

THE EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
AD 2018

IN THE HIGH COURT OF JUSTICE

NEVHCV2015/0075

BETWEEN:

CALVIN PRENTICE

CLAIMANT

AND

JAMIE WILKINSON
DEON & ASSOCIATES LTD

FIRST NAMED DEFENDANT
SECOND NAMED DEFENDANT

Appearances:

Ms. Robin C. Herbert-Thompson & Ms. Cherese Persaud for the Claimant
Mr. E. R. Hector for the First Named Defendant
Mr. Terrence Byron for the Second Named Defendant
Claimant present
First Named Defendant present
Second Named Defendant absent

2019: March, 4
2020: April, 8

Judgment

Burnett, M. (Ag.):

Background

- [1] The claimant brought an action against the first named defendant for damages for assault and battery committed by the first named defendant on the claimant on the 27th September, 2010; whilst the first named defendant was acting in the course of his employment and/or agency as the employee and/or agent of the second named defendant or alternatively, whilst the first named defendant was acting on his own and for damages against the second named defendant for personal injuries, loss and consequential damages sustained on the 27th September, 2010, during the course of his employment with the second named defendant at Nelson Spring, Nevis.

- [2] A consent order between claimant and the first named defendant for liability with damages to be assessed was filed on the 15 March, 2018. The claimant obtained a Judgment in Default of Defence against the second named defendant dated 26th October, 2015.
- [3] Counsel for the claimant and the first named defendant submitted written submission in this matter.

SPECIAL DAMAGES

- [4] The claimant claims special damages totaling \$784,953.33. The claimant claims the amount which was particularized in the schedule of special damages annexed to the claim form and statement of claim.
- [5] The claimant also sets out the sums spent in his Affidavit and annexed document in support of the sum spent.
- [6] Counsel for the claimant, Ms. Robin C. Herbert-Thompson also relies on the provisions of the Evidence Act in filing notices related to several documents on the basis that the makers were either overseas and/or that it was not reasonably practicable to secure the attendance of those persons at the hearing.
- [7] Counsel for the claimant also pleaded that the claimant required future surgery to repair the continued CSF leakage. The claimant contends that the said surgery was not available in St. Kitts and Nevis and would therefore require his travelling to Barbados for same.
- [8] The claimant claims the following:
- (a) Lost of wages from January, 2011, when employer ceased paying salary to 6th June, 2015 being \$1,600.00 per week x 237 weeks and continuing to accrue as pleaded in the claim form and statement of claim totaling \$394,420.00.
 - (b) The lost of wages from 7th June, 2015 to 9th November, 2018 being \$1,600.00 per week x 178 weeks and continuing to accrue \$284,800.00.
- [9] Mr. Hector, counsel for the first named defendant submitted that special damages refer to losses that are capable of substantially exact calculation. Such losses composed of pre-trial pecuniary losses such loss of earnings, medical and associated expenses.
- [10] Learned counsel, Mr. Hector also submitted that the claimant's claim for loss of wages prior to the filing of his claim and for pre-trial period subsequently to the filing of the claim must in accordance with Lord Reid in **Parry v Cleaver**¹ take into account "what the sums which would have been received but for the accident but which by reason of the accident can no longer be obtained."
- [11] Learned Counsel further submitted that the claimant would have obtained his weekly wages less deductions for his contributions as an insured person under the Social Security Scheme.

¹ [1969] 1 All ER 555

- [12] Section 23(1) of the **Federation Social Security Act**² provides: “Except where regulations otherwise prescribe, an employer liable to pay contribution in respect of a person employed by him or her shall in the first instance, be liable to pay also, on behalf of and to the exclusion of that person any contribution as an insured person payable to that person for the same contribution period and for the purpose of this Act, contribution paid by an employer on behalf of an insured person shall be deemed to be contributions by the insured person.”
- [13] Counsel posited and is accepted by this Court that the claimant would obtain his weekly wages less deductions for his contributions as an insured person under the Social Security Scheme.
- [14] In the premises the Court will reduce the weekly wages from \$1,600.00 to \$1,400.00 as the wages payable in this matter.
- [15] It is to be noted that counsel for the defendants did not object to the period claimed by the claimant.

ANALYSIS AND AWARD – SPECIAL DAMAGES

- [16] The claimant’s claims was that he earned \$1,600.00 per week and claims loss of income in the sum of \$393,420.00 being wages from January, 2011 when his employer commenced cessation of payment to 16th July, 2015 for a period of 237 weeks and continuing. No documentation was provided to substantiate this claim.
- [17] It is not enough for a claimant to say that he sustained a loss. A party claiming damages must prove his case, and to justify an award in the amount that is before this Court, these damages must satisfy the Court as to the fact of damage and the amount³.
- [18] Pecuniary loss consists of pre-trial earnings. Mc Gregor on damages, 18th Edition⁴, states “the function of the pecuniary heads of loss is to ensure that the claimant recovers subject to the rules of the remoteness and mitigation, full compensation for the loss he has suffered”.
- [19] Mc Gregor on damages⁵ states “where the precise amount of a particular item of damage has become clear before the trial either because it has already occurred and so become crystallized, or because it can be measured with complete accuracy this exact loss must be pleaded as special damages”.
- [20] I have already held that the claimant provided no evidence on his net income neither did the defendants one of whom being the employer of the claimant, objected to the claim of the claimant.
- [21] The claimant is making such a substantial claim under this heading and provided no documentation to guide the Court in this regard. This situation is compounded by the fact that the

² Cap 22.10 of the Laws of the Federation of St. Christopher and Nevis Revised Edition 2002

³ British Transport Commission v Gourley [1956] AC 185

⁴ At para 35-056

⁵ Chapter 49 49-02

claimant was an employee of the second named defendant and this item of the claim went unchallenged on the pleadings and during the assessment of damages.

- [22] Our Courts have held that the fact that a claimant cannot establish his earnings by way of salary slips is no bar to his recovery of special damages. This was held in the case of **Andre Winter & Another v Charles Richardson**⁶ and **Greer v Alstons Engineering Sales & Services Ltd**⁷.
- [23] I am satisfied that the Court can award damages in circumstances as this where loss has been shown but not proven. However, I must register my displeasure that a claimant in making such a substantial claim under this heading and provided no documentation to guide the Court in this regard.
- [24] In the circumstances the Court will award the claimant as follows:
- (a) Lost of wages from January, 2011 to 6th June, 2015 \$1,400.00 per week for 237 weeks weeks - \$331,800.00.
 - (b) Lost of wages from 7th June, 2015 to 9th November, 2018 - \$1,400.00 per week for 178 weeks - \$249,200.00

FUTURE SURGERY

- [25] The claimant seeks an award of \$47,688.00 for future surgery, the claimant relies on an estimate provided by Dr. Gill and marked exhibit "C.P.2". In his report Dr. John Gill stated that the claimant had a previous cranioplasty for cranial trauma that necessitated a left parietal cranioplasty.
- [26] There was no abnormal sinking of the cranial prosthesis; and no tenderness was evident over the over lying scars.
- [27] The doctor concluded that even more serious is the injury to the skull base that had resulted in an anterior cranial fossa cerebriospinal fluid fistula; with long term risk of meningitis because of defect and leak of this crerebriospinal fluid, the gravest consequent being death. The long term risk of meningitis is 80 % at 25 years post trauma if there is no specific intervention.
- [28] Dr. Gill opined that the claimant required:
- (1) Fine cut high resolution CT Scan of the anterior cranial fossa
 - (2) MRI of the Brain
- [29] I accept counsel averment and the report of the doctor that the claimant will need surgery for trans cranial repair of anterior cranial fossa CSP Fistula.
- [30] I will accept this documentation submitted by Dr. Gill to substantiate this item and award the claimant the full sum of \$47,688.00.

⁶ Antigua High Court Civil Appeal No. 0125 of 2006

⁷ (2003) 63 WIR paragraph 7, 8 & 9

OTHER SPECIAL DAMAGES

[31] The claimant has also pleaded and proved special damages of \$38,580.83 and I award same.

[32] In summary, the defendants shall pay the claimant the following award:

1. Special Damages –
 - a) Lost of wages from January 2011 to 6th June, 2015 \$331,800.00
 - b) Lost of wages from 7th June, 2015 to 9th November, 2018 \$249,200.00
 - c) Future surgery \$47,688.00
 - d) Other expenses pleaded and proved \$38,580.83.

GENERAL DAMAGES

[33] **Cornillac v St. Louis**⁸ sets out the considerations which are to be borne in mind in assessing general damages:

- The nature and extent of the injuries sustained
- The nature and gravity of the resulting physical disability
- Pain and suffering
- Loss of amenities
- The extent to which pecuniary prospect will be affected.

PAIN AND SUFFERING AND LOSS OF AMENITIES

[34] The claimant was 38 years old at the time of the injuries. He suffered the following injuries:

- (a) Loss of sensory and motor function of his right upper extremity
- (b) Left parietal laceration
- (c) Depressed skull fragments
- (d) Blunt head trauma
- (e) Mild spastic paresis of right upper limbs

[35] The claimant also pleaded that he suffered from headaches, leaking of cerebro spinal fluid through his nose, seizures, pain in his right hand, neck pains, depression, memory lapses, dizzy spells and joint pains. He is unable to withstand direct sunlight for extended periods. The claimant also underwent two (2) surgeries, a craniotomy and a trans cranial repair of Anterior Cranial Fossa CSF Fistula.

[36] The claimant relies on the medical reports of:

- Dr. Cardwell Rawlins dated 25th October, 2010
- Dr. John Gill dated 20th January, 2011
- Dr. Cardwell Rawlins dated 8th February, 2011
- Dr. Cardwell Rawlins dated 26th February, 2011
- Dr. Glenville Liburd dated 29th February, 2012

⁸ 1965 (1965)7 WIR

- Dr. John Gill dated 31st October, 2013
- Dr. Amelia Wilkin dated 22nd January, 2015

- [37] The claimant relies on the case of **Sheldon Jules v Brent Williams**⁹. In that case, the claimant suffered multiple injuries including internal bleeding, fracture to the facial bones and wounds to the face.
- [38] The claimant was hospitalized for nine (9) days was operated on to deal with internal bleeding. The claimant was referred to a plastic and reconstructive surgeon since it was discovered that the claimant had malocclusion, inability to open his mouth and loss of sensation of his lower lips.
- [39] The medical report showed fracture of several bones in the face. The claimant had to undergo further surgery and the appearance of his face was permanently altered.
- [40] The claimant who was 26 years old and an amateur boxer was awarded \$55,000.00 for pain and suffering and \$45,000.00 for loss of amenities in 2012.
- [41] **Ian Sieunarine v Doc's Engineering Works**¹⁰ in that case, the plaintiff suffered a heavy blow to the head from falling rubble at a demolition site. He underwent emergency craniectomy, on arrival at the hospital; he later underwent surgery for an underlying haematoma and eventually underwent a cranio plasty. He suffered from headaches, forgetfulness, personality change, blurred vision, slurred speech. He was unable to pursue studies and social activities. The Court awarded him TT\$200,000.00 for non-pecuniary loss.
- [42] Learned counsel, Mr. Hector for the first named defendant relied on the general principle that general damages must be compensatory and not restitutive and takes into account matters such as pain and suffering and loss of amenities suffered by the claimant.
- [43] Counsel proffers that the object of an award for personal injuries as stated by Andrew Burrows: "The general compensatory aims dictated that damages should put the claimant into a good position as if the personal injury had not occurred."

PARTICULARS OF INJURIES

- [44] At the Alexandrina Hospital, the claimant was awake and alert but had lost his sensory and motor function of his right extremity. The claimant had to undergo emergency surgery for a craniotomy after it was discovered that he suffered from a left parietal laceration that was wide open with signs of depressed skull fracture.
- [45] During surgery, the doctor found a depressed skull fracture with bony fragments and blood clot in the tissue of the brain. These were removed, hemostasis achieved and a drain left in place.

⁹ DOMHCV2009/0018

¹⁰ (1992) HCA No: 2387 of 2000 (unreported)

- [46] The claimant was kept in the Intensive Care Unit for five (5) days and subsequently transferred to the surgical ward. He continued physical therapy to regain his motor skills and underwent a further surgery to repair bone defect in the skull. He had to travel to Barbados as the prosthetic used for surgery as this was not available in his jurisdiction.

PARTICULARS OF PAIN AND SUFFERING

- [47] According to the statement of claim and witness statement, the claimant who was right handed was unable to use his right hand properly. After being discharged from the hospital, he had to return three (3) times per week for approximately one and a half year after the incident, for physical therapy. The claimant experienced seizures, headaches, dizziness, and cerebro-spinal fluid leaking through the nose. The claimant suffered from pain in his right hand, depression and memory lapses.
- [48] During this period, the claimant had to take extra precaution as there was no skull structure in the area of his injury and this prevented him from working and enjoying his regular activities.
- [49] After the surgery in 2011, the claimant suffered severe headaches and dizziness as well as joint pain for approximately one (1) year after which; he experienced at least one (1) seizure per month. He continues to have CSF leaking from his nose when he bends to retrieve items. He continued to suffer from memory lapse and was unable to withstand direct sunlight for extended period. He was unable to resume his previous form of employment as a construction worker since the job required him to spend extended period outdoors during the day. He was unable to grasp a hammer or other tools. Further, headaches were preventing him from obtaining alternative employment.

ANALYSIS

- [50] It is evident from the medical evidence submitted that the claimant endured pain and suffering at the time of the injury and had to undergo several surgeries and physiotherapy which also resulted in pain. As a relatively young man, he must be aware of the scars and the discomfort that he must now live with. He is also restricted from doing many things he could have done prior to his injury.
- [51] I have considered the evidence and the several medical reports of the claimant which I accept, there being no evidence to the contrary.
- [52] The Court relies on the guidance provided by Lord Goddard in **British Transportation Commission v Gourley**¹¹ "In an action for personal injuries the damages are always divided into two (2) main parts..... There is general damages which the law implies and is not specifically pleaded. This includes compensation for pain and suffering and the like, and if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future".

¹¹ (1955) 3 All ER 796

- [53] The Court concludes that while none of the authorities submitted is on par with the case at bar, however, they served as some guidance in aiding the Court in coming to a reasonable award.
- [54] Having considered the particular circumstances of the case and applying my discretion, I award the claimant the sum of \$140,000.00 as a total sum for pain and suffering and loss of amenities.

LOSS OF FUTURE EARNINGS

- [55] In order to assess future loss of earnings, it is necessary for the Court to determine a multiplicand and a multiplier.
- [56] Counsel for the claimant relies on the *Ian Sieunarine* (supra) case where the Court, having regard to the vicissitudes of life and fact that the claimant was receiving a lump sum, deemed a multiplier of 15 as appropriate.
- [57] However, the Court proposes to be guided in this exercise by the learning in the case of **Alphonso and others v Ramnath**¹², where JA Singh stated the following: “In determining the multiplier a Court should be mindful that it is assessing general and not special damages; that it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several small sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident.

THE EVIDENCE

- [58] The claimant, Calvin Prentice, in his witness statement, stated that his ability to work and his earning capacity has been impaired by the injuries.
- [59] Dr. Cardell Rawlins, in his medical report dated 26th February, 2011, as exhibited “EX C.P.1” stated “Calvin will never fully recover from his injury. He will not be able to return as a construction worker because of physical and mental injuries. He will, also, after prolonged rehabilitation, maintain the gains he has made since the injury.
- [60] At the time of the injury the claimant was an employee of the second named defendant for approximately six and a half (6½) years.
- [61] The claimant, in his witness statement, gave his average salary as a foreman as EC\$1,600.00 per week. He stated further, that his salary after the incident, was paid by the second named defendant and Saint Christopher Social Security in equal proportions for the period October, 2010 to Decemeber, 2010. He contended that the last payment of his salary was December, 2010.

¹² (1997) 56 WIR 183 at 193

- [62] The claimant also stated in his witness statement that in January of 2011, the second named defendant ceased payment of his salary, but his employment was never terminated.

ANALYSIS AND FINDINGS

- [63] In arriving at the multiplicand, Learned Counsel for the claimant submitted that the Court should accept the claimant's salary at the time of the accident of \$1,600.00 per week and an annual salary of \$83,200.00 and apply same to a multiplier of 15 and award a loss of future earnings of \$1,248,000.00.
- [64] Counsel relied on section 23(1) of the **Federation's Social Security Act**¹³ which states as follows; "Except where regulations otherwise prescribe, an employer liable to pay contribution in respect of a person employed by him or her shall in the first instance, be liable to pay also on behalf of and to the exclusion of that person any contribution of that person any contribution as an insured person payable by that person for the same contribution period and for the purposes of this Act Contribution paid by an employer on behalf of an insured person shall be deemed to be contributors by the insured person".
- [65] Learned counsel, Mr. E. R. Hector submitted that but for the incident, the claimant would obtain his weekly wage less deductions for contributions as an insured person under the Social Security Scheme.
- [66] Counsel further submitted that the sum claimed would be his weekly wages less deductions for his contributions as an insured person under Social Security.
- [67] In view of the evidence that is before this Court: The claimant was 43 years old at the time of filing of the claim in 2015. 46 years at the date of the Consent Order in 2018 and about 47 years at the date of assessment.
- [68] Although the claimant was employed by the second named defendant's company, no evidence was presented to substantiate the salary; neither did the defendants contradict this evidence during the assessment. The Court will, however, use this figure as a guide but will reduce it to take into account; amount deducted from his salary for Social Security and the likes and will use the figure of \$1,400.00 per week to calculate the multiplicand.
- [69] Accordingly, the multiplicand will be \$72,800.00 (\$1,400.00 x 52) with the possibility of working overtime or on weekends being cancelled out by the possibility of not working on some days having regard to the nature of his employment.
- [70] A review of the case from our Courts suggests that generally, the working life of a person engaged in this type of work the claimant was doing ends about age 65.
- [71] In the **Alphonso v Deodat Ramnath (Supra)**, I note in that case, a multiplier of 12 was used for a 42 year old male.

¹³ Cap 22:10 of the Laws of the Federation of St. Christopher and Nevis, Revised Edition 2002

- [72] The evidence is that at present, the claimant may not be able to work in the foreseeable future, if at all, again. It can be taken that he would have had a normal working life of about 65 years.
- [73] At the time of the incident he was 38 years old and had an expected working life of 27 years.
- [74] The Court also takes the following into consideration: the length of work of the claimant, the type of work he was doing, the type of employer he was working with and the severity of the disability caused by the injuries and its impact on the claimant's work.
- [75] Utilizing a multiplier of 9 to be used in the assessment of future loss of earning and applying the same to the multiplicand of \$72,800.00, the future loss of earning would arrive at \$655,200.00.
- [76] Guided by the principles stated in **Alphonso v Ramanuth (supra)** at page 193, I would discount this figure by 15% to cater for contingencies of life, this leaving a figure of \$556,920.00.
- [77] I wish to thank Counsel for their assistance rendered to the Court in this matter and to sincerely apologize for the length of time taken to give this decision.

ORDER, in summary, it is ordered that the defendants shall pay the claimant the following awards:

1. Special damages of \$667,268.83 with interest at the rate of 3% from the date of filing of the claim and at the rate of 6% from the date of filing until payment in full.
2. General damages for pain and suffering and loss of amenities of \$140,000.00 with interest at the rate of 6% from the date of judgment until payment in full.
3. Loss of future earnings \$556,920.00.
4. The defendants to pay the claimant prescribed cost pursuant to Part 65.5 of CPR 2000.

Rickie Burnett
MASTER (Ag.)

By the Court

Registrar

