

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2017/0030

BETWEEN:

DAVE ANTHONY

Claimant

and

RAYMOND YHAP

CHAN YHAP

Defendants

Before:

Master Jan Drysdale

Appearances:

Lawrence Daniels and Pete Semaj Mc Knight of counsel for the claimant

John Fuller of counsel for the defendants

2019: April 2nd

April 16th

DECISION ON ASSESSMENT

- [1] **Drysdale, M.:** The instant matter concerns an assessment of damages for assault and battery, false imprisonment and personal injuries sustained by the Claimant as a consequence of actions by the Defendants.

Background

- [2] The Claimant, a 39 year old chef by profession was on 25th January 2014 at approximately 9.30 a.m. shopping at the supermarket owned and operated by the Defendants. Whilst there he was approached by the second Defendant who requested that he follow him.

- [3] The Claimant started to comply but upon observing that he was being led into a back room and further was surrounded by several employees refused to proceed any further. Thereupon he was grabbed by the second Defendant and other employees and forced into a storeroom.
- [4] The second Defendant left the Claimant in the storeroom which was guarded by other employees and thereafter returned with the first Defendant. The first Defendant accused the Claimant of shoplifting and demanded payment for the items allegedly stolen. The Claimant denied the accusations levelled at him and demanded to be released. Failing this the Claimant attempted to unsuccessfully force his way out of the storeroom.
- [5] Thereafter the Claimant was handcuffed by the first Defendant to a metal rail. The Claimant demanded his release but the Defendants failed to so do. In light of the refusal of the Defendants to release him the Claimant demanded that the Defendants call the police. They refused to comply with that request and instead the first Defendant pulled out a gun and shot the Claimant in the right leg, whilst the Claimant was still handcuffed to the rail. The Claimant remained handcuffed to the metal rail until approximately 11.30 when police arrived. The Claimant was arrested by the police but those charges were subsequently dismissed before the Magistrate Court.
- [6] As a consequence the Claimant filed proceedings on 25th January 2017 seeking damages for false imprisonment, assault and battery, special and general damages including aggravated damages arising out of the incident. Specifically the Claimant complains of not being able to stand for protracted periods and has stated that the injury has adversely affected his lifestyle and his ability to continue in the performance of his profession as a chef.
- [7] No acknowledgment of service was filed and accordingly judgment in default was entered against the Defendants on 26th February 2018. Thereafter directions for assessment of damages were issued. During the course of the assessment proceedings the Defendants filed an application to strike out the assessment of damages on the basis that the same was statute barred. That application was subsequently withdrawn by the Defendants who opted to challenge the assessment by way of submissions and cross examination of the Claimant.
- [8] Before the court are two witness statements filed by the Claimant as well as written submissions filed by each party. The Defendants also cross examined the Claimant on his two witness statements and this evidence is also before the Court for consideration.
- [9] The Claimant has claimed the sum of \$599,400.05 as compensation for the injuries suffered. The Defendants vehemently oppose the level of damages suggested by the Claimant and instead submit that the sum of \$35,560.45 is reasonable compensation for the torts committed and the injuries sustained.

Analysis and Law

Special damages

- [10] Special damages are a specie of compensatory damages which are precisely quantifiable. The Claimant has submitted that he is entitled to be compensated the sum of \$49,930.05 which he has particularized as follows:

Consultation Fees	\$ 500.00
Ortho Medical Associates	\$ 680.00
Medication	\$ 450.00
Child Support	\$14,450.00
Child Support	\$15,525.00
Mount Saint John Medical Centre Invoice	\$ 1,764.60
Wings Inc. Invoice Ticket to Barbados	\$ 1,380.45
Estimated Consultation Costs Dr. Marquez	BD\$ 2,550.00
Ortho Medical Associates	\$ 680.00
Legal Fees Invoice for representation in the Magistrates Court	\$12,250.00

- [11] In order for special damages to be recoverable the Claimant must not only particularise the same but must demonstrate that these expenses have been incurred. A receipt is accepted universally as a clear and unmistakable method of demonstrating payment and for that reason the courts have traditionally insisted on the production of the same. Support for this position is also found in the commonwealth in the case of **Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited**¹ wherein it was accepted that neither an invoice which does not bear the words paid thereon nor a proforma invoice which is a commitment to purchase were a receipt or proof of payment. It is therefore insufficient for the Claimant to simply provide unendorsed invoices as satisfactory proof entitling a party to special damages. The invoices submitted by the Claimant are therefore not subject to recovery.

- [12] An estimate of costs like an invoice is not a receipt evidencing payment but an approximate of costs assigned for a particular service. More importantly the evidence before this Court confirms that the services which formed part of this cost estimate were never undertaken by the Claimant whom admitted in cross examination that he did not travel to Barbados to be assessed by the consultant

¹ [2015] eKLR

neurosurgeon Dr. Marquez as recommended. Clearly the Claimant is incapable of being reimbursed for damages which he has not incurred and the claim for this sum also fails.

- [13] The Claimant has listed two claims in the sum of \$680.00 each for Ortho Medical Associates. This claim does not accord with the Court's examination of the exhibits provided. Upon examination it is observed that submitted is one bill in the sum of \$680.00. Yet again the court stresses that a bill, invoice or cost estimate all do not meet the threshold of being documentary evidence of payment and as such is not recoverable.
- [14] As it relates to the claims for medication and child support those claims are also not subject to recovery. Firstly in relation to the claim for medication, the Claimant has only provided a prescription with no evidence that the same was fulfilled and or any payment made. The claim for child support are not damages which have been incurred as a direct consequence of the torts complained of. Further and in any event the sum claimed for child support represent arrears of payment and not actual payment. The claim for child support therefore also fails.
- [15] Notwithstanding that the Claimant has failed to provide the necessary evidence to satisfy a recovery of a precise quantifiable sum as special damages the Privy Council case of **Carlton Greer v Alston's Engineering Sales and Services Ltd**² has ruled that where a party has inadequately proved damages but has suffered loss the court has a discretion to award nominal damages. Having regard to this principle the Claimant is awarded nominal damages in the sum of \$1,500.00.

Loss of Income

- [16] Loss of income is a specie of special damages and as such the same principles apply for its recovery. The Claimant asserts that he is entitled to be reimbursed the sum of \$192,000.00 which represents lost earnings from the date of injury to the date of judgment. In support of this he claims that he earned the sum of \$2,000.00 per fortnight prior to the injury.
- [17] With respect to claim for loss of income the court is concerned with the bald assertions of the Claimant without any documentary proof. The Claimant has not provided a job letter, tax returns, national insurance contributions or a scintilla of documentary evidence which the court could consider to support his claim. Lord Goddard CJ in the case of **Bonham-Carter v Hyde Park Hotel**³ in examining evidence presented for damage reminded the Claimant of the duty to prove damage. He stated that:

² PC App No. 61 of 2001

³ (1948) 64 TLR 177

‘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.’

- [18] In addition to failing to provide any documentary evidence, the medical evidence relied on by the Claimant confirms that the Claimant has not suffered a permanent impairment and further reports that the Claimant has fully recovered from the injury. There is also no medical evidence that the injury sustained by the Claimant was prohibitive in the continuation of his employment or another form of employment.
- [19] Further the Claimant is under a duty to mitigate his loss. The Claimant though on cross examination suggests that he applied for other jobs has provided no evidence of the same. He simply refers to the fact that he has a written resume on which he relies but which also is not before the court and the suggestion that he had some oral enquires as evidence of him attempting to mitigate his loss. This I find to be wholly unsatisfactory. Having regard to the above I make no order for damages for loss of income.

General Damages

- [20] General damages are damages that are assumed to flow from the injury sustained. Such damages are not capable of precise calculation and for that reason the Court takes cognisance of the injuries sustained by the Claimant as well as similar cases which dealt with the issue of appropriate compensation in the circumstances.

Damages for Personal Injuries

- [21] The seminal case of **Cornilliac v St. Louis** enunciated several factors which the Court should take into account when assessing general damages. These factors include the following:
- 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.

- [22] The Claimant sustained a gunshot injury to his right leg. He was attended at the Mount St John Medical Centre wherein after initial examination he was sent home with medication. After four days his leg was put in a cast for treatment on conservative lines. No indication is given in any medical report as to the length of time that the Claimant's foot remained immobilised in the cast and the Claimant does not provide any information relating to this issue in either of his two witness statements.
- [23] Further examination of the Claimant on 11th February 2016 by the consultant orthopaedic surgeon it was noted that the Claimant 'demonstrated healing split longitudinal fracture of his right tibia with a hole in the bone on account of bullet which probably entered and exited with wound of entry and wound of exit.' The report of the consultant further notes that the Claimant 'had fairly good signs of healing and had no motor, sensory or neurological dysfunction.'
- [24] A final review by the consultant orthopaedic surgeon on 25th January 2017 concluded that the Claimant 'has very good signs of healing with absolutely no rotation or shortening of his right lower extremity.' The report concludes that the Claimant has not ended up with any physical permanent functional disability.
- [25] Notwithstanding the conclusion of the report it is also noted that the Claimant complained of pain and diminished sensation on the inner side of his right leg which does not allow him to stand for long duration of intervals. The consultant orthopaedic surgeon cautiously suggests that this complaint may be the cause of nerve damage but states that in order to make such a diagnosis that the Claimant must be examined by a Consultant Neurologist. A recommendation that the Claimant be examined by such a specialist in particular Dr. Marquez of the Diagnostic Clinic in Barbados was made. The Claimant did not follow up and therefore was never examined by the Consultant Neurologist as recommended. There is therefore no medical evidence to support this contention.
- [26] Based on the above the Claimant advanced that the sum of \$150,000.00 was reasonable compensation for the injuries sustained. The Claimant in support of this position relied on the undermentioned cases:
- (i) **Fraser v Dalrimple et al**⁴ - the claimant suffered a severely comminuted fracture of the left ankle and lower 1/3 of leg, a fracture to the left malleolus of the left tibia, severely comminuted fracture of the lower end fibula, lateral dislocation of the left ankle talar dislocation with lateral shift of talus with ankle diastases. The claimant was diagnosed as having a 24% permanent partial disability and would remain with a limp due to the shortening of the limb. The claimant was

⁴ ANUHCv 2004/0513

awarded \$150,000.00 for pain and suffering and loss of amenities.

- (ii) **Joseph v Morris et al**⁵ - the claimant a 48 year old woman suffered a crushing injury to her right leg which eventually resulted in an amputation of the limb. The claimant was fitted with an artificial limb which at the date of trial was worn. The injury affected her work life which was curtailed as well as her personal life. The claimant was awarded the sum of \$85,000.00 for pain and suffering and \$50,000.00 for loss of amenities.
- (iii) **Fevrier et al v Canchon et al**⁶- The claimants were husband and wife who sustained various injuries as a consequence of a vehicular collision. The first claimant sustained a commuted fracture of the left femur and tibia, fracture dislocations of the metacarpals and metatarsal joints in both feet. The first claimant also suffered a 6 inch laceration of the right knee region, a 6 inch laceration to the outer aspect of the right leg. The first claimant's leg was immobilised in a cast for 6 months. It was determined that the injuries to the feet would result in chronic pain and produce a disability of 2%. General damages in the sum of \$50,000.00 were awarded.

The second claimant suffered a commuted fracture of the right femur, abrasions and superficial lacerations about the body. The claimant was incapacitated for 6 months and sustained a 1 inch shortening of the lower limb which would produce chronic joint pain. The claimant was diagnosed with a 10% permanent disability. General damages in the sum of \$150,000.00 was awarded.

- [27] Unfortunately for the Claimant the cases cited above do not accord with the type of injury sustained, the injuries contained therein being far for serious than those suffered by the Claimant. The courts have frequently cautioned that regard should be had to cases which deal with similar injuries in order to calculate loss. Hence the Court is unable to place any reliance on them in determining damages.
- [28] The Defendants urge that compensation in the sum of \$25,000.00 is reasonable. In addition to the case of **Fevrier et al v Canchon et al**⁷ which is also relied on by the Defendants, the Defendants rely on the following cases as justification for a lower award than that claimed by the Claimant:

⁵ ANUHCv 2006/0133

⁶ Claim No 313 of 1989

⁷ Claim No 313 of 1989

- (i) **Christopher v Flavien et al**⁸ - The claimant a 35 year old man suffered a gunshot injury to the anterior aspect of the right knee. The bullet penetrated the limb completely leaving an entry wound one centimetre in diameter and an exit wound one and one half centimetres across. He was discharged from hospital on the same day. The limb was encased in plaster of paris. He was restricted to bed for several weeks as he convalesced. About three (3) months after the injury he was fully ambulant and undergoing therapy. A medical report in January 2004 revealed that his wound had healed. No note was made of any neurological deficit. No special loss of amenities were pleaded and the medical evidence indicated that the claimant had made a full recovery. The claimant was awarded damages of \$25,000.00 for pain and suffering and the sum of \$1,000.00 for loss of amenities.
- (ii) **Shillingford v Roseau City Council**⁹ - the claimant a 28 year old woman sustained injury upon falling 6 feet into an open grave. She sustained an undisplaced fracture in the posterior lateral aspect of the proximal end of the left tibia which extended to the articular surface of the knee joint. It was determined that she would suffer from Traumatic Osteoarthritis in her left knee. She was awarded \$35,000.00 for pain and suffering and \$10,000.00 for loss of amenities.
- (iii) **Marrocco v The Attorney General**¹⁰ - The claimant a 67 year old woman sustained a fracture to her intra-articular right upper end tibia and fractures of the right distal radius and ulna. She was hospitalised and eventually released into a rehabilitation centre for two and a half months to improve and strengthen the function of her arm and leg. During rehabilitation due to her inability to bear weight on her knee she was fitted with a knee brace which she described as extremely uncomfortable and painful. After discharge she utilised

⁸ SLUHCV 2004/0502

⁹ DOMHCV 2011/0350

¹⁰ ANUHCV 1997/0240

a walker for 6 months. She was awarded \$60,000.00 for pain and suffering and loss of amenities.

- [29] An analysis of the Defendants cases reveals that the cases of **Fevrier et al v Canchon et al**¹¹ and **Marrocco v The Attorney General**¹² also are of little assistance to the case at bar. These cases reflect injuries far more severe than the Claimant in these proceedings. However regard is given to the cases of **Christopher v Flavien et al**¹³ and **Shillingford v Roseau City Council**¹⁴. In addition to these cases the court has identified the case of **Pompey v Toney**¹⁵. In that case the claimant was injured in a motor vehicle accident when the defendant's vehicle collided with his motorcycle. The claimant sustained a compound comminuted fracture of the mid shaft of the right tibia, fracture of the right fibula, a small wound to the mid right and swelling of the right leg and abrasions to both knees and elbows. No proper evidence was provided by the claimant to support loss of amenities. General damages in the sum of \$20,000.00 were awarded.
- [30] An examination of this case reveals that the Claimant has recovered fully. There is no contrary medical evidence to suggest that the Claimant sustained nerve damage and or any permanent disability. The contention that the Claimant is therefore unable to stand for long periods is not supported by the medical evidence.
- [31] Further the court notes that the Claimant has provided no information on any pain and suffering he endured as a result of the injury. Nonetheless having regard to the nature of the injury it is presumed that the Claimant would have experienced some pain and suffering during the healing process.
- [32] Likewise as it concerns loss of amenities the Claimant has surprisingly provided very little detail regarding how the injury affected his lifestyle. He asserts that it affected his ability to stand for protracted periods but as indicated the medical evidence does not support this. The Court notes that in the submissions filed by the Claimant that it is asserted that the Claimant is unable to play football an activity which he previously enjoyed. However the Claimant has never pleaded or referred to this in his evidence. The Court is therefore unable to rely on this as evidence of loss of amenities. In spite of this it is presumed having regard to the nature of the injury that the Claimant would have suffered some restriction in his daily activities for a period of time. However in the absence of detail the Court is unable to make an award of significant damages.

¹¹ Claim No 313 of 1989

¹² ANUHCv 1997/0240

¹³ SLUHCv 2004/0502

¹⁴ DOMHCv 2011/0350

¹⁵ GDAHCV 2006/0395

[33] After due consideration of the guiding principles in assessing damages for pain and suffering and loss of amenities, the nature of the injuries the sustained by the Claimant and the resultant diagnosis, the fact no evidence has been presented on any pain felt by the Claimant although the court will presume that he endured pain and suffering and loss of amenities as a direct result of the injury and the cases utilized above the Claimant is awarded the sum of \$25,000 for pain and suffering and \$2,000 for loss of amenities.

[34] The next limb of the claim concerns general damages for assault and battery and false imprisonment. As it concerns the calculation of damages for assault and battery *Mc Gregor on Damages*¹⁶ provides useful guidance as to what the court should take into consideration. *Mc Gregor* states that:

‘In so far as an assault and battery results in physical injury to the claimant damages are calculated as in any other matter for personal injuries. However the tort of assault affords protection from the insult which may arise from interference with the person. Thus a further important head of damage is injury to feelings that is the indignity, mental suffering disgrace and humiliation that may be caused.’

[35] As it relates to false imprisonment, damages are typically awarded for injury to feelings and injury to liberty. However *de la Bastide CJ* in the case of ***Millette v McNicolls***¹⁷ in addressing the factors to be taken into account in determining false imprisonment found that in addition to the traditional heads that the initial shock should be taken into account. Specifically he stated:

‘there is an element of initial shock when a person is first arrested and imprisoned which must first be taken into account and compensated in the assessment of damages for wrongful arrest and false imprisonment, regardless of whether the term of imprisonment is long or short. The extent of the compensation for the initial shock will depend on the facts of the case (and not the length of the imprisonment) and factors which may be relevant include: the way in which the arrest and initial 2 Civil Appeal No. 14 of 2001 imprisonment are effected, any publicity attendant thereon, and any affront to dignity of the person. While any normal person will adjust to some extent to the circumstances of imprisonment is to be taken, the longer the imprisonment lasts the more burdensome it becomes: and the length of the imprisonment is to be taken into account in this

¹⁶ 19th ed para 40 -001 p1652

¹⁷ (2000) 60 WIR 362

context. Damages in such cases should not however be assessed by dividing the award strictly into separate compartments (initial shock, length imprisonment, etc) but by taking all such factors into account and then approaching the appropriate figure in the round” compartments, one for initial shock, the other for length of imprisonment and so on. All the factors are to be taken into account and an appropriate figure awarded.’

- [36] The Defendants have helpfully provided the court with certain authorities including the cases of **Charles v Steel**¹⁸ and **Cain Alexander v The Attorney General**¹⁹ in order to assess damages for assault and battery and false imprisonment. In the former case the claimant was assaulted and battered by the defendants and was restrained by handcuffs for over two (2) hours. The court awarded the sum of \$5,000.00 as general damages for assault, battery and false imprisonment. In the case of **Cain Alexander v The Attorney General**²⁰ the claimant was arrested dragged up the stairs and struck on her nose causing it to bleed and was detained for about three (3) hours by a police officer. The court awarded the sum of \$7,000.00 for assault, false imprisonment and wrongful arrest.
- [37] Regard is also given to the case of **Elihu Rymer v The Commissioner of Police et al**²¹ where in 1999, the Court of Appeal, awarded the claimant/appellant \$20,000.00 for three hours unlawful detention in a situation where none of the charges against the Appellant were pursued before the Magistrate. They were either struck out or dismissed for want of prosecution.
- [38] In the instant matter the Claimant was falsely imprisoned for a period of almost two hours. He was confronted in a supermarket a public place in the presence of other employees and was forcibly prevented from leaving. He was forced into a back room and restrained with handcuffs. Whilst restrained he was intentionally shot by the first Defendant. He was further arrested on the complaint of the Defendants and forced to defend charges which were later dismissed by the Magistrate Court. The gravity of the assault coupled with all relevant factors and the flagrancy of the trespass and the malevolence of the first Defendant in intentionally shooting the Claimant whom was unarmed and restrained in the presence of others and the increased injury to the feelings of the Claimant warrants an award for assault and battery and false imprisonment in the sum of \$15,000.00 with an additional sum of \$5,000.00 for aggravating circumstances.

¹⁸ SLUHCV 2006/0247

¹⁹ SVGHCV 2006/0150

²⁰ SVGHCV 2006/0150

²¹ BVI Civil Appeal No 13 of 1997

Interest

- [39] 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**²² 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.
- [40] Pursuant to section 5 of the Judgments Act Cap 227 of the Revised Laws of Antigua and Barbuda the Claimant is entitled to interest for the period after judgment.
- [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

- [42] Based on the foregoing it is hereby ordered that the Defendants shall pay the Claimant the following:
1. Special damages in the sum of \$1,500.00 with interest thereon at the rate of 2.5% per annum from the date of the incident to the date of judgment on assessment.
 2. Damages for pain and suffering in the sum of \$25,000.00 with interest thereon at the rate of 5% per annum from the date of the incident to the date of judgment on assessment.
 3. Damages for loss of amenities in the sum of \$2,000.00 with interest thereon at the rate of 5% per annum from the date of the incident to the date of judgment on assessment.

²² Civil Appeal No 1 of 1996

4. Damages for assault and battery and false imprisonment in the sum of \$15,000.00 with an uplift of \$5,000.00 for aggravating circumstances making in the aggregate the sum of \$20,000.00.
5. Interest.
6. Prescribed costs.



Jan Drysdale

Master

By The Court

Registrar