

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2018/0520

BETWEEN:

MILLICENT EPHRAIM

Claimant

and

[1] CHARLES ROBINSON
[2] ERIKA ROBINSON

Defendants

Appearances:

Kema Benjamin, Counsel for the Claimant
Judith Dublin, Counsel for the Defendants

2021: December 1st
2022: January 21st

DECISION

[1] **GARDNER HIPPOLYTE, M.:** This is a decision for an assessment of damages, based on injuries sustained from a vehicular accident as the claimant was crossing the road.

Background

[2] On 8th May, 2017 the claimant who was 86 years old at the time of the incident was crossing from the corner of All Saints Road. She indicated that she observed the traffic lights from east to west and from west to east remained red for a long time so she decided to cross the road. She admits there is no pedestrian crossing at that location.

[3] The second Defendant was driving vehicle registration A40389 (owned by the first defendant) and was at a standstill as she was waiting behind the red traffic light. The Claimant said the second Defendant was looking at the gas station across the road when she was at the light. While the Claimant was crossing the road the traffic light turned green and the second Defendant struck the Claimant on her right hip causing her to fall on her left side to the open drain. The Claimant sustained injuries was taken to the hospital and attended to by Dr. Dirk Yearwood.

- [4] Dr. Dirk Yearwood in his evidence indicated that the claimant was diagnosed with the following injuries:
- Fracture dislocation of her left ankle and was treated with closed reduction of her dislocation, left below the knee posterior splint;
 - She was to undergo a surgery for open reduction and internal fixation of her left ankle but developed a lower respiratory tract infection.
 - On the 23rd of May she underwent a open reduction and internal fixation of her bimalleolar fracture;
 - The medial malleolus was fixed using three percutaneous K-wires and the lateral malleolus was fixed using a four hole semi-tubular plate affixed with three screws;
 - She was discharged on the 2nd of June 2017 and during follow up she developed superficial skin necrosis and migration of K wires under her skin;
 - Two of the three K-wires were eventually removed;
- [5] The Claimant attended at the hospital for wound dressing on 15 occasions, and she also had to undergo physiotherapy. The Claimant indicates that prior to the accident she was an active 86 year old woman who did her own household and personal duties, however since the accident she has had to rely on her daughter Casilda to perform all her chores. Prior to the accident she says she walked unassisted but now she requires assistance and walks with a cane.
- [6] Casilda Daniel is the daughter of the Claimant and she indicated that she assisted her mother after the accident to bathe, brush her teeth, wash her hair, comb her, dress her, cooked her meals, washed and ironed her clothes, cleaned her house and did her grocery shopping. That all these chores her mother was capable of handling prior to the accident but from the accident until about the 15th October, 2017 Casilda performed all of those chores. The Claimant thereafter was able to cook her meals and do her personal chores but her daughter still attends to the laundry.
- [7] Evidence was also led from two witnesses who indicated that they saw the accident, and both observed that the second defendant, Ms. Robinson was distracted while at the light. The witnesses were at the back of the second Defendant's vehicle, Mrs. Durand indicated that the second Defendant was on the phone when she moved off, and Mr. Durand said the second Defendant was also on her cell phone.

Special Damages

- [8] The Claimant has requested the amount of \$17,439.84 for special damages. This amount includes medical expenses, transportation, nursing care and legal fees. The Claimant has supplied bills and receipts for medial and ancillary expenses (medication and transportation) which I will allow in the award for special damages. Additionally, there are some instances where no such receipt is provided and having regard to relevant case law in relation to items with no

receipts for example the bus fare and taxi service,¹ I will allow the amounts submitted in the statement of claim as follows:

Item	Amount
Transportation – inclusive of taxi and bus fare	3,444.00
Medical expenses, police report	1,308.34
Total	4,752.34

- [9] It is also settled law that a Claimant can pursue sums for home care while recuperating.² The amount requested is \$12,000.³ The case law relied on by the claimant in this case refers to the cost of domestic care and the husband of the claimant in the case provided was forced to leave his job to attend to his wife. In the instant case there is no evidence that Ms. Daniel had to leave her job to attend to her mother. Therefore, I find the sum of \$35 per day for 160 days to be more appropriate and this totals the sum of \$5,600.00.
- [10] The amount claimed for legal fees will not be included in the award for special damages.
- [11] I therefore find the total amount claimed for special damages is reasonable and therefore I award the sum of \$ 10,352.34 for special damages.

General Damages

- [12] 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:
- (a) The nature and extent of the injury sustained;
 - (b) The nature and the gravity of the resulting physical disability;
 - (c) The pain and suffering endured;
 - (d) The loss of amenities suffered; and
 - (e) The extent to which the claimant's pecuniary interests have suffered

The Nature and Extent of the Injuries Sustained

- [13] In summary the Claimant suffered:-
- Fracture dislocation of her left ankle and was treated with closed reduction of her dislocation, left below the knee posterior splint;

¹ Relied on Greer v Alstons Engineering Sales and Services Limited [2003] 63 WIR 388 for the items with no receipts.

² Shunette Thompson et al v Owen Jones et al SVGHCV 2012/0138

³ The amount claimed is \$75.00 per day which is the cost of average daily nursing care, case relied on Mary Anderson v Kenson Donacien and Lester Charles SLUHCV 2013/0965 refers to cost of domestic care vs nursing care.

- She was to undergo a surgery for open reduction and internal fixation of her left ankle but developed a lower respiratory tract infection.
- On the 23rd of May she underwent an open reduction and internal fixation of her bimalleolar fracture;
- The medial malleolus was fixed using three percutaneous K-wires and the lateral malleolus was fixed using a four hole semi-tubular plate affixed with three screws;
- She was discharged on the 2nd of June 2017 and during follow up she developed superficial skin necrosis and migration of K wires under her skin;
- Two of the three K-wires were eventually removed;

[14] Dr. KK Singh gave evidence and he stated that he is a Consultant Orthopaedic Surgeon and he examined Ms. Ephraim 2nd July, 2018 and he assessed her disability at 3% permanent impairment as a whole person. He confirmed that she had a severely comminuted fracture dislocation of the left ankle. He was not cross examined.

The Pain and Suffering and Loss of Amenities

[15] The Claimant at paragraph 13 and 14 indicates in summary that she was no longer independent and had to rely on her daughter as well as the fact that she now uses a walking aid. She also was admitted to the hospital and underwent two surgeries, and had to attend for dressing several times. She was incapacitated from May to October of 2017. Her daughter had to perform basic chores liking bathing her and doing her cooking.

[16] Counsel for the Claimant referred to the following cases as comparable amounts to be considered:

- a. **Randy Aaron v Barrington Pond et al**⁴ - the Claimant who was 59 years suffered injury bilateral malleolar fracture of the left ankle. He was awarded \$45,000.00 for PSLA.
- b. **Rasmin Rogers v Tyrone Creese**⁵ - the Claimant who was 46 suffered fracture to the 5th Metatarsal of the right foot and fracture of the proximal phalanx of the left foot. Her award was \$80,000.00 for PSLA.
- c. **Ann Robertson v The Attorney General**⁶. - the Claimant was age 70 and received a complete displaced fracture of the distal tibia and fibula. She was awarded \$60,000.00 for PSLA.

[17] The Defendants have distinguished the cases provided by the Claimant stating that those cases the injuries sustained were more severe. The Defendants have instead proposed the following cases as more comparable of the injury received:

⁴ DOMHCV 2008/0123

⁵ SVGHCV 2017/0065

⁶ GDAHCV 2009/0338

- a. **Raymond v Joseph**⁷ - the Claimant's most significant injury was fracture of the ankle. The claimant was 60 years at the time of the accident. Judgement was issued in 2001. There were no complication and full recovery was expected. An award of \$20,000.00 was given for PSLA.
- b. **Barber v Samuel**⁸ - the Claimant age was not known and he received a fracture to the ankle. The injury was fully resolved; an award of \$10,000 was given for PSLA.

[18] The Court having reviewed the cases found that the none were comparable in full. The Claimant in the instant case was 86, had complications, two surgeries and has a permanent disability at 3% whole person.

Analysis

[19] I agree with the principles stated in **Wells v Wells**⁹ 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."

[20] Counsel for the Claimant proposes a reasonable amount to be \$70,000.00 for the PSLA and counsel for the defendant proposes \$22,000.00. Having considered the authorities, I found the most two useful cases are **Randy Aaron and Raymond**. I have considered the injuries received by the claimant, the impact on her life, the Claimant's age, and inclusive of but not limited to the passage of time of 20 years in relation to the Raymond case.

[21] I noted the distinctions of the facts in **Randy Aaron** where he had complications, however the Claimant had "three percutaneous K-wires and the lateral malleolus was fixed using a four-hole semi-tubular plate affixed with three screws." The Claimant who was 86 also indicated she was incapacitated and had to rely on her daughter for basic needs.

[22] In the circumstances an award of \$45,000.00 for pain and suffering and loss of amenities is appropriate.

Contributory Negligence

[23] The Defendant have argued that the Claimant is contributory negligent for the accident. The witnesses were all tested under cross examination. The Court listened to all of the evidence of the witnesses and in particular the evidence of the two eyewitnesses Mr. and Mrs. Durand. I found them to be forthright and independent, as they were sitting in a vehicle behind the second

⁷ DOMHCV1994/0289

⁸ DOMHCV 2009/0101

⁹ [1998] 3 ALL ER 481

Defendant. The second Defendant gave no evidence and was not present during the proceedings.

[24] Mr. Durand was cross examined extensively about if he thought a pedestrian should make eye contact with a driver before crossing, about the Claimant crossing when the light was green, that the Claimant was the fault of the accident. To which he answered in the negative for all the questions. I agree that there is relevant case law¹⁰ to allow the Court to make a finding of contributory negligence at this stage of the proceedings. However, on the evidence presented, - I do not find that such a case has been made.

[25] In summary it was indicated in the evidence by two witnesses that the second Defendant was at a stop light, she was looking in the gas station across the road, she was on her phone, she drove off and hit the claimant who had started to cross the road when the light was red. Accordingly, I do not find that the Claimant was contributory negligent.

Payment of Bills for Attendance at Court by Doctors

[26] The bills for the Doctors to attend Court were submitted by the Claimant in the sum of \$3,500.00 collectively. The Defendant has opposed the requirement to pay for the attendance of the doctors and or half of the same. The Defendant has relied on the position that they only elected to cross examine the Claimant and did not cross examine the doctors. Only one question was asked of Dr .Yearwood in cross examination, and none of Dr. Singh.

[27] Counsel for the Defendant has placed reliance on CPR 65.7 (1) but the court goes further and looks at CPR 65.7(2) where it states – “ Prescribed costs exclude - (a) expert’s fees for preparing a report and attending any conference, hearing or trial;”.

[28] I now turn to Part 32 which establishes the rules for a court appointed expert. Under part 32.11 the Court may give directions for “the payment of expert witness’ fees and expenses.” In this instant case the two Doctors were witnesses for the Claimant as opposed to Court appointed experts and in the circumstances I decline to make an award under this area.

Interest

[29] The Claimant is entitled to interest and as per the decision in **Nigel Mason v Maundays Bay Management Ltd**¹¹ as follows:

[30] With regard to general damages, no interest should be awarded before judgment on loss of future earnings;

1. On damages for pain, suffering and loss of amenities interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money

¹⁰ Bonny Alexander v 1. Stanislaus Smith 2. James Enterprises Limited SLUHCV 2017/0280 – from paragraphs 27-33.

¹¹ AXAHCV 2006/0090 at paragraph 39

- in court placed on short term investment and, in the absence of evidence of that rate, the statutory rate of interest would be used;
2. With regard to special damages, interest should be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

Conclusion

Court's Order

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

1. Special damages in the sum of \$10,352.34 with interest at 2.5% per annum from the date of the accident to 1st December 2021;
2. Pain and Suffering and loss of amenities - \$45,000.00, interest at 5% per annum from the date of service of the writ to today's date;
3. 60 % of Prescribed costs on the global sum in accordance with CPR 65.5;
4. The Claimant to draw file and serve this Order.

Charon Gardner-Hippolyte
High Court Master

By the Court

Registrar