

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

IN THE HIGH COURT OF JUSTICE

Claim No: ANUHCv2014/0371

BETWEEN:

BLONDELL DYER-CHRISTOPHER

Claimant

and

MCBERT ARTHUR

Defendant

APPEARANCES:

Kyle Kentish, Counsel for the Claimant

Judith Dublin, Counsel for the Defendant

2022: April 5th;
July 25th.

DECISION

- [1] **GARDNER-HIPPOLYTE, M.:** This is an assessment of damages stemming from a vehicular accident that occurred on the 8th July, 2011. The instant claim was filed on the 7th July, 2014 and Judgment was entered for the Claimant on the 29th April, 2015 with damages to be assessed.

Background

- [2] The Claimant filed a witness statement on the 11th November, 2019 in relation to the assessment of damages and Form 31 was filed by the Defendant on the 21st November, 2019 stating the intention to be heard on quantum and to cross examine the Claimant.
- [3] Thereafter the matter went to mediation and was not resolved. In February 2022 further directions were issued for the filing of an expert report, further witness statements by the Claimant and witness statements by the Defendant as well as submissions. The matter was then given a hearing date for the assessment of damages on the 5th April, 2022.
- [4] On the 5th April, 2022 when the assessment of damages came up for hearing, the Defendant relied on the submissions previously filed and the claimant had filed witness summaries on the 2nd March, 2022 which were out of time, and no application for an extension of time and relief from sanctions was filed. The counsel for the Defendant objected to a further adjournment citing interest as a major factor since the accident occurred in 2011. The Court chose to proceed with the assessment of damages hearing on the 5th April, 2022 with the evidence previously filed in the witness statement of the Claimant. I agreed that the claim was a long-standing matter and

since there was no application for an extension of time and relief from sanctions, the witness summaries were not allowed.

- [5] The evidence led by the Claimant was that at the time of the accident she was 43 years old. She is employed by the Government and earns a salary of \$1,377.60 a month. She also does hairdressing and prior to the accident she made \$2,000.00 and after the accident she earned about \$1,800.00.
- [6] That because of her injuries she cannot stand for more than four hours and has had to use a back brace to help support her spine as well as a special stool to sit on at work. She can no longer lift heavy objects, has difficulty sleeping, and it is difficult to perform everyday functions like driving, walking, standing and bending. Prior to the accident she enjoyed outdoor activities with her husband such as hiking, gardening, swimming, jet skiing and boating. She is an avid swimmer but can no longer swim comfortably. She also finds that sexual activity with her husband is painful. She can no longer iron and wash and at times it is difficult to pay bills, go grocery shopping and conduct business generally.
- [7] Attached to the Claimant's witness statement are 3 MRI reports, 2 Medical reports from Dr. Eumel Samuel and 2 medical reports from Dr. James Sutton.
- [8] The medical report from Dr. Samuel dated 28th September, 2011 indicates that the Claimant's past medical history was unrevealing and a clinical assessment was made of disc herniation and muscle spasm. The prognosis in this report states that the Claimant prognosis is good and she is expected to recover within 6 months with 98% functionality.
- [9] MR imaging was done and confirmed the clinical impressions. The MRI dated 7/13/2011 of the LS Spine indicates that "there is a 5.68mm x 6.28 mm diffuse disc herniation at L4/5....mass effect on the thecal sac and cauda equina....the lateral recesses are not compromised and there is no nerve root contact." The MRI dated 7/13/2011 of the C spine indicates that "there is hypertrophy of the ligamentum flavum at the level of D2."
- [10] A subsequent report from Dr. Samuel dated 2nd July, 2014 states that the Claimant prognosis is guarded and from a medical standpoint it is anticipated she will have continued back pains and medical intervention may become necessary.
- [11] Dr. Sutton's report dated 7th February, 2019 indicates that the Claimant has been experiencing severe lower back pains, difficulty sitting, standing, lifting objects, difficulty walking up steps of which she has had to buy specially prescribed shoes to minimize the pain to the lower back and that she has severe lower extremity cramps bilaterally during climax. The Doctor also states that this is despite rigorous treatment with analgesics and anti-inflammatory agents, which have also resulted in a peptic ulcer that is also managed with medication. There is a second report from Dr. Sutton that lists the dates and times as well as the cost associated with the management of her condition.

Special Damages

- [12] The general rule is that special damages in a personal injury case must be strictly proved and documentary evidence is the best rule. The approximate amount the Claimant has requested under this head is \$97,284.00 for loss of income, travel and medical, transportation costs and nominal damages.

Medical Expenses

- [13] The Claimant has requested the amount of \$19,784.79 for her expenses under the general head of special damages. This amount is for medical expenses, fees for consultation, travel and medication. The Claimant has supplied receipts for most of those expenses. The Claimant averred in her evidence that she travelled to the United States on several occasions to receive treatment because of the injuries sustained. She was cross examined on this point and it was suggested to her that the services she sought overseas were available in Antigua. She agreed that the services were available but that she had family overseas and in an effort to minimize costs she chose the option of travelling to the United States to obtain these services.
- [14] I have reviewed the documents referred to as receipts from Bronx Lebanon Hospital Center and have noted the following:
- The documents attached are not receipts but statements;
 - In some instances, the statements refer to an amount brought forward/previous balance;
 - 4 documents were subsequently discussed at a further hearing¹ as it had the same service date, it was agreed between the parties and adopted by the court that two out of the four were duplicates and therefore the amount for the Court to consider was \$185 USD and \$231.00 USD = \$ 1,123.20 ECD;
 - Three documents with separate service dates of 06/11/12, 06/15/12 and 06/18/12 and statement dates of 06/18/12, 06/22/12, and 06/25/12 refer to a description in the charges. These statements will be taken as three separate statements with a total \$434.16 USD = \$1,172.23 ECD;
 - The two remaining statements have service dates of 12/31/12 and 09/01/15 respectively with the amounts \$469.72 USD and \$526.83 USD. Both statements refer these amounts as being for previous balances. On the balance I will allow the award of these sums and the total amount = \$2,690.69 ECD;
 - Therefore the total amount for treatment is \$ 4,986.12.
- [15] There is no evidence from the Defendant to support the fact that the services would have been more cost effective in Antigua or that the cost of treatment received by the Claimant in the United States for her injuries were unreasonable. In the circumstances, I will allow the expenses incurred

¹ 19th July 2022

for her treatment and I find the amount claimed in the sum of \$4,986.12 for treatment at the Bronx Lebanon Hospital Center to be reasonable and I so award the same.

- [16] With respect to the plane tickets no receipts are provided. The Claimant has attached passenger itinerary tickets with a cost handwritten in either the left or right hand corner of the document. This is not a receipt and accordingly, the Court is not able to include these amounts in the award for special damages.
- [17] The Claimant has provided receipts for MRIs, medication and doctors' consultations. Having provided the receipts to the sum of \$9,756.49, I find that this amount has been proven and will so award.

Transportation Expenses to Hospital in Antigua

- [18] The Claimant has claimed an additional amount of \$500.00 for travel expenses to and from the hospital but has provided no receipts. I rely on the case **Greer vs Alston's Engineering Sales and Services Ltd²** and find that the sum of \$500.00 for travel to and from the hospital in Antigua is a reasonable amount and I so award.

Transportation Expenses to and from Hospital in United States

- [19] The Claimant has also argued for the sum of \$1,000.00 for transportation expenses to the hospital overseas, but no receipts are provided. Counsel for the Defendant has argued that there was no basis for travel to the United States and that the Claimant has a duty to mitigate. The evidence led from the Claimant does not demonstrate that the cost of physical therapy obtained was unreasonable and therefore a natural expense flowing from this head would have been transportation costs whether it was incurred in the United States or in Antigua. Therefore, based on the principle relied on above I will award a nominal amount in the sum of \$500.00.

Care by the Husband

- [20] The Claimant has also requested an award for the care that her husband has provided to her as a result of the injuries sustained. She was cross examined on the issue and she agreed that her husband did not give up his job to look after her. However, the law provides that the Claimant can recover for services rendered irrespective of a legal obligation to pay for it.³ The Claimant has requested the sum of \$50,000.00 for this head.

² [2003] UKPC 46

³ Cleos Billingy v Kevon Jessie-Don Anderson and Leonet Anderson SVGHCV 2013/0096 decision of Master Pearletta Lanns at paragraph 40 and 41 and Shunette Thompson et al v Owen Jones et al SVGHCV 2012/0138

- [21] In the Claimant's evidence on the 5th April, 2022 the Claimant stated that her husband assists her with her government job as well as her hairdressing job. The evidence led highlighted that the Claimant's husband did not give up his job to look after her and that he travelled to the United States to help her as she could not lift anything heavy. Accordingly, there is no evidence to support an amount of \$50,000.00 and whilst the law makes provision for awards for nursing and domestic care there is no evidence to support that a nominal amount should be made. In the circumstances I decline to make such an award.

Loss of Earnings

- [22] The Claimant has also sought to claim for loss of earnings,⁴ and whilst she has provided the sick note forms to accompany the dates led in her evidence, there is no proof from the Claimant that she did not receive her salary from the Government for this period. The Claimant was cross examined on this point and I agree with the Counsel for the Defendant that there is no evidence to support the fact that she did not receive her salary.
- [23] The Claimant stated that she is also a hairdresser. The submissions from the Claimant's Counsel refer to an award of \$61,000.00 for loss of earnings as fair and reasonable. At this juncture, I agree with the argument of Counsel for the Defendant that there is no evidence to support a claim for this amount.
- [24] However, the Privy Council decision in **Greer vs Alston's Engineering Sales and Services Ltd**⁵ quoting from McGregor on Damages⁶ 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."

- [25] Also relying on **Central Soya of Jamaica Ltd v Freeman**⁷ where the Court stated that there are circumstances in casual work cases it is difficult to present an exact loss of earnings and the Court can use its own experience to arrive at what is proved on the evidence. In the circumstances, I accept that on the balance, the Claimant was on sick leave for the period claimed.⁸ In total it amounts to 237 sick days spanning from 2011 to 2017. In her evidence she said prior to the accident she earned \$2,000.00 a month from her hairdressing business and whilst she did not provide a breakdown of the same, her evidence on this point was not shaken.

⁴ Paragraph 35 of the Witness Statement of Blondell Dryer Christopher, page 9.

⁵ [2003] UKPC 46

⁶ 13th Ed at paragraph 295

⁷ (1985) CA of Jamaica Civ App no 18 of 1984 (unreported)

⁸ Medical sick notes attached but in paragraph 35 of the witness statement there is one error says it 23rd November to 10th November 2016 when it should read 3rd November to 10th November 2016, accordingly the correct number of days for this period were accounted for in the total number of sick leave days.

Accordingly, I will award a nominal amount of \$10,000.00 for the income earned under the Claimant's hairdressing business.⁹

Nominal Damages

- [26] In addition to the other heads listed above the submissions of the Claimant requested nominal damages in the sum of \$15,000.00 for "transportation costs as a result of the accident in Antigua, police report, some of husband's accompanying travels transportation cost overseas in New York, cost of physical therapy in New York, purchasing back braces, building a special stool, purchasing a firmer mattress and the purchase of specially prescribed shoes." Three of those areas listed have already been dealt with above.
- [27] In Dr. Sutton's report of 7th February, 2019 it refers to the great expense the Claimant had to "purchase specially prescribed shoes to minimize severe pain." The Court does not have receipts for those expenses but as submitted in the case law by Counsel for the Claimant nominal awards can be made. In the circumstances the Court will award \$3,500.00 for the additional items requested of shoes, mattress, back braces and a special stool.
- [28] In conclusion the awards for special damages are grouped and the amounts awarded are as follows:

Item	Amount
Receipts for Belmont Clinic MRI etc.	\$5,500.00
Receipts for medication (not allowing one for \$65.34 as the receipt is not clear)	\$ 806.49
Bronx Lebanon Hospital Center – treatment	\$4,986.12
Receipts for consultations	\$3,450.00
Nominal award for loss of earnings	\$10,000.00
Nominal award for transportation to and from the hospital in Antigua and United States	\$ 1,000.00
Nominal award for shoes, mattress back braces and special stool	\$3,500.00
Domestic Aid (post-accident) ¹⁰	\$5,000.00
Total	\$34,242.61

- [29] Therefore, the total amount awarded under Special damages is \$34,242.61. Interest will be awarded under this head at 2.5% from the date of the accident to the date of judgment.

⁹ Commonwealth Caribbean Tort Law 4th edition, Gilbert Kodilinye at page 369-370. Reference to a common-sense approach in relation to these types of special damages. Further "that the court could use its experience in order to arrive at an award that meets the justice of the case." AG v Clarke (2004) CA Jamaica, Civ App No 109/2002.

¹⁰ Addressed at paragraph 42

General Damages

[30] 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

[31] The Claimant has invited the Court to award a sum of \$150,000.00 under this head of damages. A total of nine cases have been referred to by the Claimant as comparative injuries to assist the Court in making an award.

[32] The cases referred to are:-

- a. **Joseph v Hilton SLUHCV 2012/1025** – the Claimant underwent surgery for open reduction interspinous wiring with base grafting, had to wear a cervical collar for three months, was diagnosed with 4th cervical vertebrae which had shifted about 10% over C5. He had a permanent disability of 25% and was awarded \$100,000.00 for PSLA.
- b. **Tobitt v Royal Antigua ANUHCV 2006/0026** – the Claimant had a prolapsed lumbar intervertebral disc/Lumbo-sacral disc with diminished sensation in the dermatome distribution of L5-S1. The MRI revealed central and left lateral disc herniation at L5/S1 with impingement of the thecal sac. She was found to be 8% disabled and was awarded \$50,000.00¹¹ for PSLA.
- c. **De Costro v Antigua Masonry Products Limited ANUHCV 2010/0456** – the Claimant injuries disc dessication and substance degeneration in the lower lumbar discs, disc herniation at L4/5 and L5/S1, mass effect on thecal sac and cauda, compromise of the lateral recesses and bilateral nerve root contacts. He had surgery and permanent partial disability at 25%. His award was \$100,000.00 for PSLA and diminution in his pecuniary prospects.
- d. **Myers v Dickenson Bay et al ANUHCV 2013/0231** – the Claimant was diagnosed with L4/5 broad disc herniation with severe degeneration of the L4/L5 disc. She had permanent partial disability of 7% and a recommendation for surgery. Her award was \$95,000.00 for PSLA.
- e. **Sparman vs Jolly Beach Resort & Spa ANUHCV2012/0292** – the Claimant suffering from pains in her lower back, right hip, lower limb pains in spine due initially to sacroiliitis/sprain with L5-S1 disc bulge and sensory paraesthesia which

¹¹ Paragraph 13

progressed to mild discal dehydration with mild annular bulge of L4-L5 spine and to her current state of L4-5 L5/S1 radiculopathy sensation reflex and power loss of the lower limbs. Surgery was recommended but she could not afford it. She was also pregnant at the time of the injury. She was awarded \$65,000.00 for PSLA.

- f. **Mason v Maundays Bay AXAHCV2006/0090** – the Claimant suffered a disc herniation of or at L5/S1 – a slip disc in the lower back region. This produced sciatica which is compression of the spinal nerve root in the lower back. He was awarded \$50,000.00 for PSLA.
- g. **Joseph v King-George ANUHCV2011/0280** – the Claimant injuries were post traumatic severe lumbosacral subluxation syndrome, degenerative joint disease of lower lumbar spine, left side lumbar sacral strain to iliolumbar and sacro-lumbar ligaments, diminished sensation in the distribution of L5/S1 dermatomes suggesting prolapsed lumbar intervertebral disc. Further assessment revealed reversal of the lordosis, sagittal opening of the C4-5 disc with anterior angulation at the C4-C5 level, diffuse disc bulging contacting the cervical cord and a small annular tear. At C5-C6 there was also a small annular tear but no significant disc bulge. The Claimant also had a diffuse disc bulge at the L4-L5 level which along with ligament flavum hypertrophy was producing moderate narrowing of the spinal canal bilateral recess. She was awarded \$40,000.00 for PSLA.
- h. **Celestine v Ventour GDAHCV 2007/0530** – the Claimant suffered a contusion to the lower back, post traumatic para-vertebral muscle spasm due to muscular strain, chilles reflex decreased on left side with decreased power in planar flexion of the ankle, and the MRI showed a large L5-S1 central disc protrusion of lumbo sacral spine. She was awarded \$35,000.00 for PSLA.
- i. **Hatchett v First Caribbean International Bank et al BVIHCV 2006/0227** – the Claimant suffered from a fractured C3 vertebrae without displacement of her cervical spine and also central disc herniation of her lumbar L5/S1 vertebrae with degenerative disc disease at L4/L5. She was awarded \$20,000.00 **USD**¹² for PSLA.

[33] The Defendant in the alternative argues that the sum of \$20,000.00 is an appropriate award and reliance was placed on **Tobitt v Royal Antiguan** ANUHCV 2006/0026 as a comparable authority. The Defendant counsel argues that in the other cases the injuries sustained were more serious.

[34] I agree with Counsel for the Defendant that some of the cases proposed, the injuries sustained were more than those received by the Claimant. For example in **Joseph v Hilton** SLUHCV 2012/1025 the Claimant ended up with a 25% permanent disability. However, I disagree that an amount of \$20,000.00 is an appropriate award. The injuries of the Claimant as stated above are that that “there is a 5.68mm x 6.28 mm diffuse disc herniation at L4/5.mass effect on the thecal sac and cauda equina....the lateral recesses are not compromised and there is no nerve root contact.” The MRI dated 7/13/2011 of the C spine indicates that “there is hypertrophy of the ligamentum flavum at the level of D2.” The Claimant has also listed the difficulties she has daily

¹² Paragraph 24

with basic tasks such as walking, standing, sitting; further the challenges encountered during sexual activity and the impact this injury has had on her social life. The pain has not gone away, it is ongoing, and she now has a peptic ulcer because of the medication for her injury.

- [35] I agree with the principles stated in Wells v Wells¹³ 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 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.”
- [36] Most of the cases provided indicate an award of approximately \$35,000.00 to \$95,000.00 and the cases are from the period 2006 to 2013. Having considered the injuries, the impact on the Claimant, an uplift for inflation and economic conditions and comparing them to all of the cases in the round, I am of the view an award of \$70,000.00 is appropriate in the circumstances.

Loss of Future Earnings

- [37] The Claimant in the submissions argues that an award for future earnings in the sum of \$550,413.70 should be granted. The evidence led from the Claimant is that she is still employed at her Government job and in her hairdressing business she makes \$200.00 less than what she made prior to the accident. At paragraph 3 she says “As a hairdresser I earned \$2,000.00 on average a month prior to the accident and about \$1,800.00 thereafter.” She also stated that she is also now only able to work for 4 hours and she used to be able to work for twice as long. She also stated she is in fear of losing clients, does not have the money to hire additional help and has to wait for her husband to assist her.
- [38] Counsel for the Defendant has argued that it is mandatory for the Claimant to provide reliable evidence for example bank records, accounting or other financial records to support this head. Reference is made to Joseph v Hill et al¹⁴ where the Court highlighted that in:-

“An assessment of damages for loss of earnings, it is always important to furnish the court with clear information, backed up with evidence of pre-trial earnings, evidence of the nature of work carried out and evidence such as pay slips or bank statements, to demonstrate earnings before the accident.”

- [39] The test highlighted by the Court Joseph v Hill states:-¹⁵

“A plaintiff who seeks general damages for loss of earnings must show that there is a real or substantial risk that he may be disabled from continuing his present occupation

¹³ [1998] 3 ALL ER 481

¹⁴ Mary Joseph v Asha Hill and Jerry Henry DOMHCV 2014/0192 at paragraph 21 where Mitcham Black v The Attorney General of Saint Lucia SLUHCV 2004/0502 was quoted referring to the test laid down by the Jamaica Court of Appeal in *Gravesandy v Moore* (1986) 40 WIR 222

¹⁵ *Gravesandy v Moore* (1986) 40 WIR 222

and be thrown handicapped, on the labor market at some time before the estimated end of his working life. The risk in such a case will depend on the degree, nature, or severity of his injury and the prognosis of full recovery; and the evidence must be adduced as to these matters and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location.”

- [40] There is no evidence to support that she has lost her job or is unable to work at all. I have read the arguments of Counsel for the Claimant and I disagree with the submissions as the evidence provided does not support an award in the sum of \$550,413.70 as suggested. At the most the evidence suggests that she is short \$200.00 each month, however in the absence of documentary evidence I find myself handicapped to provide an award with some precise calculation as to the amount and the length of time the Court should consider as was contemplated in the test laid out in Joseph v Hill. I therefore decline to make such an award under this head.

Future Domestic Aid

- [41] The Claimant has requested a sum under this head in the amount of \$50,400.00. In Sparman v Jolly Beach Resort & Spa¹⁶ the Court allowed an award for domestic help. The evidence of the Claimant is that due to the challenges she has in her daily life she hired someone to assist her at home.¹⁷ She indicated she can no longer wash, iron, lift anything heavy or do gardening. It was highlighted in Sparman¹⁸ that whilst there is no documentary proof under this head it is not usual to obtain receipts from domestic helpers.
- [42] In the instant case as I do not have an indication of the total amount spent post-accident expenses, so I will award a nominal amount of \$5,000.00. The post-accident nominal amount of \$5,000.00 will attract interest at 2.5% from the date of the accident to the date of judgment. In relation to post trial domestic help I have no information as to how often help is required or the approximate cost but I accept the evidence of the Claimant that assistance is required. Therefore I will also award a nominal amount of \$5,000.00 for the post trial domestic help.

Future Medical Care

- [43] The Claimant has submitted that an amount of \$28,365.64 is an appropriate award under this head of damages since the Claimant's average medical expenses are approximately \$1,439.88. There is no breakdown as to how this amount was arrived at and the Court is handicapped to apply the multiplier and discount as proposed by Counsel. I have noted however that the

¹⁶ ANUHCv2012/0292 at paragraphs 56-61

¹⁷ Claimant witness statement at paragraph 28

¹⁸ Ibid at paragraph 56

Claimant will continue to see a doctor for her injuries and is taking medication.¹⁹ Therefore a nominal award of \$7,000.00 is awarded.

Future do it Yourself

[44] The Claimant has argued that an appropriate award under this head is \$50,400.00. The Claimant proposes that an award under this head is appropriate for extra gardening assistance and self-maintenance works. In her witness statement the Claimant indicated that she did gardening. However, I decline to make such an award in this instance as an award has already been given for domestic help and there is no evidence to support an award for this amount for do-it-yourself maintenance works.

[45] Therefore, the total amount awarded under the heading of General Damages are as follows:-

Item	Amount
Pain Suffering and Loss of Amenities	\$70,000.00
Future Domestic Aid	\$5,000.00
Future Medical Care	\$7,000.00
Total	\$82,000.00

Conclusion

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

1. Special damages in the sum of \$ \$34,242.61 with interest at 2.5% per annum from the date of the accident which is 8th July, 2011 to date of judgment;
2. General Damages for Pain and Suffering and Loss of Amenities - \$70,000.00, interest at 5% per annum from the date of service of the writ to date of judgment;
3. General damages for future domestic aid and future medical care \$12,000.00;
4. Interest from the date of judgment to payment in full on the global amount at 5%;
5. 60 % of Prescribed costs on the global sum in accordance with CPR 65.5;
6. The Claimant to draw, file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

BY THE COURT

REGISTRAR

¹⁹ As per Dr James Sutton report dated 1st November 2019, where she has visited the doctor at least twice a year and he indicates she is managed with medication.