

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
CLAIM NO. SKBHCV2016/0225

BETWEEN:

TREVOR RICHARDS

Claimant

and

1. CHANEL CAINES
2. THE ATTORNEY GENERAL OF SAINT KITTS AND NEVIS

Defendants

Appearances:

Ms. Natasha Grey for the Claimant
Ms. Nisharma Rattan Mack with Mrs. Eshe Hendrickson-Johnson for the Defendants

2018: November 6, 14
(Written Closing Submissions filed on 16 and 27 November 2018)
December 3

JUDGMENT

- [1] **VENTOSE, J.:** On one quiet afternoon the Claimant was driving his church bus on the Island Main Road near the majestic Brimstone Hill Fortress, heading in an easterly direction from Sandy Point in the island of Saint Christopher. The tranquility of the drive was interrupted suddenly by a collision with the ambulance

driven by the First Defendant. The circumstances surrounding this collision are the subject of this decision.

- [2] The Claimant avers that while driving along the Island Main Road he signaled and attempted to make a right turn in the vicinity of an abandoned nightclub. The Claimant further avers that while doing so, the ambulance driven by the First Defendant attempted, without giving any notice, to overtake his bus. In the process, the ambulance collided with the bus. The ambulance overturned on its right side and slid for some distance before stopping. As a result of the accident, the Claimant sustained injuries and was taken to the Joseph N. France Hospital where he was admitted for medical and surgical treatment. He remained at the hospital for approximately two months.
- [3] The First Defendant avers that she was driving the ambulance with the emergency lights on and saw a bus driving slowly in front of her vehicle. At a distance of approximately 10-15 feet, she blew the horn once to indicate to the Claimant that she was about to overtake the bus. As soon as she attempted to do so, the Claimant made a sudden sharp turn to the right into the road. The First Defendant states that she then applied the brakes but the vehicles collided causing the ambulance to flip, landing on its right side in the center of the road, after sliding along the road for some time. The First Defendant was trapped inside the ambulance but was rescued by two men who arrived immediately on the scene of the accident.
- [4] Mr. Gordon Woodley was a passenger in the ambulance on the day of the accident. Mr. Woodley avers that when the ambulance approached the Brimstone Hill area, they came upon a blue church bus, which was driving ahead of them at the time. Mr. Woodley continues that at an approximate distance of 10-15 feet, the First Defendant began blowing the horn of the ambulance that had its emergency lights flashing to indicate that she was ready to overtake the bus and began doing so. Mr. Woodley states that the First Defendant was unsuccessful in her attempt to overtake the bus because the Claimant made a sudden right turn into the road without indicating and that, as a result of the Claimant's actions, the bus collided

with the ambulance. Mr. Woodley avers that two persons from a nearby mechanic shop rescued them from the ambulance.

- [5] Police Constable Kester Mills (PC Mills) in his report dated 6 April 2016 states he took statements from the Claimant and the First Defendant. In the report, it is stated that the Claimant provided the following explanation of the accident:

I was travelling from Sandy Point and went to the mechanic shop to drop off something and having completed I leave the mechanic yard and travelled further down the road to turn around to go back into sandy point and as I did so I felt the impact into the vehicle.

- [6] The report contains the following statement from the First Defendant:

I was turning from Sandy Point heading to JNF Hospital and when I got in the vicinity of Brimstone Hill going across the long stretch of road, while I was overtaking a blue bus I felt a head on impact.

- [7] PC Mills concluded that both vehicles were travelling from Sandy Point to the Halfway Tree direction with the bus driven by the Claimant in front of the ambulance. PC Mills continued that the bus began turning right in the vicinity of the abandoned nightclub to go in the opposite direction, while the ambulance driven by the First Defendant was overtaking. The report noted that the ambulance collided with the bus on the right side and overturned on its side and slid for some distance before stopping.

Analysis of the Evidence to Determine Fault

- [8] At trial the Claimant stated that he: (1) slowed down the speed at which the bus was driving; (2) put his indicating lights on before turning right; (3) did not hear any horn from the ambulance that was approaching from behind; and (4) checked the mirrors but did not see any vehicle behind him. The Claimant stated that as soon as he was about to turn right the ambulance driven by the First Defendant hit the bus. The Claimant further stated that he attempted to make the right turn in an area with a small roundabout that most drivers use to turn before heading west.
- [9] The First Defendant stated that she was on her way to collect a patient, was not in a hurry and was unaware that drivers made turns in the area in which the Claimant

stated he was attempting to turn. The First Defendant claimed that the ambulance was approximately 10-15 feet away from the bus when she started overtaking. She stated that an ambulance is driven in three "stages", namely: (stage one) the emergency lights are on all the time and the chirping sound (horn) is used only when necessary; (stage two) both the emergency lights and the chirping sound are on all the time; and (stage three) both the emergency lights and sirens are on all the time. The First Defendant claimed that the ambulance was at stage one at the material time, and that since the bus was driving slowly she assumed the driver was simply cruising around the island. The First Defendant stated that she first ensured the path was clear, made the chirping sound once and proceeded to accelerate in order to overtake the bus. She further stated that while doing so the Claimant turned right into the road and his bus collided into the front side of the ambulance. The First Defendant further stated that the Claimant did not indicate by either using hand signals or the indicating lights. The First Defendant admitted at trial that the ambulance was a left hand drive vehicle.

- [10] Mr. Gordon Woodley stated that both vehicles were driving at approximately 20 mph and that the First Defendant blew the horn on the ambulance several times before overtaking the bus. Mr. Woodley further stated that drivers do not usually use the part of the road where the accident occurred to turn and that a U-turn can only be made illegally in the road itself. Mr. Woodley clarified that the bus had no indicator on and that he was in a better position to know since he was on the right hand side of the ambulance.
- [11] PC Mills testified at trial that after his investigation he prepared a report that was given to his superiors. He stated that he has never worked at the Traffic Department but that he has dealt with any traffic matters before and that the accident was the first one he had to investigate without the assistance of the drivers. PC Mills further stated that there was no right turn into the area where the Claimant alleged he was turning but that vehicles nonetheless turned in the area all the time.

- [12] Having considered all the evidence given in this case, I am of the view that had the Claimant looked in his rearview mirror or the right side mirror before turning right he would have noticed the ambulance approaching. The Claimant testified at trial that he checked the mirrors before turning but I am not convinced. Since the First Defendant had already commenced overtaking, and given the point of the collision, had the Claimant checked his right side mirrors he would have seen the ambulance. The Claimant drove the bus slower in order to make the right turn. At that point, he should have ensured that it was safe for him to turn right by ensuring that he checked his rearview mirror and right side mirror. At trial the Claimant gave evidence that he turned right into what he described as a "little roundabout". The court viewed the locus of the accident on 14 November 2018 and found no evidence of any roundabout. The area was simply the side of the road where the verge is larger than in other areas. The Claimant stated that although there was no junction vehicles were able to pull off the road on the grass verge and turn back in the opposite direction to head to Basseterre.
- [13] The Claimant testified at trial that he had the indicating lights on. It was only during cross-examination at the trial that the First Defendant stated that the Claimant did not have the indicating lights on but it formed no part of her defence or witness statement and she did not mention it to PC Mills. It is more likely than not that the Claimant had the indicating lights on. The First Defendant assumed that the Claimant was driving slowly because he was cruising the island. Before she attempted to overtake the bus, the First Defendant should have first ensured it was safe to do so by blowing the horn several times, not just once as she testified at trial. The burden was on the First Defendant to ensure that it was safe to overtake the bus and to do so without causing any risk of injury to the Claimant or damage to his bus or in relation to any other road user or vehicle. Since the First Defendant was going to be on the right side of the road while overtaking extra care was therefore necessary.
- [14] Mr. Woodley's statement that the First Defendant blew the horn several times, which he stated more than once, undermines his testimony. It is simply untrue.

The First Defendant testified that she blew the horn once. I therefore do not accept Mr. Woodley's statement as correct. This therefore undermines his testimony that the Claimant did not have the indicating lights on and I place no reliance on it.

- [15] Although *McCall v Ogiste* [1965] 9 WIR 291 concerned criminal liability for driving without due care and attention, the following words of Phillips JA (at p. 293) are applicable here:

The law places the onus on the driver of an overtaking vehicle to make sure that that movement is safely conducted and completed; one must make sure that one can pass a vehicle and get back at once to the proper side before the approach of oncoming vehicles.

- [16] Taking into account all the circumstances, I find both the Claimant and the First Defendant at fault for the accident. Both parties had a duty to ensure that it was safe to do so before they both attempted their maneuvers on the road. The Claimant had a duty to ensure that it was safe for him turn right before he attempted to do so. The First Defendant, before overtaking the vehicle driven by the Claimant, should have done more to ensure that the Claimant was aware of her oncoming vehicle by blowing the horn a few more times, and not just once as she stated at trial. The law places a greater onus on the First Defendant to ensure that when overtaking the movement of her vehicle is safely conducted and completed, not just in relation to oncoming vehicles but all users of the road in particular the vehicle that is being overtaken. I therefore find the Claimant and First Defendant contributed to the accident and therefore both are liable, with 65 per cent to the First Defendant and 35 per cent to the Claimant.

Vicarious Liability

- [17] In *Launchbury v Morgans* [1972] R.T.R. 406, Lord Wilberforce stated (at p. 409-410) that:

For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty.

- [18] There was no dispute at trial that the Second Defendant is vicariously liable for the actions of the First Defendant. I therefore hold that the Second Defendant is

vicariously liable for the accident caused in part by the negligence of the First Defendant.

Assessment of Damages

- [19] The Claimant claims the sum of \$26,214.00 as special damages. Special damages must be specifically pleaded and proved. In *Ilkiw v Samuels* [1963] 1 WLR 991, Diplock L.J. stated (at p. 1006) that:

... special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized ... it is plain law ... that one can recover in an action only special damage which has been pleaded and, of course proved.

- [20] Where a claimant does not provide evidence of loss, the court may award nominal damages. In *Greer v Alstons Engineering Sales and Services Ltd.* [2003] UKPC 46, the Privy Council approved the following dictum of Jones JA in the Court of Appeal of Trinidad and Tobago:

When such evidence is not provided, however, it is open to the trial judge to give consideration to an award of nominal damages. In McGregor on Damages 13th ed at para 295 it is stated:

'Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss."

- [21] The Claimant provided evidence of the following expenses: (1) hospital bill - \$2,434.00; (2) surgery - \$7,500.00; (3) traffic report - \$50.00; (4) Physiotherapy - \$70.00; (5) consultation - \$100.00; and (6) hospital fee - \$60.00, totaling the sum of \$10,214.00.

- [22] The Claimant also claims the sum of \$16,000.00 for loss of earnings for 16 weeks at \$1,000.00 per week. The Claimant was not able to provide any evidence of the income that he earned to substantiate his claim for loss earnings for 16 weeks. Consequently, a sum of \$500.00 per week is awarded as nominal damages giving

a total of \$8,000.00. The sum awarded for special damages is \$18,214.00 (\$10,214.00 + \$8,000.00).

General Damages

- [23] The leading authority 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.

- [24] The Claimant was diagnosed with a fracture of the right mid-shaft femur, fracture of the right distal perone and a chest contusion. The Claimant underwent surgery where screws and plates were fitted in the right femur and avers that he: (1) was in extreme pain as a result of his injuries; (2) had limited mobility, swelling and tenderness; (3) had to use crutches for 3 months and a walking stick thereafter; (4) had to undergo physiotherapy to assist with his walking; and (5) felt some excruciating pain in his chest.
- [25] In a medical report dated 26 April 2016, Dr. Duane Hendrickson noted that the Claimant was assessed and diagnosed with a chest contusion and fractures of the right lower extremity. On examination, in relation to the mid shaft, there was: (1) pain on movement and manipulation, range of motion decrease, swelling and tenderness. Skeleton traction of the right knee in situ; and (2) right ankle – swollen, tenderness on palpation and no deformity and range of motion decrease; and (3) chest pain on right side no swelling or change in color. The radiography results showed discontinuity of mid-shaft right femur completely displaced and discontinuity of the right distal person mildly displaced. On 3 February 2016, the Claimant was admitted to surgery with skeleton traction of the tibia and POP back slab of the right ankle and then underwent open reduction and internal fixation surgery on the right femur using an intra-medullar rod.

[26] In a subsequent report dated 21 June 2016, Dr. Hendrickson added that the Claimant returned to her office complaining of limping on occasion with metatarsal pain. Dr. Hendrickson noted that the Claimant has no disability as his future prognosis is good and that there is no need for further surgical intervention. The Claimant states that he still experiences pain from time to time and is unable to carry out his duties in the home and be a husband to his wife. The Claimant also avers that he is a singer and is not able to record songs in the studio.

[27] The Claimant cites in support the decision of **Mathurin v Rain Forest Sky Rides Ltd** (SLUHCV200810551 dated 3 August 2010) for the view that the court can award \$160,000.00 for his pain, suffering and loss of amenities. In **Mathurin**, the claimant had to undergo a procedure for the restoring of the joint alignment that necessitated the internal fixation of plates and screws along with bone grafting of the fracture. A medical report authored two years after the accident showed that the management of the claimant's condition at that time was in the form of pain medication and rest. The court also found that just about every aspect of the claimant's everyday life was affected. The court noted:

[16] ... according to the conclusive medical report of Dr. Horatius Jeffers dated 6th February 2009, (Exhibit HJ3) the impairment of the right hind foot and ankle function has given rise to an impairment of 20% in the performance of activities of daily living i.e. restriction in walking distance prolonged standing walking inclined surfaces stair climbing and inability to wear heels and that this was predicted to worsen with time.

[17] Further post ankle fusion there is a 40% incidence of ongoing right hind and fore-foot pain consequent on degeneration of the joints. In my opinion the prognosis does not in the light of the concluding report look favourable

[28] The Claimant also cites **Rodney v Airall** (Claim No. ANUHCV2013/0051 dated 27 April 2017) where the claimant was awarded \$140,000.00 for pain, suffering and loss of amenities in 2017. In that case, the claimant sustained a fracture of the mid-shaft of the right femur, right leg externally rotated, with tenderness and swelling around the fracture site and an abrasion on the left foot.

[29] The Claimant submits that he had screws and plates fitted in his right femur and that surgery would be required if the screws and plates were to be removed. The

Claimant provided no evidence of whether the screws and plates were temporary and that they would be required to be removed at some point in the future. Dr. Hendrickson in her report dated 21 June 2016 stated that there is no need for the Claimant to undergo any further surgical intervention. The court therefore does not award the sum of \$10,000.00 as claimed to cover the surgery or any other amount for incidental expenses.

- [30] The Defendants cite the decision of **Pigott et al v Potter et al** (ANUHCV2010/0423 dated 23 August 2012) where the first claimant suffered a severely comminuted fracture of the right femur, a 1.25 lower limb shortening; 15 degree of angulation /mal-union at the fracture site of the injured femur. In that case, there was an overall 45 per cent permanent physical impairment of the right lower extremity and 18 per cent whole person impairment. The court awarded \$50,000.00 for pain, suffering and loss of amenities. The deformity of the first claimant's leg played a huge part in the court's consideration in making such an award. In **Richard v Francois** (GDAHCV2010/0156 dated 7 November 2013), the court awarded the claimant the sum of \$80,000.00 for pain and suffering and loss of amenities. The claimant suffered the following injuries: comminuted mid shaft fracture, permanent limp and deformity. In arriving at its award the court observed that the claimant would have a permanent limp and deformity of the left lower limb.
- [31] The Court of Appeal in **CCCA Limited v Jeffrey** (CA No. 10 of 2003) stated that

... 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 beings. 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.

- [32] It is important that when cases are cited in support of a party's case that counsel states clearly the similarities and differences between the cases cited and in the

case at bar using the four factors considered in *Cornilliac v St Louis*. It is this exercise that will assist in determining whether a particular decision can provide any guidance in the award general damages. More importantly, counsel must point out the particular features of their case that might require the court to make a downward or upward adjustment of the award. Once this is done with as much precision as possible noting, of course, this is not an exact science, it will provide guidance to assist: (1) the parties to manage their client's expectations; and (2) the trial judge in the exercise of his or her discretion in determining the award of general damages, and ultimately provide greater predictability in the award of general damages as intimated by the Court of Appeal in *Jeffrey*.

- [33] The **Mathurin** decision bears some similarity to the case at bar. However there are marked differences in that the claimant in **Martharin** had: (1) 20 per cent impairment in the performance of activities of daily living; (2) 40 per cent incidence of ongoing right hind and fore-foot pain consequent on degeneration of the joints; (3) a prognosis that did not look favorable. Two years after the accident, the claimant was still in pain and every aspect of the claimant's daily life was affected by the injuries sustained. In light of these factors, the award of \$140,000.00 for pain, suffering and loss of amenities seem justified. The claimant in **Rodney** sustained injuries to her foot, was physically disabled for some time, and *importantly* the medical report noted that her prognosis was good and she had recovered well. Although noting that the claimant was fully recovered and the claimant's case was not as severe as the cases cited by counsel for the claimant, the master nonetheless awarded the sum of \$140,000.00 for pain, suffering and loss of amenities. Since **Rodney** seems out of sync with the usual awards made I draw no assistance from it.
- [34] In **Richard**, the claimant had a permanent limp and deformity of left lower limb. Both claimants in **Piggot** and **Richard** had some form of permanent disability and the prognosis was not good. In the case at bar, there was no impairment and Dr. Hendrickson in her report dated 21 June 2016 noted that the Claimant had no disability as his future prognosis is good, and that there is no need for the

Claimant to undergo any further surgical intervention. Taking into account all the evidence in this case, the Claimant is awarded the sum of \$35,000.00 as general damages for pain, suffering and loss of amenities.

Disposition

[35] For the reasons explained above, I make the following orders:

- 1) The Claimant is awarded special damages in the sum of \$18,214.00 (less 35%) at the rate of 6% from the date of the accident to the date of judgment and thereafter at the rate of 6% until payment in full.
- 2) The Claimant is awarded general damages in the sum of \$35, 000.00 (less 35%) together with interest thereon at the rate of 6% from the date of judgment until payment in full.
- 3) The total award of damages is \$34,589.10 (\$53,214.00 - \$18,624.90 (35%)).
- 4) The Claimant is entitled to prescribed costs based on the total award of damages of \$34,589.10.

Eddy D. Ventose
High Court Judge

By the Court

Registrar