

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
SAINT VINCENT AND THE GRENADINES

Claim No. SVGHCV2016/0116

Between:-

ANDRELLA WICKHAM

First-named Claimant

And

FELECIA WICKHAM

Second-named Claimant

And

**DILECIA WICKHAM a minor
(By her Mother and Next Friend
ANDRELLA WICKHAM)**

Third-Named Claimant

And

**DILANA WICKHAM A minor
(By her Mother and Next Friend
ANDRELLA WICKHAM)**

Fourth-Named Claimant

And

DESHAWN GORDON

Defendant

Appearances:

Mrs. Zhingia Horne Edwards of Counsel for the Claimants

Mr. Duane Daniel of Counsel for the Defendant

2017: November 22, 23

2018: April 10

ASSESSMENT OF DAMAGES

- [1] **WALLACE, M.:** On 11th March, 2015, the First, Second, Third and Fourth Named Claimants, then 23 years, 42 years, 4 years and 2 years old respectively (hereinafter called “Andrella”, “Felicia”, “Dilecia” and “Dilana” respectively and collectively called “the Claimants”), were travelling from Kingstown towards the direction of Chateaubelair in a passenger van owned and driven by the

Defendant (hereinafter called “Deshawn” or “the Defendant”). The allegations are that DeShawn was speeding in the area of the Old Cemetery in Layou when the vehicle overturned. The Claimants sustained personal injuries and were taken to the Milton Cato Memorial Hospital, where they received medical treatment.

- [2] The Claimants commenced legal proceeding for negligence on the 13th June 2016 claiming damages, interest and costs. On the 13th June 2017, judgment in default of defence was entered for the Claimants with damages to be assessed.
- [3] Evidence on the assessment was given by witness statements and the witnesses were cross examined.

SPECIAL DAMAGES

- [4] The Claimants pleaded and particularized various heads of special damages for a total sum of \$11,476.25 for Andrella, \$260.00 for Felicia and \$50.00 each for Dilecia and Dilana. DeShawn accepted all the sums claimed except the sum of \$10,800.00 claimed by Andrella for loss of earnings.
- [5] DeShawn contends that Andrella is not entitled to the full amount claimed for loss of earnings as she failed to take into consideration her expenses. Moreover, given this failure, the amount of earnings claimed and duration of the loss should be adjusted downwards given the lack of proof provided by Andrella.
- [6] It is a well-established principle that special damages which are generally capable of exact calculation have to be specially pleaded and proved.
- [7] On cross-examination Andrella conceded that the amount of \$1,800.00 per month claimed was an average gross sum and did not take into consideration her expenses. Based on her evidence, these expenses would average about \$208.00 per month for materials and transportation cost to and from Kingstown where she worked several times per week as a self-employed nail technician. She also worked from home.

[8] I accept that Andrella had expenses amounting to about \$208.00 per month and agree with Counsel for DeShawn that this sum must be deducted from the gross earnings¹. It is also Andrella's evidence that the average monthly earnings was in the range of \$400.00 to \$500.00 per week. She provided no independent evidence to support this. I find her to be credible and truthful notwithstanding the failure to deduct her expenses from the loss of earning calculations. I find that the range works out to be \$1,600.00 to \$2,000.00 per month. I will apply the median of these figures which is \$1,800.00 per month. The net income is therefore \$1,592.00.

[9] I also accept the evidence of the witnesses for Andrella that she was unable to work for 6 months and given that DeShawn has not provided any evidence to the contrary, I will allow the amount claimed but will discount it by the amount for expenses.

[10] Accordingly, the loss of earnings claim of Andrella will be allowed in the sum of \$9,552.00 for loss of earnings for six (6) months at \$1,592.00 per month.

[11] I am satisfied that the total Special Damages which have been pleaded and have been proven and therefore allowed as follows:

Andrella	\$10,228.25
Felecia	\$260.00
Delicia	\$50.00
Dilana	\$50.00

GENERAL DAMAGES:

[12] The legal principles governing the assessment of general damages are well settled.² Consideration is to be given to the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering endured; the loss of amenities suffered; and the extent to which the Claimant's pecuniary prospects have been affected.

[13] The Court must award a fair and reasonable amount in compensation to reflect the loss or injury caused to the Claimant by the Defendant's actions. The sum is not calculable by any fixed formula but is intended to put the injured party in the position that they would have been had they not

¹ See *Garna O'Neal v Steadroy Matthews*; BVIHCV 2014/153 at para 29

²*Cornilliac v St Louis* (1965) 7 WIR 491

sustained the injury. A Claimant's general damages may represent the damages for pain and suffering, loss of amenities and for future loss of earnings.

[14] In **Wells v Wells**³, Lord Hope of Craighead said 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...."

[15] The criteria that a judge should apply in the exercise of his or her discretion in relation to general damages for personal injuries is well set out in the Civil Appeal case of **CCCA Limited v Julius Jeffrey**⁴ and reads as follows:

"...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 kind. 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".

Andrella

[16] Andrella's injuries are detailed as-

- i) Severe soft tissue injury to the right elbow
- ii) Severe full thickness abrasions and lacerations to the lateral elbow
- iii) Severe scarring/disfigurement to the elbow
- iv) Small subcutaneous foreign body palpable to the lateral elbow
- v) Elbow pain
- vi) Slight stiffness at the site of the injury
- vii) Bruise to the lateral aspect of the right thigh

³ [1998] 3 ALL ER 481

⁴ C.A. No. 10 of 2003 SVG

- [17] Andrella averred that the laceration she suffered to her right arm was serious to warrant a two-week stay at the hospital and during this time she endured painful debridement procedures, frequent dressing changes and difficult physiotherapy. The dressing changes and physiotherapy continued at a clinic after she was discharged from the hospital.
- [18] She stated the residual pain in her elbow, the stiffness, the chronic itching that she experienced once she was discharged from the hospital, the inability to flex her arm and the discovery of a sharp, foreign object under her skin, the existence of which continues, has created a sense of unease.
- [19] Andrella submitted that the Court ought to give consideration to the mental and psychological effect of the injury and suffering therefrom. She avers that the emotional trauma and anxiety associated with experiencing a serious motor vehicle accident, particularly one that also involved her two young children as well as her mother, coupled with negative effect of disfigurement are among the factors that the Court should take in consideration.
- [20] The evidence of Andrella and her witnesses is that she was unable to carry out her vocation as a nail technician, she could not do simple everyday chores for approximately two months, and she continued to rely on Felicia for daily assistance for about six months following the accident.
- [21] Andrella is now 26 years old. Her evidence is that the disfiguring scar on her arm has left a psychological toll on her as it has given an unexpected negative attention and she has been on the receiving end of hurtful and distasteful comments, looks and questions from strangers. She also makes a claim for future medical expenses on the basis that she has consulted with Dr. Bary Aussi regarding foreign object that has remained in her arm since the accident, as well as the extensive scarring on her arm. He has recommended surgery to remove both.
- [22] Counsel for the Claimants submitted that an award in the amount of \$60,000.00 for pain and suffering and \$30,000.00 for loss of amenities would be appropriate for Andrellain these circumstances.

- [23] I have noted the authorities that were submitted in support of these sums. In **Garna O’Neal v Steadroy Matthews**⁵, a BVI decision in 2015, an award of US\$100,000.00 was made to the claimant who was dragged under a bus and suffered several injuries and disfigurement. Her injuries included 8 broken ribs, a collapsed lung, removal of her spleen, laceration of her liver, a broken right arm along with extensive burns and scarring to her abdomen and arms. The court noted the “the obvious sadness, humiliation and embarrassment caused by her disfigurement for not being able to expose her arm because of extensive scarring”. In **Sidley Binda v Juan Caliste et al**,⁶ a 2016 decision from Grenada, an award was made of \$65,000.00 where the claimant suffered scarring as a result of laceration to his forehead and which resulted in extensive facial scarring causing unfavourable self-image. The Claimant, in **Megan Julien-Bishop v John Buckmire**⁷ was awarded a sum of \$45,000.00 in 2006 for numerous injuries including post-concussion syndrome, ligamentous injury to the spine, and extensive facial scarring and as well as continued sensitivity as a result of her injuries. The Claimant also relied on **Mercedes Delpesche v Samuel Emmanuel DeRoche**⁸, a decision from this jurisdiction where an award of \$65,000.00 was made in 2013 for general damages to a 57 year old Claimant who suffered inter alia, scars on her face and had to attend physiotherapy sessions at an outpatient clinic.
- [24] Counsel for the Defendant argued that the injuries suffered by the claimants in the cases relied on by Andrella were more serious than those suffered by her. Further, there was no medical evidence of the period of incapacity of Andrella and that there is no evidence that Andrella was involved in sports or similar activities.
- [25] I find that the cases above have some degree of similarity with the case at bar in the nature of the injuries suffered with respect to the scarring although each has some factual differences that made the injuries more severe than those of Andrella. I bear in mind that the medical evidence in the case at bar is that while Andrella has severe disfigurement, this can be alleviated with plastic surgery and she has good range of motion of the elbow and no neurological deficit.

⁵BVIHCV 2014/153

⁶GDAHCV2014/0097

⁷GDAHCV 2004/0289

⁸SVGHCV 2012/0041

[26] Having been guided by the cases and the particular circumstances of this case and applied my discretion thereto I award Andrella the sum of \$70,000.00 as a total sum for her pain, suffering and loss of amenities.

Nursing/Domestic Care

[27] Andrella stated that she was taken care of by her mother during her time in hospital and during her recovery at home for approximately two months and to a lesser extent for an additional four months. This level of care was over and above that which they would normally have to provide in the course of family life. Andrella submits that the sum of \$400.00 per month would be reasonable compensation under this head.

[28] This figure was not challenged. The Court will therefore award the sum of \$2,400.00 which is reasonable in all the circumstances.

Loss of Earning Capacity/Loss of Pecuniary Prospects

[30] Andrella has also made a claim for an award for compensation for the disadvantageous position to which her injuries have placed her in the labour market. She provided one account of attending an interview for a position on a cruise ship and not getting the position in support of her contention that her disfigurement has and may continue to negatively impact her job prospects in the future, particularly in the service industry. She urges the Court to make a *Smith v. Manchester* award in the sum of \$20,000.00, representing approximately one year's earnings.

[31] A claimant is entitled to recover damages for a handicap on the open labour market when they can show that as a result of their injuries there is a real risk that they will be out of work and will find it hard to obtain similar employment. As a matter of convention a claim for damages on this basis is commonly referred to as a *Smith v Manchester claim*.

[32] In **Smith v Manchester Corporation** (1974) 17 KIR 1 the plaintiff developed a frozen shoulder as a result of an accident caused by her employer's negligence. At the date of trial the plaintiff was undertaking work for the same employer and at the same rate of pay as before (£16.50 per week), so that she had no current loss of earnings. Her employer undertook to continue employing her as long as it could properly do so. The Court of Appeal increased the plaintiff's award of damages so as to include £1,000 for future loss of earning capacity. The court explained that this sum was to

compensate the plaintiff for the fact that, if she became unemployed, she would find it more difficult than uninjured persons to obtain employment. Both Edmund Davies LJ and Scarman LJ explained that they could not calculate this award using a multiplier and multiplicand. Instead they were looking at the matter in the round and making a general assessment. Stamp LJ agreed.

[33] In **Moeliker v A. Reyrolle & Co. Ltd**⁹, Browne LJ said that a plaintiff's loss of earning capacity arises where "as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury". Browne LJ stated further that the court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life.

[34] I find that this is not a case where the Claimant is at a substantial risk of becoming unemployed and that it is only in such circumstances that such an award is to be made. Moreover, given that I will be making an award for future medical expenses which include cost of recommended surgery for the improvement of the scarring, I make no award under this head.

Future Medical Expenses

[35] I accept Andrella's evidence that she received consultation for Dr. Barry Aussi wherein he recommended surgery for removal of the foreign object and treatment for the improvement of the scarring. Dr. Aussi stated in his report that the treatment varies between patients and may take "up to at least 6 months and can be more".

[36] The proposed treatment is as follows:

1. The surgery is \$900.00
2. Triamcinolone injections every 3 weeks for 7-10 times (10 times at \$200.00 each amount to \$2,000.00)
3. Silicone gel treatment at one sheet every 6 weeks, \$350.00 per sheet (4.3 times \$350.00 each amounts to \$1,516.66)
4. Bio oil to be applied daily, \$90.00 per bottle, \$90.00 times 4 bottles amounts to \$360.00.

⁹[1977] 1WLR 132

[37] The total treatment cost is \$5,710.00 for 6 months of treatment. In the event that treatment surpasses the 6-month period, then, as Counsel for the Claimants submits, a further 3 months should be awarded to compensate Andrella.

[38] Counsel for DeShawn submits that the period of nine months being claimed by Andrella is excessive as it is fifty percent more than the period indicated in the medical report.

[39] Having given consideration to both submissions and the medical report which stated that treatment can take up to at least 6 months and can be more, I will award the sum of \$7,000.00 representing approximately seven and one-half (7 ½) months of treatment. For the avoidance of doubt no interest is payable on this sum.

Felecia

[40] Felecia's injuries are detailed in the medical report of the Milton Cato Memorial Hospital. On the day of the accident those injuries were reported to be trauma to the upper left shoulder and chest pains to the anterior chest wall on deep inspiration. It is important to note that she denied any head trauma and was treated with anti-inflammatory medications and was discharged on oral analgesics and advised to administer cold compresses to the shoulder.

[41] Felicia's evidence is that while recovering she would experience daily throbbing headaches which radiated to her right eye and which she would relieve by taking painkillers or by sleeping it off. She was subsequently seen by Dr. Charles Woods in November 2015 concerning the headaches.

[42] The medical report of Dr. Woods indicated neurological examinations were negative and there were no signs of intracranial injury. Further, that "she should be reviewed by and [sic] ophthalmologist to rule out and [sic] possible optic disorder which may be contributing to her symptoms". Under cross examination, Felicia admitted that she has not been attended by an ophthalmologist.

[43] Felicia also stated that she had to put aside her personal discomfort and nurse her grandchildren and their mother (her daughter) back to good health. She suffered anxiety, described having a crushed spirit when she realized how much her daughter's injury to her arm had limited her and eroded her self-esteem.

[44] Counsel for the Claimants submitted that an award in the amount of \$25,000.00 as general damages for Felicia.

[45] I have noted the authorities that were submitted in support of this sum. In **Trevor Louis v Lincoln St. Omer et al.**¹⁰, a 2005 decision from Saint Lucia, the claimant was awarded \$7,000.00 as general damages for injuries including lacerations over the scalp and left shoulder, a ligamentous injury to the thumb, a sprain in the shoulder region. The injuries healed completely after four weeks. In **Peter Cherry et al v Trevor Trim et al**^{11a} a 2013 decision, also from Saint Lucia, an award was made of \$8,000.00 where the claimant suffered neck injury which produced much pain and discomfort. The Claimant also relied on **Dexter James v M&A Soufriere Sightseeing Tours Limited et al**¹², another decision from Saint Lucia where an award of \$7,500.00 was made in 2009 for pain and suffering and loss of amenities to a claimant who suffered tenderness to the hip and superficial lacerations to the heel and forehead.

[46] Mr. Daniel argued that Felicia was discharged within hours of being at the hospital and suffered what really were soft tissue injuries. He submitted that the medical evidence did not reveal any injury to Felicia's head and the evidence as contained in the Medical Report prepared by Dr. Yearwood after examining her on the evening of the accident was that "Ms. Wickham was fully alert and oriented to time, place and person and was not in any cardiopulmonary or respiratory distress. Head, eye, ear and neck examination was unremarkable" and that \$5,000.00 was sufficient to compensate her under this head.

[47] Having considered the evidence and authorities relied on I will award the sum of \$10,000.00 for general damages.

Dilecia and Dilana

[48] Dilecia suffered head trauma, headache and a 1.5 cm x 2 cm hematoma to the middle forehead. The injuries sustained by Dilana were a mild abrasion, about 2 cm in diameter, to the right posterior ear, superficial abrasions between her fingers and a 7 cm x 3 cm abrasion to the proximal one-third of the forearm. Both children were examined at the Milton Cato Memorial Hospital and later discharged that night.

¹⁰SLUHCV 2001/0586

¹¹SLUHCV2011/0073

¹²SLUHCV2002/0965

- [49] Andrella and Felicia gave insight as to the extent of pain and suffering both girls endured. Andrella stated that the Dilecia was distressed and screaming at the time of the accident and while being transported to the hospital. Dilana shed no tears despite the “nasty” abrasion to her arm and appeared to be in shock.
- [50] Felicia gave an account of the discomfort experienced by Dilana. Felecia had the task of performing daily dressing changes of Dilana’s wound. She stated that the bandage would often stick to the wound and the child would scream from pain. The evidence is that Dilana not only suffered considerable pain and suffering but also experienced trouble sleeping at night, frequent nightmares which continued into about six months after the accident and anxiety with traveling in any passenger vehicle.
- [51] Counsel for the Claimants suggested an award in the amount of \$8,500.00 for pain and suffering for Dilecia and Dilana. The authorities submitted in support of this sum are as follow: **Rosabel Chambers v Frank Gooding**¹³, where the claimant, a minor, sustained soft tissue injury to the left ankle and lacerations on her left leg while on board the defendant’s passenger boat. The court awarded the claimant the sum of \$6,000.00 for general damages. In **Peter Cherry et al v. Trevor Trim et al**¹⁴an award was made of \$2,500.00 where the claimant, a minor, suffered a laceration to the right side of his head and some swelling to his right leg. In **Jessica Ledger v Heslyn Codougan**¹⁵, a two-year old boy, was awarded a sum of \$5,000,00.00 in 2016 for general damages when he suffered a superficial 2.5 cm laceration on his forehead with a small hematoma and laceration to the left leg when he was thrown from his mother’s arms and fell to the ground after she was struck by a vehicle.
- [52] Having reviewed these authorities I see no reason to reduce the amount suggested by Mrs. Horne-Edwards and would award the sum of \$8,500.00 in respect of Dilecia and Dilana for pain and suffering.

INTEREST

- [53] Counsel for the Claimants has submitted that interest on general damages awarded for pain and suffering and loss of amenities from the date of service of the claim form to the date of judgment at

¹³SVGHCV1991/0113

¹⁴Supra, note 11

¹⁵SVGHCV2013/0077

the rate payable on money in court placed on short-term investment. In the absence of evidence of such rate then one-half of the statutory rate should be applied. Similarly, with respect to special damages, the Claimants are also entitled to interest at the rate payable on short-term investment from the date of the accident to the date of judgment. This principle was addressed by the Court of Appeal in **Alphonso and Others v Deodat Ramnath** (1997) 56 WIR 183 and I find it as instructive.

[54] Consequently, Interest at the rate of 3% per annum is awarded to the Claimants on the Special Damages from the date of the accident to the date of judgment and 6% per annum on the General Damages from the date of filing of the claim to the date of judgment. After judgment, the Claimants are entitled to interest at the rate provided in the Interest Act to the date of payment in full.

[55] In summary, for the foregoing reasons the Court orders on the assessment of damages:

(1) **Andrella**

- (i) \$70,000.00 for pain and suffering and loss of amenities with interest at the rate of 6% per annum from the date of service of the claim to the date of judgment.
- (ii) \$10,228.25 as special damages with interest on special damages at the rate of 3% per annum from date of accident to date of judgment.
- (iii) \$2,400.00 for nursing and domestic care. No pre-judgment interest.
- (iv) \$7,000.00 for future medical expenses. No pre-judgment interest.

(2) **Felicia**

- (i) \$10,000.00 for pain and suffering and loss of amenities with interest at the rate of 6% per annum from the date of service of the claim to the date of judgment.
- (ii) \$260.00 as special damages with interest on special damages at the rate of 3% per annum from date of accident to date of judgment.

(3) **Dilecia**

- (i) \$8,500.00 for pain and suffering with interest at the rate of 6% per annum from the date of service of the claim to the date of judgment.
- (ii) \$50.00 as special damages with interest on special damages at the rate of 3% per annum from date of accident to date of judgment.

(4) **Dilana**

- (i) \$\$8,500.00 for pain and suffering with interest at the rate of 6% per annum from the date of service of the claim to the date of judgment.
 - (ii) \$50.00 as special damages with interest on special damages at the rate of 3% per annum from date of accident to date of judgment.
- (5) Interest on all awards, save and except for the award for future medical expenses, following judgment is at the rate provided in the Interest Act to the date of payment in full.
- (6) The Claimant will also be awarded prescribed costs as per Rule 65.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

Yvette Wallace
MASTER

By the Court

Registrar