

EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2015/0887

BETWEEN:

DEBORAH JULES

Claimant

and

FELIX EMERSON HUTCHINSON
NIAH GEDDEN
ALVIN PRINCE

Defendants

Before: Ms. Agnes Actie

Master

Appearances: Mrs. Maureen John-Xavier for the claimant
Ms. Patricia Augustin for the Defendants

2018: August 17

Judgment

- [1] ACTIE M: Following a collision on 7th July 2013, the claimant sustained injuries to the forehead, left wrist and right ankle as a passenger in a minibus driven by the first defendant, and owned by the second and third defendants. The claimant obtained judgment in default of acknowledgment of service and the matter comes on for assessment in accordance with CPR 12.13 and CPR 16.

Special Damages

- [2] Special Damages comprising of the following sums were uncontested:

- (1) Legal Letter and service - \$550.00
- (2) Medical Report - \$1000.00
- (3) Traffic accident report - \$200.00
- (4) Domestic Assistance for 4 months @\$50.00 a day - \$6150. 00

General Damages

- [3] The claimant, 41 years old and a hairdresser by profession, seeks compensation for general damages in the sum of \$160,000.00, in keeping with the principles enunciated by Wooding C J, in the seminal case of Cornilliac v St Louis¹.

Nature and extent of injuries

- [4] The claimant's injuries were described in three (3) medical reports from Dr. Dagbue, Consultant Orthopedic Surgeon, dated 26th March 2014, 3rd November 2015 and 12th November 2016 respectively:

- (1) Report dated 26th March 2014: **The claimant was admitted to the St Jude's Hospital and was managed with wound dressing, suturing of laceration at the left forehead and plaster of paris cast to the left wrist and right lower limb. She was diagnosed with: a small laceration above the left eyelid with swelling of the forehead; fracture of the left distal radius; open fracture of the right distal tibia and fracture of the right fibula. She was managed surgically on 12th July 2013 with open reduction and external fixation of the right leg. She was discharged from hospital on 17th July 2013 for follow up care in the orthopedic outpatient's clinic.**

- (a) Upon further review on 11th February 2014, she was diagnosed as stable with no further expected incapacitation. The laceration on her forehead had healed but left a permanent scar over her eyelid. The fracture of the left distal had healed well with normal movement of her wrist, but with continued pain off and on whenever she lifts

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

up heavy items or uses her left arm a lot, a condition which may continue for years. The open fracture on her right distal tibia and fibula had healed leaving a large scar on her right leg. She walked with a limp and pain in her leg when she walked a long distance which was expected to improve with time and rehabilitation.

(2) Report dated 3rd November 2015: On examination on 29th September 2015, the claimant continued the complaints of pain in the right leg whenever she walks long distances together with headaches; back pains due to lumbar spondylosis, consistent with degenerative changes of the lumbar spine. The report states that the claimant would still have some difficulties when she performs her job as a hairdresser, as she is required to stand for prolonged periods of time and also work in a bent position which would cause back pain and in the right leg pain off and on.

(3) Report dated 12th November 2016: The claimant was assessed as having reached her maximum medical improvements after two years since the accident with 11% whole person impairment. The report reiterated that the claimant would have some difficulties when she performs her job as a hairdresser as she is required to stand for prolonged periods of time with back pains on and off.

Pain and Suffering

- [5] The claimant averred that she was totally incapacitated and in pain for four months. She still continues to suffer pain when she walks long distances and in her left upper limb when she performs strenuous activities.
- [6] The claimant states she has difficulty performing her job as a hairdresser as she is required to stand for prolonged periods and suffers with back pain.

Effects on pecuniary prospects

- [7] The claimant contends that the persistent pain prevents her from continuing her professional hair dressing business.

Defendants' submissions

- [8] The defendants were dissatisfied with some aspects of the medical evidence and requested that the claimant be medically examined by Dr. Horatius Jeffers, Orthopedic Surgeon. The claimant refused to be examined by Dr. Jeffers.
- [9] Dr. Jeffers in his witness statement and examination-in-chief, states that a period of 4 months in which the claimant required assistance to perform basic activities is in keeping with the generally accepted time period over which the type of injuries would heal. However, Dr. Jeffers contends that the reports do not indicate that there was any malalignment or persistent infection all of which, if present singularly or in combination, may give rise to impairment in standing for prolonged periods of time. **Dr. Jeffers was of the view that the claimant's inability to stand for prolonged periods,** and her back pains cannot be attributable to the now healed right tibial fracture. Dr. Jeffers contends that any continuous pain after 3 years, despite the fact that the bone had sufficiently healed, was suggestive of ongoing infection which would have required treatment as something was seriously wrong. Dr. Jeffers was also of the view that the issue of the back pain raised 2½ years after the accident is not associated with the nature of the injuries suffered by the claimant, as the back pain would have presented itself within two weeks of the accident.

Analysis

- [10] 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] The claimant in support cites the following authorities:

- (1) *Cleos Billingly v Kevon Jessie-Don Anderson*³: the claimant suffered laceration to left parastatal scalp; deformity of distal leg and left elbow; fracture to left tibia and fibula; fractures to left distal humerus and right thumb. She was hospitalized for 10 days and underwent surgery for external fixation of the distal humerus as well as closed reduction and casting of the fracture of the tibia/fibula. He underwent further surgery to remove the external fixator and was discharged with follow up treatment at the out patients’ clinic. The claimant healed well but continued to complain of pain and stiffness of the elbow with post trauma arthritis. In 2014, the court awarded the sum of \$80,000.00 for pain and suffering and \$30,000.00 for loss of amenities.
- (2) *Ronald Fraser v Joe Dalrimple*⁴:- the claimant suffered comminuted fracture of left ankle and lower 1/3 of leg; fractured left medial malleolus of left tibia; severely comminuted fracture of lower end fibula; lateral dislocation of left ankle/tibio dislocation with lateral shift of talus with ankle diastases; severely contaminated compound wound with neuro-vascular compromise. The claimant was discharged from hospital after 28 days and taken to his home where he remained bedridden for approximately 4 months after which he began to move around with a crutch. He underwent physiotherapy and had to return to the doctor on numerous occasions as he was in constant pain and the fracture was not healing properly. He had full disability of the lower limb

² [1998] 3 All ER 481

³ SVGHCV2013/0096 delivered Dec 3,2014

⁴ ANUHCV2004/0513 delivered on 5th My 2010

and had to have further surgery in Guyana for his ankle joint to be fused as his ankle was not healing. He continued to experience pain and discomfort over twenty months. In 2010, he was awarded general damages in the sum of \$150,000.00 with \$85,000.00 for pain and suffering and \$65,000.00 for loss of amenities.

(3) *Sherma Mathurin v Rain Forest Sky Rides Ltd*⁵: the claimant suffered a displaced intra-articular open fracture of the low end of the right tibia with a fracture of the fibula; multiple grazes and bruises to the forehead and right upper limb. She underwent surgery for the internal fixation of plates and screws along with bone grafting of the fracture. She developed arthrosis of the right ankle and had to seek medical treatment in Martinique. The claimant's permanent impairment of the right hind restricted her ability to walk long distances, standing for prolonged periods, waking on inclined surfaces or even wearing shoes with heels. In 2010 the sum of \$150,000.00 was awarded for general damages.

[12] Counsel for the defendants **contend that the claimant's injuries do not support** the award of \$160,000.00 claimed, as the injuries in the authorities cited are more severe.

[13] Counsel for the defendant suggests an award in the sum of \$50,000.00 and relies on the decision of Master Taylor-Alexander, as she then was, in *Peter Cherry et al v Trevor John*⁶, and the authorities cited in arriving at the award. Following an accident on 9th February 2008, Peter Cherry, who was 36 years old, suffered a fracture of his upper leg near his hip. He was hospitalized for three (3) days and suffered temporary partial disability for a period of six months with permanent partial disability of 7%. He ambulated on crutches until 2nd May 2008 for short period and distances. His work as a driver was occasionally affected by his injuries. In 2013,

⁵ SLUHCV2008/0551 delivered on August 3 2010

⁶ SLUHCV2011/0073

an award in the sum of \$24,000.00 was made for pain and suffering and loss of amenities.

- [14] I have considered the medical evidence, both in the medical reports and the witness statements. Dr. **Dagbue's** medical reports are consistent that the claimant had healed well but with lingering pain which will affect her ability to walk and stand for long periods. It is unfortunate that the claimant did not allow a further evaluation by Dr. Jeffers and neither was Dr. Dagbue called upon to be cross- examined on his evidence. In a letter dated 22nd July 2017, Dr. Dagbue, in response to Dr. **Jeffers's** opinion, states although degenerative changes may not only be due to injuries sustained, the pain is most likely triggered and worsened by the injuries sustained in the accident.
- [15] The evidence of each of the medical officers in this case gave respective opinions **of the claimant's injuries**. Dr. Jeffers did not have the opportunity to examine the claimant but gave an opinion on **Dr. Dagbue's** reports for the purpose of the assessment. Ultimately, it is a matter for the court to put the evidence together and to weigh on a balance of probabilities.
- [16] From the outset, the claimant's injuries were primarily directed to the left wrist and right ankle with no issue mentioned about degenerative back pains. I accept Dr. Jeffers' evidence that it is highly improbable that the back pains were as a result of the accident. I am also in agreement with the defendants that the injuries in the authorities cited by the claimant are a lot more severe than the case at bar. For instance, the claimant in Cleos Billingily suffered laceration the scalp; deformity of distal leg and left elbow; fracture to left tibia and fibula; fractures to left distal humerus and right thumb. The injuries in the other two cases are even more severe. I am of the view that an award of \$65,000.00, with \$40,000.00 for pain and suffering and \$25,000.00 for loss of amenities is a fair and reasonable amount to compensate the claimant for the injuries suffered.

Loss of Income

- [17] The claimant seeks an award in the sum of \$74,680.00 for loss of income for 4 years. The claimant states that she was the sole owner of 'A Touch of Ambiance Beauty Salon' at the Gablewoods South Mall in Vieux-Fort, which became unprofitable and had to be closed due to the fracture in her left wrist and her inability to stand for long periods.
- [18] The defendants are of the view that the claimant should only be compensated for a period of two years as the medical report of Dr. Dagbue states that the claimant was completely healed within two (2) years of the accident without any further incapacitation.

Analysis

- [19] A claimant is awarded loss of income for loss suffered from the date of the accident **till trial and calculated on the claimant's net earnings**. I accept the medical evidence that the claimant had reached her maximum medical improvement and was completely healed after two years of the accident, but with residual pain. The claimant failed to provide evidence of efforts made to mitigate her loss after the two year period. She merely states that she was unable to get a job. It is the evidence that the claimant had employees which she could have supervised to continue her business or take other measures to mitigate her loss.
- [20] The claimant presented a copy of her Income Tax Returns Form to prove her pre-accident net annual average income of \$18,676.00. In keeping with the medical evidence, I accordingly award loss of income for two (2) years in the sum of \$37,352.00.

Loss of pecuniary prospects

- [21] The claimant seeks the sum of 186,760.00 for future earnings, using the conventional multiplier/multiplicand principle. The claimant avers that she has been unable to pursue her pre-accident occupation as a hairdresser due to the pain in her wrist, leg and back.
- [22] The defendants contend that the medical reports do not support the **claimant's** averments. As indicated above, the defendants contend that **Dr. Dagbue's** medical assessment stated that the claimant had been completely healed for the last three years after the initial review.

Analysis

- [23] Loss of pecuniary prospects is awarded at the time of trial upon proof that the **claimant's injuries prevented 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.
- [24] In *Mitcham Black v The Attorney General of Saint Lucia*⁷ *Hariprasad-Charles J* as she then was, referred to the test laid down by the Jamaica Court of Appeal in *Gravesandy v Moore*⁸ for an award under this head which states:
- “A plaintiff who seeks general damages for loss of earnings must show that there is a real or substantial risk that he may be disabled from continuing his present occupation and be thrown handicapped, on the labour market at some time before the estimated end of his working life. The risk in such a case will depend on the degree, nature, or severity of his injury and the prognosis of full recovery; and the evidence must be adduced as to these matters and also as to the length of the rest of his working life, the nature **of his skills and the economic realities of his trade and location.**”

⁷ SLUHCV 2004/0502 delivered on 19th March 2007

⁸ (1986) 40 WIR 222

- [25] An award for loss of future income compensates for earnings that a claimant would have had, had he/she not been injured. The proof need not be that the future loss **will likely occur, but that there is a “real and substantial possibility and not mere speculation” that the loss will occur. The claimant is to be compensated for the loss** of earning capacity, if it is proven to be attributable to the injuries suffered as a result of the accident.
- [26] The conventional approach in an assessment of future loss of earning capacity is the use of the multiplicand and the multiplier method, 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.**
- [27] At the time of the assessment, the claimant was unemployed. There is no mathematical basis upon which to assess future loss of earnings. The medical reports did not support a total incapacity to justify an award using the multiplier/multiplicand principle. It is the evidence that the claimant is able to return to work but with some pain when standing for long periods and continuous use of the wrist. I accept that a hairdresser is required to stand for long periods and would definitely have some limitations with wrists and ankle pains.
- [28] In such a case ‘A Blamire Award’ is appropriate where evidence shows that there may be a loss of earnings, but there are too many uncertainties to adopt the conventional method of multiplier/multiplicand to calculate compensation.

[29] In the Court of Appeal, Michel JA in *Steadroy Matthews v Garna O'neal*⁹ cited with approval the English court of Appeal decision in the case of *Pritchard v J. H. Cobden*¹⁰

“[41], the English Court of Appeal held that damages for loss of earnings for a living claimant should be assessed as special damages for the earnings lost between injury and trial, with a calculation of the future loss of earnings from trial by selecting a multiplier from the date of trial to compensate the claimant for the likely loss of earnings for his future working life.”

At paragraph 49 Michel JA stated:

“In the case of *Blamire v South Cumbria Health Authority*¹¹, the English Court of Appeal held that the trial judge was entitled to reject the multiplier-**multiplicand approach in assessing the injured party's future loss of earnings**, given the number of uncertainties in that case as to the amount the injured party would have earned if she had not been injured, as well as the likely future **pattern of her earnings.**”

[30] I accept the evidence that the claimant may have a diminished capacity in continuing her profession as hairdresser which is attributable to the injuries suffered. However I am of the view that there are too many uncertainties to adopt the conventional multiplier and multiplicand approach. In the circumstances, I will make a broad blush ‘Blamire Award’ in the sum of \$20,000.00 to compensate for loss of future earnings.

ORDER

[31] The defendants shall pay the claimant the following sums:

(1) Special damages comprising the following:

- (a) Legal Letter and service - \$550.00
- (b) Medical Report - \$1000.00
- (c) Traffic accident report - \$200.00
- (d) Domestic Assistance - \$6150. 00
- (e) Loss of income - \$37,352.00.

⁹ BVIHCVP2015/0019

¹⁰ [1988] Fam. 22.

¹¹ [1993] PIQR Q1; [1992] Lexis Citation 2222.

Total Special Damages in the sum of \$45,252.00 with interest at the rate of 3% from the date of the accident to the date of judgement and at the rate of 6% from the date of assessment until payment.

- (2) General Damages in the sum of \$65,000.00 with interest at the rate of 6% from the date of judgment until payment in full.
- (3) Loss of future earnings in the sum of \$20,000.00 with no award for interest.
- (4) Prescribed Costs on the global sum pursuant to CPR 65.5

Agnes Actie
Master, High Court

By the Court

REGISTRAR