

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2019/0711

BETWEEN:

DOMINIQUE WARNER

Claimant

-AND-

JUMBY BAY ISLAND COMPANY LIMITED

Defendant

Appearances:

Ms. Sherrie Ann Bradshaw for the Claimant

Mr. Kwame Simon for the Defendant

2023: November 15th
December 12th

DECISION ON ASSESSMENT

- [1] **DRYSDALE, J.:** The matter for consideration is an assessment of damages for certain personal injuries sustained by the Claimant during the course of his employment with the Defendant and as a result of the negligence of the Defendant. The Defendant having been found liable for negligence judgment was obtained in favour of the Claimant on 6th June 2023 with damages to be assessed. The quantum is assessed on the evidence of the Claimant and the submissions of the parties.

Background

- [2] The Claimant was employed with the Defendant from June 2013 initially as a ferry mate and then later from 2014 in the capacity of a heavy equipment marine and industrial mechanic. On or about the 13th day of May 2017, he was on a boat assisting the Defendant in the transportation of seaweed. The seaweed was tied to the boat by a rope which secured it. The ropes used to secure the seaweed coiled around the Claimant's feet whilst the boat was moving, resulting in the Claimant being thrown into the bottom of the boat which sped up after he accidentally pulled the throttle while falling. Although the Claimant was able to reach up and pull the throttle down, he injured his back because of the incident. As a result of the accident, the Claimant was unable to perform his duties at his place of employment and was on sick leave for a prolonged period, resulting in a mutually agreed separation from his employment on 28th June 2019. The Claimant was 28 years of age at the time of the accident but is now 34 years old.
- [3] As a result of the accident the Claimant sustained mild lumbar annular disc bulges at L2/3, L3/4 and L4/5 according to a CT scan done at the Island Diagnostic Center on 23rd May 2017. Additionally, he shows signs of Schmorl node at endplates of L3, L4 and L5, sagittal T2 sequence, minimal change at L4/5 with a very mild bulge on T2 axial according to a MRI lumbar spine done at Belmont Clinic on 26th September 2017. The Claimant has muscle tendinous ligament injuries in the spine and hip and is permanently partially disabled on account of the injury to his lumbar disc and is assessed at 11% of permanent partial impairment.
- [4] He asserts that he is now and will remain permanently at a disability on the labour market as a mechanic by reason of the restrictive disability from which he continues to suffer as a result of the said accident. Additionally, he requires further physiotherapy and treatment and the percentage of permanent physical impairment as a whole man will increase as the Claimant grows older on account of the developing further post traumatic degenerative joint disease; he will require orthopaedic and neurological monitoring for the rest of his life as well as physical therapy to maintain the current level of ability whenever symptomatic.
- [5] The Claimant claims special and general damages for personal injuries in the aggregate sum of \$436,592.00.

SPECIAL DAMAGES

- [6] The Claimant's previous medical bills have already been paid for by the Defendant Company. In the circumstances there is no need for the court to consider an award of damages under this head.

GENERAL DAMAGES

- [7] In **Stroms Bruks Aktie Bolag v Hutchinson**¹ the court defined general damages as those which "the law will presume to be the direct natural or probable consequence of the act complained". Such damages are not capable of precise calculation and for that reason the court takes cognisance of the injuries sustained by the Claimant as well as similar cases which dealt with the issue of appropriate compensation in the circumstances.

- [8] In assessing the appropriate measure of general damages, the Court also takes cognisance of the factors which ought to be borne in mind as enunciated in the case of **Cornilliac v St. Louis**² being:-

- a. The 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 claimant's pecuniary prospects have been affected.
- [9] In addition to the injuries detailed in paragraphs [3] and [4] above Dr. Gaekwad in his report dated 10th October 2017 states that the Claimant "is a young man and should consider a change in the nature of his job and opt for a more sedentary occupation." By letter dated 16th October 2017 Dr. Gaekwad notes that "Schmorl Nodes in Mr. Warner's case are suggestive of degenerative process which is and will be further aggravated by the nature of Mr. Warner's present occupational duties."

¹ [1905] A.C. 515

² (1965) 7 WIR 491

- [10] By letter dated 14th June 2018 Dr. Carl Bruce notes that the Claimant experiences pain when attempting to do chores such as changing a tire, he also notes that the pains experienced by the Claimant are worsened by sitting and standing for more than 20 minutes and that lying down or turning sometimes causes him pain.
- [11] In his witness statement filed on 7th July 2023 the Claimant gave an account of the effects his injuries have had on his life to date. In it he says that since his injury he has not been able to play football nor participate in other outdoor activities he enjoyed prior to the accident.
- [12] He also spoke about the financial difficulties he has suffered as a result of being unable to work, he had to sell his jeep so that he could get some money, he also exhausted his savings. The Claimant was also forced to sell his prized sports car, a decision which caused him great dismay.
- [13] He explained that he experiences unbearable pain every day and that standing, sitting and sometimes laying for long periods of time makes him uncomfortable. Simple tasks such as mopping and sweeping cause him pain and discomfort. He also stated that since the injury he has gained weight as it has become painful to exercise, this makes him self-conscious. He also said that the injury has affected his sex life and that over the years he has experienced depression and stress over his situation.
- [14] He said that he has had to abandon his hope of pursuing higher education to become a certified diesel mechanic as his doctors have advised that he should look into changing careers as his back will get worse with age and physical demands of the work of a mechanic would only speed up the process.

Pain and Suffering & Loss of Amenities

- [15] Ms. Bradshaw for the Claimant has argued that an appropriate award under this head would be \$90,000.00.
- [16] She relies on the medical reports of the Claimant's doctors for her assessment of compensation under this head.

- [17] She also relies on **Darel Christopher v Benedicta Samuels dba Samuels Richardson & Co**³ where the court stated that “damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff’s necessary medical care, operations and treatment.”
- [18] Counsel also drew the court’s attention to the cases of **Fenton Auguste v Francis Neptune Suit No. 205 of 1994**, **Anita Tobitt v Grand Royal Beach Resort Limited v Stanford Frederick ANUHCv2006/0026** and **Oscar Frederick v LIAT (1974) Limited ANUHCv2007/0391**.
- [19] In terms of loss of amenities Ms. Bradshaw submitted that it is authoritatively settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. She went to argue that among the loss of the amenities of life, there are to be considered: the injured person’s inability to engage in indoor and outdoor games, his dependence, to a greater or lesser extent, on the assistance of others in his daily life, the inability to cope by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence, any prejudice to the prospects of marriage and his inability to lead the life he wants to lead and was able to lead before the injuries.
- [20] Ms. Bradshaw wishes the court to note that the Claimant has problems standing for long periods as a result of the injuries sustained. He has stated that he has to stop and sit several times while trying to do physical work at work and home because of the pain. He also states that he is unable to walk fast or run because of the uneasiness with his leg and finds himself enduring unbearable pain when he attempts to do so. The Claimant enjoyed socializing and seldom does so since the accident. His sex life has deteriorated as a result of the pain that he has to endure.

³ BVIHCv2008/0183 at paragraph 61

- [21] Mr. Simon on the other hand argues that the award under this head should be \$40,000. He relies on the case of **Collin Hope Jr. v Edmond Lake**⁴ wherein the Claimant, aged 23, sustained partial disability of 15% whole person impairment as a result of a road traffic accident that left him with a damaged cervical spine. The claimant in that case did not require surgery and was awarded \$40,000.00 for his pain, suffering and loss of amenities.
- [22] Mr. Simon submits the case of **Oscar Frederick v LIAT (1974) Limited (supra)** should not be relied on as the injuries sustained by the Claimant in that case were of a more serious nature than the present case as the claimant there was diagnosed with a higher percentage of physical impairment than Mr. Warner and required surgery. As for the **Anita Tobitt case** Mr. Simon submits that while the age profile of the claimant and the percentage of physical impairment is more aligned to the case at bar, the award appears excessive as the court in that case used the UK JSB Guidelines which emanates from a jurisdiction the economy of which is disparate to that of Antigua.
- [23] The court has reviewed the case law referenced by Counsel for both parties.
- [24] In the **Anita Tobitt case**, the claimant who was involved in a road traffic accident at aged 35, sustained a prolapsed lumbar intervertebral disc and disc herniation at L5/S1 resulting in 8% whole person impairment. In October 2010, the claimant was awarded \$50,000.00 for pain, suffering and loss of amenities. The court takes note of Mr. Simon's submission that the Guidelines used in Anita Tobitt do in fact emanate from a jurisdiction whose economy is not comparable to that of Antigua. The court also notes the learning from the Court of Appeal decision of **CCCA Limited v Julius Jeffrey**⁵ wherein the court expressed the view that "the courts should always strive for consistency of awards and that to that end local and regional authorities along with evidence are first to be considered to determine quantum."⁶
- [25] Notwithstanding this, the court notes that while authority emanating outside this region was applied in **Anita Tobitt** the end result was in keeping with regional decisions.

⁴ ANUHCv2018/0500

⁵ Civil Appeal No. 10 of 2003

⁶ Collin Hope Jr v Edmond Lake ANUHCv2018/0500 at paragraph [15]

- [26] In the **Oscar Frederick case**, the claimant aged 59 fell in the workplace and suffered compression of his sciatic nerve roots at L4-L5, multiple disc herniation in the cervical spine C4/C5, C3/C4 and C5/C6 for which he underwent surgery. The claimant was diagnosed with 17% whole person impairment. In May 2010, the claimant was awarded \$140,000.00 for pain, suffering and loss of amenities. Having examined **Oscar Frederick** it is my view that this case does not assist the Claimant as the injuries in that case were more serious than the those sustained by the Claimant in the case at bar.
- [27] The court will rely on the **Hope v Laurent case** as the nature of injuries sustained in that case are comparable to the instant case. Given the comparable nature of the injuries in both cases, with the primary distinction in the **Hope v Laurent case** being the higher percentage of permanent disability, the precedent set by the **Hope case** suggests that an adjustment in the quantum of damages for pain and suffering and loss of amenities may not be necessary. Therefore, the Claimant is awarded damages under this head in the sum of \$40,000.00.

Loss of Future Earnings

- [28] In his witness statement the Claimant asserts that in 2016 he was accepted to the Nova Scotia Community College in Canada to pursue studies to become a certified diesel mechanic. He was unable to attend college due to issues with financing and planned to save money to pursue his degree in the future.
- [29] The court notes that Counsel for the Claimant did not advance an argument for damages to be awarded on the basis of the Claimant's loss of future income as a certified diesel mechanic but wishes to note that the court would not have been able to make any such award as the Claimant provided no tangible evidence of his acceptance to university and his plans to pursue higher education.⁷

⁷ Collin Hope Jr v Edmond Lake ANUHCv2018/0500 at paragraph [23]

- [30] Counsel for the Claimant submits that the multiplicand/multiplier approach is to be applied to determine loss of future income.
- [31] Counsel submits that as the Claimant's last pay was \$1,944.00 per fortnight his annual earnings would therefore be \$46,656.00. The multiplicand would thus be fixed at \$46,656.00.
- [32] In arriving at the same, Counsel said she has followed the principles enunciated in **Cookson v Knowles**⁸ and followed in **Alphonse v Ramnath**⁹ and **Fenton Auguste v Francis Neptune**¹⁰, that for the purpose of arriving at the multiplicand, the basis should be the least amount that the Claimant would have been earning if he had continued working without being injured.
- [33] As for a determination of the figure to be used as the multiplier Counsel referred to the case of **Alphonse v Ramnath** wherein Singh J.A. said:

"In determining the multiplier, a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident."

- [34] Applying the principles laid down in the cases of **Alphonse v Ramnath case** and the **Fenton Auguste case** Counsel argues that the working life of the Claimant would be 65 years and fix a multiplier of 7 and a multiplicand of \$46,656.00, thus the award under this head as submitted by Ms. Bradshaw should be \$326,592.00.

⁸ (1979) A.C. 556

⁹ Civil Appeal No. 1 of 1996 (unreported BVI)

¹⁰ Suit No. 205 of 1994

[35] Counsel for the Defendant, Mr. Simon, argues that the multiplier-multiplicand approach is not to be used in this case as the Claimant has not provided substantial evidence of his current earnings. Counsel notes that there is no medical evidence suggesting that the Claimant is unable to work and that further the Claimant advised both the Defendant¹¹ and one of his doctors¹² that he wished to have his employment with the Defendant terminated as he had various enterprises, he thought would be more beneficial to him. Mr. Simon also points to the Claimant's own witness statement wherein he indicated "I have been home for almost 6 years now with no income...even if I try to find a job, I would be a liability to any company, and it would be difficult for me to get hired".¹³

[36] Counsel posits that in the circumstances an award of nominal damages should be given under this head in the amount of \$20,000.00 in accordance with the principle in **Greer v Alston's Engineering Sales and Services Ltd**¹⁴. Sir Legatt in **Greer** quoted with approval from **McGregor on Damages, 13th Edition** at paragraph 295 which states:

"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."

[37] The court having considered the position of both parties must now make a determination on what approach to take in assessing damages under this head.

[38] The court notes that the Claimant's evidence that his last pay was \$1,944.00 per fortnight was unchallenged. The submission of the Defendant that the Claimant's salary cannot be determined is therefore not accepted. In the circumstances the court finds that the multiplicand to be applied is \$46,656.00.

¹¹ TB 3 at page 34 – Letter from the Defendant to the Claimant dated 28th June 2019

¹² TB 3 at page 11 – Medical Report of Dr. Godfrey M. Araujo dated 18th March 2019

¹³ Witness Statement of the Claimant filed on 7th July 2023 at paragraph 29

¹⁴ [2003] UKPC 46

- [39] In **Alphonso v Ramnath (supra)** the court made reference to numerous authorities which emphasized that “the identification of the true multiplier depended on the individual facts and circumstances of each case and that there was no rigid formula.” The court bares this in mind when making its decision on the multiplier to be applied in this matter.
- [40] The Claimant’s admission of unauthorized handling of funds received from a third party meant for rental income raises concerns about his credibility, particularly in relation to his ability to work and the claim for loss of future income. This is buttressed by the Claimant’s consistent assertion to assessing doctors that his desire to be discharged from employment was motivated by other ventures he wished to undertake.¹⁵ The Court also takes note of the medical evidence which conclusively states that the Claimant is capable of working in a different, possibly more sedentary capacity.
- [41] This evidence, when taken together with the lack of medical evidence of the Claimant’s inability to work indicates that the Claimant has simply refused to engage himself in meaningful employment since the accident. It does not appear to this court that his injury is the cause for his sustained period of employment which at the time of writing has been four and a half years.¹⁶
- [42] Finally, the court notes that the Claimant despite his relatively young age has accepted a low multiplier considering the potential duration of his working life which it is estimated would have easily been another 30 years.
- [43] Taking all the above factors into consideration, it is reasonable to conclude that the Claimant is not incapable of working for the remainder of his life as he seemed to have intimated at trial. The low multiplier of 7 utilized by the Claimant may be justified in light of this assessment.
- [44] In the circumstances I will adopt a multiplier of 7 and in keeping with the judgment of the court in the **Steadroy Matthews case** I will apply a 40% discount bringing the multiplier down to 4.2 rounded down to 4 years.

¹⁵ Supra n12

¹⁶ Counted from the date of the Claimant’s mutual separation from the Defendant’s employ.

[45] In the circumstances the Claimant is awarded the sum of \$186,624.00 under this head.

Future Medical Expenses

[46] As for the Claimant's future medical expenses the evidence before the court is that the Claimant will be required to undergo orthopedic and neurological consultation for the rest of his life as well as physical therapy to maintain the current level of ability whenever symptomatic. The medical reports suggest that the Claimant is to continue self-directed exercises and physiotherapy however no specific time period or associated cost is stated in any of the reports.

[47] As stated earlier the Claimant's percentage of permanent impairment will increase as he grows older on account of developing further post traumatic degenerative joint disease.

[48] The court notes that the parties in their submissions agree that the amount to be awarded under this head is \$20,000.00. The court accordingly awards the Claimant \$20,000.00 in damages to cover the cost of his future medical expenses.

Interest

[49] As it relates to the issue of interest the relevant guiding principles for determining the measure is found in the case of **Alphonso v Ramnath (supra)** where the court held that *"No interest should be awarded before judgment on judgment on general damages in respect of loss of future earnings, **but interest should be award from the date of service of the writ to the date of trial at the rate payable on money in court placed on short-term investment in respect of damages payable for loss of amenity and for pain and suffering; interest payable on special damages should be awarded from the date of the accident to the date of the accident at half that rate.**"* (emphasis mine)

[50] Pursuant to section 7 of the Judgments Act, Cap 227 the Claimant is entitled to interest for the period after judgment.

Legal Costs

[51] The matter having gone to trial and the Claimant succeeding in both liability and damages assessment, the Claimant is also entitled to legal costs in accordance with CPR 65.5.

[52]

ORDER

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

- a. Damages for pain and suffering and loss of amenities in the sum of \$40,000.00.
- b. Damages of loss of future earnings in the sum of \$186,624.00.
- c. Damages for future medical expenses in the sum of \$20,000.00
- d. Prescribed costs
- e. Interest from the date of judgment.

Jan Drysdale

High Court Judge

By the Court

Registrar