

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: SVGHCV2018/204

BETWEEN:

Alicia Aberdeen Smith

CLAIMANT

AND

Elios Baptiste

DEFENDANT

Appearances:

Mrs. Patricia Marks-Minors for the Claimant
Mr. Jonathan Lewis for the Defendant

2019: November, 07
2020: June 5

JUDGMENT

ON WRITTEN SUBMISSIONS

Burnett, M. (Ag.):

- [1] This is an application for assessment of damages consequent upon entry of judgment in default of Acknowledgment of Service entered against the defendant on the 10th day of April, 2019.

INTRODUCTION

- [2] According to the Statement of Claim filed on the 24th December, 2018, the claimant was a passenger in the defendant's vehicle travelling towards Richland Park on the 27th December, 2015.
- [3] While on their journey the defendant got involved in an accident whereby the claimant was injured.
- [4] The claimant was admitted to the Milton Cato Memorial Hospital on the day of the accident. The claimant spent one (1) month in the hospital and wore a neck brace for five (5) months and was unable to work for about nine (9) months.

- [5] A Medical Report from Dr. Anwarui Siddiqui dated 4th October, 2016, stated that the claimant sustained the following injuries:
- (a) depressed fracture of the small bone in the right temporal area; and
 - (b) right facial nerve injury causing lower motor neurons lesion due to depressed fracture of the skull.
- [6] Dr. Siddiqui further stated in his Medical Report, “in my opinion facial weakness may persist for the rest of Ms. Aberdeen’s life. As far as improvement in the lower motor neurons it is unlikely that she will have any further improvements.”
- [7] The claimant was also seen by Dr. Mishka Duncan-Adams, neurologist. In her Medical Report dated 12th September, 2019, Dr. Duncan-Adams stated that on examination, the claimant complained of having frequent episodes of memory loss, weaknesses to the right side of her face as well as migraine type headaches.
- [8] The Doctor further concluded that these are post traumatic migraine headaches and depending on the intensity and frequency of the claimant migraine this may hinder her daily activities and may result in her requiring prophylactic medication in order to control her attacks.
- [9] Dr. Duncan-Adams concluded that on physical examination the claimant was found to have peripheral facial nerve palsy to the right side of her face. This is most likely due to the nerve injury that she sustained from the depressed skull fracture.
- [10] The Neurologist opined that due to the nature of the claimant’s injury and the time that has elapsed since the accident, her paralysis is most likely to be permanent.
- [11] In her witness statement dated 9th August, 2019 the claimant stated that the collision was so great that the impact caused her to lose consciousness which was regained at the Milton Cato Memorial Hospital. She further stated that the injuries caused her great pain and suffering.
- [12] The claimant stated that as a result of her injuries, she incurred expenses for medical and suffered loss of earning since the date of the injury. She visited the Richland Park Out-Patient Clinic for check-ups following her discharge from the hospital and wore a neck brace for almost five (5) months.

SPECIAL DAMAGES

- [13] The claimant claims the sum of \$7,474.00 as special damages comprising loss of earning during her recovery period of nine (9) months and medical expenses.
- [14] In her witness statements dated 9th August, 2019 and 13th September, 2019, the claimant claims medical expenses of \$634.00. I found those sums to have been pleaded and proved by the testimony of the claimant and by documentary evidence and I award that sum.
- [15] The claimant also claims loss of earnings. The claimant was employed as a Security Guard and received a monthly salary of seven hundred and sixty dollars (\$760.00). The claimant, in her

witness statement stated that she was on sick leave for an extended period after sustaining her injuries and was unable to work for approximately nine (9) months for the period of January, 2016 to September, 2016 and claims loss of earning of six thousand, eight hundred and forty dollars (\$6,840.00). The claimant submitted copies of her pay slips.

DISCUSSIONS

- [16] Learned Counsel, Mr. Jonathan Lewis, Counsel for the defendant submitted that during the claimant's sick leave, it was possible the claimant could have received her full salary and which said salary would have been paid by her employer and in part by the National Insurance Scheme and concluded that the claimant would have suffered no loss of earnings during the period.

PARTICULARS OF LOSS OF EARNINGS

- [17] The claimant alleges that she was unable to work for approximately nine (9) months and, lost earnings for the period January, 2016 to September, 2016.

ANALYSIS

- [18] Special damages represent the claimant's actual pecuniary loss between the date of injury and the date of trial, for which the losses are strictly measurable in money and susceptible to precise calculation.
- [19] Every item of special damage must be specifically pleaded and specifically proven. It means that every item can be given a value which is ascertainable.
- [20] To justify her loss of earnings claim, the claimant submitted what is purported to be salary slips for the period February, 2017 to December, 2017.
- [21] Lord Diplock in **Ilkew v Samuel**¹: "Special damages in the sense of monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized.....it is plain law....that one can recover in an action only special damages which has pleaded and, of course proved."
- [22] The exhibit that was presented to satisfy the Court as to loss of income for the period January, 2016 to September, 2016 has presented some difficulties for the assessment.
- [23] The pay slips that have been tendered are for the period subsequent to the period claimed in the matter at bar. That evidence does not show whether the claimant worked for the period claimed or whether she was remunerated.

¹ [1963] 1 WLR 991 at 1006

- [24] It would appear from the evidence and the submissions of Counsel for the claimant that neither the employer nor Social Security paid any monies to the claimant for the period which is the subject of the claim.
- [25] However, the Court notes, from “Exhibit AA3” that National Insurance Scheme contribution was deducted from the claimant salary for the said period.
- [26] The Court is of the view that having regard to the nature of the employment of the claimant, the employer would have paid some sick leave to the claimant for a portion of that period and likewise the National Insurance Services, as the claimant was a contributor to National Insurance.
- [27] The Court concludes that the failure of the claimant to lead the necessary evidence to justify this head of the award, does not, in my view, means that no award should be made. Doing so, would not be just in the circumstances as there exists medical evidence to show the extent of the injury and the real possibility of the claimant being off the job.
- [28] In **Greer v Alston’s Engineering Sales and Services**², Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from McGregor on Damages 13th Edition, paragraph 295: “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.”
- [29] Applying the legal principle enunciated in Greer; I propose to reduce the amount claimed by the claimant to reflect that it was opened to the claimant to claim and received some income from the National Insurance Scheme and from her employer for a limited period. I propose to award the sum of four thousand dollars (\$4,000.00) for loss of income which the Court deems to be reasonable in the circumstances.

HOME CARE/NURSING CARE

- [30] The claimant, in her witness statement, refers to help she received from family members and friends during the recovery period.
- [31] She stated that she had difficulties carrying out her usual household chores of washing, cleaning and caring for her younger son.
- [32] Mrs. Patricia Marks-Minors, Counsel for the claimant, asked the Court to award the sum of five hundred dollars (\$500.00) per month for nine (9) months for home care/nursing care.
- [33] Counsel relies on the case of **Cleos Billingsy v Kevorn Jessie-Don Anderson et al**³. In that case the learned Master stated “It is the law that if a wife or mother or other members of the family undertakes to provide nursing care, an allowance will be made for the fair value of the services

² [2003] UK PC46

³ SVGHCV2013/0096

rendered because they are services made necessary by the injury, although the claimant made no agreement to pay them (Cunningham v Harrison [1973] QB943).

- [34] I accept that the claimant would have needed some assistance after the injury, however, based on the evidence proffered in the matter, the Court is of the view that the calculation should be based on averaging what would be a reasonable monetary sum that is paid for nursing care and to consider a deduction to reflect that the assistance was provided by a family member.
- [35] I consider a sum of three hundred and fifty dollars (\$350.00) per month for nine (9) months to be just in the circumstances. I award the sum of \$3,150.00.

GENERAL DAMAGES

THE DEFENDANT'S SUBMISSION

- [36] The defendant relies on the general principles set out by Wooding J in **Cornillac v St. Louis**⁴ which provides the list of consideration to be examined when assessing the damages to be awarded to an injured party:
- pain and Suffering
 - loss of amenity
 - nature and extent of the injury sustained resulting in physical disability
 - extent to which pecuniary prospect is affected.
- [37] Learned Counsel, Mr. Lewis refers the Court to the medical reports dated 17th February, 2016 and 4th October, 2016 respectively.
- [38] Counsel then concluded that, from the medical report, there is no indication that the claimant was the subject of an invasive extensive, or cosmetic surgical procedure; or any surgical procedure at all.

THE CLAIMANT'S SUBMISSION

PAIN AND SUFFERING

- [39] Learned Counsel for the claimant, Mrs. Patricia Marks-Minors, submitted that, in arriving at an award for pain and suffering and loss of amenities, the direction of Lord Hope of Craigwell in **Wells v Wells**⁵ should be considered:

"The amount of the award to be made for pain and 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.

⁴ [1965] 7WIR 491

⁵ [1998] All ER 481

LEGAL AUTHORITIES

- [40] Learned Counsel Mr. Jonathan Lewis submitted that the case of **Dawn Noel v Don John**⁶ should be considered by the Court. In that case, the injuries sustained by the claimant from a vehicle accident were detailed to be:
- (1) facial laceration approximately 15cm long in right zygomatic region;
 - (2) laceration to the right lower lip approximately 10 cm long;
 - (3) intraoral laceration of approximately 20cm in the right cheek; and
 - (4) comminuted fracture of the right maxilla-malar complex.
- [41] The claimant was awarded \$160,000.00 in 2012 as adequate compensation for her injuries, however, Counsel hastened to add that the case at bar cannot be compared to that case.
- [42] **Mercedes Delplesche v Samuel Emmanuel DeRoche**⁷ relied on by both parties.
- [43] **Sidney Binda v Juan Calister and Marin John**⁸ relied on by both parties.
- [44] The defendant contends that the case of Megan Julien-Bishop v John Buckmire provides a relatively close comparison to the facts of the claimant.

ANALYSIS AND AWARD

- [45] The principles for assessment of general damages for personal injuries are well established. The Court must award a fair and reasonable sum having regard to the head of damages outlined in the **Cornillac** Case.
- [46] **Pain and suffering:** The claimant claims damages for pain and suffering caused by the injuries and the medical treatment rendered necessary by the said injuries.
- [47] The Court is able to infer pain and suffering from paragraphs 3, 4, 5 and 10 from the witness statement of the claimant dated 9th August, 2019, and paragraphs 5, 6 and 8 from the supplemental witness statement dated 13th September, 2019.
- [48] **Loss of amenity:** The injuries caused by the accident have adversely affected the claimant's enjoyment of life in the circumstances.
- [49] The claimant deposes that she was 32 years of age at the time of the incident and that she was a normal, healthy and active individual. She states that she is unable to function as she did prior to the incident or to take part in social activities with her family and friends. She has difficulty sleeping at nights.

⁶ GDAHCV2011/0568

⁷ SVGHCV2012/0041

⁸ GDAHCV2014/0097

- [50] Further, the claimant is employed as a Security Guard. However, she contends that she is currently handicapped on the job market due to her injuries.
- [51] **Nature and extent of injuries:** The claimant submits, that having regard to the nature of the injury outlined in her witness statement, she spent one (1) month in the hospital and that she wore a neck brace for five (5) months. There was a hole in her skull which she had to clean and dress.
- [52] The medical reports show that she sustained fracture of the small bone in the right temporal area. She also had right facial nerve injury causing lower neurons lesion due to depressed fracture of the skull which is not likely to improve. She now suffers from lower facial weakness which may persist for the rest of her life.
- [53] The criteria that a Master should apply in the exercise of his discretion on the question of general damages for personal injuries is well set out in the Civil Appeal from this jurisdiction in the case of **CCA Limited v Julius Jeffery**⁹: which reads as follows: “..it is, in my view, a function of the law, as far as possible, to be predictable, given the infinite variety of the affairs of human kind. In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the claimant’s injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge’s discretion”.
- [54] In arriving at an award for pain and suffering, the Court looked at the following factors:
- (1) the claimant was unconscious for a period.
 - (2) the seriousness of the injuries received and the duration of the period for which she was hospitalized.
 - (3) the conclusion of Dr. Siddiqui “facial weakness may persist for the rest of her life”.
- [55] Learned Counsel, Mr. Lewis, submitted that the case of Megan Julien-Bishop v John Buckmire provides a close comparison with the fact of the case at bar.
- [56] In **Megan Julien-Bishop v John Buckmire**¹⁰, the claimant received several injuries to her forehead when it struck the windshield for the motor vehicle in which she was travelling. She lost consciousness and was hospitalised for three weeks. She suffered numerous injuries including post concussion syndrome, ligamentous injury to the spine, loss of sensation to the left side of the forehead, generalized scarring to the left forehead, depression in the skull and abnormal corrugation of scar tissue between the eyebrows when she attempts to wrinkle. The claimant, who was left with a permanent depression in the supra orbital region and suffered extensive scarring, was awarded \$35,000.00 for pain and suffering and loss of amenities and \$10,000.00 for the continued facial scarring and sensitivity to this in 2006.

⁹ Civil Appeal No 10 of 2003 of St. Vincent and the Grenadines

¹⁰ GDAHCV2004/0289

- [57] The case at bar is distinguished from the Buckmire Case (Supra) on the following grounds:
1. there was no challenge to the submission of the claimant that the claimant spent one (1) month in the hospital;
 2. she was on sick leave for about nine (9) months;
 3. the claimant suffers memory loss; and
 4. facial paralysis is more likely to be permanent than not as articulated by the doctor.
- [58] Having addressed my mind to the legal principles, the authorities submitted by Counsel, the particular facts and distinguishing features of the case at bar. I am of the view that \$90,000.00 is a fair and reasonable sum for pain and suffering and loss of amenities and I so make this award.

FUTURE LOSS OF EARNING/HANDICAP ON THE LABOR MARKET

- [59] Counsel for the claimant submits that the Court should award the sum of \$50,000.00 for future loss of earnings/handicap on the labor market.
- [60] The claimant works as a Security Guard, and has already been placed on reduced hours and reduced pay as a result of her injuries.
- [61] The claimant is entitled to recover damages for handicap on the open market when she can show that, as a result of her injury, there is a real risk that she will be out of work and will find it hard to obtain similar employment. This is a claim made on the basis of what is referred to as Smith v Manchester principle.
- [62] In **Smith v Manchester Corporation**¹¹ the plaintiff developed a frozen shoulder as a result of an accident caused by her employer's negligence. At the date of trial, the plaintiff was undertaking work for the same employer and at the same rate of pay as before (£16.50 per week), so that she had no current loss of earnings. Her employer undertook to continue employing her as long as it could properly do so. The Court of Appeal increased the plaintiff's award of damages so to include £1,000 for future loss of earning capacity. The Court explained that this sum was to compensate the plaintiff for the fact that, if she became unemployed, she would find it more difficult than uninjured persons to obtain employment. Both Edmund Davies LJ and Scarman LJ explained that they could not calculate this award using a multiplier and multiplicand. Instead, they were looking at the matter in the round and making a general assessment. Stamp LJ agreed.
- [63] In **Moeliker v A. Reyrolle & Co Ltd**¹², Browne LJ said that a plaintiff's loss of earning capacity arises where "as a result of his injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury". Browne LJ stated further that the court will have to make the usual discounts for the immediate receipt of a lump sum and for the general chances of life.
- [64] I find that the claimant is at a substantial risk of becoming unemployed and that it is only in such circumstances that such an award is to be made.

¹¹ (1974) 17 KIR 1

¹² (1977) 1 WLR 132

[65] Moreover, given that I will not make an award for future medical care, I make an award of \$25,000.00.

FUTURE MEDICAL CARE

[66] The Court agrees with the submission of Learned Counsel, Mr. Jonathan Lewis who submitted that there was no evidence to indicate that the claimant would require future care.

[67] Having awarded the sum of \$25,000.00 for handicap in the labor market. I make no award for future medical care.

ORDER

In summary, the claimant is awarded damages as follows:

1. Special Damages:

a) Medical Expenses	\$ 634.00
b) Loss of Earnings	\$4,000.00
c) Home Care/Nursing Care	\$3,150.00
Total Special Damages	\$7,784.00

2. General Damages:

a) Pain and Suffering and Loss of Amenities	\$ 90,000.00
b) Future Loss of Earnings	\$ 25,000.00
Total General Damages	\$115,000.00

3. The claimant is awarded interest of 3% per annum on Special Damages from date of the accident to the date of judgment on liability.

4. The claimant is awarded interest of 6% per annum on damages for pain and suffering and loss of amenities from date of service of claim to the date of judgment on liability.

5. The claimant is awarded prescribed cost pursuant to Part 65.5 of the C.P.R. 2000.

**Rickie Burnett
MASTER (Ag.)**

By the Court

Registrar