

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim Number: BVIHCV2016/0311

Between

1. Ellina Turnbull
2. George Turnbull

Claimants

and

Renard Benjamin

Defendant

APPEARANCES:

Ms. Neline Bute of counsel for the claimants

Ms Marie Lou-Creque for the defendant

2019: April 9
June 21

Judgment

[1] ACTIE M: This is an assessment of damages in accordance with CPR 12.13 and 16.2.

Background

[2] On 24th November 2010, the defendant's **vehicle** collided with the back of the **claimants'** vehicle which at the time was driven by the first claimant, Elina Turnbull. The claimants filed a claim and obtained summary judgment with damages to be assessed.

General Damages

[3] Elina Turnbull, 67 years at the date of the accident and 76 years at assessment, claims general damages in the sum of \$35,500.00 under the general principles enunciated by Wooding CJ in the well-known case of *Cornilliac v St Louis*¹ namely (1) Nature and extent of injuries suffered; (2) Nature and gravity of the resulting

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

physical disability; (3) Pain and suffering endured; (4) Loss of amenities;(5) Extent to which the claimant's pecuniary prospects have been affected.

The nature and extent of injuries suffered

- [4] Elina Turnbull suffered an injury to her right shoulder, neck and back. She was described as having suffered a rotator cuff tear with decreased range of motion and strength in the right shoulder. She was first admitted to Pebbles Hospital in Tortola where an x-ray revealed that the muscles in her neck were twisted. On 9th February 2011, she underwent surgery in St Thomas, USVI and her right arm was placed in a cast for 3 months followed by physiotherapy.

Nature and gravity of the resulting physical disability

- [5] Mrs. Turnbull has limited ability for repetitive activities to the upper extremity as well as limitations in weight bearing.

Pain and suffering endured

- [6] Mrs. Turnbull has experienced significant pain and discomfort since the injury and now reports moderate to severe symptoms episode of pain ranging from 3 to 7 out of 10.

Loss of amenities suffered

- [7] Mrs. Turnbull has diminished capacity for weight bearing and repetitive activities to the upper extremities. She is restricted by pain from many functional positions. She avers that she is unable to enjoy her pre-accident activities such as cooking and household chores.

Extent to which the **claimant's pecuniary prospects have been affected**

- [8] Mrs. Turnbull has diminished ability to work in her usual capacities prior to her injury which is affecting her business.
- [9] The court must strive for consistency in an assessment of damages 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**”.

- [10] The claimant citing the cases of *Denroy Baptiste v Tortola Yacht Services Ltd*³ and *Leanne Forbes v Ulbana Morillo*⁴ as comparatives claims for an award in the sum of

² [1998] 3 All ER 481

³ - BVIHCV 2006/0130

⁴ BVIHCV 2005/0008 delivered on 20 February 2006

\$35,500.00. The defendant suggests an award in the sum of \$9,000.00 and cites the case of Damon Dubois v Matthias Jerome⁵ emanating from Grenada.

[11] The court in an assessment of damages 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 exists. The award of general damages is an artificial sum to compensate the claimant and to put the claimant in as close a position as prior to the incident as far as money can go.

[12] In Denroy Baptiste, the claimant, 42 years old and a boat painter, suffered a dislocated shoulder, injury to the back and shoulder and developed a degenerating disc disease as a result of an accident. He was treated at the Pebbles Hospital and discharged. Due to complications, he was referred to an orthopaedic surgeon in St Thomas for neurological evaluation. He was unable to continue in his employment as a painter with a real possibility that his condition would worsen. In 2008, he was awarded the sum of \$45,000.00 for pain and suffering and loss of amenities.

[13] In my view the injuries in Denroy Baptiste were more extensive than the claimant at bar. The court, in an assessment of damages, 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 claim will be considered on its own merits taking into account the individual circumstances of each claimant. The court takes into account that the claimant in Denroy was 42 years unlike the claimant in the instant case is 76 years old. I am of the view that a sum of \$35,000.00 for pain and suffering and loss of amenities is reasonable in the circumstances.

Special Damages

[14] Cost of Repairs to Motor Vehicle: The claimants claim the cost of repair in the sum of \$927.82 supported by an invoice from Tadpole Autobody repairs.

[15] The defendant contends that the vehicle was relatively new and likely to be comprehensively insured and suggests that the claimants should have claimed from their insurers.

[16] The answer to the defendant's opposition to pay the claimant is found in the dicta of Barrow J(ag), as he then was, in Malcolm Joseph v Alison Charles⁶ where he stated:

“The primary obligation, I would think, was on the wrongdoer to pay compensation for the damage that he had caused. It was the defendant who had the primary duty to act promptly. I reject the proposition that

⁵ GDAHCV2011/0088 delivered on March 7,2012

⁶ GDAHCV 2002/0077 delivered on 6/2/2003

because the claimant had comprehensive insurance cover that displaced the defendant's primary obligation. That insurance cover was for the benefit of the claimants, not for the benefit of the defendant".

[17] This court accepts the evidence as pleaded and awards the cost of repair in the sum of \$927.82.

[18].Traveling expenses;- Mrs. Turnbull avers that in an effort to mitigate her losses she took up residence in St Thomas USVI rather than travelling from BVI on each occasion **for her doctors' appointments and therapy.** Her husband, George Turnbull, in the meantime had to remain on Tortola to manage his business affairs but made frequent visits to St Thomas to assist and attend to matters on her behalf. The claimants claim **the sum of \$800.00 for the husband's** twice weekly fares to St Thomas for eight (8) weeks from 10th January 2011 through August 2011. Mrs. Turnbull also claims the sum of \$100.00 for the cost of round trip to Tortola and back to St Thomas. The sums claimed are not supported by evidence.

[19] The defendant is of the view that no award should be made as the claimants did not provide receipts to substantiate the amounts claimed.

[20] It is trite that special damages must be proved. However, the absence of proof may lead to an award of a nominal sum where the issue is only the lack of evidence to prove the amount claimed. The Privy Council in Greer v. Alstons Engineering Sales and Services Ltd⁷ states;

"Where a claimant has pleaded the amounts claimed as special damages, but do not provide tangible evidence to prove the amount, it is always open to the court to give consideration to an award of nominal damages since the problem is one of proof but not the absence of loss".

[21]I have taken into account the medical evidence and the fact that Mrs. Turnbull spent a significant time in St Thomas for medical treatment and follow ups. In light of the evidence, I am of the view that a nominal sum of \$500.00 is reasonable for transportation charges.

[22]Nursing Care: The claimants aver that they both incurred additional expenses to facilitate the management of household chores as the first claimant was severely restricted in the use of her right dominant right hand. Mrs Turnbull states that her

⁷ [2003] UKPC 46 (19 June 2003).

husband and daughter had to do everything for her initially as a result of the injury. The claimants aver that it was necessary to order takeout food orders at \$60.00 a day for a period of 40 weeks from November 24, 2010 to November 2011 making a total sum of \$48000.00. The claimants also seek the sum of \$12,320.00 for a domestic helper from November 2011 to July 2013, working two days weekly at \$70.00 a day. The amounts claimed are unsubstantiated.

[23] It was stated in *Donnelly v Joyce*⁸ that:-

“In an action for personal injuries in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided were irrelevant; the plaintiff’s loss was the need for those services, the value which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supporting the plaintiff’s need.”

[24] In view of the fact, that Mrs. Turnbull suffered a significant injury to her dominant right hand and the resulting limitations, an award for domestic care is not an unreasonable claim. However, the absence of receipts to support the amounts claimed leads the court to make a nominal award of \$5000.00 for domestic care and costs of meals.

[25] Costs of Bissel electric sweeper:- The claimants claims the sum of \$89.00 for an electric sweeper purchased after the domestic helper was discharged. The amount is not substantiated and a nominal sum of \$50.00 is allowed.

[26] Physiotherapy and Surgery Expenses: Mrs. Turnbull claims costs for the surgery and hospital bills in the sum of \$35,718.27. She presented an itemized bill to prove the sum. She also claims the sum of \$6227.40 for physiotherapy sessions with supporting **invoice from “Therapy Works”**. **The amounts were all pleaded and proved and are allowed as claimed.**

[27] Loss of earnings- It is the evidence that Mrs. Turnbull at the time of the accident specialized in interior decorations **and operated her own business “Blinds and Tings”** both in Tortola and St. Thomas. Mrs Turnbull avers that after the accident in 2010, she

⁸ (1973) ALL ER 475

was severely restricted and during that period her business operations suffered severe losses which led to closure of the USVI branch in 2012. Mrs Turnbull states that it was not unusual to make a gross amount of \$190,000.00 yearly in each of the branches.

[28] Mrs Turnbull claimed loss of earnings for the BVI branch for the following years

1. 2011- \$173, 129.00;
2. January – June 2012- \$80,000.00;
3. 2013 - \$64,912.00;
4. 2014- \$29,149.50

[29] In support. the claimant provided a performance report prepared based on the business accounting records. Kreston Accounting services in a letter dated February 1, 2016 states that the financial performance report was provided without verification of the information but relied on information reported by the first claimant. The report clearly states that the information does not extend to any financial statement from the business.

[30] In relation to the USVI branch, the claimants seeks loss of earnings for the following two years namely:

- 2010 - \$41,667.00
- 2011- \$30,458.27

[31] In support, the claimant provided Inland Revenue tax returns forms from 2008 through to 2013. The Court notes that the claimant shows gross sales ranging from \$185,683 to \$10,036.00. However, there were consistent net losses ranging from – \$15,991, - \$3105, - \$10,020, -\$ 288 respectively, with only a net profit of \$1251 recorded in 2009.

[32] In my view the claimants have not provided evidence to prove that the losses suffered were directly as a **result of the claimant's injuries**. The burden of proving causation in an assessment of damages rests with the claimant. The claimant must adduce evidence to prove that it is more likely than not that the wrongful conduct of the defendant in fact resulted in the loss in respect of which she complains.

[33] The court in *Bonham Carter -v- Hyde Park Hotel*⁹ said “Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and, so to speak, throw themselves at the head **of the court saying “This is what I have lost. I ask you to give me these damages”. They have to prove it.**”

[34] The Privy Council in *Strachan v. The Gleaner Company Ltd. & Anor (Jamaica)*¹⁰, states that assessment of damages whether contested or not is not made by default; the claimant must prove his loss or damage by evidence.

⁹ [1948] WN, 92 Sol Jo 154, KBD)

¹⁰ [2005] UKPC 33

[35] I have considered the medical evidence and the claim made for loss of earnings. I accept the fact that Mrs Turnbull was restricted from performing her work duties. However, she has not provided evidence to prove her loss. The court is always able to award a nominal sum in keeping with the Privy Council decision in Greer v. Alstons Engineering Sales and Services Ltd, where there is a loss but not sufficient evidence to prove the loss. In the circumstances I am minded to award a nominal sum of \$10,000.00 for loss of earnings.

ORDER

[36] In summary, the defendant shall pay the claimants the following awards:

- i. General damages to the Elina Turnbull in the sum of \$35,000.00 with interest at the rate of 5% from judgment until payment in full.
- ii. Special damages in the total sum of \$58,423.49 comprising of the following
 - Cost of repairs- \$927.82
 - Travelling expenses - \$500.00
 - Domestic care and meals - \$5,000.00
 - Electric sweeper - \$50.00
 - Physiotherapy - \$6,227.40
 - Surgical fees - \$ 35,718.27
 - Loss of Earnings- \$10,000.00

with interest at the rate of 3% from the date of the accident until judgment and at the rate of 5% from the date of the judgment until payment.

- iii. Prescribed costs on the global sum pursuant to CPR 65.5.

AGNES ACTIE

MASTER, HIGH COURT

BY THE COURT

REGISTRAR