

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

Antigua and Barbuda

Claim No: ANUHCV 2018/0285

BETWEEN:

JELLON KIRBY

Claimant

and

KELVIN RUSSELL

Defendant

Before:

Master Jan Drysdale

Appearances:

Andrea Smithen of counsel for the claimant

2019: March 20th

April 1st

ASSESSMENT OF DAMAGES

[1] **Drysdale, M.:** The matter for consideration is an assessment of damages for personal injuries sustained by the claimant as a consequence of a motor vehicle collision.

Background

[2] On 16th October 2016 the claimant a 21 year old male whilst driving motor vehicle A44879 decided to overtake the defendant. Prior to so doing he blew his horn to alert the defendant in front that he was overtaking. In the process of overtaking the defendant suddenly and without warning swung his motor vehicle to the right and thereby

collided with the left side of the vehicle driven by the claimant. This collision forced the claimant off the road and further resulted in the claimant colliding with a concrete wall.

- [3] A subsequent police report concluded that the defendant was wholly at fault for the accident. Accordingly the claimant commenced an action against the defendant on 15th June 2018 for damages for personal injuries sustained as a consequence of the accident.
- [4] The defendant failed to file a defence and on 24th September 2018 judgment in default of defence was entered with damages to be assessed. Subsequently on 18th October 2018 the defendant filed an application seeking to set aside the judgment in default. The court found that the defendant had inter alia failed to proffer any good explanation for the failure to file a defence and as such the application was refused. Directions for assessment of damages were then issued. However the defendant has failed to file any witness statements and or written submissions in these proceedings.
- [4] The court therefore has before it only the witness statement and written submissions of the claimant both filed on 14th January 2019. Notwithstanding the court will undertake an analysis to determine the appropriate measure of damages that the claimant is entitled to.

Damages

- [5] The object of an award is to compensate the injured party and not to punish the wrongdoer. Bearing this in mind the court is guided by Brett J who in the case of **Rowley v London and North Western Railway Co.**¹ cautioned that one “must not attempt to give damages to the full amount of a perfect compensation for pecuniary injuries but must take a reasonable view of the case and give what they considered in all the circumstances a fair compensation.” It is against this backdrop that damages which are categorised as special and general will be assessed.

Special Damages

- [6] Special damages are quantifiable monetary losses which a party has sustained as a result of the incident. Such damages must be specifically pleaded and proved.

¹(1861-73) All E.R. 823

[7] The claimant has claimed special damages relating to medical care in the sum of \$4,834.81. Details of those expenses are listed hereunder:

Physical Therapy	\$3,200.00
MSJMC Clinic/Orthopaedic Consultations	\$ 100.00
Consultation with Dr. K.K. Singh	\$ 200.00
Medical Report of Dr. K.K. Singh	\$ 580.00
Medical Report of Dr. Yearwood	\$ 150.00
MSJMC hospital billing (cost to patient)	\$ 100.00
Crutches	\$ 164.81
Knee Brace Immobilizer	\$ 340.00
Total	\$4,834.81

[8] All the above expenses have been verified by the production of receipts. The claimant is therefore entitled to the full recovery of the same.

[9] Under the rubric of special damages the claimant has also claimed loss of income. Loss of income is meant to compensate the injured party for any monetary loss of wages or income sustained during the period of injury. The claimant provided a copy of his letter of employment which evidenced that he earned the sum of \$395.00 per week. Further the various medical reports submitted by the claimant confirms that the claimant was injured and was in recovery for a period of 7 months. Based on the nature of injury as well as the type of employment which was labour intensive the court accepts that the claimant could not have worked during the recovery period. Ergo the claimant is entitled to the sum of \$11,060.50 for lost income.

[10] Finally the claimant has submitted that he is entitled to the sum of \$11,480.00 representing cost of future medical care. This is premised on the various medical reports which recommend that the claimant will require amongst other things physical therapy sessions twice a week for a period of 6 months at a cost of \$100.00 per session, a recommendation that the claimant would need to join a gym to maintain strength and power of his quadriceps for the remainder of his life and a recommendation that the claimant would be required for one year to

have monthly consultations with the consultant orthopaedic surgeon at a cost of \$150.00 per visit.

- [11] In relation to the recommendation that the claimant needs to join a gym and maintain those services for the remainder of his life, the claimant has suggested that a fair assessment of the same is damages for a period of one year. The claimant also further submits that there is a need to hire a personal trainer at least initially to ensure that the type of exercises that are performed are done correctly to ensure that the claimant does not do further injury to his knee. The court accepts these submissions to be reasonable. After an analysis of the above, the court accepts that claimant will require future medical care in the amount claimed.
- [12] In total therefore the claimant is awarded the sum of \$27,375.31 for special damages.

General Damages

- [13] General damages are damages which the law ‘will presume to be a direct natural or probable consequence of the action complained of.’²
- [14] In assessing the appropriate measure of general damages the undermentioned factors as enunciated in the case of **Cornilliac v St. Louis**³ will be taken into account. These factors are as follows:

- a. nature and extent of the injuries suffered;
- b. the nature and gravity of the resulting physical disability;
- c. the pain and suffering which had to be endured;
- d. the loss of amenities suffered; and
- e. the extent to which, consequentially, the plaintiff’s pecuniary prospects have been affected.

The Nature and Extent of the Injuries Suffered

- [15] The claimant presented several medical reports detailing his injuries and the progress made during the assessed period. The claimant upon

² *Stroms Bruks Aktie Bolag v Hutchinson* [1905] A.C. 515

³ 1965 7 W.I.R 491

examination was assessed as having a 10cm laceration which was found over the anterior surface of the knee joint and extended to the underlying patella that was further found to be separated from the quadriceps muscle. Moderate bleeding was observed but there was no contamination of the wound. No distal neurovascular deficit was found and all other examination findings were normal. The claimant underwent a successful muscle repair and thereafter was treated with analgesics and antibiotics. His left lower limb was immobilised to prevent knee flexion and to assist in the healing process. He was discharged 10 days later after an uncomplicated stay and advised a knee immobilizer, ambulation with support and follow up at the outpatient clinic.

- [16] During an out-patient visit it was observed that the claimant's wound had sufficiently healed and he advised to start physical therapy to regain his range of motion of the knee. Subsequently on 12th January 2017 it was further observed that the claimant was able to ambulate without any difficulty and had the full range of motion of his knee.

Nature and Extent of Physical Disability

- [17] A further medical assessment by a consultant orthopaedic Dr. K.K. Singh on 7th June 2017 notes that the claimant has been temporarily disabled in the functions of his lower left extremity for a period of seven months but has not ended up with any permanent disability. The report notes that the claimant has weak quadriceps and that further that the claimant may develop post traumatic degenerative joint disease on account of the injury when he grows older giving rise to partial temporary disabilities.

Impact on pecuniary prospects

- [18] The claimant states that as a direct consequence of the injury that the same has affected his ability to effectively perform his job. The claimant now works as a porter at a restaurant which entails transporting items, managing stock and restocking supplies. The claimant deposed that in the performance of his duties he must frequently traverse stairs which can be challenging in the performance of his duties because of the pain he experiences. As there is no claim for loss of future income or loss of earning capacity this will be considered in the context of general damages for pain and suffering and loss of amenities.

Pain and Suffering and Loss of Amenities

- [19] Since the accident the claimant asserts that he has not been able to play the beloved sport of football. The claimant claims that he played this sport since primary school and was a member of the Parham Football Club. He claims that now due to his inability to play the same that he become emotional when watching the game and dealing with the reality of this injury.
- [20] The claimant asserts that he is unable to run without feeling pain or to extend his leg with force as this causes a grinding feeling and pain in his knee. He states further that he is unable to sit or be stationary in one place for an extended period of time due to the discomfort that he feels and that he must do leg movements to help elevate the pain. The claimant complains of pain when the weather becomes cold and further pain upon standing up. The claimant also complains of chest pains and bad headaches which he asserted never happened before the accident.
- [21] The claimant contends that the injury has adversely affected his social life as he can no longer attend parties, events and movies which he did regularly. He complains that he is now essentially house bound as a result.
- [22] Accordingly the claimant posits that reasonable damages is the sum of \$90,000.00 and has relied on the following cases in support of this proposition:
- (i) **Rossi v Peters**⁴ - the claimant was a 46 year old man who suffered a ruptured collateral ligament of the right knee. He was hospitalised for 16 days. Following the surgery he was only able to stand with the use of crutches and was temporarily disabled for a period of 4 months. He was awarded the sum of \$80,000.00 for pain and suffering and loss of amenities.
 - (ii) **Robertson v The Attorney General**⁵ - This claimant a 76 year old woman sustained an open fracture of the left fibula with exposure of the bone. The wound was dirty with foreign particles including sand and gravel. There was audible and palpable bony crepitation which put simply is a grating or cracking sound which can be

⁴ DOMHCV2013/0308

⁵ GDAHCV2009/0338

heard under the skin or joint which happens typically when two fragments of a fracture are moved together. The claimant underwent surgery and remained hospitalised for a period of 10 days thereafter. She was released with follow up treatment to continue through the out-patient clinic. However upon examination at the clinic sometime in March it was observed that the claimant had an infection at the site of the wound. She was then readmitted to hospital and after a number of days was subsequently released at the end of the said month. General damages for pain and suffering and loss of amenities in the sum of \$60,000.00 was awarded.

- (iii) **James v Lewis**⁶- The claimant whom was 25 years old at the date of the accident suffered fractures of both bones of the right forearm, injury to the right eye and ear and severe internal de-arrangement of the left knee with rupture of the ligament support. The claimant was rendered unconscious for a period of five days immediately following the accident and spent a total of 4 months hospitalised. The claimant's injuries were accepted as being serious and debilitating. The various injuries also left visible scarring on the claimant's face which affected his personality and made him feel insecure and self-conscious. The court taking all this into account awarded the claimant the sum of \$130,000 for general damages for pain and suffering and loss of amenities.
- (iv) **O'Garro et al v Ross et al**⁷ - the claimant a 30 year old woman sustained a fractured acetabulum and dislocated right hip. She was hospitalised for one month. She walked with a cane and a knee brace to keep her knee in place. It was diagnosed that there would likely be complications of post traumatic arthritis of the hip in the future. General damages in the sum of \$100,000.00 for pain and suffering and \$40,000.00 for loss of amenities were awarded.

⁶ ANUHCV2007/0403

⁷ SVGHCV2004/0329

- [23] The claimant accepts that not all of the cases referred to fall squarely within the injuries sustained by the claimant and for that reason purports to rely on the cases of **Rossi v Peters** and **Robertson v The Attorney General** as justification for an award of damages in the sum of \$90,000.00.
- [24] Based on an examination of the cases relied on by the claimant the court is also in agreement that the cases of **James v Lewis** and **O'Garro et al v Ross et al** bares little similarity to the injuries in the case at bar and as such also refuses to rely on them as guidance for determining damages. However as it relates to the case of **Robertson v The Attorney General** the court also sounds a cautionary note in relation to the same due to the disparity of age of the claimant and the type of injury sustained.
- [25] The court also takes cognisance of two additional cases sourced through its own research as follows:
- (i) **Prescott v Rambally's Funeral Parlour Limited et al**⁸ - The claimant was a passenger in a motor vehicle which was involved in a collision with the motor hearse of the first defendant which was being driven at the material time by the second defendant. She suffered a displaced medial malleolus fracture, a displaced calcaneal fracture of the right ankle, chest pain and a depressed fracture of the right knee. She was unable to work for 8 months and continued to have lateral foot and ankle pain which according to her doctor was not likely to improve in the future. The claimant was awarded the sum of \$65,000.00 for pain and suffering and loss of amenities.
 - (ii) **Browne v Israel et al**⁹ - The ancillary claimant, an ambulance driver sustained suffered injury when the ambulance in which he was driving was involved in a collision with the defendant's vehicle. The ancillary claimant's legs were both pinned under the dashboard resulting in injuries to both knees. He suffered damage to the tendons of both knees and developed osteoarthritis which caused him constant pain and restrictions in his movements. It was determined that he would have lifelong problems with both knees which would worsen with age despite palliative treatment, medication and physiotherapy.

⁸ SLUHCV2001/0359

⁹ SVGHCV2008/0080

He was awarded the sum of \$50,000.00 for pain and suffering and \$20,000.00 for loss of amenities.

[26] The court notes the similarities as well as dissimilarities in relation to the injuries sustained in the cases referred to in relation to the claimant in these proceedings. Consideration is also given the age of the cases some being of recent vintage as opposed to others which are almost two decades old. Based on the above as well as the extent of the pain and suffering loss of amenities and the impact the injury had on the pecuniary prospects of the claimant, it is the courts considered opinion that the sum of \$85,000.00 for pain and suffering and loss of amenities is reasonable.

Interest

[27] As it relates to the issue of interest, the relevant guiding principles for determining the measure are found in the case of down in **Alphonso v Ramnath British Virgin Islands**¹⁰ and are as follows:

- a) Damages for pain and suffering and loss of amenities, the court should award interest from the date of the service of the claim to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of such evidence of that rate, the statutory rate of interest is to be used.
- b) In relation to special damages, interest is to be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

Legal Costs

[28] The claimant is also entitled to legal costs in this matter. Pursuant to part 65 of the Civil Procedure Rules the Claimant is awarded 60% of the total prescribed costs.

Order

[29] Based on the foregoing the order of the court is as follows:

1. Special damages in the sum of \$27,375.31 with interest thereon at the rate of 2.5% per annum from the date of the accident to the date of judgment on assessment.

¹⁰ Civil Appeal No 1 of 1996

2. General damages for pain and suffering and loss of amenities in the sum of \$85,000.00 with interest thereon at the rate of 5% per annum from the date of the accident to the date of judgment on assessment.
3. Prescribed costs

Jan Drysdale

Master

By The Court

Registrar