other surgeries in Barbados and remained on sick leave until 6th February 2011. In 2012, she was

[2] [1998] 3 All ER 481
[3] SLUHCV2009/0746 delivered on May 7, 2012.
[4] GDAHCV2011/0568 delivered on December 21, 2012

awarded general damages in the sum of $110,000.00 for pain and suffering and $50,000.00 for loss of amenities.

3. **Garna O'neal v Steadroy Matthews[5]:-** In 2010, the claimant, 51 years old, was struck by and dragged several feet under a safari bus. She suffered 8 broken ribs, a collapsed lung, removal of her spleen, laceration of her liver, a broken right arm, chipped tooth, incontinence, extensive burns and scarring on her abdomen and arms and scarring on her thighs due to removal of skin for skin grafts. She had permanent titanium rods and plates inserted in her arms. She had repeated infections and underwent several surgical procedures to remove pebbles and foreign bodies from the wounds. In 2015, the court awarded the sum of USD$100,000.00 for pain and suffering and loss of amenities.

**The defendant's submissions**

12. The defendants in response suggest an award in the range of $75,000.00 - $100,000.00 for pain and suffering and $25,000.00 for loss of amenities. Counsel submits that the nature, gravity of the resulting physical disabilities and resulting loss of amenities were more severe in **Dawn Noel** and **Garna O'neal** cases cited by the claimant.

13. The defendants contend that the claimant, unlike the claimants in **Dawn** and **Garna,** has made a full recovery with no disfigurement, negative cosmetic effects or psychological impact. Counsel for the defendants avers that the proposed award of $220,000.00 for general damages is a direct currency conversion to the award made in **Garna O'neal**. Counsel cites the decision of **Lester Anderson v Penor Limited**[6] when a defendant sought to convert ECD currency into USD to arrive at an award. Joseph-Ollivetti J. rejecting that approach states;

> "In my judgment we cannot simply convert EC$ to US$ without more as one has to have regard to the prevailing social and economic situation in the countries which are being sought to be treated as comparable=. In my judgment, such an award would be palpably unfair and without reason".

14. Rawlins J. as he then was in **Kathleen McNally v Eric Lotte and CITCO (BVI) Ltd**, states:

[5] BVIHCV2013/0153 delivered on 27th November 2015
[6] BVIHV+CV2011/0102 delivered on 18th July 2012

"The practice is to grant a global sum for general damages for pain and suffering and loss of amenities, considering these against the background of the nature and extent of the injuries sustained and the nature and gravity of the resulting impairment and physical disability."

15. An award of general damages is not strictly for the injuries sustained, but for the pain and the suffering and the loss of amenities which resulted from them. Where multiple injuries are sustained there will be an immediate loss of amenities and an accumulation of pain and suffering. The pain and suffering and lost amenities may develop to either a greater or lesser degree to the individual. Each case will be tailored to its specific facts and considered with a view to determining a figure which reflects the combined effect of the injuries.

16. It is the evidence that the claimant, like the claimant in **O'neal** suffered multiple life threatening injuries. However, I am in agreement with the defendants that the resulting impairment and physical disabilities in the **O'neal's** case were more severe. The court must always have regard to the extent of the injury, and the effect on the claimant's work and lifestyle. It is the evidence that the claimant has made a complete recovery from the injuries sustained with no functional defects except for a slight limp and pain in his thigh when he walks long distances, stands for prolonged periods or lifts heavy objects. The claimant did not provide supporting evidence of any attempts to pursue his ambition to join the police force or the British army.

17. Counsel for the claimant placed much emphasis on the susceptibility to infections as a result of the splenectomy. Counsel for the defendants in response cites the decision in **Mary Anna Alexander V Augustin Deterville,** decided in 2004, where the trial judge, being aware of the nature and gravity of the claimant's asplenic state and susceptibility to overwhelming sepsis for the rest of her life, made an award in the sum of $17,000.00 for general damages. The authority is of some vintage and is not of much assistance as a comparative award.

18. I take into consideration the claimant's age, the severity of the injuries with numerous surgical procedures. I also note his full recuperation from the injuries but with a limp and slight pain which will endure for life. I am of the view that an award in the sum of $100,000.00 for pain and suffering and the sum of $40,000.00 for loss of amenities is a fair compensation.

## Loss of Pecuniary Prospects

19. The claimant, using the conventional multiplicand/multiplier principle, seeks loss of pecuniary prospects in the sum of $159,600.00.

20. Loss of pecuniary prospects must be proved at the time of trial upon proof that the claimant's injuries prevent him or her from carrying out his or her former employment or has returned to employment but is working for pay at a lower rate. The evidence before the court is that the claimant has resumed his employment without any diminution in wages or conditions of work. The medical evidence does not indicate that the claimant will be prevented from continuing his employment. Accordingly an award is not made under this head.

## Loss of Earning Capacity

21. The claimant seeks loss of earning capacity in the sum of $10,000.00. An award made under this head is made where a claimant resumes employment without any loss of earnings or higher rate of earnings. The award is made if the claimant has suffered a disability that may increase the risk that if his present employment ceases and he has to seek alternative employment he would be less able to compete in the labour market because of the injury. The text **Mc Gregor on Damages** at para 38-095 states:

> "Where the claimant continues in employment but is disadvantaged in the labour market as a result of the injuries, an alternative course is to make a separate award for this head of damage distinguishing between the loss of actual earnings- of which there will be none if the claimant has continued in employment at the same salary as formerly and the loss of earning capacity represented by the physical handicap was produced by the injury".

22. The recent Court of Appeal decision in **Steadroy Matthews v Garna O'neal**[7] gives guidance on this point. Michel J. A. states:

**"** a **Smith v Manchester** award is made in a situation in which the injured party is in regular employment at the date of the trial but has a partial disability resulting from the injury which puts him at a disadvantage in the labour market because he may lose his employment and may not be

[7] BVIHCVAP2015/0019 delivered January 16, 2018.

able to get another similarly-remunerated job. In such a situation, the English Court of Appeal in **Smith v Manchester** considered that it would be impractical to try to work out a multiplier and a multiplicand on which to arrive at an award for loss of earnings, and that the better approach was to make an award to the injured party for loss of earning capacity consequent on the injuries sustained."

23. The claimant is a security officer who continues to suffer pain in his left thigh with strenuous activities or prolonged walking or standing. Also because of his splenic state may develop infections which may impact his ability to work. In keeping with the decision in **Alphonso et al v Deodat Ramnath**[8] and taking into consideration the claimant's age and the combined effect of his injuries I accordingly award the sum of $10,000.00 as claimed under this head.

**Special Damages:**

24. Special Damages in the sum of $60,415.60 comprising of the following sums were uncontested by the defendants:
    1. Medical Expenses totaling - $44,460.00
    2. Loss of Earnings less 5% NIC Contributions in the sum of $12,105.60
    3. Nursing care in the sum of $3850.00

**Issue Estoppel - Whether the defendants having admitted liability, with a judgment in default of a defence, can now raise the issue of Contributory negligence?**

25. Counsel for the defendants submits that the claimant's failure to wear the seat belt gives rise to the issue of contributory negligence which is relevant in assessment of quantum of damages. Counsel citing the decision in **Gleeson v Court (2007) All ER(D) 280**, avers that any award made ought to be discounted by 25% to reflect the claimant's contribution to the loss and damaged suffered.

26. Counsel for the claimant in response contends that the defendants cannot now be entertained on the issue of contributory negligence. Counsel avers that negligence was pleaded and particularized in the statement of claim and the defendants having admitted liability in the acknowledgement of

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service without filing a defence cannot now attempt to avail themselves of any defences on the assessment of damages. Counsel contends that the admission of liability unqualifiedly in the acknowledgment of service and the entry of judgment in default amount to an estoppel on the issue of liability.

## Analysis

27. A default judgment is conclusive on the issue of liability of the defendants as pleaded in the statement of claim but not necessarily conclusive on the issue of damages. It is open to the defendant at the assessment of damages to advance a causation objection, failure to mitigate loss or contributory negligence.

28. The Court of Appeal in **Keith Claudius Mitchell et al v Capital Bank International Limited[9],** per Blenman JA citing with approval the decision in **Lunnun v Singh [1999] CPLR 587** states:-

> "It is incumbent on the judicial officer at the assessment hearing based on a default judgment, to scrutinise the pleadings in order to determine what the default judgment represents. As a general rule, the default judgment does not represent a decision that all of the loss or damage alleged by the claimant was indeed suffered by him or attributable to the defendant. On an assessment of damages all questions going to quantification, including the question of causation in relation to particular heads of loss claimed by the claimant, remain open and could be raised by the defendant provided that it was not inconsistent with liability alleged in the statement of claim "

29. Clarke LJ, in **Lunnun v Singh** said that on the assessment of the damages:-

> "the defendant might not take any point which was inconsistent with the liability alleged in the statement of claim, but subject to that might take any point which was relevant to the assessment of damages, including contributory negligence, failure to take reasonable steps to mitigate, and causation to the extent that the defendant's acts were not causative of any particular items of alleged loss"..

30. The law of contributory negligence in an assessment of damages was developed in the seminal decision in **Froom v Butcher [1976] 1 QB 286,** where the driver of a vehicle, who was not wearing

[9] GDAHCVAP2015/0034 delivered September 22.,2017

his seatbelt, suffered head and chest injuries in a collision caused by the Defendant's negligence. The late Lord Denning stated:- "Everyone knows, or ought to know, that when he goes out in a car he should fasten the seatbelt"

31. Lord Denning M.R sets out guidance as to the apportionment of damages in cases of contributory negligence as follows:-.

"Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be?

…….

But we live in a practical world. In most of these cases the liability of the driver is admitted, the failure to wear a seat belt is admitted, the only question is: what damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.

**Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such cases the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent." (**emphasis added**)**

32. In **O'Connell v Jackson**[10]**,** the issue arose as to whether a motorist's failure to wear a helmet amounted to contributory negligence in case of an accident. The plaintiff was an experienced

[10] [1971] 3 WLR 463; [1972] 1 QB 270; [1971] 3 All ER 129;

motorist, travelling to work at 20 mph on a major road in a busy traffic area. Contrary to the **Highway Code**, the plaintiff was not wearing a seatbelt. The defendant was emerging from a minor road and stopped at the junction with the major road but then negligently moved forwards, causing the plaintiff to collide with it. As a result, the plaintiff sustained severe head injuries. At the trial of the plaintiff's action for damages, the defendant admitted that he was guilty of negligence. The Court of Appeal applying ***Jones v Livox Quarries*** **[1952] 2 QB 608**, held (i) the plaintiff should have foreseen the possibility of being involved in an accident even though he was driving with care and at a reasonable speed, (ii) although the defendant is solely responsible for the accident, the plaintiff's negligence is relevant to the gravity of the injuries and damage sustained as injuries of such gravity would not have occurred, had he worn a helmet, (iii) therefore, the plaintiff must bear some of the responsibility for the consequences of the accident and the amount of damages is to be reduced by 15 per cent.

33. It is uncontested that the claimant as a front seat passenger was not wearing a seat belt at the time of the accident. Under the **Laws of Saint Lucia**, the wearing of a seat belt as a front seat passenger is compulsory. The rationale for this mandatory requirement is that a front seat passenger who is unrestrained is at serious risks as he can be ejected from the vehicle and exposed to serious injuries as happened in this case. While the accident was admittedly caused by the second defendant's negligent attempt to overtake the when it was unsafe to do so, I am of the view that the claimant's injuries would have been less severe had he worn his seatbelt. Applying the guidelines set out by Lord Denning, M.R. in **Froom v Butcher** and the authority in **O'Connell v Jackson,** I will reduce the global sum by 15%.

## Order

34. The defendants shall pay the claimant the following sums :

i. General damages for pain and suffering in the sum of $100,000.00 and loss of amenities in the sum of $40,000.00. less 15% = $119,000.00 with interest at the rate of 6% from the date of judgment until payment in full.

ii. Special damages in the sum of $60,415.60 less 15% = $51,353.26 with interest at the rate of 3% from the date of accident until judgment and at the rate of 6 % from judgment until payment in full.

iii. Loss of earning capacity in the sum of $10,000.00 less 15% = $8500.00

iv. Prescribed Costs in the sum of $13,414.00 on the global sum of $178,853.26 in accordance with CPR 65.5

**AGNES ACTIE**

**MASTER, HIGH COURT**

**BY THE COURT**

**REGISTRAR**