

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

Antigua and Barbuda

Claim No: ANUHCv2017/0196

BETWEEN:

JEAN ANN FIELDS-JOHNSON

Claimant

and

CARLTON KENTISH

CANGEN YE

Defendants

Before:

Master Jan Drysdale

Appearances:

Judith Dublin of counsel for the claimant

Lawrence Daniels of counsel for the defendant

2019: February 13th

March 19th

ASSESSMENT OF DAMAGES

- [1] **Drysdale, M.:** The matter for consideration is an assessment of damages for personal injuries sustained by the claimant which the parties agreed would be decided on paper.

Background

- [2] On 5th December 2014 the claimant a 42 year old female whilst standing on the side walk on Whenner Road was injured when a motor van driven

by the by the first defendant and owned by the second defendant struck her.

- [3] The claimant commenced an action against the defendants on 17th April 2017 for damages for personal injuries sustained as a consequence of the accident. Neither of the defendants filed a defence and on 17th October 2017 the claimant obtained judgment against the defendants with damages to be assessed.
- [4] The defendants have not filed any witness statements and or submissions notwithstanding an extension of time being granted to the defendants to file the same. The court therefore has before it only the witness statement and written submissions of the claimant filed on 1st and 7th June 2018 respectively. Notwithstanding the court will undertake an analysis to determine the appropriate measure of damages that the claimant is entitled to.

Damages

- [5] The object of an award is to compensate the injured party and not to punish the wrongdoer. Bearing this in mind the court is guided by Brett J who in the case of **Rowley v London and North Western Railway Co.**¹ cautioned that one “must not attempt to give damages to the full amount of a perfect compensation for pecuniary injuries but must take a reasonable view of the case and give what they considered in all the circumstances a fair compensation.” It is against this backdrop that damages which are categorised as special and general will be assessed.

Special Damages

- [6] Special damages are monetary losses which a party has sustained as a result of the incident. In order to be recoverable special damages must be pleaded and proved.
- [7] The claimant has claimed special damages in the sum of \$22,505.36 for amongst other things expenses relating to medical attention, transportation and house-keeping. The expenses are listed hereunder:

¹ (1861-73) All E.R. 823

Police Report	\$ 50.00
Physiotherapy Treatment	\$ 1,600.00
Medical Reports	\$ 1,130.00
Neurodiagnostics Inc. /Dr Marquez	\$11,468.19
Personal Assistant/House Keeping	\$ 1,883.34
Accommodation	\$ 3,766.68
Transportation	\$ 807.15
Air Fare	\$ 1,800.00

- [8] The claimant has submitted that the sum of \$1,130.00 was paid towards medical reports. However the claimant has only submitted a receipt for \$580 with respect to the same. No explanation is offered for the discrepancy in relation to the sum claimed and the amount proved. I therefore only allow the sum of \$580.00 with respect to medical reports.
- [9] The claimant has also failed to provide evidence relating to the air fare in the sum claimed. However the claimant's evidence and the medical report produced by the consultant Neurosurgeon in Barbados and the MRI Report which evidences that the same was undergone in Barbados on 17th February 2015 clearly establishes that the claimant indeed travelled to Barbados for medical attention.
- [10] The general rule that special damages must be verified by documentary evidence is not an inflexible one. Bowen L.J in the case of **Ratcliffe v Evans**² advocated that there may be circumstances which may warrant the relaxation of this rule. He declared:

‘As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax the old and intelligible

² (1892) 2 Q.B. 524

principles. To insist upon more would be the vainest pedantry.'

[11] Based on the above, the court accepts that claimant incurred travel expenses for airfare in the sum of \$1,800.00. However the failure to provide certain documentary evidence articulated above has the resultant effect of the claimant's claim for special damages being reduced to the sum of \$21,955.36.

General Damages

[12] General damages are damages which the law 'will presume to be a direct natural or probable consequence of the action complained of.'³

[13] In assessing the appropriate measure of general damages the undermentioned factors as enunciated in the case of **Cornilliac v St. Louis**⁴ will be taken into account. These factors are as follows:

- a. nature and extent of the injuries suffered;
- b. the nature and gravity of the resulting physical disability;
- c. the pain and suffering which had to be endured;
- d. the loss of amenities suffered; and
- e. the extent to which, consequentially, the plaintiff's pecuniary prospects have been affected.

The Nature and Extent of the Injuries Suffered

[14] The claimant presented several medical reports detailing her injuries and the progress made during the assessed period. The first two medical reports were produced by Dr. Dirk Yearwood, Senior Orthopaedic House Officer at Mount St John's Medical Clinic. The third report dated 17th February 2015 was produced by the neurologist Dr. Marquez. The final report dated

³ *Stroms Bruks Aktie Bolag v Hutchinson* [1905] A.C. 515

⁴ 1965 7 W.I.R 491

17th October 2016 was produced by Dr. Singh. The claimant also produced an MRI report dated 17th February 2015.

- [15] The claimant upon examination was assessed as having suffered a bruise on the left flank and left hip contusion, pain and tenderness in the entire thoraco lumbar spine and complete loss of power in the left lower extremity.
- [16] The claimant remained at the hospital for a period of 19 days wherein she was treated with analgesics, anticoagulants and physical therapy. She was discharged to go home ambulating with the help of a walking aid.
- [17] A subsequent neurological examination performed on 17th February 2015 stated that there was no evidence of any inflammation of the lumbar and sacral vertebrae region or any disease involving the lumbar spinal nerve root. The report also states that there was no evidence of femoral neuropathy that is damage to the femoral nerve which nerve provides feeling in the lower leg and helps control the straightening of the leg. The report also stated that there was no evidence of nerve and or muscular damage. In all it was found to be a normal study.
- [18] The claimant also underwent an MRI which found a small left paracentral disc protrusion at T12/L1. This report concludes that this did not significantly narrow the central canal or intervertebral foramina.
- [19] On 17th October 2016 the claimant was examined by Dr. K.K. Singh, Consultant Orthopaedic Surgeon. The claimant was assessed as walking without the walking aid but having a limping gate with spasticity and weakness in her left lower extremity.

Nature and Extent of Physical Disability

- [20] Dr. Singh in his report dated 17th October 2016 concludes that the claimant though recovering slowly remains disabled in the full functions from the date of the accident to present. Further evaluation was recommended to determine the total duration of her temporary disability and to calculate the permanent physical impairment if the same is determined at the end of treatment. A follow up report was not produced by the claimant.

Pain and Suffering and Loss of Amenities

- [21] The claimant suffered pain and suffering and this was in fact detailed on the various medical reports. The claimant could not breathe on her own and was administered oxygen and pain killers and injections. The evidence of the claimant is that the pain was so intense that she could not be off oxygen for any long period of time and as such the attempt to have her transported to another clinic to have an MRI undertaken had to be aborted as a result.
- [22] The claimant submits that upon discharge from the hospital that she was unable to care for herself. A nurse was hired to care for her and assisted her in bathing, using a bed pan, changing of soiled bed linen, other personal needs and the preparation of meals. The claimant felt helpless and humiliated by having someone to assist her in her most basic and intimate functions which previously she performed without assistance.
- [23] Upon the recommendation of the consultant neurologist for a period of 12 days the claimant underwent shock therapy. The claimant also underwent further surgical intervention regarding the mass which was found to be close to her lower spine.
- [24] The claimant asserts that she still experiences pain and discomfort. She states that she is unable to walk properly and drags her foot and walks with a limp. She claims that she is unable to sit for prolonged periods of time and also is unable to immediately get up from a seated position.
- [25] The claimant's evidence is that the accident has resulted in a dramatic change in the level of pain she experiences during her menstrual cycle. Her evidence is that the pain is so severe that it causes discomfort in sleeping, eating and sometimes results in a blackout.
- [26] Prior to the accident the claimant was involved in tennis and participated in social activities and outings. Due to her injuries she is no longer able to do so. The claimant was unable to enjoy sexual intimacy with her partner due to the pain experienced which resulted in a termination of the relationship.

[27] The claimant relied on **Guidelines for the Assessment of General Damages in Personal Injury Cases**⁵ and the case of **Mayers v Deep Bay Development Company Ltd**⁶ and submitted that general damages should be the sum of \$170,000.00. Whilst the court will consider the relevance of the case relied on the court will guard against the usage of the Guidelines which were prepared for the United Kingdom which country clearly differs significantly in terms of cost of living and development and which bears little similarity to the economic realities of this region.

[28] As it relates to the case of **Mayers v Deep Bay Development Company Ltd** the court observes that the injury sustained by that claimant was a fracture of the vertebra which gave rise to the condition of post traumatic fibromyofacial syndrome and Reflex Dystrophy Syndrome (RSD). RSD is an incurable condition and is characterised by inter alia chronic severe pain, swelling and may also affect the proper functioning of the lower extremity of the body. In that case the claimant's total body impairment was assessed at 60% of the whole person. The injuries sustained by this claimant are far less severe than the above authority relied on. The court notes that the claimant did not obtain a follow up report to determine the duration of the temporary disability and or whether there was any resultant permanent disability.

[29] The court therefore takes cognisance of the case of **Piggot v Potter**⁷ wherein the claimant suffered a comminuted fracture of the right femur, entire right lower limb in external rotation, 1/2" 1.25 cm shortening of right lower extremity, 15 degrees of mal-union at the fracture site of the injured femur, 45% permanent physical impairment of the right lower extremity and an 18% permanent physical impairment as a whole person. As a result of the injuries the claimant was required to wear a special shoe with a heel raise of 1cm to 1.5 cm for the rest of his life and it was determined that he would develop post traumatic degenerative joint disease as he aged, which would increase the percentage of permanent physical impairment in

⁵ 14th edition, compiled for the Judicial College by The Hon Mr Justice Langstaff et al

⁶ Suit No 241 of 1993

⁷ CLAIM NO: ANUHCv 2010/0423

future. The claimant walked with crutches for a few months after the accident and thereafter switched to the use of a cane. At the date of trial the claimant walked with a visible limp. Further of note is the fact that the claimant was hospitalized for 19 days and that he received physiotherapy thereafter but complained of the inability to sleep on his right side and the inability to gyrate his hips because of the limited rotation in his hips.

[30] The court acknowledges that this authority whilst bearing some similarity to some of the injuries sustained by the claimant in fact details more serious injuries than that suffered by the claimant. This will be taken into account in determining damages.

[31] After due consideration of the injuries sustained by the claimant coupled with the various medical reports and the pain and suffering and loss of amenities experienced general damages in the sum of \$35,000.00 is awarded.

Future Medical Care

[32] The claimant claims the sum of \$106,000.00 for future medical care for a period of five years. The claimant relies on the report of Dr. Singh dated 17th October 2016 which simply recommends continued physiotherapy treatment 3 times a week at a cost of \$100.00 - \$120.00 per session and Orthopaedic Consultation and neurological monitoring at a cost of \$200.00 - \$250.00 per session. The court notes that the report does not give any timeframe for the continuation of the treatment pending reassessment. There is therefore no medical basis for the contention that such treatment would continue for a period of five years.

[33] Furthermore the court is reminded that the claimant failed to obtain a subsequent report which was recommended by Dr. Singh regarding the determination of whether there was any permanent disability and or whether further treatment was warranted. The medical report relied on by the claimant simply asserts that the claimant was temporarily disabled. It does not state that the claimant has suffered any permanent impairment. Consequently the court will not speculate that the claimant will continue to

need further medical treatment. No award is therefore made under this head of damages.

Loss of income and future income

[34] Prior to the accident the claimant asserts that she owned and operated a restaurant named True Flavour Restaurant. The claimant claims to have employed two persons in the restaurant and further to have earned a net daily income of \$1,000.00. The claimant has submitted no documentary proof of her earnings.

[35] The claimant claims further that she was unable to continue operating the restaurant and thereafter closed the same. No indication is given as to when the restaurant was closed. The claimant claims to have now become dependent upon the friends and family who send her money to assist in the payment of her rent and other living expenses.

[36] With respect to the claimant's claim for loss of income and future income the court is concerned with the bald assertions of the claimant without any documentary proof. The claimant has not provided any tax returns, national insurance contributions, bank records, accounting or other financial records or any evidence that she was in fact earning the daily sum of \$1,000.00 as claimed. Lord Goddard CJ in the case of **Bonham-Carter v Hyde Park Hotel**⁸ in examining evidence presented for damage reminded the claimant of the duty to prove damage. He stated that:

‘On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; 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.’

[37] In addition to failing to provide any documentary evidence, the medical evidence relied on by the claimant does not state that the claimant has suffered a permanent impairment. There is also no medical evidence that the injury sustained by the claimant was

⁸ (1948) 64 TLR 177

prohibitive for her continuing in the business or another form of employment.

- [38] Further the claimant is under a duty to mitigate her loss. The claimant claims that she was forced to close the restaurant after the accident. The claimant's own evidence is that she employed two persons in the restaurant. She has offered no explanation as to why it was not feasible to continue the operation of the business with the two employees on staff.
- [39] Having regard to the above I make no order for damages for loss of income and or future income.

Interest

- [40] As it relates to the issue of interest, the relevant guiding principles for determining the measure are found in the case of **down in Alphonso v Ramnath British Virgin Islands**⁹ and are as follows:
- a) Damages for pain and suffering and loss of amenities, the court should award interest from the date of the service of the claim to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of such evidence of that rate, the statutory rate of interest is to be used.
 - b) In relation to special damages, interest is to 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.

Legal Costs

- [41] The claimant is also entitled to legal costs in this matter. Pursuant to part 65 of the Civil Procedure Rules the Claimant is awarded 60% of the total prescribed costs.

Order

⁹ Civil Appeal No 1 of 1996

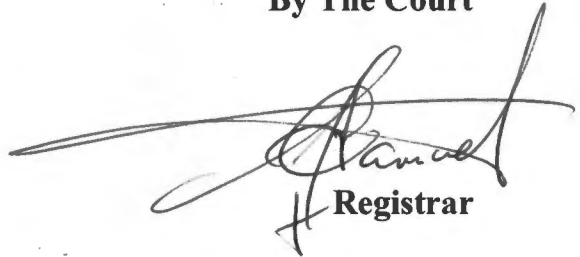
[42] Based on the foregoing the order of the court is as follows:

1. Special damages in the sum of \$21,955.36 with interest thereon at the rate of 2.5% per annum from the date of the accident to the date of judgment on assessment.
2. General damages for pain and suffering and loss of amenities in the sum of \$35,000.00 with interest thereon at the rate of 5% per annum from the date of the accident to the date of judgment on assessment.
3. Prescribed costs

Jan Drysdale

Master

By The Court



Registrar

