

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CIVIL DIVISION)

CLAIM NO. ANUHCV2024/0334

BETWEEN:

DAWN TRACELYN O'MARD

Claimant

and

[1] ALVIN JOHN

[2] LYNDON T. GAGE

Defendants

Appearances:

Ms. Kivinee Knight-Edwards and Ms. Dericia Browne, Counsel for the
Claimant

No appearance by the Defendants

2026: March 9th, 10th.

ORAL DECISION

- [1] **MICHEL, M.:** This is an assessment of damages following a judgment in default of defence obtained by the Claimant against the Defendants.
- [2] The brief background to the matter is that, on 24th January, 2022 the Claimant was driving her vehicle along All Saints Road when the 1st Defendant, driving a vehicle owned by the 2nd Defendant, collided with the Claimant's car. As a result of the collision, the Claimant suffered personal injuries and she subsequently commenced these proceedings against the Defendants by claim form and statement of claim filed on 23rd August, 2024 seeking general damages to be assessed, special damages in the sum of \$5,510.00, costs and interest.
- [3] The Claimant alleged in her claim that the Accident was caused wholly by the negligence of the 1st Defendant, who at all material times was driving the 2nd Defendant's vehicle as the servant and/or agent of the 2nd Defendant with the permission and consent of the 2nd Defendant.
- [4] The Claimant's claim was duly served on the Defendants, however, the Defendants failed to file a defence to the claim. At the request of the Claimant,

judgment in default of defence was entered for the Claimant for special damages in the amount of \$5,510.00 plus general damages, interest and costs to be decided by the Court.

- [5] Liability and special damages having been crystalised by the default judgment, the only task remaining for the Court is to determine how much compensation is due to the Claimant based on the evidence she has adduced in support of her claim for general damages.
- [6] The Claimant sought and obtained permission for Dr. K.K. Singh to be deemed an expert witness for the purpose of the assessment of damages and for Dr. Singh to file an expert report. The expert report of Dr. Singh was filed by the Claimant, and the Claimant subsequently filed a witness statement and written submissions for the assessment of damages. The Defendants, despite being represented by Counsel in these proceedings, failed to file a notice of intention to be heard on assessment, failed to comply with the other directions for the assessment of damages and neither the Defendants nor their counsel attended the assessment of damages hearing. The assessment of damages therefore proceeded on the expert evidence of Dr. Singh, the Claimant's evidence and the applicable law.
- [7] I will now consider the Claimant's claim for general damages.

General Damages

- [8] It is well settled that in assessing general damages, the Court will consider: (1) the nature and extent of injuries suffered; (2) the nature and gravity of the resulting physical disability; (3) the pain and suffering endured; (4) the loss of amenities suffered; and (5) the extent to which the claimant's pecuniary prospects have been affected.¹

The Nature and Extent of Injuries Suffered

- [9] The Claimant pleaded in her statement of claim that following the Accident, she was initially diagnosed as having sustained the following injuries:-
- (i) Fracture to the proximal fibular with chronic instability;
 - (ii) Deficiency of the postero lateral corner with joint effusion (lateral collateral);
 - (iii) Photo lateral instability of the right knee;

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

- [10] The Claimant was born on 18th October, 1973. She was 48 years old at the time of the Accident and 52 years old as of the date of the assessment of damages.
- [11] The Claimant's injuries are set out in the expert report of Dr. Singh. Dr. Singh stated in his report that the Claimant came to see him for a clinical orthopedic evaluation and consultation on account of the injury she sustained in the Accident on 24th January, 2022. It is not clear in the report what date Dr. Singh first saw the Claimant, but it appears to have been in 2022, sometime after the Accident.
- [12] Dr. Singh stated that in examination of the Claimant's skeleton muscular system confined to right knee she had classical, clinical, and radiological signs to conclude the following diagnosis:-
- (i) Chronic instability postero lateral in right knee joint;
 - (ii) Avulsion fracture upper end fibular.
- [13] Dr. Singh stated that the Claimant was being treated on conservative lines and was advised to remain non-weight bearing for a period of 4 to 6 weeks, and to come back for radiological studies and a clinical review. Dr. Singh stated that further MRI scans of the Claimant's right knee dated 11th October, 2022 confirmed:-
- (i) Non-displaced fracture of the proximal fibular (right fibula)
 - (ii) Chronic instability deficiency of the posterolateral corner
 - (iii) Joint effusion (lateral collateral and posterolateral instability of right knee.

The Nature and Gravity of the Resulting Physical Disability

- [14] Dr. Singh stated in his expert report that the Claimant has been temporary disabled in the full functions of her right knee. He stated that the Claimant's disability has been evaluated approximately after 11 months of treatment including physical therapy on reaching the level of plateau as per "Guides to the Evaluation of Permanent Impairment 6th edition of American Medical Association. Dr Singh assessed the Claimant as having ended up with a 16% of permanent physical impairment of the lower extremity, giving rise to 6% of impairment as a whole person. Dr. Singh stated that the Claimant will be permanently impaired for the rest of her life and that her percentage of permanent physical impairment will increase gradually as she grows older on account of knee instability and post traumatic degenerative joint disease.

Pain and Suffering Endured and Loss of Amenities Suffered

- [15] In her witness statement, the Claimant stated that during the Accident, she sustained injuries, particularly her knee which hit against the dashboard under the steering wheel. She stated that she felt immediate pain around her right knee and was taken to the Sir Lester Bird Mount St. John's Medical Centre for attention and treatment.
- [16] The Claimant stated that as a result of the accident, her daily life has changed considerably, and she now struggles with many activities that she once did with ease. The Claimant stated that she is unable to stand properly as her knee frequently buckles and occasionally locks, and she cannot fully extend it because of the severe pain. She stated that she cannot stand for long periods or climb stairs without pain, and she often has to stop and take breaks because her leg becomes weak and uncomfortable.
- [17] The Claimant stated that she still has to wear a knee brace, elevate her leg every night, and is very uncomfortable in cold environments, even in air-conditioned offices. She stated that simple household tasks such as hanging clothes became so difficult that she had to purchase a dryer, and she now avoids places with stairs because of the pain and strain they cause. The Claimant stated that the pain has also affected the intimate aspects of her life and her husband has since left the home, leaving her without any assistance or support.
- [18] The Claimant stated that she was subsequently diagnosed by Dr. Lennox Doran as suffering from severe depression and moderate to severe anxiety. She stated that all of these changes have greatly reduced her independence and overall quality of life, and continues to affect her ability to carry out her normal daily activities.
- [19] It should be noted that Dr. Doran was not called as a witness in this matter nor was he deemed to be an expert and therefore no expert report was filed by him pursuant to Part 32 of the Civil Procedure Rules (Revised Edition) 2023. No mention is made in the expert report of Dr. Singh that the Claimant has been diagnosed with depression and moderate to severe anxiety and therefore this diagnosis is not supported by any medical evidence properly before the Court for the assessment of damages.

Effect on Pecuniary Prospects

- [20] The Claimant further stated that prior to the Accident, she was self-employed as a cook, but due to her injury she could no longer function in that role,

which caused her significant loss of income and mental distress. The Claimant stated that she was forced to close her small business on Cross Street, which had been her main source of income.

Award of General Damages for Pain, Suffering and Loss of Amenities

- [21] The purpose of compensation in personal injury cases is to attempt to put the injured party back in the position he or she was in before the injuries occurred. 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 explained the approach in the following terms:-

“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 [claimant’s] damage”.

- [22] Learned Counsel for the Claimant submitted that an appropriate award to the Claimant for pain and suffering is \$53,000.00 and for loss of amenities, \$30,000.00. Learned Counsel for the Claimant relied on the following cases to support this award:-

- (1) **Deborah Jules v Felix Emerson Hutchinson et al**:³ The claimant was a passenger in a minibus driven by the 1st defendant and owned by the 2nd defendant which was involved in a collision. As a result of the collision that claimant sustained 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 with open reduction and external fixation of the right leg. The claimant complained of pain in the right leg whenever she walked long distances together with headaches; back pains due to lumbar spondylosis, which was consistent with degenerative changes of the lumbar spine. 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. The Claimant was

² [1998] 3 All ER 481.

³ SLUHCV2015/0887 (delivered 17th August 2018, unreported).

awarded general damages, consisting of \$40,000.00 for pain and suffering and \$25,000.00 for loss of amenities in 2018.

- (2) **Ann Robertson v The Attorney General:**⁴ The claimant suffered severe injuries when an employee of the Government at the time caused the claimant to be struck on the leg with the heavy duty roller he was driving at the time. The claimant was 70 years old at the time of the incident. As a result of the accident, she had a deep extensive wound with irregular edges on the medial aspect of her left leg with exposure of bone. X-rays subsequently revealed that she had an open fracture of the left fibula and tibia as well as abrasion on the same leg. The claimant was operated on and her wound healed satisfactorily and she was discharged from the hospital 10 days later. The claimant was awarded general damages of \$60,000.00 comprising of \$45,000.00 for pain and suffering and \$15,000.00 for loss of amenities in 2010.

- [23] I have carefully read and considered the cases referred to by learned Counsel for the Claimant. I note the similarities between the claimants in those cases and the Claimant in the present case, and I also note the differences. I have also had regard to the vintage of the cases. There is no doubt that the Claimant suffered serious injuries in the Accident. She has suffered permanent physical disability as a result of the injuries. Based on the medical evidence before the Court, the Claimant's unchallenged evidence of the pain and suffering she continues to endure and her loss of amenities, and considering the cases referred to the Court, which I consider to be comparable, I would award the Claimant the sum of \$75,000.00 as general damages for pain, suffering and loss of amenities

Future Medical Expenses

- [24] In his expert medical report, Dr. Singh stated that at the time of seeing the Claimant, she did not need surgical management but it was recommended that she continue physical therapy three times per week in order to maintain adequate quadriceps, and hamstring strengths in order to ambulate with present antalgic gait. Dr. Singh stated that the Claimant needs regular orthopedic consultations every six weeks which amounts to 9 times in a year, the present rate being \$250.00 per consultation, which does not include any charges for investigations advised. He stated that the Claimant will also need physical therapy for a minimum six to nine months in a year for the rest of her life the present rate being \$125.00 per session. Dr. Singh stated that the

⁴ GDAHCV2009/0338 (delivered 20th October 2010, unreported).

Claimant will also need a knee replacement surgery in the future which cost approximately EC\$60,000.00 at present.

[25] Learned Counsel for the Claimant submitted that based on the Dr. Singh's report, and considering the overall clinical picture, together with the evidence before the Court, the Claimant will require knee replacement surgery which is currently approximately \$60,000.00. Learned Counsel for the Claimant submitted that in addition to the surgery, funds will be required to cover post-operative medication, future nursing care, and post-operative medical consultations. Thus, learned Counsel for the Claimant submitted that an appropriate additional award of \$6,000.00 is reasonable compensation to cover those additional expenses.

[26] Learned Counsel for the Claimant further submitted that Dr. Singh's medical report highlights that the Claimant needs physical therapy three times per week for rest of her life probably six to nine months in a year. Learned Counsel for the Claimant submitted that at present the cost of physical therapy is \$125.00 per session. Learned Counsel for the Claimant submitted that this equates to \$14,625.00 per year. Learned Counsel for the Claimant submitted that the Claimant is currently 52 years old, with a life expectancy in Antigua and Barbuda of approximately 75 years, giving a further 23 years, however, considering the vicissitudes of life, learned Counsel for the Claimant submitted that a multiplier of 11 is appropriate. Learned Counsel submitted that the Claimant therefore seeks an award of \$160,875.00 for future physical therapy.

[27] Learned Counsel for the Claimant further submitted that the Claimant also needs regular orthopedic follow up consultation every six weeks, 9 times a year at a cost of \$250.00 per visit in Antigua and that this does not involve the cost of any X-rays or other investigations. Learned Counsel for the Claimant submitted that applying the same multiplier of 11 years, the Claimant requests an award of EC\$24,750.00 for consultations.

Discussion on Future Medical Expenses

[28] In appropriate circumstances, the Court ought to compensate an injured claimant for the costs of future medical care, however, a claimant must furnish the Court with cogent evidence to support such a claim.

Knee Replacement Surgery

[29] Based on the Claimant's injuries and the expert report of Dr. Singh and the Claimant's evidence of her difficulties with walking due to knee pain, I am satisfied that the Claimant will require knee replacement surgery in the future

and should be compensated for such. It would have been appropriate for the Claimant to provide clear evidence as to the costs of this surgery rather than relying solely on the statement of Dr Singh in his report that at present, knee replacement surgery will cost approximately EC\$60,000.00. Whilst this presents some difficulty to the Court, it does not prevent the court from making an award.

- [30] Given the nature of Dr. Singh's qualifications, I consider that some weight can be placed on his evidence as to the cost of knee replacement Surgery. Dr. Singh estimated the cost of the knee replacement surgery at \$60,000.00. I consider this reasonable and would award the Claimant this sum for the cost of the knee replacement surgery.

Physiotherapy and Orthopedic Consultations

- [31] Looking at the evidence before the Court, it appears likely that the Claimant will need further medical care to manage her injuries as a result of the Accident. It is noted that in Dr. Singh's opinion, the Claimant's percentage of permanent physical impairment will increase gradually as she grows older on account of knee instability and post traumatic degenerative joint disease.
- [32] As it relates to physiotherapy, Dr. Singh stated that at the time of seeing the Claimant, he recommended that she continue physical therapy three times per week to maintain adequate quadriceps, and hamstring strengths to ambulate with present antalgic gait. Dr. Singh later stated that the Claimant will require physiotherapy for the rest of her life.
- [33] Given the nature of the Claimant's injury to her knee, the need for knee replacement surgery, and her evidence as to the difficulties she has experiences walking, I have no doubt that she will require physiotherapy in the future.
- [34] Again, it behoved the Claimant to provide the court with clear and reliable evidence as to the cost of physiotherapy sessions, however, I do not consider the sum of \$125.00 per session to be unreasonable. Based on the evidence of Dr. Singh, I estimate that the minimum yearly cost of physiotherapy at \$9,750.00 (\$125.00 x (26 weeks x 3)). Given the uncertainties of life, and the possibility that the Claimant's condition may improve with surgery, which may no longer necessitate in office physiotherapy sessions for life, I believe a multiplier of four is appropriate. I would therefore award the Claimant the sum of \$39,000.00 for future physiotherapy.

- [35] As it relates to future orthopaedic consultations, I also consider that the evidence before the Court demonstrates that the Claimant will require orthopedic consultations in the future, however, Dr. Singh did not explain why the Claimant would require those orthopadic visits every six weeks for the rest of her life.
- [36] As it relates to the cost of these consultations, again the Claimant did not provide any other documentary evidence in support of the costs, however, given the nature of Dr. Singh's expertise and his medical practice, I am of the view that the court can place weight on his estimate of the cost of the consultations.
- [37] Based on the evidence of Dr. Singh, I estimate the yearly cost of future orthopedic visits at \$2,250.00 (\$250.00 x 9). Due to the uncertainty of the need for the orthopedic visits for life, and for the similar reasons set out above, I would use a multiplier of four to determine this award. I am of therefore of the view that the Claimant should be awarded the sum \$9,000.00 for future orthopedic consultations.

Special Damages

- [38] The default judgment obtained by the Claimant included special damages in the sum of \$5,510.00. The Claimant sought to amend her statement of claim to claim a further special damages, however, I am of he view that the default judgment obtained by the Claimant crystalised the issue of special damages. In circumstances, the Court is unable to make a further award of special damages unless the default judgment was set aside or varied.

Costs

- [39] The Claimant is entitled to prescribed costs in accordance with rule 65.5 of the Civil Procedure Rules (Revised Edition) 2023 and Part 65 of the Civil Procedure Rules (Revised Edition) 2023, appendices B and C.

Interest

- [40] In calculating interest on the sums found payable to the Claimant, I am guided by the principles espoused in **Martin Alphonso et al v Deodat Ramnath**.⁵ Interest on general damages shall be calculated from the date of service of the claim on the Defendants to the date of this Order at the rate of 5% per annum. Interest on special damages shall be calculated from the date of the Accident

⁵ (1997) 56 WIR 183.

to the date of this Order at the rate of 2.5% per annum. No prejudgment interest shall be awarded for future medical expenses. Post judgment interest shall be at the statutory rate of 5% per annum.

Disposition

[41] In light of the foregoing, the Defendants shall pay the Claimant the following:-

- (i) General damages for pain, suffering and loss of amenities in the sum of \$75,000.00 together with interest from the date of service of the claim to the date of this Order at the rate of 5% per annum.
- (ii) The sum of \$108,000.00 for future medical care. No pre-judgment interest is awarded on this sum.
- (iii) Special damages in the sum of \$5,510.00 together with interest from the date of the Accident to the date of this Order at the rate of 2.5% per annum.
- (iv) Prescribed costs in accordance with rule 65.5 of the Civil Procedure Rules (Revised Edition) 2023 and Part 65 of the Civil Procedure Rules (Revised edition) 2023, appendices B and C.
- (v) Post judgment interest at the statutory rate of 5% per annum.

[42] I wish to thank learned Counsel for both Parties for their helpful submissions.

Carlos Cameron Michel
High Court Master

By the Court

Registrar