

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
CIVIL**

GRENADA

CLAIM NO. GDAHCV2019/0305

BETWEEN

YVONNE ANTONIA FELIX

Claimant

And

ARNIC COMPANY LIMITED

Defendant

Before Master Pariagsingh (Ag.)

Date of Delivery: May 25, 2021 – via email

Appearances: Ms. Alicia Lawrence for the Claimant
Mrs. Crystal Braveboy – Chetram for the Defendant

JUDGMENT

On Assessment of Damages heard on May 11, 2021.

Before the Court is the Claimant's assessment of damages. Liability was agreed between the parties by order made at a case management conference on January 16, 2020. This is a personal injury claim arising out of a work-related slip-and-fall accident that occurred on April 16, 2016. At the time of the accident the Claimant was 32 years old and employed by the Defendant as a waitress. At the assessment the Claimant and her partner gave evidence. One expert report was filed by the Claimant and the Defendant filed three witness statements. Neither party opted to cross examine the other party's witness at the assessment.

GENERAL DAMAGES:

- 1) A Claimant who suffers personal injuries is entitled to general damages. In assessing the damages, the following heads are considered as per **Cornilliac v St. Louis (1964) 7 WIR 491** at page 492:
 - a) the nature and extent of the injury sustained;
 - b) the nature and 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 prospects have been affected.

- 2) Lord Diplock in **Wright v British Railways Board [1983] 3 WLR 211** at page 214 describes the character of an award of damages in personal injury cases as:

".....that non-economic loss constitutes a major item in the damages. Such loss is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, the figure must be " basically a conventional figure derived from experience and from awards in comparable cases."

The nature and extent of the injury sustained

- 3) The nature of the injury is set out in the medical report of Dr. Dragon dated December 17, 2020 and Dr. Douglas Noel dated July 06, 2020. Dr. Dragon concludes that the Claimant sustained injury to the interspinous ligament with disc bulge at L5 – S1 and multiple contusions. Dr. Noël concludes that the Claimant suffered a soft tissue injury to the left knee and non-boney injuries to the cervical and lumbosacral spine, ligamentous injury at L3 – L5. Both medical reports state that the Claimant had pre-existing degenerative changes to the lumbosacral. Dr. Noel also attributes some of the Claimant's pain to a previous injury due to a stabbing incident.
- 4) The Claimant also relied on the medical report of Dr. Justin La Rose dated December 19, 2020. Save for recommending that the Claimant use a back brace as part of her treatment, this doctor's report does not delve into any details about the Claimant's injury.
- 5) Dr. Dragon in his report of December 17, 2020 refers to a medical report dated October 21, 2016 in which it is stated that the Claimant was deemed fit to work on October 14, 2016. This medical report was not disclosed by the Claimant and does not form part of the evidence.

The nature and gravity of the resulting physical disability

- 6) As a result of her injuries, the Claimant contends that she continues to suffer with pain. The gravity of the pain is severe according to her evidence. Whilst the Defendant in its witness statement put the resulting disability in issue, having not cross-examined her on it, accordingly, the Court accepts the Claimant's evidence on the nature and gravity of the resulting disability contended by the Claimant. The Claimant is not under an evidential burden to prove a negative. The onus was on the Defendant who asserted an inconsistent fact, to cross examine the Claimant and put its case to her. The Defendant chose not to do this. The effect of the Defendant's election is that the Court must treat the Claimant's evidence on several aspects as unchallenged.

Pain and Suffering

- 7) The Court must consider the Claimant's subjective awareness of pain and suffering. Under this head damages is awarded for both the physical and mental stressed caused to the Claimant both pre and post-trial as a result of the injury and includes:

Pain caused by the injury itself;

- 8) Dr. Dragon states that from his assessment of the Claimant and her scans, he found mild degenerative changes and foraminal narrowing in both cervical and lumbar spine, with soft tissue over the interspinous ligament at L3 to L5.
- 9) He was of the opinion that the Claimant sustained injury to the interspinous ligament with disc bulge at L5 – S1 and multiple contusions. He noted that the degenerative changes noted on the imaging studies would be pre-existing and not related to the recent injury. In this report dated January 02, 2018, Dr. Dragon expresses a similar opinion save that bracing is recommended.
- 10) Dr. Noel in his report dated July 06, 2020 which the Claimant has annexed to her witness statement goes into a little more detail. His opinion is that the Claimant suffered soft tissue injury to the left knee and

non-boney injuries to the cervical and lumbosacral spine. He indicates that the left knee injury has resolved. The lower back and left lower limb pain is due to ligamentous injury at L3 – L5 as well as degenerative changes to the lumbosacral spine and L5/S1 left paracentral disc bulge.

- 11) Dr. Noel's opinion is that the ligamentous injury L3-L5 and left paracentral disc bulge are most likely due to the fall. The degenerative changes were also present before the fall. He gives an opinion that the Claimant's reduced sensation in the C5, C6 and C7 dermatomes of the right upper limb and weakness of the right hand is significantly contributed to by a stabbing injury to her right upper limb in 2011 or 2012. This previous injury was not disclosed by the Claimant in her evidence nor does it feature in the evidence of Dr. Dragon, the expert.
- 12) In his concluding paragraph of his report, Dr. Noel indicates that the Claimant has significant symptoms of pain in the neck and shoulders as well as lower back pain radiating to the left lower limb due to the fall superimposed on the already degenerate spine. He believes that the fall is additive to the pre-existing condition of the Claimant and that the fall can accelerate her degenerative changes moderately.
- 13) The extent of the injury in the Court's view ought to be assessed in the context of the evidence of the existing degenerative changes. It seems inherently probable that the injuries sustained in the fall accelerated the Claimant's existing degenerative changes. Further, it seems more probable than not that a portion of the pain which the Claimant complains about may be as a result of the effect of her previous stabbing injury. It is difficult to apportion in a mathematical sense what portion of the Claimant's pain was caused by the injuries caused by the accident. This is more so in the circumstances of this case, where there was no cross examination and no medical evidence led by the Defendant.
- 14) The Claimant's own evidence of not seeking medical attention until two days later, the time lapse between seeking medical treatment, her returning to her job, her finding a similar job and her continuing to work up to the present time when considered as a whole, on a balance of probabilities, leads the Court to the inescapable conclusion that the Claimant has exaggerated the pain caused by the injury.

Pain from treatment taken to treat the injury;

- 15) There is no evidence of surgery or medical procedures being performed on the Claimant. The Claimant's pain was managed with painkillers. During her treatment she also managed to return to work, got a raise in salary, participated in a fight, got fired and started a new career as a Home Care giver.
- 16) On the evidence, the Court finds that the pain from treatment taken to treat the injury is not as severe as the Claimant contends.

Awareness and embarrassment at the disability or disfigurement.

- 17) There is no evidence of any disability or disfigurement as a result of the injuries suffered and this issue does not arise.

Suffering the Claimant may undergo as a result of anxiety about the possible further deterioration of her condition.

- 18) It is reasonable to expect that the Claimant will undergo some anxiety about the possible further deterioration of her condition. This has to be considered in the context of her pre-existing degenerative condition and her existing injury at the time of the accident.

Loss of Amenity

- 19) This head of damage flows from the Claimant's loss of the ability to do everyday things which she did prior to the accident. This head of damage is objective. This type of damage is awarded, whether or not the Claimant is aware of them since the Claimant is compensated for her deprivation suffered rather than his awareness of it for example, **Hunt v Severs [1974] 2 AC 350** where the Claimant suffered paralysis or **Moriarty v Mc Carthy [1978] 2 All ER 213** where the Claimant suffered the loss of marriage prospects.

20) The Claimant's evidence is that her social life is impacted. She contends that she was a "people's person" before the accident and this has now changed. This is corroborated by her partner. She also says her ability to clean, sweep and home-make is affected. This evidence was not challenged. The Court finds that is more probable than not that given the Claimant's neck and back pains her ability to do these things have been impacted by her injury. The Claimant nevertheless seems to have lived a normal life after the accident. She even became pregnant after the accident. The context in which she refers to her pregnancy is, by suggesting that her pregnancy had to be terminated on the advice of her doctors. There was no medical evidence led to support this assertion. Accordingly, no weight was attached to this evidence.

21) The Defendant has invited the Court to reduce the sums to be awarded as damages for pain and suffering on account of the Claimant's pre-existing medical condition.

22) On this issue the Court has considered the authority of **Lenroy Conor v Cynthia Flemming SKBHCV2012/0353** relied on by the Claimant and **Taylor v Weston Area Health Authority [2003] All ER (D) 50** relied on by the Defendant. The most definitive statement of law on the issue is contained in **Ellis v Environmental Agency [2008] All ER (D) 163**. The Court stated that apportionment should be limited to where the effect of the harm is divisible. In **Estable V New 2011 BSSC 1556** a formulation of divisible and indivisible injuries is stated as:

"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. "

23) In both cases relied on by the parties, it is accepted that the Court can apportion the damages awarded for pain and suffering. In **Lenroy Conor v Cynthia Flemming**, the Court does not understand the Court in that case to be saying the 'eggshell' rule applies across the board. The Court's approach was simply to adopt the 'eggshell' rule where the injuries were indivisible.

- 24) Any apportionment however has to be made on a finding of whether the injury was divisible or indivisible. This finding has to be made based on the evidence. At the assessment of damages, although both parties led evidence, neither party opted to cross examine the other party's witness or the expert.
- 25) The Defendant pleaded "*The Claimant cannot therefore now ascribe any and all complications or injury, to her said fall*". The Defendant having put the extent of the injury in issue on the pleading had a duty to lead evidence to show that the Defendant is only liable of the part of the injury that was caused by its negligence, this was not done. More so, the obligation was on the Defendant to ask the Doctor to apportion the pain caused by the injury if his opinion is that the injuries were divisible.
- 26) The Court will not embark on a speculative exercise of trying to resolve any issue of divisibility of injuries or contribution to pain absent the Defendant having challenged the evidence on this or leading its own evidence.
- 27) The decision not to cross examine witnesses where there are disputed facts on material issues is not only unhelpful to the Court but puts the Court and the parties at a significant disadvantage.
- 28) **Blackstone's Civil Practice 2014 Edition at page 796** contains the following helpful guidance on this issue:

"A party who fails to cross – examine a witness on an issue in respect of which it is proposed to contradict his evidence – in chief – or impeach his credit by calling other witnesses, should not be permitted to invite the tribunal of fact to disbelieve the witness's evidence on the issue."

- 29) A similar position is expressed on the failure to cross – examine a witness by the learned Authors of **The Modern Law of Evidence, 4th Edition by Keane and Mc Keown at Page 198** where it is stated:

"A party may decide that there is no need to cross-examine at all, especially if the witness in question has proved to be unfavourable or even hostile to the party calling him. A party's failure to cross-examine, however, has important consequences. It amounts to a tacit acceptance of

the witness's evidence-in-chief. A party who has failed to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict his evidence-in-chief or impeach his credit by calling other witnesses, will not be permitted to invite the jury or tribunal of fact to disbelieve the witness's evidence on that matter"

- 30) Whilst the burden remains on the Claimant to prove her damages, she does not have to prove a negative assertion made by the Defendant. The onus was on the Defendant to prove the facts that it put in issue. Having not challenged the Claimant on the disputed facts, the Court now has to assess the inherent probability or improbability of the rival contentions on the pleadings, witness statements and documentary evidence as a whole.
- 31) The Defendant is now seeking to submit on a germane issue on which it led no evidence or challenged the expert evidence led by the Claimant. In these circumstances, the Court having considered the pleadings, the Defendant having led no evidence of divisibility and the Defendant electing not to challenge the expert, there is no evidence of divisibility and the Court does not find that the pre-existing injury to the present condition of the Claimant is divisibly from her present pain.
- 32) In considering the sum to be awarded as general damages the Court considered the most comparable injuries from the authorities submitted to be in the cases of **Elizabeth Celestine v Theobald Vantor GDAHCV2007/0530** and **David et al v Bowen et al GDAHCV2007/055**. Awards of \$35,000 and \$37,000 respectively were made in respect of pain and suffering and loss of amenities.
- 33) Given that both these awards were made more than a decade ago, the Court orders the sum of **\$40,000.00** in respect of pain and suffering and loss of amenities.

The extent to which the claimant's pecuniary prospects have been affected.

- 34) The purpose of the award of pecuniary damages is, "to ensure that the claimant recovers, subject to the rules of remoteness and mitigation, full compensation for the loss that he has suffered". See **McGregor on Damages 20th Edition paragraph 40-057**. In **Parry v. Cleaver [1970] AC 1 at page 13** Lord Reid approached the issue of compensation for the financial loss suffered as a result of the claimant's inability

to work, by posing the following questions: “... *what did the plaintiff lose as a result of the accident? What are the sums which he would have received but for the accident but which by reason of the accident, he can no longer get?*” He added that the decision in **British Transport Commission v. Gourley** made it clear, in answer to those questions, “*that it is a universal rule that the plaintiff cannot recover more than he has lost*”.

- 35) The Claimant has submitted that the Court ought to make an award using the traditional multiplier multiplicand approach. Alternatively, the Claimant submitted that the Court ought to make an award for loss of earning capacity following the approach in **Karen John v David Dibiqye, SVGHCV2009/0359**. The Court considers this approach to be more applicable in cases where the Claimant continued in her employment or at a higher salary as before the accident and if the Claimant were to be unemployed she would suffer a handicap on the labour market.
- 36) The Defendant has invited the Court to reject this approach and award the Claimant a global sum for loss of future earnings. The Court was referred to the authority of **Steadroy Matthews v Garna O’Neil BVIHCVAP2015/0019**. At paragraph 49 Michel JA referred to the approach taken by the English Court of Appeal in **Blamire v South Cumbria Health Authority [1993] PIQR Q1**. The reasoning for the Court ordering a global sum in **Blamire** was because there were evidential uncertainties which do not allow the Court the usage of the multiplier/ multiplicand method.
- 37) In this case, the Court sees no reason to depart from the traditional multiplier/ multiplicand approach. By the Claimant’s evidence she earned \$1,512.00 as a waitress prior to the incident and now she earns \$960.00 as a home care giver. The Claimant therefore suffered a difference of \$522.00 in her monthly income. The Claimant’s multiplicand by her own evidence is $\$522.00 \times 12 = \mathbf{\$6,264.00}$. At the time of the accident the Claimant was 32 years old. She is now 37 years old. There is no evidence to suggest any reason why the Claimant would not have worked until at least 60 years old.
- 38) The multiplier is a number of years used to calculate the amount of years the Claimant is likely to work, and is discounted to take into account the uncertain events of life. Further in this claim, the Court considers the fact that the Claimant had a pre-existing degenerative condition and suffered the effects of

pain attributable to her first stabbing incident prior to the injury material to calculating the multiplier. In the instant case, the Court considers an appropriate multiplier to be 8 years.

- 39) There shall therefore be an award to reflect the Claimant's loss of pecuniary prospects in the sum of **\$50,112.00**. This sum will attract no interest.

SPECIAL DAMAGES:

- 40) This award consists of actual pecuniary loss suffered by the Claimant up to the date of trial. These must be specifically pleaded and proved; **Grant v Motilal Moonan Ltd, 43 WIR 372.**

- 41) The Claimant has claimed her pre-action expenses as special damages. Pre- action expenses are not special damages. They are a part of the costs in a matter. This claim is refused.

- 42) In respect of nursing care, no particulars of this claim were contained in the witness statement of the Claimant. There is a bald statement that she was unable to do things she could have done for herself and this is supported by her unchallenged medial evidence. The Court is therefore prepared to allow a nominal sum of **\$1,000. 00**

- 43) With respect to her brace, the sum of **\$116.30** is allowed as there is a receipt provided for this sum. Further the expert Dr. Dragon confirms in his evidence that this brace was recommended for the Claimant as did Dr. La Rose.

INTEREST:

- 44) The Claimant's entitlement to interest is grounded in statute by **Section 27 of the West Indies Associates States (Grenada) Act Chapter 336 of the 1990** Revised Laws of Grenada.

- 45) As stated by Lord Denning in **Jefford v Gee [1970] 2 QB 130** at para 146 A:

"Interest should not be awarded as compensation for damage done. It should only be awarded to a plaintiff for being kept out of money which ought to have been paid to him"

"In all ordinary cases we should have thought it would be fair to award interest on the today sum of special damages from the date of the accident to until the date of the trial"

COSTS

46) There is no reason to depart from the general rule that costs follow the event. Costs will be on the prescribed scale based on the value of the awards made. The percentage of costs to be recovered at this stage taking into account that liability was agreed upon at an early stage would be 70%.

ORDER:

47) The Defendant do pay the Claimant the following sums:

- a) General damages for pain and suffering and loss of amenities assessed in the sum of **\$40,000.00** together with interest thereon at the rate of 6% from the date of the filing of the claim to today's date (693 days) in the sum of **\$4,556.71**;
- b) Loss of future earnings assessed in the sum **\$50,112.00** with no pre-judgment interest;
- c) Special damages assessed in the sum of **\$1,116.30** together with interest thereon at the rate of 3% from the date of the accident today's date (1,864 days) in the sum of **\$171.02**;
- d) The Defendant is also to pay the Claimant 70% of his prescribed costs on the awards made above (\$95,956.03) calculated in the total sum of **\$10,075.38**; and

48) There be a stay of execution of 28 days.

Alvin Shiva Pariagsingh
Master (Ag.)