

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2016/0351

BETWEEN:

PETER ESPIRIT

Claimant

and

[1] KISHORE WALSH
[2] COOLIAGE TRUCKING & HEAVY DUTY EQUIPMENT
LIMITED

Defendants

Appearances:

Mrs. Kivinee Knight Edwards, Counsel for the Claimant

Mr. Warren Cassell, Counsel for the Defendants

2021: November 30th

DECISION

[1] **GARDNER HIPPOLYTE, M.:** This is a decision for an assessment of damages, based on injuries received when a bucket from a backhoe was dropped on the Claimant's foot. Liability was established at 70% to the Defendant and 30% to the Claimant.

Background

[2] On 20th November, 2013 the Claimant was on the property belonging to the second Defendant carrying out repairs and maintenance to the vehicles belonging to the second Defendant. The first Defendant was driving a backhoe and accidentally dropped the bucket of the backhoe on the Defendant's foot causing the following injuries:

- (a) A 7 cm laceration over the right medial malleolus with small superficial bruise over the lateral malleolus;
- (b) And compound bimalleolar fracture of the right ankle;

- [3] The evidence of Dr. Singh indicates that he was attended to at Mount St. John's Medical Centre and was transferred to the surgical ward where debridement and open reduction of his fracture fragment was performed, he was treated along conservative line because of the contamination and severity of the compound injury. He received daily wound care, closed reduction and casting in order to minimize the complications. He subsequently received below the knee cast on the right leg.
- [4] A follow up assessment by Dr. Singh states in his notes that he continues to do well, however based on the injury he has been evaluated to be 20% disabled in his full functions of his extremity and 8% of the whole man for the rest of his life.
- [5] The Doctor states that the Claimant may require surgery in the future to give him a painless ankle and the present cost of the ankle arthrodesis is \$35,000.00.

Evidence of Peter Espirit

- [6] The Claimant provided a witness statement in relation to his assessment. He also gave evidence in Court today and was cross examined briefly. In his evidence he states the following salient points:
- When the backhoe bucket was dropped on his foot he was in so much pain he could not wait for the ambulance and asked to be taken to the hospital;
 - He remained at the hospital for five days;
 - He incurred medical expenses to the sum of \$18,085.86;
 - That when he resumed work about the 5th December, 2014 he was in a lot of pain and visited his doctor and was placed on sick leave;
 - That social security did not pay the sick leave as it was an occupational injury;
 - That he earned \$692.25 per week and resumed work periodically on or about April 2015 periodically but had leave that arrangement due to the pain and swelling in his ankle;
 - He was recommended to do physiotherapy about three times a week at \$100.00 per week but has not been able to do this due to the cost;
 - That when he stands a lot it puts a strain on his ankle and this causes severe pain and swelling at night.
 - That he is in constant pain and cannot stand for long as his ankle gets swollen.
- [7] The Claimant has claimed \$76,234.86 for special damages of which \$18,085.86 is for expenses incurred as a result of his injury. The amounts are for doctor's visits, MRI, taxi fare, rehab therapy, x-ray reports and hospital fees. The balance of \$58,149.00 is claimed for loss of salary at \$692.25 per week for the period 5th December, 2014 to 30th June, 2015 but has only exhibited one cheque and it does not indicate a period.

Special Damages

Medical and Associated Fees

- [8] The Defendant has not challenged the medical expenses, inclusive of rehabilitation and taxi fare, submitted by the Claimant and the expenses incurred totals \$18,085.86. The Court has no other document submitted suggesting to the contrary for medical expenses. I therefore find the amount claimed for the medical expenses and associated expenses to be reasonable and therefore I award the sum of \$18,085.86 for this head.

Loss of Income

- [9] The Claimant has submitted that his weekly salary is \$692.25 and has provided one cheque to prove this fact. In the Court's opinion this is insufficient to claim the sum of \$58,149.00. It is trite law that special damages must be pleaded and proved.
- [10] However, The Privy Council in **Greer vs Alston's Engineering Sales and Services Ltd**¹ quoting from McGregor on Damages² 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."

- [11] In the circumstances, I accept that on the balance, the Claimant was out of work from the 5th December, 2014 to April 2015 and I make a nominal award of \$20,000.00.
- [12] The total amount for special damages is \$38,085.86 with the 30% contributory negligence the amount the Defendant has to pay is \$26,660.10.

General Damages

- [13] Once a person suffers personal injuries they are entitled to general damages under the heads as set out in **Cornilliac vs 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

¹ [2003] UKPC 46

² 13th Ed at paragraph 295

The Nature and Extent of the Injuries Sustained

[14] The Claimant's injuries are set out in detail in the medical reports. In summary the Claimant suffered

- (i) A 7 cm laceration over the right medial malleolus with small superficial bruise over the lateral malleolus;
- (ii) And compound bimalleolar fracture of the right ankle;

[15] The evidence of Dr. Singh indicated at paragraph 3 and 4 above concludes with the fact that he has been evaluated to be 20% disabled in his full functions of his extremity and 8% of the whole man for the rest of his life. This last assessment was done on the 18th September, 2017 and the Court does not have a recent assessment to confirm the current position and a definite position in relation to surgery.

The Pain and Suffering and Loss of Amenities

[16] The Claimant stated that he is in constant pain especially when standing for long and his feet swell as a result.

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

- (a) **Sylvian Laurent vs Simon Anthony Cuffy**³ - the Claimant who was 41 years old suffered a fractured right foot that was almost amputated, had 5 surgeries, several infections and was hospitalized for six weeks. She cannot stand for longer than half an hour, uses a walking aid. She was awarded \$110,000.00 for PSLA.
- (b) **Sherma Mathurin vs Rain Forest Sky Rides Ltd**⁴ - the Claimant suffered injuries to her right tibia – displaced intra-articular open fracture of the low end and a fracture of the fibula. All activities of her life were affected including sexual intercourse. Her award was \$150,000.00 for PSLA.
- (c) **Troy Barthelmy vs John Neptune**⁵ - the Claimant sustained fracture of the posterior wall of the right acetabular (hip socket) and recommended to refrain from full and unrestricted employment activity for 8 months post injury. The injury had a severe impact on his life including his sex life. He was awarded \$150,000.00 for PSLA.

[18] The Court having reviewed several cases found that comparisons in part could be made but not as a whole.

³ DOMHCV 2012/0238

⁴ SLUHCV2008/0551

⁵ SLUHCV2009/0147

Analysis

- [19] I agree with the principles stated in **Wells v Wells**⁶ 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 \$190,000.00 for the PSLA. The Court does not have the benefit of an updated medical report. I have considered the authorities, the injury sustained, the Claimant to now be 20% disabled in his full functions of his extremity, 8% of the whole man for the rest of his life and the pain and discomfort that he refers to after standing for an extended period.
- [21] In the circumstances an award of \$90,000.00 for pain and suffering and loss of amenities is appropriate.

Future Medical Care

- [22] It is proposed by the Claimant that the Court should make an award under this head, however there is no updated medical report before the Court to substantiate an award of \$35,000.00 as proposed by the Claimant. The last time he was seen by Dr. Singh was in September 2017. Dr. Singh’s evidence is that the Claimant may need surgery in the future and the cost is \$35,000.00. It is also suggested that the Claimant will require physiotherapy 3 times a week at \$100.00 per session.
- [23] The Court in **Curvin Colaire**⁷ reemphasises that the Claimant must satisfy the Court both as to the fact of damage and the amount that is being claimed. Master Actie, as she then was referred to, in the case of **Strachan vs The Gleaner Company Ltd & Anor (Jamaica)**⁸ which stated:-
- “...the second is that whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss....”
- [24] I accept this well-established position, but I am also guided by the fact that the Claimant continues to experience pain and swelling and his overall permanent disability and there is a

⁶ [1998] 3 ALL ER 481

⁷ Curvin Colaire vs Attorney General of Commonwealth of Dominica et al DOMHCV 2014/0079 at paragraph 21

⁸ [2005] UKPC 33 (25th July 2005)

possibility that surgery may be required in the future. I have noted a precedent has been established of nominal damages being awarded for future medical care⁹ where the Court accepts that there is going to be some future care required but there is insufficient evidence submitted to support a concrete amount. I am satisfied on the balance that there will be some future care required for the Claimant. In the circumstances I will award a nominal amount of \$15,000.00.

Future Loss of Earnings

[25] It is submitted that the Court should award a loss of future earnings based on the cheque submitted by the Claimant in the sum of \$692.25 which represents his weekly wage. The Court only has this one cheque which does not represent a period for which payment is made. I have no further evidence and in the circumstances I decline to make an award under this head.

[26] The total amount under general damages is \$105,000.00 with 30% contributory negligence the total amount the Defendant has to pay is \$73,500.00

Interest

[27] The Claimant is entitled to interest and as per the decision in **Nigel Mason v Maundays Bay Management Ltd**¹⁰ as follows:

1. With regard to general damages, no interest should be awarded before judgment on loss of future earnings;
2. 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 in court placed on short term investment and, in the absence of evidence of that rate, the statutory rate of interest would be used;
3. 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.

Court's Order

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

1. Special damages in the sum of \$26,660.10 with interest at 2.5% from the date of the accident to today's date;

⁹ Seepersad vs Persad & Anor (Trinidad & Tobago) [2004] UKPC 19, Geraldine Welsh vs Joel Budd GDAHCV 2017/0235 at paragraph 17, Akim Morain vs Devon Pierre GDAHCV 2017/0241 at paragraph 17.

¹⁰ AXAHCV 2006/0090 at paragraph 39

2. General damages in the sum of \$73,500.00 with interest from the date of service of the writ to the date of trial at 5%;
3. 60% 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