

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

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

Claim Number: SVGHCV2019/0034

BETWEEN:

Emmanuel Matthews

CLAIMANT

AND

Milton Davy

DEFENDANT

Appearances:

Mr. Ronald Marks for the Claimant

Ms. Shirlan Barnwell for the Defendant

**2019: September 15
2020: March 27**

JUDGMENT

- [1] Burnett, M (Ag.): On the 10th February, 2016 the claimant was injured, while walking in the vicinity of Indian Bay. He was hit by a jeep driven by the defendant.
- [2] The claimant filed a Claim with a Statement of Claim against the defendant and obtained a Judgment in Default of Defence with damages to be assessed. The matter now comes for the Assessment of Damages.

SPECIAL DAMAGES

- [3] The claimant Special Damages comprises the following:
- | | |
|---|----------|
| 1) X-Ray fees 24th February, 2017 | \$ 20.00 |
| 2) Medical Consultation 23rd March, 2017 | \$100.00 |
| 3) Medical Report & Injections 24th April, 2017 | \$175.00 |

4) Physiotherapy 19th April, 2018	\$ 30.00
5) Consultation & Injections 17th April, 2018	\$120.00
6) Medical Report 25th April, 2018	\$ 75.00
7) Cost of Police Report 2nd July, 2019	\$100.00
8) Medical Report 2nd July, 2019	\$ 60.00
9) Registration Details of Vehicle	\$100.00
10) Medication	\$ 34.45
TOTAL	\$814.45

- [4] The claimant also claims the sum of \$4,200.00 for nursing care and domestic assistance.
- [5] The claimant claims that prior to the accident he was a self-sufficient man who carried out his own cooking, cleaning and washing as well as assisting his mother with her own care and duties around the house. Due to the accident, he was unable to do so for several months, resulting in a home assistant being hired.
- [6] The claimant avers that one Sunique was hired to assist with cooking, cleaning, washing and aid with his mother's exercise which was previously carried out by the claimant who lives with his mother.
- [7] Sunique was paid \$150.00 per week for a period of six (6) to seven (7) months.
- [8] The defendant disputes the nursing care and domestic assistance and this item listed under Special Damages.
- [9] The claimant did not provide any evidence to prove the nursing care and domestic help; neither at the time of filing claim or at the stage of assessment of damages.
- [10] It is not enough for the claimant to say that he sustained loss. In claiming damages, he must prove his case and to justify an award of damages, the court must be satisfied as to the fact of damages and also the amount¹.
- [11] The defendant contended that it is trite law that Special Damages must be specifically pleaded and that supporting documents must be attached.
- [12] Though that legal proposition is a true state of the law, the Privy Council in Greer v Alstons Engineering Sales and Services Limited,² states that "where a claimant has pleaded the amounts claimed as Special Damages, but does not provide tangible evidence to prove the amount it is always open to a Court to give consideration to an award of nominal damages since the problem is one of proof but not the absence of loss" of the medical evidence, to make an award to the claimant.

¹ British Transport Commission v Gourley [1956] AC 185.

² [2003] UKPC (19 June 2003)

- [13] In *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 at 178, Lord Goddard CJ, who found it possible to arrive at a conclusion, despite the extremely unsatisfactory evidence as to damages, said:
“Plaintiffs must understand that, if they bring action for damages, it is for them to prove their damages, it is not enough to write down particulars and so to speak, throw them at the head of the Court saying:
“This is what I have lost, I ask you to give me these damages.” They have to prove it.”
- [14] However, the Court went on to find that the probability existed that some loss resulted and went on to make its own assessment on the primary facts alone. In that case, the claimant’s claim was reduced.
- [15] In the case at bar, the claimant contends that due to the injury, he had to rely on assistance to carry on normal every day chores and hired help to assist with duties related to his mother who he lived with.
- [16] Notwithstanding the inadequacy of the evidence under this head; the Court is minded, based on an evaluation of the medical evidence, to make an award to the claimant.
- [17] I propose to use the principle of the best estimate rule in *Ashcroft v Curtin*³ and “pluck a figure from the air” as Lord Justice Edmund Davies ventured in that case.
- [18] Accordingly, I assess Special Damages to be \$520.00 and Nursing Care/Domestic Assistance \$2,100.00.
- [19] Total Special Damages \$2,620.00.

GENERAL DAMAGES

- [20] Both parties, in their submissions, referred the Court to the well known principles enunciated in the case of *Cornilliac v St. Louis*,⁴ as to the considerations to be borne in mind in assessing the General Damages to be awarded in the matter. These include:
- 1) The nature and extent of the injuries suffered
 - 2) The nature and gravity of the resulting disability
 - 3) Pain and suffering endured
 - 4) Loss of amenities
 - 5) Extent to which the claimant’s pecuniary prospects have been affected.
- [21] The Court also bears in mind the legal principles outlined in *Heeralall v Hack Bros*⁵ that an award of compensation must be fair to Mr. Matthew Emmanuel for what he endured through the negligence of the defendant and considers it fair for the defendant to pay for that

³ [1971] 1WLR.173

⁴ [1965] WIR 491

⁵ [1977] 15 WIR 117

negligence. Such damages cannot be perfect compensation, but fair compensation for his injuries and the social and domestic consequences to him.

PAIN AND SUFFERING AND LOSS OF AMENITIES

- [22] The claimant was approximately 50 years at the time of the accident and about 52 years at the date of the assessment of damages. He was rendered unconscious and sustained injuries to his right arm and sought medical attention at the Milton Cato Memorial Hospital. He was treated on the said day with a half cast and discharged.
- [23] The medical report of Dr. Perry DeFreitas dated 29th March, 2017 and 24th April, 2018 respectively diagnosed the claimant with:
- Limited range of movement of the wrist
 - Tenderness and swelling to the medial side of the wrist in the area of ulna styloid
 - Tenderness to the wrist
 - Ganglion Cyst
- [24] He was given anti-inflammatory medication. The wrist and forearm were x-rayed, which showed good alignment and good healing of the fractured bones.
- [25] On the re-examination on the 17th April, 2018, evidence in the medical report showed that the claimant complained of pain to his right wrist and forearm and of discomfort to the area of his healed fracture at the side of the radial bone when it rained.
- [26] The examination revealed that the claimant:
- Did not have full range of movement
 - Right muscles were weaker than the left
 - Medial deviation wrist was small
- [27] The claimant was advised to seek physiotherapy, and carried out three (3) prescribed sessions as shown in the evidence by receipt dated 19th April, 2018.
- [28] Strengthening exercises, the use of a wrist brace when performing strenuous work and to ensure wrist is supported during activities were also recommended. An injection of Triamcinolone and Lignocaine were also administered to aid with pain and inflammation reduction.
- [29] The medical report of 1st July, 2019, showed that the claimant has developed osteoarthritis, of his joints and spinal column, continued to experience pain to the joints and back.

AUTHORITIES SUBMITTED BY THE PARTIES

- [30] Counsel for the Claimant has referred to the following cases:

- **Augustine Biscette v Club Mediterranee⁶** – In that case, the claimant was employed as a carpenter and worked with the defendant. He suffered an accident at work which resulted in injury to his right hand resulting in the amputation of 3 fingers on the said hand. He was unable to continue his carpentry as he was unable to grip tools. He was awarded \$93,000.00, \$45,000.00 for pain and suffering and loss of amenity and \$48,000.00 for loss of earning capacity.
- **Mercedes Delplesche v Samuel Emmanuel DeRoche⁷** - In that case, the claimant was struck down by a vehicle, hospitalized and discharged after 4 days, following which she attended the outpatient clinic for physiotherapy sessions. The injuries were described as trauma to head and knee, abrasion to face, laceration to the forehead, nose and lower lip with bleeding from the nostril. On further medical examination, the claimant was found to have complained of pain in the right side of neck, lower back and knee. Further examination revealed degenerative disease of the lumbar spine. The claimant continued with severe pains which made it difficult to walk and stand for long periods. The court awarded the sum of \$65,000.00 for pain and suffering and loss of amenities.

[31] The defendant referred the Court to the following cases:

- Pages 216-217 of the Eastern Caribbean Supreme Court Personal Injury Digest refers to **Guy v Watson⁸** case – in that case, the claimant's most significant injury was fracture to left wrist. The Claimant also suffered additional injuries to the left leg, shoulder, face and head. The Court awarded to the claimant \$65,000.00 for loss of amenities and \$120,000.00 for pain and suffering. Counsel however, proffers that in that case, the claimant suffered severe injuries.
- **Anderson v Penngor Ltd⁹** the claimant suffered:
 1. Fractured scaphoid to the right wrist.
 2. No hospitalization, but out-patient for approximately 4 months.
 3. Sick leave for about 4 months and unemployed for 1 year.
 4. Wearing of cast.
 5. Pain on movement of right thumb and wrist.
 6. Additional injury pain to hip.
 7. Change of work as a result of injury, from carpenter to housekeeping which paid less than his long standing work as a carpenter.
 8. No permanent disability was found by the court.
 9. Inability to prepare meals.

The Court awarded \$15,000.00 for pain and suffering and loss of amenities.

⁶ SLUHCv2000/0645

⁷ SVGHCv2012/0041

⁸ SVGHCv2011/0410 decided in 2015

⁹ BVIHCv2011/0002

- Longville v Windajammer¹⁰ - In that case, the claimant suffered muscle injury to arm affecting the use of left wrist and sustained in 2014. The case was decided in 2017 and the Court awarded \$40,000.00 for pain and suffering and loss of amenities.
- H West & Son Ltd v Shepherd¹¹ - In that case, the House of Lords held that General Damages for personal injuries and to compensate for result that have actually been caused..... An injured person who is rendered continuously unconscious is spared the subjective element and thus cannot receive compensation for it.

ANALYSIS AND FINDINGS

- [32] A good starting point in determining, the quantum of damages, to be awarded is to put the claimant's case in its proper context.
- [33] I propose to look at the Medical Report of Dr. Perry De Freitas dated 29 March, 2017. The Doctor stated that the claimant's right arm was broken in 2016. When he examined the claimant on 7th February, 2017, the claimant did not have full range of movement of the wrist especially on medial flexion of the hand.
- [34] A further report was dated 24th April, 2018, and a final one of 1st July, 2019, which concluded that the claimant returned to be reviewed for pain to lower back, shoulder, pain to knee and wrist. The doctor concluded that the claimant had developed osteo-arthritis of his joint and spinal column. Therefore, he can expect to experience pain to the joints and back from time to time depending on his activities.
- [35] Further, Mr. Randolph Findlay, who was present at the time of the incident stated in his witness statement that he carefully took him from under the vehicle; he was placed flat on the ground until the ambulance came. Prior to the arrival of the ambulance, the claimant right hand seemed to be broken and he looked as though he was in a lot of pain.
- [36] The court also takes cognizance of the following additional case, sourced through its own research, Browne V Israel et al¹². The ancillary claimant, an ambulance driver sustained injuries when the ambulance which he was driving was involved in a collision with the defendant's vehicle. The ancillary claimant's legs were both pinned under the dashboard resulting in injuries to both knees. He suffered damage to the tendons of both knees and developed osteoarthritis which caused him constant pain and restriction in movement. It was determined that he would have lifelong problems with both knees which would worsen with age, despite palliative treatment, medication and physiotherapy. He was awarded the sum of \$50,000.00 for pain and suffering and \$20,000.00 for loss and amenities.
- [37] The court notes the similarities and the dissimilarities in relation to the injuries sustained in the cases referred to and the case at bar.

¹⁰ SLUHCV2016/0404

¹¹ [1964] AC 326

¹² SVGHCV2008/0080

- [38] Ms, Shirilan Barnwell, counsel for the defendant posited the Learning of Lord Morris in the *H West & Son Ltd. v Shephard* (1964) AC 326. Here, he posited “An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened and moved the court to consider the consciousness or lack thereof as a factor in assessing pain and suffering.
- [39] The court determines that the claimant must have suffered significant pain before he lost consciousness. Pain and suffering include both past and future pain and suffering arising from the injuries and from any significant operations or treatment. Randolph Findlay evidenced that the claimant appeared to be in pain.
- [40] All of the authorities submitted were considered and aided the court in categorizing the nature of the injuries and provided a guide on damages to be awarded. In *Wells v Wells*¹³ Lord Craighead observed this: “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 best estimate of the plaintiff’s general damages”.
- [41] Having considered the authorities submitted and having considered the facts relied on by the claimant, the medical evidence and applying my discretion to same, I award the claimant the sum of \$70,000.00 for his pain and suffering and loss of amenities.

LOSS OF EARNINGS AND LOSS OF EARNING CAPACITY

- [42] Ms. Shirilan Barnwell, counsel for the defendant contended that the claimant had not provided adequate details to assist the court with a proper computation to make an award.
- [43] The explanation on the basis for an award for loss of earning capacity was outlined by Brown L.J in the case of *Moeliker v Reyrolle and Co Ltd*¹⁴ “In deciding this question, all sorts of factors will have to be taken into account, varying almost infinitely with the facts of the particular cases. For example, the nature and prospects of the employer’s business, the plaintiffs’ age and qualifications, his length of service, his remaining length of working life, the nature of his disabilities and any undertaking or statement of intention by his employers as to this future employment.”
- [44] “There is no fixed approach to the computation of damages for loss of earning capacity. The court may use the multiplier/multiplicand method or it may award a fixed and relatively moderate sum; or the loss may be subsumed in the General Damages awarded.” *Joyce v Yeomans*¹⁵

¹³ (1998) 3 All ER 481

¹⁴ [1977] 1 WLR 132

¹⁵ [1981] 2 ALL ER21. *Kiskimo Ltd v Salmon* (1991) Court of Appeal No 13 of 1994 (unreported)

- [45] In his submission, Mr. Ronald Marks, counsel for the claimant, urged the court to consider the case of Cleos Billingsy v Kevon Jessie Don Anderson et al¹⁶ and Randy James v Leroy Lewis et al¹⁷.
- [46] The evidence proffered by the claimant to substantiate his claim was that:
- 1) Claimant was self-employed tradesman who worked in the Construction Industry between 2014 and August 2018. He was contracted on a job by job basis with Dr. Hadeed at a rate of \$90.00 per job.
 - 2) In 2013 to 2016, he was employed with Child Construction & Contractors Ltd earning various sums.
 - 3) Due to injury, he was unable to carry out his duties from February, 2016 to August, 2016. He was only able to earn \$50.00
 - 4) He was laid off in November, 2018.
- [47] The conventional approach in an assessment of future loss of earning capacity is the use of the multiplicand/multiplier method, taking the amount which the claimant has been prevented by injury from earning in the future multiplicand/and multiplying it by the number of years during which he was expected to earn it.
- [48] In order to calculate on the multiplier/multiplicand method, the claimant had to provide reliable evidence as to his pre-accident earning capacity.
- [49] The claimant failed to provide the court with adequate evidence to properly calculate his earnings, to enable computation of the multiplicand.
- [50] However, in the witness statement provided by the claimant, there is evidence that he worked as a mason, tile layer and plumber from 2013 to 2016, with Child Construction & Contractors Limited for sums ranging from \$80.00 to \$110.00 per day, and that he was dismissed with effect from 16th November, 2018 as a result of:
- (1) His inability to provide his employer with the required hours to complete a day's work.
 - (2) His periodical absence from work.
- [51] There was no evidence as to the frequency of the various tasks undertaken by the claimant and how often he worked in the various occupations (plumber, mason, tile layer).
- [52] In an assessment of damages, it is for the claimant to satisfy the court on loss of future earnings with clear evidence, corroborated by evidence of pre-trial earnings and evidence of pay slips to demonstrate earnings before the accident.
- [53] From the evidence, I conclude that the claimant may be able to work but with restrictions.
- [54] The claimant stated that, subsequent to the injury he got occasional jobs from Dr. Hadeed, however, the frequency and rate were not specified.

¹⁶ SVGHCV2013/0096

¹⁷ ANUHCV2007/0403

- [55] I am of the view that the multiplier/multiplicand basis may be inappropriate in the case at bar.
- [56] The court will rely on the case of *Blamire v South Cumbria Health Authority*¹⁸ which held that the court can disregard the conventional approach and arrive at a lump sum figure for future loss of earnings where there are evidential uncertainties which prevent the court from using the multiplier/multiplicand method.
- [57] In the premises, having determined that the claimant would not possess the same earning capacity due to the injury and the continuous pain I accept that the following exist. Evidential uncertainties which do not allow the court the usage of the conventional approach of the multiplier/multiplicand method of calculating loss of earning capacity and assessing the cases submitted for the Court's consideration.
- [58] The court applies the *Blamire's* principles to the case at bar and award the claimant a nominal sum of \$15,000.00 for loss of future earnings.

FUTURE MEDICAL EXPENSE

- [59] These are likely to be the same items or the same sort of items as were included in the Claim for Special Damages where the expenditure has not yet been incurred or will continue into the future for a number of years or indefinitely. The court awards the sum of \$2,500.00 for future medical care.

ORDER

In summary, it is ordered that the defendant shall pay the claimant the following awards:

1. An award for general damages in the sum of \$70,000.00 for pain and suffering and loss of amenities. Interest at the rate of 6% per annum from date of filing of claim form to date of assessment.
2. An award of \$2,620.00 for special damages. Interest at the rate of 3% per annum from date of accident to date of assessment.
3. An award of \$15,000.00 for loss of earning capacity.
4. An award of \$2,500.00 for future medical care.
5. Prescribed costs to be paid by the defendant to claimant pursuant to C.P.R Part 65.5.

¹⁸ 1993 P.I.Q.R. Q1 CA

**Rickie Burnett
MASTER (Ag.)**

By the Court

Registrar