

EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: DOMHCV2017/0161

BETWEEN

Garth Lewis

Claimant

and

Leonnoth Serrant
Kenneth Serrant

Defendants

Appearances: Ms. Gina Dyer Munro for the Claimant
Mrs. Singoalla Blomqvist – Williams for the Defendants

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**2019: January 28
February 8**
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RULING ON ASSESSMENT OF DAMAGES

1. **ACTIE M:** On 8th October 2018, the claimant obtained summary judgment against the defendants with damages to be assessed.

Background facts

2. On 12th June 2015, the claimant, 45 years of age, was involved in a motor vehicular accident when a vehicle, owned by the first defendant and driven by the 2nd defendant, collided with his vehicle. On 19th June 2015, the claimant visited the office of Dr. De Armas complaining of pain in his lower back which radiated down his lower left limb. He was diagnosed as having weakness in left knee extension with decreased ranged of reflex in the left knee. He was treated with NSAIDS, rest and the use of a lumbar spine brace. He did a CT scan on 26th June 2015 at Princess Margaret Hospital in Dominica and a MRI in Barbados on October 16, 2015. Both revealed left foraminal disc protrusion L3-L4 and

L4-L5 with left L3–L4 nerve root encroachment. A small disc protrusion at the L5-S1 region was noted without nerve root encroachment. The claimant was diagnosed with multiple post-traumatic disc herniation lumbar spine L3- L4 and L4-L5.

3. The claimant continued to experience excruciating pain and was treated with a line of physiotherapy with strict restriction of physical activities and the use of NSAIDS. Surgery was recommended in September 2018 as the spine pain was still present without improvement.
4. The defendants failed to comply with Rule 12.13 and 16.2 and accordingly the assessment is conducted solely on the claimant's evidence in keeping with guiding principles.

Special Damages

5. The claimant is awarded the following amounts which were pleaded, particularized and proved:
 - i. Cost of Cat Scan - \$1,040.00
 - ii. Cost of MRI 0 - \$2,374.04
 - iii. Cost of medical consultation with Dr. Mc Intyre - \$80.00
 - iv. Cost for medical consultation with Dr. Julian De Armas - \$1,250.00
6. It is well established that special damages need not only be pleaded but must be proved. The following items were pleaded as special damages but were not substantiated with documentary evidence. The claimant invites the court to consider a nominal award in keeping with the Privy Council decision in **Greer v. Alstons Engineering Sales and Services Ltd. (Trinidad and Tobago) [2003] UKPC 46.**

1. Loss of wages

7. The claimant claims for loss of wages in the sum of \$44,000.00. The claimant states that he works as an auto dealer and an all-rounder in his family business, A1 Motors & Co. He also owns a recording studio. The claimant avers that prior to the accident he earned a monthly salary of \$6500.00 which has now been reduced to \$2500.00 as a result of the injuries suffered.

8. The claimant did not provide a scintilla of evidence to support his averment. A salary slip, income tax returns, a check stub, financial statements or National Insurance Contributions would have greatly assisted the court.
9. The Privy Council in **Strachan v. The Gleaner Company Ltd. & Anor (Jamaica) [2005] UKPC 33**, a later decision after **Greer** states that assessment of damages whether contested or not is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss.
10. Although the claimant made reference to earnings having been reduced, there is no direct evidence to prove the loss. The claimant's failure to produce key documents to prove the amount claimed under this head makes it untenable for the court to make an award for loss of earnings. The court cannot be asked to make a nominal award in the absence of evidence. Accordingly, no award is made under this head.

2. Costs of labour for house construction

11. The claimant states that he was building his house at the time of the accident and had to pay a labourer the sum of \$35,000.00 to complete the finishing touches due to his injury. Again, no details are given. The sum claimed under this head was pleaded with such accuracy yet without any evidence of the payment made to justify an award under this head. The claimant did not provide any explanation as to the manner or the amount was paid. In the absence of evidence, I will make no award under this head.

3. Cost of hiring persons to do maintenance

12. The claimant avers that due to his injuries he was and is still unable to perform his regular maintenance around the house and had to employ an individual to assist. He avers that he paid a monthly sum of \$320.00 for maintenance since the accident to date making a total sum of \$11,200.00. The claimant presented a witness summary from one "Nathan Rolle" to substantiate the amount claimed under this head. However, the witness was not present at the assessment to give evidence. It is accepted that the medical evidence restricted the claimant from physical

activities. I accept the medical evidence and assistance for home maintenance over the past 3 years and accordingly award a nominal sum of \$5,000.00.

4. Costs of ticket, hotel stay and incidentals

13. The claimant claims \$3,350.26 comprising cost of ticket, hotel stay and incidentals and travel to Barbados: Costs of ticket and hotel stay in Barbados-\$1738.45; departure tax -\$45.00; taxi to and from airport in Dominica - \$200.00; taxi in Barbados - \$379.91; food in Barbados - \$203.52; 4 therapeutic pillows - \$543.38; therapy - \$240.00. The amounts claimed are computed with such precision but with no supporting receipts. The court accepts the medical evidence recommending travel to Barbados and acknowledges the incidentals claimed and makes a nominal award in the sum of \$2,500.00.

General Damages

14. General damages are usually determined taking into consideration the principles set out by Wooding C J in the seminal case 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.
15. The claimant states that he continues to suffer pain and is unable to sleep comfortably. He has difficulty standing for long periods as he experiences excruciating pain in his back which sometimes causes him to fall to the ground and onto his knees. The claimant avers that he has been taking pain-killers since the accident in an attempt to ease the pain. The claimant further avers that his life has changed significantly as he is unable to engage in sports and has had to restrict the games he can now play with his six year old daughter.
16. The claimant claims the sum of \$400,000.00 as general damages for pain and suffering and loss of amenities. The claimant cites the authorities in **Oscar Frederick V Liat (1974)**², **Danny Bramble v William Danny et al**³ and **Lisa Bellot v Albert Raffoul**⁴ as comparatives.

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

² Anuhcv2007/0391 delivered 31st May 2010

17. In **Oscar Frederick V Liat (1974)**, the claimant was 59 years old, an accountant and internal auditor, fell on the defendant's premises and sustained injuries to his lumbar spine. He was diagnosed as having suffered compression of sciatic nerve roots at L4-L5; multiple disc herniation in cervical spine C4/C5, C3/C4 and C5/C6; surgery at the level L4/L5 and L5/S1. Oscar experienced facet hypertrophy with fluid in the right facet at L4/L5, extrusion of disc material into the neural foramen bilaterally at L3/L4 abutting the existing nerve roots. The claimant suffered blindingly immense pain and continued numbness to his leg with great discomfort. He was advised to seek medical attention in the USA and had several consultations with different doctors in the USA. He underwent surgery to his back with spinal needle injections and steroid injections to relieve the pain in his lower spine which had become arthritic due to the multiple open surgeries in the back. Oscar was unable to swim, do vigorous exercises or engage in any demanding physical activity. He was unable to stand for long periods and was unable to assist in household or yard chores. His sexual life and sexual ability were severely affected. He remained in constant pain and was unable to perform his duties as a night auditor which involved sitting for long periods. In 2010, the court, taking into consideration the extent to which Oscar's pecuniary prospects had been affected by the injuries awarded the sum of \$80,000.00 for pain and suffering, and \$60,000.00 for loss of amenities.

18. The claimant in **Lisa Bellot v Albert Raffoul**⁵, a case from the Commonwealth of Dominica, was a graphic designer who suffered a whiplash in a motor vehicular accident together with soft tissue injury of the head, neck, back and shoulder which greatly affected her activities of daily living. A MRI diagnosed her with post-traumatic cervical spine Disc herniation C6-C7 left side. Physiotherapy was recommended for six weeks with surgical Disectomy plus bone grafting, if there was no improvement. At the date of the assessment the surgery had not been done and an award in the sum of \$40,000.00 for pain and suffering and loss of amenities was made in 2014.

³ ANUHCV1999/0160 delivered in 2004

⁴ DOMHCV360/2012 delivered May 30, 2014

⁵ DOMHCV 2012/0360 delivered o 30 may 2014

19. Counsel for the claimant is of the view that an award greater than that made in **Oscar Frederick** should be made taking into consideration the claimant's age of 41 when compared to Oscar's age of 59, and also the injuries suffered.
20. In an assessment of damages, 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 damage⁶.
21. I noted the case of **David Robin et al v Auguste Et al**⁷ emanating from the Commonwealth of Dominica. In that case, David Robin, 41 years of age, was a fireman. He was also a part-time farmer. He owned and operated two (2) back hoes and a truck. He also owned and operated a 27 seater bus. He was a registered taxi -driver. Mr. Robin sustained an injury to his back in a motor vehicular accident. A MRI scan revealed posterocentral disc herniation with thecal sac impingement and moderate foramina stenosis bilaterally at the L4/5level. Robin was referred to Trinidad for specialist treatment. He was seen by a surgeon who performed a lumbar laminectomy with L4/L5 discectomy and bilateral L4/5 undercutting facetectomies and foraminotomies. After the operation, Robin remained 7days in the hospital. He returned to Dominica and was on sick leave for 6 months. Eventually, he was boarded off the public service on medical grounds in July 2005. He was no longer able to sit or stand for longer than one hour at a time. He could no longer farm. He sold his 29 seater bus, one backhoe excavator and his truck. He continued to suffer pain and became impotent. In 2010, the court awarded the sum of \$30,000.00 for pain and suffering and loss of amenities.
22. The court is usually guided by the range of awards which have been determined in the same jurisdiction or in a locality where similar social, economic and industrial conditions exist⁸. The court must have regard inter-alia to the age of the claimant, occupation, severity of the injury, extent of treatment required, effect on the claimant's work and the impact on the claimant's lifestyle. Each

⁶ Wells v Wells [1998] 3 All ER 481

⁷ DOMHCV 2003/0141 delivered on 25th November 2010

⁸ Singh (Infant v Toong Fong Omnibus co.Ltd. 1964 All ER 925 at 927

claim will be considered on its own merits taking into account the individual circumstances of each claimant.

23. I considered the claimant's injuries to be a little more severe than the **Lisa Bellot's** case, but less serious than the **Oscar Frederick's** and **David Robin's** case. It is noted that the claimant was not hospitalized and has not undergone any surgical procedures when compared to **Oscar Frederick**. As in the case of **Lisa Bellot**, Dr. De Armas in his medical report and examination-in-chief recommends surgery which may alleviate the claimant's pain. However, he opined that there was no guarantee that the surgery would be a cure for the defendant's recurrent pain which may persist for the rest of his life.
24. I take it into consideration that the injuries in the instant case are slightly more severe than those in the **Bellot's** case however the same surgical procedure was recommended in an attempt to alleviate the pain. I also accept the doctor's evidence that the surgery may not provide complete relief and that the claimant may continue to have pain for life. I also take into consideration the impact on the claimant's' social life, sports and enjoyment with his six year old daughter since the injury in 2015. I am of the view that a sum of \$70,000.00.00 is a reasonable award being \$40,000.00 for pain and suffering and \$30,000.00 for loss of amenity.

Future medical expense

25. The claimant seeks future medical expense. Dr De Armas recommends a discectomy surgery which can only be performed abroad by a neurosurgeon as the expertise is not available locally. He gave an estimate cost of USD \$20,000 - \$30,000.00. I accept the evidence and award the sum of \$81,507.00.
26. The claimant seeks an additional sum total of \$95,898.00 for contingencies such as travel costs, accommodation and out of pocket expenses. It is noted that the amount claimed exceeds the costs of surgery. There is no evidence to show how such cost had been calculated.
27. The claimant failed to provide supporting documents to establish, for example, the number of days required to spend in hospital and the recovery period, an estimate of cost of travel, and hotel accommodation. The claimant has just pleaded a lump sum without any conclusive information to

justify the amount claimed. I have little doubt that the claimant will incur out of pocket expenses for accommodation, travel costs, medication and post-surgery incidentals.

28. It is accepted that though the loss under this head was unquantified, it is the duty of the court to recognize it by an award that is not out of scale.⁹ In the absence of evidence to support the sum claimed I will allow a nominal sum of \$30,000.00.

Loss of earnings

29. The claimant claims loss of earnings for one year in the sum of \$20,000.00. The medical evidence does not support the claimant's claim under this head and neither has the claimant provided any other evidence to justify an award. Accordingly, an award is not made under this head.

ORDER

30. In summary, the defendant shall pay the claimant the following awards:]
1. Special Damages in the sum of \$12,244.04 with interest at the rate of 3% from the date of accident until judgment and at the rate of 5% from the date of judgment until payment in full.
 2. General Damages in the sum of \$70,000.00 for pain and suffering and loss of amenities with interest at the rate of 5% from date of judgment until payment in full.
 3. Future Medical Care in the sum of \$81,507.00 + \$ 30,000.00 = \$111,507.00 with no award of interest.
 4. Prescribed Costs on the global sum pursuant to CPR 65.5.

Agnes Actie
Master, High Court

By the Court

Registrar

⁹ Greer v. Alstons Engineering Sales and Services Ltd (Trinidad and Tobago) [2003] UKPC 46