

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

BRITISH VIRGIN ISLANDS

BVIHCV 2018/0250

BETWEEN:

NOLA PETERS

Claimant

and

SHELFORD TUCKER

Defendant

Appearances:

Ms. Reynela Rawlins for the Claimant

Ms. Ayodeji Bernard for the Defendant

2021: June 18;
October 22;
November 30.

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] **GILL, M.** This is an assessment of damages following judgment in default entered in a claim in negligence for damages for personal injuries.

Background

- [2] On 23rd December 2015, the claimant, Nola Peters, was a pedestrian on Virgin Gorda when she was struck by a motor vehicle owned and driven by the defendant, Shelford Tucker. The claimant was 65 years old at the time.
- [3] As a result, the claimant suffered an injury to her right knee, to wit, a severely depressed lateral tibial plateau fracture. She underwent reconstructive surgery of the lateral tibial plateau.
- [4] The claimant instituted these proceedings by filing a claim on 23rd November 2018. Judgment in default was entered for her against the defendant in March 2019.

- [5] On a preliminary point, in the circumstances of this case, the defendant was not allowed to raise the issue of contributory negligence. The court was of the view that to allow the defendant to do so in this case would be to re-open the issue of liability in the face of the default judgment. Contributory negligence was not a live issue raised in the statement of claim. Therefore, to allow the defendant to raise it at the assessment of damages stage would entail a fact-finding exercise or inquiry frowned upon by the authorities.¹

SPECIAL DAMAGES

- [6] In closing submissions, the claimant seeks special damages in the sum of US\$22,683.25 broken down as follows:

- Medical expenses - \$1,513.14
- Loss of earnings - \$16,100.00
- Domestic assistance - \$5,070.11

- [7] The court notes the fundamental rule that special damages must be pleaded, particularised and proved. I refer to the frequently quoted dictum of Lord Diplock in **Ilkiw v Samuels and Others**:²

“Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised... it is plain law...that one can recover in an action only special damage which has been pleaded and of course, proved.”

- [8] In the statement of claim filed on 23rd November 2018, the claim for damages, including special damages, is raised in paragraph 6 as follows (verbatim):

“The Claimant also claims damages for pain suffering and loss of amenity included but not limited to her loss of earnings, loss of future earnings and handicap on the labour market as well as special damages as particulars in the Schedule annexed hereto.

...

AND THE CLAIMANT CLAIMS:

- a)** Damages
- b)** Interest
- c)** Such further or other relief as this Honourable Court deems fit;
- d)** Costs.”

¹ See *Froom v Butcher* [1976] 1 QB 286; *Leymon Strachan v The Gleaner Company Limited and Dudley Stokes* [2005] UKPC 33 (Jamaica); *Michael Laudat and the Attorney General of Dominica v Danny Ambo* HCVAP2010/016

² [1963] 2 All ER 879 at 890

- [9] Annexed to the statement of claim is a schedule of special damages. The claimant submits that this amounts to a pleading of special damages. This schedule consists of invoices, dates and monetary amounts without specifying what these sums are for.
- [10] At the hearing on the 18th June 2021, the claimant attempted to put in an updated schedule of special damages as evidence in chief. The said schedule was not exhibited to the claimant's witness statement, and the court disallowed the schedule as evidence in chief. In submissions filed before the hearing, the claimant sought the sum of US\$105,600.00 as loss of earnings. That sum was reduced to US\$16,100 in the claimant's closing submissions. Neither sum was specifically pleaded. This claim is for the period the claimant states she was on sick leave, that is, for seven (7) months from January 2016 to 31st July 2016, for which her employer did not pay her, and social security refused to pay her as she was of pension age and receiving a pension. Any sum claimed as special damages for loss of earnings was easily calculable at the time the claim was filed so that it is startling that this was not specifically pleaded. Likewise, no amount is pleaded for domestic assistance, which the claimant states, was provided to her by her niece who traveled from Tortola to Virgin Gorda by ferry from around January 2016 for a few months. In fact, domestic assistance is not even mentioned in the claim. I am not satisfied that the claimant has properly pleaded, particularised or strictly proved special damages.
- [11] In the event the court does not find favour with the claimant's submissions on special damages (which it does not), the claimant invites the court to consider that if it accepts that the claimant was injured, visited the hospital and underwent surgery, then by extension she would have incurred medical expenses. The claimant submits that the court has a discretion to award nominal damages for her medical expenses and that an appropriate figure for nominal damages is US\$1,513.14, as sought.
- [12] In support of this submission, the claimant cites the case of **Cosmos William v The Comptroller of Customs and The Attorney General**³ where Mason J referred to the Privy Council decision in the Trinidad and Tobago case of **Carlton Greer v Alstons**

³ SLUHCV2006/0259

Engineering Sales and Services Ltd⁴ in which it was held that when the necessary evidence is not provided, it is open to the court to give consideration to an award of nominal damages. Mason J further stated, “Nominal damages however does not mean small damages but it is the duty of the court to recognize it by an award that is not out of scale.”

- [13] The claimant’s witness statement reveals, and the claim and default judgment establish, that she was injured as a result of the negligence of the defendant. Her evidence is that she was hospitalised, underwent surgery and incurred expenses, at least, for physical therapy. Given the shortcomings in the evidence, I am of the view that a nominal award is appropriate and accordingly, I will grant the claimant the sum of US\$1,000.00 as nominal damages for medical expenses only.

GENERAL DAMAGES

- [14] The well-established legal principles to be followed in awarding damages in personal injury cases were laid down by Sir Hugh Wooding CJ in **Cornilliac v St. Louis**.⁵ The main factors to be taken into account are (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the extent to which pecuniary prospects are affected.

The nature and extent of the injuries sustained and resulting physical disability

- [15] The claimant suffered a severe injury to her right knee, to wit, a severely depressed lateral tibia plateau fracture. On 24th December 2015, the day after the accident, she underwent reconstructive surgery of the said lateral tibia plateau. The claimant relies on the expert evidence of Dr. Christoph Ahrens, consultant orthopaedic surgeon, who explained the injury as a break or crack at the top in the shin bone, at the knee. In his latest medical report dated 21st October 2020, he added that the claimant suffered an injury to the peroneal nerve at and below knee level. Dr. Ahrens’ evidence is that the nerve injury is as a result of the impact of the claimant being hit by the vehicle. In this report, he explained

⁴ (2003) WIR 388; [2003] UKPC 46

⁵ (1965) 7 WIR 491

that it was not mentioned in earlier reports as it was not evident before, due to the fact that the claimant has close to normal sensation and normal muscle function.

[16] The defendant challenges Dr. Ahrens' conclusion that the nerve injury was caused by the accident. In making this argument, the defendant directs the court to the evidence brought out in the cross-examination of Dr. Ahrens. Dr. Ahrens indicated that at the time he saw the claimant after the accident he did not see any signs of a nerve injury. He also indicated that at the time of the first surgery he did not see any sign of a nerve injury. Dr. Ahrens' conceded that a peroneal nerve injury can be caused by factors external to an accident such as the one involving the claimant. When asked whether there is a possibility that the nerve can be injured during surgery, although he said that he tries to stay away from the nerves during surgery, he admitted that there is a possibility. The defendant asks the court to recall that Dr. Ahrens was almost hostile to the cross-examiner when asked if it was possible that the nerve was damaged during surgery.

[17] The defendant posits that there was no explanation, or in the alternative, no rational or reasonable explanation, provided by the doctor as to why it is that the nerve injury was not apparent before and now, almost five (5) years post-accident, he presents a finding on a nerve injury which he says resulted from the accident. The defendant submits that other than to make a bald statement that the accident caused the nerve injury, Dr. Ahrens presented no clinical findings to support this statement. The defendant submits that Dr. Ahrens' evidence about there being pain associated with a nerve injury is nothing but a bald statement made by the doctor. There is no evidence from a neurologist who, by Dr. Ahrens' own admission, is the specialist in that area. He further admitted that the claimant was never referred to a neurologist. In these circumstances, the defendant asks the court to find this evidence, at best, tenuous and unreliable, and urges the court to reject the evidence of any nerve injury resulting from the accident, or in the alternative, to find that the claimant is not experiencing any pain, or the degree of pain that she wants the court to believe, from any stated nerve injury.

Court's analysis and conclusion on the nerve injury

[18] Dr. Ahrens explained how the nerve injury came about. He told the court that in order for the bone (lateral tibia) to be fractured, there would have been considerable force. Part of the impact, he said, would have had to go through the nerve. He stated that the nerve was not severed, it was crushed. Dr. Ahrens' report of 21st October 2020 states that the nerve injury did not result in significant loss of sensation or muscle function, but chronic pain. Under cross-examination, he reiterated that one can get pain, even with loss of sensation or muscle function. He further explained that one can distinguish pain from the bone from pain from the nerve.

[19] As mentioned earlier, Dr. Ahrens noted in his latest medical report that the nerve injury was not recorded in earlier reports as it was not evident before. He did not see a nerve injury at the time of the accident or when he did the surgery. As to the late diagnosis of the nerve injury, the report states as follows:

"When I saw Mrs. Peters in 2020 she complained of pain in the lateral right knee and lower leg. Pain from arthritis alone would be limited to the knee. We investigated the lower leg pain with an X-ray and Ultrasound initially and the Ultrasound was reported to show some degree of echogenic process in this area. However, a subsequent MRI, which shows the soft tissues in much more detail, was normal.

The next diagnostic step was an injection in the knee with local anesthetic and cortisone. This took most of her pain away (generated by the knee), but she was still left with lateral lower leg pain. There is no doubt left that this is nerve pain resulting from the impact injury directly onto the nerve. She is lucky in the sense that it is "only" pain without loss of muscle function." (Emphasis added)

[20] Under cross-examination, Dr. Ahrens was adamant that he did not touch the nerve during the operation. He stated that during the operation, he could not see the nerve as the nerve was not in the operating field. He informed that "when you perform surgery, you try to stay away from muscles and nerves as far as you can". However, he conceded that there is always a possibility to damage a nerve or muscle in surgery. The doctor's described hostility appeared to be with regard to his perception of being accused of possible medical negligence in damaging the claimant's nerve during surgery.

[21] Having heard and digested the expert evidence of Dr. Ahrens, I accept it as credible and sufficient so as to allow the court to find, and I so find, that the claimant's nerve injury was as a result of the impact of the accident of 23rd December 2015.

[22] Dr. Ahrens indicated that the reconstructive surgery was necessary or else the claimant would not have been able to walk again. She was given seven (7) months' sick leave from her job as a chef at Bitter End Yacht Club until July 2016 on Dr. Ahrens' directions and an additional month in August 2016 at her employer's request. The claimant wore a cast for three (3) months and her foot was banded strongly for a further three (3) months. She also underwent physical therapy for three (3) months. The plate and screws were removed from her right knee in early 2017 and Dr. Ahrens noted that the fracture was completely healed allowing for removal of the hardware. The updated medical report shows that the claimant has post traumatic arthritis. Whereas Dr. Ahrens concedes that there was some arthritis present at the time of the injury, he is adamant that "there is absolutely no doubt that the injury is responsible for the severe arthritis we see now".

The pain and suffering endured

[23] The claimant seeks an award of US\$150,000.00 for pain and suffering. She states that following the accident, she experiences pain on a daily basis in her right leg down to her ankle, and sometimes feels no sensation in that leg. She also states that following the surgery, she was unable to walk and was in a lot of pain. Dr. Ahrens' evidence is that the claimant will never be pain free. The claimant says sometimes the leg gets swollen and very stiff. In 2020, she complained to Dr. Ahrens of pain in the lateral right knee and lower leg. In her witness statement, she complains of having no feeling in her pinky toe and "ring toe" of her left foot, over which she states the vehicle also passed over in the accident. There is no medical evidence before the court in relation to the claimant's left leg or foot so that any evidence as to that limb will be disregarded. Additionally, her evidence is that she gets frequent headaches, dizziness and occasional fainting as a result of hitting her head in the accident. In making an award under this head, in the absence of any medical evidence on this aspect of the claimant's claim, I will also disregard that evidence.

[24] Dr. Ahrens' evidence is that the claimant will never be pain free due to the nerve injury which cannot be "fixed" by surgery. Notably, the fracture has completely healed. He opines that the majority of the claimant's pain is generated by the post traumatic arthritis and that the knee pain can be close to eliminated by knee replacement surgery, but the chronic pain will stay with her for the rest of her life. Whereas the claimant says that she was unaware that she had arthritis before the accident, in answer to the court, Dr. Ahrens explained that one can have arthritis without pain.

[25] In his report, Dr. Ahrens states that the injury essentially finished the claimant's work life and that her day to day activities are reduced due to the injury-inflicted progression of her arthritis and to some degree by the nerve injury. In cross-examination, the doctor admitted that it was the claimant who told him she could no longer work as a chef. Interestingly, the claimant's evidence is that she now works as a part-time cleaner.

[26] As a result of several inconsistencies in the claimant's evidence, some best highlighted under the following head (loss of amenities), the defendant urges upon the court that the claimant is not a witness of truth and is prone to exaggeration and grossly overstating her injuries and any pain she may be experiencing.

The loss of amenities

[27] The claimant states that she is unable to walk long distances as she used to. She does not drive and so, walking was a useful exercise. She says that she is unable to bend down or clean her house to her satisfaction like she used to. As a result of her reduced mobility, she states that she is unable to have babysitting and house-cleaning jobs as before. She avers that she is unable to work as a chef due to lengthy hours of standing and fast movement required. Under this head, the claimant asks the court to award her US\$10,000.00.

[28] The defendant contends that Ms. Peters is not a witness of truth. The defence points out that when taxed on cross-examination about whether or not she sings and dances in church, as stated by the defendant in his witness statement, she was quite circuitous in her response and finally admitted that she sings and dances in church and blurted out, "What that have to do with that, it's God who have me alive." In these circumstances, the

defendant submits, it is clear that the claimant exaggerates any pain that she may have and wants to attribute to the accident.

[29] The defendant further highlights that the claimant states that she can no longer walk around on Virgin Gorda but when taxed on cross-examination, she finally admitted that she walks around to catch rides on Virgin Gorda. The defendant asks the court to note that she also admitted to walking to the supermarket, although not much, yet she wishes the court to believe that she is totally unable to walk around.

[30] The defendant submits that the evidence of Mr. Kennis Alexander is also important in assessing the extent of the claimant's injuries. Mr. Alexander's evidence is that he started working with the claimant at the Bitter End Yacht Club in 2016 (after the accident on 23rd December 2015). He states that he began working at Bitter End in May 2016 as a chef and that it was about the middle of 2016 that he became closer acquainted with Ms. Peters in the Bitter End kitchen. He gave evidence that he worked at the Club House as the Executive Sous Chef and that the claimant, although she worked at the fast-food restaurant called "The Pool", her preparation was done in the Club House, and that he would see her working. Mr. Alexander states that prior to 2016, he knew the claimant as a resident of Virgin Gorda and that "she always walked with a rock from side to side". It came out in cross-examination that in 2016, when Mr. Alexander started working with the claimant, he did not know that her leg was injured, and that at the time she returned to work, she seemed pretty normal to him. The defendant posits that Mr. Alexander's evidence of the claimant's rocking from side to side when she walked suggests some kind of discomfort or walking irregularity prior to the accident.

[31] The defendant is of the view that there should be no award for loss of amenities since it has not been proved that there was any loss of amenities in relation to this claimant. In fact, the defendant points out that there is direct evidence contradicting her claim for loss of amenities, in particular, her evidence that she sings and dances in church and that she is currently employed doing cleaning jobs, yet she claims that she cannot clean her house "good anymore". As such, the defendant contends that any award should be limited to pain and suffering.

[32] The defendant asks the court to reject the claimant's evidence about her pain and the extent of her injuries and the effect of same, and Dr. Ahrens' evidence to the court about the majority of Ms. Peters' pain being generated by post traumatic arthritis associated with the accident.

[33] As with Dr. Ahrens' findings in relation to the nerve injury, I accept his evidence on the claimant's post traumatic arthritis – that there was some arthritis present at the time of the injury, and that the injury caused the severe arthritis and the pain associated with it, which the claimant suffers to present. He states, "This is a common scenario where a joint that has some arthritis becomes a lot worse and progresses quickly into severe arthritis after a significant injury."

Comparable awards

[34] The court is aware of the need to strive to make an award in keeping with comparable cases. As stated by Lord Craighead in **Wells v Wells**:⁶

"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."

[35] The claimant relies on the following 3 cases to convince the court to award a total of about US\$160,000.00 for pain and suffering and loss of amenities. Unless otherwise stated, the amounts quoted are in Eastern Caribbean Currency.

- 1) **Ronald Fraser v Joe Dalrimple et al.**⁷ In this case, the claimant fell from a moving truck in the course of his employment and suffered the following injuries to his left leg and ankle: severely comminuted fracture of left ankle and lower 1/3 of leg; fracture of left medial malleolus of left tibia; severely comminuted fracture of lower end fibula; lateral dislocation of left ankle/tibiotalar dislocation with lateral shift of talus with ankle diastases; and severely contaminated compound wound with neuro-vascular compromise. He underwent surgery the same evening and spent 28 days in hospital after which he remained bedridden at home for over 4

⁶ [1998] 3 All ER 481

⁷ ANUHCv 2004/0513 (delivered May 5, 2010)

months. Thereafter, he began to move around with a crutch and underwent physiotherapy. The claimant returned to the doctor several times as he was in constant pain and the fracture was not healing properly. He had full disability of the lower limb and travelled to Guyana for further surgery for his ankle joint to be fused. At the trial, a doctor testified that the claimant remained disabled, not able to walk on one of his legs. In 2010, Michel J, as he then was, awarded the claimant \$85,000.00 for pain and suffering and \$65,000.00 for loss of amenities, a total of \$150,000.00. Clearly, this ankle injury was much more serious and with far greater consequences than in the case at bar.

- 2) **Sherma Mathurin v Rain Forest Sky Rides Ltd.**⁸ The claimant in this case, 28 years old at the time, was severely injured when she fell in a gondola accident during which her right leg struck a tree and her heel exploded. She suffered a displaced intra-articular open fracture of the low end of the right tibia (the bigger of the 2 leg bones, extending into the ankle joint) with a fracture of the fibula (the smaller of the 2 leg bones); and multiple grazes and bruises to the forehead and upper right limb. She underwent surgery in order to restore the joint alignment which necessitated the internal fixation of plates and screws along with bone grafting of the fracture. She also sought medical attention in Martinique. The claimant developed arthrosis (wear and tear) of the right ankle which required surgical fusion. The result was a permanent impairment of the right hind foot which restricted the claimant's ability to walk long distances, standing for prolonged periods, walking on inclined surfaces or in shoes with heels. The injuries affected every aspect of her everyday life. She could no longer play with her children or enjoy dancing with her husband. She placed great emphasis on the negative effect of her injuries in relation to intimacy with her husband. Georges J (Ag) awarded her \$150,000.00 for pain and suffering and loss of amenities. Again, I consider that these injuries and consequences are much more severe than in the instant case.

⁸ SLUHCV2008/0551, (delivered August 3, 2010)

- 3) **Jennifer Prescott v Aldrick Parris and John Primus.**⁹ A jeep collided with the claimant in the road as she was walking to her home. She was 36 years old at the time. As a result, she suffered an injury to the anterior cruciate ligament of the right knee; lateral collateral ligament tear of the knee (anterolateral instability of the knee); and bone bruising to the upper tibia (shin bone). The injury was secondary to blunt trauma of a moderate to severe degree. She was managed with a knee brace and crutches. She underwent surgical repair of ligaments of the right knee in Martinique. She continued to complain of episodes of sudden giving way of the right knee which caused her near falls. She had pain in the knee, difficulty getting up and was unable to run. She could not stand for prolonged periods of time or carry heavy items. The medical evidence was that 7 years after she sustained her injuries, she was considered to have reached maximum medical improvement “in spite of the fact that further surgeries may be required in the future”. She was considered to have a total of 34% lower extremity impairment, which translated to a whole person impairment of 14%. Wilkinson J awarded the claimant \$60,000.00 for pain and suffering and \$25,000.00 for loss of amenities. Whereas this is a case involving a knee injury, this was a much younger claimant with diagnosed whole person impairment and ought not to be relied on as a comparable case here.

[36] The defendant cites the following cases for the consideration of the court.

- 1) **Tishelle Browne v Lennox Israel et al.**¹⁰ The ancillary claimant, an ambulance driver, was transporting the claimant, pregnant and experiencing birth pains, to hospital when the ambulance collided with a minivan. As a result, his legs were pinned under the dashboard and he suffered injuries to both knees. He was taken to hospital and discharged the same day with pain killers. Thereafter, he was diagnosed with post traumatic degenerative disease or osteoarthritis of both knees. The medical evidence was that there was no doubt that the osteoarthritis was initiated by the trauma sustained in the accident, and that he would need constant physiotherapy and possible knee replacement surgery in the future. Lanns M awarded him \$50,000.00 for pain and suffering and \$20,000 for loss of

⁹ SLUHCV2009/0814, (delivered June 13, 2013)

¹⁰ Claim No. 80 of 2006 (Saint Vincent and the Grenadines), (delivered July 24, 2013)

amenities. Using a conversion formula of US\$1 = EC\$2.68, the defendant points out that this would amount to US\$18,656.72 and US\$7,462.69 respectively. I note that the main and significant distinction here is that Ms. Peters suffered an injury to one knee.

- 2) **Glenda Williams v Francis Wilson et al.**¹¹ In this case, the claimant was injured when a motor vehicle collided with her as she was crossing a highway. Cenac-Phulgence J noted that she complained of pain in the left knee “which drags and buckles and causes near falls” and said that she experienced pain when climbing stairs and walking short distances. Her assessments indicated post traumatic chondromalacia to the left knee and subsequently, osteoarthritis of the left knee. The court further noted that her osteoarthritis was considered mild with no evidence that it would worsen significantly or require constant physiotherapy or knee replacement surgery. Her Ladyship awarded \$18,000.00 (US\$6,716.42) in general damages for pain and suffering in respect of the knee injury. This claimant did not undergo surgery to the knee. Ms. Peters had two surgeries performed on her (one to remove the hardware), and is recommended for a knee replacement surgery. Further, her arthritis as described by Dr. Ahrens is severe. In my view, the instant case shows a more serious knee injury than in the **Glenda Williams** case.
- 3) **Keslar Dawson and Stephanie George.**¹² Ventose M [AG], as he then was, assessed general damages inclusive of pain and suffering and loss of amenities to be US\$13,500.00. The claimant here was injured as he was sitting in his motor vehicle in a long line of traffic when the defendant reversed her vehicle, which collided with his. He suffered the following injuries: blunt trauma to the left knee; trauma to the left shoulder, left supraclavicular tenderness involving left posterior scapula; and trauma to the left wrist. The medical evidence revealed that the claimant sustained blunt trauma to **his left knee which was previously injured** by a minor twisting of his knee at home, and an MRI scan and surgery showed that he had pre-existing degeneration (arthritis). He would have to undergo surgery to his knee, that is, a knee replacement surgery and wear a knee brace.

¹¹ SLUHCV2018/0535, (delivered September 4, 2020)

¹² BVIHCV2015/0088, (delivered January 11, 2017; reissued February 3, 2017)

The medical evidence of the said Dr. Ahrens in the instant case was that the impact of the accident resulted in a complete breach of the anterior cruciate ligament (ACL), which is the most important stabilizer of the knee joint and in his view, this had “dire consequences for the claimant’s knee function and pain”. The claimant averred that he was unable to perform his full duties as a prison officer and that he had been on light duties because his mobility had been affected by his injuries. It is of note that the court in considering the award discounted same due to the claimant’s pre-existing condition. The learned master followed the approach in **Taylor v Weston Area Health Authority**¹³ where the trial judge discounted the amount payable by about 30% taking into consideration the claimant’s pre-existing condition with Crohn’s disease. The award payable for pain and suffering and loss of amenities in **Keslar Dawson** was US\$18,000.00 (US\$6,000.00 for pain and suffering and US\$12,000.00 for loss of amenities). However, the court was of the view that the award should be discounted by 25% by virtue of the claimant’s pre-existing condition. Consequently, the defendant was ordered to pay the sum of US\$13,500.00 as general damages for pain and suffering and loss of amenities.

Court’s analysis and conclusion on pain and suffering and loss of amenities

- [37] The defence makes great moment about the fact that the claimant sings and dances in church to submit that she is exaggerating the extent of her pain and suffering and loss of amenities. I do not see this evidence as contradictory to her evidence that she can no longer walk long distances because of her injury. The claimant does not claim to be unable to walk or dance. She is simply saying that her movements are restricted since her knee was seriously injured. This is a most likely outcome from the type of injury sustained. There is nothing before the court to suggest that her dancing in church entailed any kind of gymnastics or extreme physicality. In fact, there is nothing to suggest the extent of the dancing observed or admitted. However, there is some merit in the concern that she claims to be unable to clean her house to her satisfaction as she did before the injury, but she now has a job as a part-time cleaner.

¹³ [2003] All ER (D) 50

[38] In my view, the amounts sought by the claimant, especially that for pain and suffering, are grossly excessive considering the evidence on her injury and the case law.

[39] However, I am not satisfied that the sum awarded should be discounted in light of the claimant's pre-existing condition. The law on apportionment, where there is evidence of a pre-existing condition, concerns the issue as to whether the effect of the pre-existing condition is divisible or indivisible from the injury caused by the accident. This distinction is explained by Madam Justice Gropper in **Estable v New** ¹⁴ as follows:

"Divisible injuries are those which are capable of being separated out, such as injuries to different body parts or injuries to which the defendant has not contributed.

Indivisible injuries are those that cannot be separated, such as aggravation or exacerbation of an earlier injury, an injury to the same area of the body, or global symptoms that are impossible to separate."

[40] Distilling principles from several authorities, Corbin-Lincoln M, as she then was, in **Lenroy Connor v Cynthia Flemming**¹⁵ stated:

"Whether or not any particular state of health or injury is divisible or indivisible is a question of fact. The cases appear to establish that in the case of a *divisible* injury damages may be apportioned but if the injuries are *indivisible*, the court must apply the "but for" test in respect of the defendant's act. In the case of indivisible injuries, even though there may be several tortuous or non-tortuous causes of injury, so long as the defendant's act is a cause, the defendant is fully liable for that damage."

[41] Clearly, the claimant's pre-existing condition of arthritis falls into the category of indivisible injuries. Therefore, I am of the view that the proper approach to be taken in this case is that taken by Mitchell J in **Danny Bramble v William Danny Key Properties Limited**,¹⁶ where he awarded the claimant \$50,000.00 for general damages where an accident caused severe whiplash which aggravated his pre-existing degenerative joint disease. His Lordship stated:

"The Defendants must take Mr Bramble as they found him. If their negligence aggravated his injury and pain (as it did) because his pre-existing condition made him more sensitive to injury, that is something for which they are responsible. I

¹⁴ 2011 BCSC 1556

¹⁵ SKBHCV2012/0353, (delivered January 14, 2016) at paragraph 42

¹⁶ ANUHCv1999/0160, at paragraph 6, delivered January 15, 2004; see also Cyril Donnelly v Aldrick Octave SLUHCv2012/0940

take in to (*sic*) account the nature and gravity of his resulting physical disabilities and the additional pain and suffering he has had to endure. It seems reasonable that some of his subsequent loss of amenities and loss of pecuniary prospects must have been due to the injuries he received.”

[42] Whereas the court in **Keslar Dawson** did not deal with the divisibility/indivisibility issue, I note that there appeared to be both types of injuries present.

[43] This is the only case cited from this Territory. Whereas the claimant averred that the injury to his wrist still affected him with stiffness from time to time, it is clear that his main injury was with respect to his knee. This was a breach of the ACL and Ms. Peters suffered a fracture. The consequences appear to be more serious for Mr. Dawson than for Ms. Peters in this case.

[44] Given Dr. Ahrens’ evidence acknowledging the pre-existing arthritis in the claimant, but emphatically opining that the severe arthritis the claimant is riddled with today resulted from the impact of the accident, I am satisfied that “but for” the accident, Ms. Peters’ arthritis would not have degenerated to the extent it has, and therefore I will not discount the award for the claimant’s pre-accident arthritis.

[45] Having considered the evidence, the submissions and the authorities, I award general damages for pain and suffering in the sum of US\$12,000.00, and loss of amenities in the sum of US\$3,000.00.

The extent to which pecuniary prospects are affected/future loss of earnings

[46] Citing the case of **Sarju v Walker**,¹⁷ Blenman J, as she then was, in **Gloria Lake v Antigua Commercial Bank**¹⁸ explained, “This head of damage is meant to compensate a claimant for the loss of money she would have earned as salary during her normal working life had the accident not occurred.”

[47] The claimant states that she was terminated from her job at Bitter End Yacht Club one year after the accident, as her employers were of the view that she was not performing up to standard as a result of her injuries. She worked as a chef for twenty (20) years prior to the

¹⁷ (1973) 21 WIR 86

¹⁸ ANUHCv1999/0123 at paragraph 30

accident. She now earns a lesser salary as a part-time cleaner at the office of the Social Security Board on Virgin Gorda.

[48] The claimant outlines that after she underwent her second surgery in January 2017, she took some time to recover and then obtained a job with fewer hours and less pay. She continues to work at 71 years old even though she is over the retirement age. She submits that although she has reached the age at which she became entitled to an age benefit in the Territory, this of itself ought not to bar her from obtaining relief for future loss of earnings, as she intends to work until the age of 72.

[49] The claimant proffers that persons in the region have successfully claimed for future loss of earnings even beyond the retirement age, and invites the court to adopt this position. In support of this submission, the claimant cites one case, **Osley Baptiste v C K Greaves & Company Limited**¹⁹ where Bruce-Lyle J awarded a sum for future loss of earnings to the claimant who had already passed the retirement age in St. Vincent and the Grenadines. He was 72 years old. The court adopted a multiplier of 1, which the claimant asks the court to do in this case. I note that the claimant in that case was the owner and manager of a clothing factory. He was severely incapacitated as a result of his injuries sustained from slipping and falling in a pool of slimy water in a supermarket. His business ground to a halt. Given his age, the court considered that it was unlikely that he would have continued the business for much longer.

[50] The claimant here is now 71 years old. The evidence reveals, as the defendant contends, that the claimant was sent on retirement in December 2016 on the ground of age. In that case, the defendant is of the view that the claimant, having passed the compulsory retirement age, is not entitled to an award for future loss of earnings.

[51] The evidence in the instant case reveals that the defendant was retired from Bitter End. I accept this as the reason the claimant was no longer employed at Bitter End rather than her being terminated on account of her injuries. Therefore, she is not entitled to any income in relation to Bitter End after she retired. She claims that she is now employed as a

¹⁹ Claim No. 192 of 1997, Saint Vincent and the Grenadines, (delivered May 10, 2006)

part-time cleaner for which she receives an income. In the circumstances, I make no award for future loss of earnings.

Future medical expenses

[52] Dr. Ahrens' evidence is that although the chronic nerve pain will stay with the claimant for the rest of her life, the knee pain can be close to eliminated by knee replacement surgery at a cost of about US\$25,000.00. I accept that this surgery is needed to give the claimant some relief from her pain and suffering and I will award the claimant accordingly.

Order

[53] Based on the foregoing, it is hereby ordered as follows:

The defendant shall pay the claimant the following:

- 1) Special damages in the sum of US\$1,000.00.
- 2) General damages for pain and suffering in the sum of US\$12,000.00 and loss of amenities in the sum of US\$3,000.00.
- 3) Future medical expenses in the sum of US\$25,000.00.
- 4) Interest on special damages at a rate of 2.5% per annum from the date of the accident to the date of judgment in default.
- 5) Interest on general damages for pain and suffering and loss of amenities at the rate of 5% per annum from the date of filing of the claim to the date of judgment in default.
- 6) Interest on the global sum at the rate of 5% per annum from the date of assessment to the date of payment in full.
- 7) Prescribed costs in the sum of US\$3,690.00 in accordance with CPR 65.5.

Tamara Gill
Master

By the Court

Registrar