

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

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2011/0581

BETWEEN:

TRISHELL WETHERILL

Claimant

and

JOSEPH PINDER

Defendant

Appearances:

C. Debra Burnette, Counsel for the Claimant

Dr. David Dorsett, Counsel for the Defendant

2022: May 9th
November 4th

DECISION

- [1] **GARDNER HIPPOLYTE, M.:** This is an assessment of damages stemming from a vehicular accident that occurred on the 26th June, 2011. The instant claim was filed on the 20th September, 2011 and after a trial on liability, judgment was granted in favour for the Claimant on the 30th April, 2014, with damages to be assessed. Costs up to the stage of trial were initially awarded in the form of budgeted costs in the sum of \$96,434.05 and this was varied further on the 7th October, 2021 to the sum of \$175,141.67.

Background

- [2] As stated above the claimant was in a vehicle accident on the 26th June, 2011 and she filed additional witness statements for the assessment of damages hearing. In her statements and evidence to the court she emphasised the severity of the impact the accident has had on her, both physically and mentally. Her evidence indicates that she was hospitalised initially from the 26th June, 2011 to the 16th July, 2011 for approximately 3 weeks.
- [3] She remembers being in excruciating pain and had surgery on her two femurs to stabilize the fractures. As a result of the injuries sustained, she was immobilised with 24-hour nursing care for several months. The Claimant recalled that she would be in severe pain when having to be

transported to and from the hospital for physiotherapy and during the drive she was also filled with fear and anxiety because of the accident.

[4] The Claimant provided the following medical reports to the Court:

- (1) Emergency Department Report from Mount St. John's Medical Center (hereinafter referred to as MSJMC) dated 26th June, 2011;
- (2) MSJMC medical report dated 30th June, 2011;
- (3) Medical Report of Dr. D.C. Gaekwad dated 10th August, 2011;
- (4) Medical report of Dr. D.C. Gaekwad dated 3rd November, 2011;
- (5) Medical report of Dr. D.C. Gaekwad dated 30th November, 2011;
- (6) Medical Report of Dr. D.C. Gaekwad dated 21st February, 2012;
- (7) Medical Report from Dr. Jason Belizaire dated 28th July, 2014;
- (8) MSJMC medical report dated 14th January, 2016;
- (9) EEG report dated 6th March, 2020;
- (10) Expert reports of Dr. Jean-Machelle Benn Dubois filed 15th April, 2021;
- (11) Expert report of Dr. Henry Bedaysie filed 26th April, 2021;

[5] The injuries suffered by the claimant in summary are as follows:

- (i) Multiple facial lacerations;
- (ii) Cervical spine tenderness;
- (iii) A 2cm x 0.5 cm contused lacerated wound over the postero lateral aspect of the elbow on her right upper limb;
- (iv) Abrasions over the medial aspect of the left upper limb
- (v) Sift tissue contusion over the left shoulder;
- (vi) Closed fracture of the bilateral femoral shafts; right ankle sprain; and
- (vii) 0.5 diameter puncture wound over Midshaft of left leg anteriorly;

[6] As a result of the fractures the claimant underwent surgery and two Steinmann pins were passed in each of the proximal tibiae for application of the skeletal traction, a right ankle posterior slab was applied, she was operated on for open reduction and internal fixation of both right and left femurs with K Nails and a cerclage wiring of the right femoral shaft. The Claimant was also seen by an ophthalmologist for subconjunctival haemorrhage of the left eye.

[7] The medical report of Dr. Gaekwad dated 10th August, 2011 highlighted that whilst the Claimant was discharged from the hospital, she had to remain non weight bearing on both legs for the next eight weeks. In November 2011, a chronicle of her progress was given by Dr. Gaekwad. The result was that she could continue her educational activities once she did not do prolonged standing for more than 45 minutes, the Claimant at that point was using crutches.

[8] A follow up report of Dr. Gaekwad on 21st February, 2012 indicated that whilst there has been steady progress while walking, knee bending, balancing, and squatting, the claimant continues to have residual hip adductor weakness. Additionally, according to the doctor she would not be able to participate in impact activities and her recovery time would be a minimum of 18 months, from the removal of the implant and exchange nailing, scheduled for May 2012.

- [9] In 2016 a medical report from MSJMC stated that the Claimant was suffering from epileptic seizures and had to be placed on medication.
- [10] Dr. Henry Bedaysie provided expert reports which were filed on the 26th April, 2021. The expert reports state a diagnosis of Post Traumatic Seizure, Post-Concussion Syndrome and Supraorbital Neuritis which Dr. Bedaysie said is consistent with the 2011 accident reported by the Claimant. Under cross examination, the Doctor clarified that the effect of Post-Concussion Syndrome is headache, dizziness, sensitivity to loud noise and bright lights, easily irritable and fatigued as well as decreased memory and concentration. Additionally, under cross examination the Doctor stated that Supraorbital Neuritis is pain just above the eye on the right side and is caused by damage to a nerve. The Doctor also elaborated that research shows that after three years post-accident if these symptoms do not abate it is permanent.
- [11] The Claimant has highlighted that because of the accident she has become very depressed, her memory is failing and she must be reminded by friends and family about things and places that occurred before the accident. She also has conversations with them for what she thinks is the first time, but it is not, and concern is expressed by them. In 2012 she was diagnosed with having chronic Post Traumatic Stress Disorder, PTSD, which had a significant limitation on her capacity to perform academically. Additionally, she has had a major personality change. The Claimant recalls she used to be a fun, happy and outgoing person but she is no longer any of those things.
- [12] In terms of the physical impact of the accident the Claimant recalls that she used to be an avid gym and fitness enthusiast and she wanted to become an ophthalmologist. As a result of the accident and the impact on her health she had to quit medical school and is now working in an administrative post in a science department. She has gained about thirty pounds and she is not very confident because of the scars on her face. She also suffers from insomnia and is very fearful. Overall, the accident has had a very significant impact on her life, both mentally and physically.

Special Damages

- [13] The general rule is that special damages in a personal injury case must be strictly proven and documentary evidence is the best rule. The Claimant has set out in detail her expenses for special damages totalling the sum of \$321,313.43 and the Defendant's Attorney has indicated in his submissions that he is unable to mount any serious challenge to the claim for special damages and that the battle ground area is in the assessment for general damages.
- [14] I have reviewed the exhibits attached and I thank the Claimant's counsel for setting out the receipts and schedule of damages in such detail as it assisted the Court finalising the amount due to the Claimant for special damages. There was an error with a receipt being submitted for the sum of \$250.00, this will be removed from the overall amount and a duplication of the nursing care highlighted in the bundle provided on the 14th January, 2022. The new totalled figure for special damages amounts to \$319,478.23. I therefore find that this amount has been proven and will so be awarded. Interim payments have been made totalling the sum of \$150,000.00. The balance due

under the special damages head is now \$169,478.23 and prejudgment interest will be awarded under this head at 2.5% from the date of the accident to the date of judgment.

General Damages

[15] Once a person suffers personal injuries they are entitled to general damages under the heads as set out in **Cornilliac v St. Louis** (1964) 7 WIR 491 at page 492:

- The nature and extent of the injury sustained;
- The nature and the gravity of the resulting physical disability;
- The pain and suffering endured;
- The loss of amenities suffered; and
- The extent to which the claimant's pecuniary interests have suffered.

Pain Suffering and Loss of Amenities

[16] The Claimant has invited the Court to award a sum of \$175,000.00 for pain and suffering and \$70,000.00 for loss of amenities. Counsel for the Claimant has asked the Court to award two separate amounts for the two separate heads and has provided case law to support the same. Counsel for the Defendant countered that it should be one award for both heads. I agree that they are two separate heads but my practice has been to award the two heads in one sum. In the circumstances of this case the Court notes the value in separating the awards under the two heads, since the loss of amenities for the Claimant continue to be severe and permanent. A total of six cases have been referred to by the Claimant as comparative injuries to assist the Court in making an award and to support the proposition in awarding amounts under two heads.

[17] The cases referred to are:-

- a. **Carol Cassandra Richards vs Regino Nicholas ANUHCV 2018/0381** - the Claimant had laceration to the right supra orbital area, lacerations throughout her body, a fracture to the shaft of the right Femur, avulsion fracture of the right patellar tendon, fracture of the left superior articulating facet of C6 vertebrae and fracture of the spinous process of the C5 vertebrae. The Claimant underwent surgery to fix her fractured femur and patellar tendon. She was awarded \$140,000.00 for PSLA.
- b. **George Reynold Scotland vs Osbourne Hewitt SVGHCV2015/0136** – the Claimant in this case had a fractured skull, fractured right femur and after surgery his injuries healed, additionally, there was evidence to conclude that there was some measure of brain damage.¹ The Claimant was awarded \$100,000.00 for PSLA.
- c. **Alisha Rodney vs William Airall deceased (2017) ANUHCV 2013/0051** - the Claimant suffered injuries as follows – fracture of the mid-shaft of the right femur, right leg externally rotated, with tenderness and swelling around the fracture site, abrasion on the left foot. The Claimant had surgery - open reduction and internal fixation with K nail

¹ At paragraph 24

insertion. She was in her twenties, restricted in her activities, had scars from the injuries and she was awarded \$140,000.00 for PSLA.

- d. **Jair Horsford a minor vs Carrington Coppin GDAHCV (2011) 2008/0621** – the Claimant suffered a displaced right femoral fracture, a fracture to the right proximal tibia fibula, keloid scars on her face, scars on her wrist and elbows, as well as the lower part of her body and legs. The Claimant was hospitalised for over four months and underwent four operations – one inclusive of K-nail insertion. He has headaches and walks with a limp. He was awarded \$150,000.00 for PSLA.
- e. **Kareem Edwin vs John D’Auvergne (2020) SLUHCV 2017/0547** – the Claimant in this instance was awarded a separate amount of \$15,000.00 for loss of amenities.
- f. **Lincoln Carty vs Lionel Patrick (2009) SKBHCV1998/0054** – where age was a factor in considering the award for loss of amenities.

[18] The Defendant in the alternative argues that the sum of \$175,000.00 is an appropriate award for both heads and reliance was placed on **George Reynold Scotland vs Osbourne Hewitt** SVGHCV2015/0136, **Carol Cassandra Richards vs Regino Nicholas** ANUHCV 2018/0381 and **Collin Hope Jr vs Edmond Lake** ANUHCV 2018/0500 as comparable authorities. Counsel also argues that pain and suffering and loss of amenities are inextricably bound up with each other. Whilst I agree with Counsel’s argument, I believe in this instance they can be separated.

[19] The accident happened over 11 years ago and whilst there has been progress, the loss of amenities is on-going and, in my opinion, severe. Therefore, there is justification for it to be separated in this case.

[20] The Claimant’s evidence and medical reports highlight that the physical injuries she sustained resulted in her being immobilised for a considerable time. Her recovery time from May 2012 would have been an additional 18 months on top of the period 26th June, 2011 to May 2012. The Claimant initially had open reduction and internal fixation of both right and left femurs with K Nails and cerclage wiring of the right femoral shaft and had to rely on 24-hour nursing care. The Claimant has also provided medical reports to substantiate epilepsy, further highlighted as Post Traumatic Seizure, as well as Post-Concussion Syndrome and Supraorbital Neuritis. These are not minor injuries. Her evidence states that she is in pain, her memory is failing and she was also diagnosed with chronic PTSD in 2012.

[21] In relation to her loss of amenities the Claimant has highlighted the impact it has had on her lifestyle of being an avid gym enthusiast, she is depressed, her weight gain, the on-going pain, the fact that she had to repeat her school year, had to withdraw from university as a doctor, she also had to withdraw from becoming a teacher due to the headaches, her lack of confidence and the effect of the anti-epileptic drugs. The Claimant has proved to the Court and I am satisfied that the overall effect of this accident has been drastic and as stated – life changing for her as young woman.

[22] I agree with the principles stated in **Wells v Wells**² where “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

² [1998] 3 ALL ER 481

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."

- [23] Most of the cases provided indicate an award of approximately \$100,000.00 to \$150,000.00 for PSIA, and the cases are from the period 2011 to 2020. Having considered the extensive injuries, the impact on the claimant, comparing all the cases in the round, I am of the view that an award of \$150,000.00 for pain and suffering and \$70,000.00 for loss of amenities is appropriate in the circumstances. Therefore, the total amount awarded is \$220,000.00.

Loss of Earning Capacity

- [24] Counsel for the Claimant has submitted to the Court that an appropriate award for this head of damages should be \$4,320,000.00. Counsel has provided the Court with authorities and justification³ for the Court to look at a multiplier of 24, and a multiplicand of \$15,000.00. Counsel for the Defendant has argued that this is not an appropriate award since the Claimant's pecuniary prospects are speculative and that there are too many imponderables. Therefore, Counsel for the Defendant proposed an award based on a global sum and referred the Court to **Blamire vs South Cumbria Health Authority**⁴ as the justification for this proposition. This case was recently referred to by Michel JA in **Mathews vs O'Neal** (2018) 92 WIR 374, and at paragraph 49 the court highlighted that the court is entitled to "reject the multiplier-multiplicand approach ...given the number of uncertainties in that case as to the amount the injured party would have earned if she had not been injured...."

- [25] Counsel for the Claimant countered and stipulated that **Blamire** is not authority for the principle that in every case where a Claimant is not working, the Court must award a global amount. Counsel also referred the Court to **Kareem Edwin**⁵ where Master Sandcroft opined at paragraphs 82 and 83 and referred to the **Monex case**⁶ where Harrison JA stated

"The award of damages for loss of earning capacity in respect of an infant victim not yet earning a wage and disabled by the act of the defendant, although speculative, represents to the said victim a real loss which a court has a duty to examine and quantify, if material is provided by the evidence."

Counsel for the Claimant highlighted in **Collin Hope** the Court did not have the **tangible evidence** to consider the earnings of a pilot but considered the earnings of a construction worker. (My Emphasis)

- [26] The tangible evidence that has been provided to the Court to support a career choice is as follows:

1. Letter from the American University of Antigua – indicating that the claimant attended the American International College of Arts and Sciences from 05/01/2010 and graduated

³ **Collin Hope Jr v Edmond Lake** ANUHCv 2018/0500 and **Kareem Edwin v John D'Auvergne** (2020) SLUHCv 2017/0547

⁴ [1992] EWCA Civ 20

⁵ Ibid

⁶ **Monex Ltd. v Mitchell and Grimes** SCCA 83/96

04/30/2012. She then was promoted to the American University of Antigua College of Medicine from 08/01/2012 and her anticipated graduation date was 08/19/2016.

2. The Claimant's unofficial transcripts from the above Collage/University showing her grades for the period Summer 2010 to Spring 2012 and Fall 2011 to Fall 2013.
3. A Letter from the Chief Establishment Officer in the Ministry of Social Transformation, Human Resource Development and the Blue Economy indicating the salary for an Ophthalmologist per annum at \$231,313.72 or \$19,276.14 per month.
4. The evidence of the claimant stating her initial scholarship to China to study medicine, her transfer to the American International College of Arts and Sciences, and then her subsequent withdrawal because of the impact from the accident. The claimant also stated that she wanted to become an Ophthalmologist.

[27] The Claimant has also tried to be a teacher but with her health and memory challenges she was subsequently placed in an administrative position now earning \$2,754.00 monthly. The Claimant has provided evidence from the doctors in relation to her suffering from PTSD, memory loss and the diagnosis of Post Traumatic Seizure, Post-Concussion Syndrome and Supraorbital Neuritis, which are all because of the accident. Therefore, I am satisfied that the accident has affected her earning capacity.

[28] I am satisfied on the evidence provided that the Claimant was embarking on a career path to become a Medical Practitioner. I also accept the evidence submitted by the Claimant to show the yearly salary for an Ophthalmologist. However, I am guided by the fact that life does have many imponderables and that whilst she has provided the evidence to show she was embarking on a career it is not definitive that this would have been her definitive result.

[29] Counsel for the Defendant has stated that there are many imponderables, and gives examples as follows:

1. There is great uncertainty on if the claimant would have qualified as an Ophthalmologist;
2. She was on the front end of her educational path for medical school when the accident happened;
3. She has not submitted the likely pattern of earnings along a career path; and
4. He also places emphasis that it is not on day one that one is a medical student and another day an Ophthalmologist.

I have noted the arguments and I agree with the reasoning. I also say further that the Claimant had initially started out her studies in another country, in a separate language, however circumstances changed because she could not adapt to the cold weather, and she returned home. She then started at the American International College of Arts and Sciences in the pre-med division. I am very clear that the Claimant wanted to be a medical practitioner and wanting to become one does not necessarily mean that she would have become one.

[30] I have examined the evidence and I also have considered the fact that the Claimant has only provided evidence to support a salary of an Ophthalmologist. I have also received in her evidence her current salary. Defence counsel has proposed a figure in the round of \$500,000.00 instead of a multiplier/multiplicand approach. I do not agree with this amount as it is not a true reflection of the loss of earning capacity of the Claimant based on her permanent injuries.

- [31] I now turn to the multiplicand and multiplier proposed by Counsel for the Claimant.
- [32] The multiplicand for the Claimant was arrived at by doing the following: the current salary of the Claimant of \$2,754.00 was deducted from the monthly amount of an Ophthalmologist - \$19,276.14 and then taking into consideration the imponderables of life, a sum of \$15,000.00 is proposed. In this instance the Claimant is working but in a much-reduced capacity. The Doctors have indicated her current health challenges are permanent.
- [33] The multiplier proposed by the Claimant is 24, however I reject this proposed figure after reviewing the evidence and I adopt the following as the multiplier: 20.25. The Claimant was born on the 20th October, 1990. At the time of the accident, she was 20 years old. As per Mathews vs O' Neal⁷ the starting point for calculation of the multiplier was the 18th January, 2022 when the Claimant gave her evidence for the assessment of damages trial. Therefore, from the date of trial to retirement is 33 years, 9 months, and 2 days – which is an undiscounted multiplier of 33.75⁸. This amount discounted at the 40% rate proposed in Mathew vs O'Neal gives a multiplier of 20.25.
- [34] Therefore, if the Court went with the figures proposed the amount to be awarded is \$15,000.00 x 12 = \$180,000.00 x 20.25 = \$ 3,645,000.00 for loss of earning capacity. As stated above, I am satisfied the Claimant was embarking on a journey to become a medical practitioner but I am not satisfied that she would have become an Ophthalmologist due to the imponderables of life but it also does not mean that she would not have become one either. I cannot say what the Claimant would have become if this accident did not happen as she was at the front end of her medical path. Therefore, a fairer and balanced approach would be to discount the figure of \$3,645,000.00 by 50%, taking into consideration everything in the round.
- [35] Therefore, the amount awarded for loss of earning capacity is \$1,822,500.00.

Future Medical Care

- [36] The Claimant has submitted that an amount of \$4,500.00 is an appropriate award under this head of damages since the Claimant is required to see the neurologist every six months at \$100.00 USD per visit as well as possible medication at \$50 USD. Counsel for the Defendant does not challenge this amount but he requested a discount of 25% since the amount is received up front. I have noted the request and I reject it as the doctor's fee is for the rest of her life will not remain at \$100.00 USD and I will not speculate further. Therefore, based on the report provided I am of the view that this amount should be awarded, as it is reasonable, and I so do. The Claimant is awarded \$4,500.00 USD or \$12,150.00 ECD.
- [37] Therefore, the total amount awarded under the heading of General Damages are as follows:-

Item	Amount
Pain Suffering and Loss of Amenities	\$ 220,000.00

⁷ 92 WIR 374 at paragraph 41-

⁸ 275 days /365 days = .75

Loss of Earning Capacity	\$ 1,822,500.00
Future Medical Care	\$ 12,150.00
Total	\$ 2,054,650.00

Conclusion

[38] The Defendant shall pay to the Claimant the following awards:

1. Special damages in the sum of \$169,478.23 with interest at 2.5% per annum from the date of the accident which is 26th June, 2011 to date of judgment;
2. General Damages for Pain and Suffering and Loss of Amenities - \$220,000.00, interest at 5% per annum from the date of service of the claim to date of judgment;
3. General damages for Loss of Earning Capacity - \$1,822,500.00;
4. General damages for future medical care - \$12,150.00;
5. Interest from the date of judgement to payment in full on the global amount at the rate of 5%;
6. Budgeted costs in the sum of \$175,141.67;
7. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

BY THE COURT

REGISTRAR