

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

ON MONTSERRAT

CASE MNIHCV 2016/0011

BETWEEN

AGATHA ASPIN

Claimant

and

MINISTRY OF AGRICULTURE

1st Defendant

HON. ATTORNEY GENERAL

2nd Defendant

APPEARANCES

Mr David Brandt for the claimant.

Ms Amelia Daley for the defendants.

2018: JULY 16

SEPTEMBER 17

JUDGMENT ON QUANTUM

Concerning ankle injury

- 1 **Morley J:** On 16.07.18, the court heard argument on how much is payable by the defendants for Ms Aspin's injured ankle (Aspin)¹. This is the assessment of quantum. Liability is conceded.
- 2 This is a claim against the Montserrat government, defended by the office of the Attorney General acting for a government ministry, where liability for an ankle injury arises because it occurred on Ministry premises, ostensibly because the Ministry was negligent in how it maintained a drain grating.

¹ For the purposes of this judgement, the parties will be referred to as bracketed or as the Ministry, for ease of reading, with no disrespect intended by not writing out on each mention full names, offices, and titles, or the legalese as to whether a claimant or defendant.

- 3 On 22.07.15, when aged 60 and suffering diabetes, Aspin's right foot slipped between two iron grids positioned over a drain at the top of steps leaving the ministry. Within 30 seconds, there was swelling.
- a. At Glendon hospital the foot was placed in a cast for three weeks. Crutches had to be used for four weeks. A foot brace was needed for a further four weeks.
 - b. On 19.12.15, on review by Dr Buffonge, pain was persisting and the injury was described as likely to give rise to lifelong problems. Aspin was gaining weight owing to immobility. X-rays showed early degenerative changes owing to accelerated arthritis at the right ankle joint with surrounding damage to ligaments.
 - c. On 03.08.16, Dr Buffonge reported no significant improvement from physiotherapy.
 - d. On 02.09.16, on Antigua, Dr Singh diagnosed a rupture of the deltoid collateral ligament with scar tissue, complete rupture of the anterior tallo fibular ligament, and a lot of scar tissue formation on the medial and lateral side of the ankle joint, concluding Aspin had a chronic ligament injury, requiring an ankle brace, and encouraging that she progress her walking pattern gradually back to five miles daily.
 - e. On 17.01.17, Dr Singh reported it is well known such injuries also cause post-traumatic degenerative joint disease in time increasing an individual's disability.
 - f. In February 2017, Aspin's right ankle gave way owing to the original injury, causing ligament damage to the left ankle, with again a need to be in a cast for three weeks, this time on the left ankle.
 - g. On 23.06.17, Dr Kassim opined the disability was most simply expressed as 'arthritis'.
 - h. Assessed on 08.06.18, there followed a report on 11.06.18 where Dr Singh observed swelling on account of constant standing, with dull pain on account of walking, and sitting, and there will be further need for orthopedic monitoring, physical therapy, and radiological studies. He concludes that Aspin has regained full range of motion in her ankle and does not have any functional permanent physical impairments. However, she is disabled in the functions of her right ankle and right lower limb as a whole when swelling appears, and pain increases on account of secondary restriction of movements. She does not require any surgical interference. He adds, *'looking at the overall clinical picture it is likely that she will develop post-traumatic degenerative joint disease as she grows older, giving rise to partial permanent physical impairment.'*

- i. It is not argued in any medical report that Aspin can no longer work, (though the court notes her age).
- 4 Aspin reports she cannot exercise, her ballooning weight means her clothes do not fit, she has been unable to enjoy dancing, cannot perform domestic tasks for an extended time, and used to walk five miles daily but now less, and only with a stick and brace.
- 5 The court has seen photos of her continuing swollen ankle and the ankle has been shown live in court on 16.07.18.
- 6 She has claimed \$3591.71ec as specific medical expenses and travel, which the court accepts.
- 7 She has further claimed \$6000ec as specific housekeeping expenses, which the court accepts, as reasonable in the context of this injury, though undocumented; however, the sum will be offset by \$2215.20 which was received as social security sickness benefit, making a total recovery of \$3784.80ec.
- 8 The total award for special damages is therefore \$7376.51ec, with interest accruing at the rate, as agreed by counsel, of 4%pa from the date of judgement.
- 9 Concerning general damages, the leading case is **Cornilliac v St. Louis [1965] 7 WIR 491** from the Trinidad Court of Appeal, where Wooding CJ said the relevant considerations to be taken into account are: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects.
- 10 The court should seek by an award of general damages to put a claimant as far as possible by monetary award in a position that she would have been in had she not suffered the injuries. To do this it is helpful to refer to awards in similar previous cases. In **Wells v Wells [1998] 3ALL ER 481**, Lord Hope of Craighead said:

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

- 11 In **Eugenia Charles v Cecil Gilbert GDA 2000/0128** decided in 2002, the claimant suffered open fracture of the left distal fibula, multiple superficial abrasions, deep abrasions to the left thigh and leg, lacerated wound to the left leg, and extensive loss of skin with exposure of the peroneal muscle, tendon and the distal fibula. Surgery was performed three times on her leg between May and August in hospital. Award for pain and suffering and loss of amenities was \$20000ec.
- 12 In **Claim No. 164 of 2006 Soraya Lewis (by her mother and next-of-kin Lily Lewis) v Eardley Browne**, from St. Vincent & The Grenadines, decided in 2009, the claimant, a 6 year old girl was involved in a motor vehicle accident. She sustained deformity of the distal third of her left leg with laceration, with fractures of the distal ends of the tibia and fibula of the left leg with displacement, multiple contusion to the left leg, and a swollen deformed right leg with a small wound to the distal right leg with soft tissue trauma to the foot. According to a doctor's report three years after accident, it was found the claimant was suffering from weak ligaments of the left ankle on the lateral side with evidence of soft tissue swelling. There was no evidence of permanent damage to ankle. Medication was continued to be given to assist with swelling and pain at ankle. The amount awarded for general damages was \$29000ec.
- 13 In **McPherson Barber v Meyona Samuel DOM HCV2009/0101**, decided in 2011, a collision between claimant's motor cycle and the defendant's car resulted in the claimant sustaining an initially hard to identify undisplaced fracture of the ankle. The joint was encased in a cast for six weeks and completely healed, leading to an award of \$10000ec.
- 14 In **Balwah v Teelucking** 643/74 DDP 74 CA 27/7/74, in Trinidad, Borne J awarded \$10000tttd for a fractured leg and ankle, adjusted to \$99915tttd (at today's exchange rate, almost \$40000ec).
- 15 In **Munkman on Damages**, 10th ed 1996, the amount recommended for the fracture of an ankle with extensive soft tissue damage resulting in deformity and the risk of future injury, and bilateral ankle fractures causing deformity in joints, was £20000-£27000, while ligamentous tears giving

- rise to walking over uneven ground and awkwardness on standing was £5500-11000 (where at today's exchange rate £1 is \$3.5).
- 16 In this case, as argued by counsel, weighing general damages requires an assessment of pain and suffering and of loss of amenities.
- 17 As to pain and suffering, it is clear Aspin's injury has been persistently troublesome for now three years. An ankle injury may not be life threatening, but inability to walk about without being in pain is a significant daily distress.
- 18 Loss of amenity embraces everything which reduces a claimant's enjoyment of life apart from pain and suffering or pecuniary loss. In **Hughes v Godall**, reported in **Kemp & Kemp**, Bridge LJ, as he then was, noted in assessing loss of amenity an important consideration is how long the claimant will be deprived of those amenities, and this court notes that in Aspin's case, given her age, this may likely be for the rest of her life.
- 19 Specifically, as to loss of amenity, there is an inability to dance and to exercise. The latter is particularly important as Aspin is a diabetic, and weight gain may lead to diabetic complication, accelerating further loss of amenity.
- 20 There has been no argued claim for loss of earnings as pecuniary impact.
- 21 On the one hand, Aspin has suffered an injury which it seems accepted has caused post-traumatic degenerative joint disease leading to accelerated chronic arthritis, so that she is disabled in the functions of her right ankle and right lower limb as a whole and suffers daily pain and loss of the amenity of exercise. On the other hand, there was no fracture, no surgery has been needed, she has regained full range of motion in her ankle, and she does not have any functional permanent physical impairments.
- 22 In addition as we age, on the one hand arthritis may be expected. However, on the other, it is clear the injury brought it on aggressively. Moreover, while we grow older and so become more restricted, it may be said that we treasure all the more what flexibility we have, so that to lose it is more onerous.

- 23 In the context of other awards, the closest seems to be the **McPherson** case, though in that case there was a fracture, and also a full recovery meaning no further pain, whereas here there was no fracture, and yet also no full recovery, meaning enduring pain. Moreover the **McPherson** award was in 2011 and would need upward adjustment for inflation, while this injury is persisting and therefore should attract a higher sum.
- 24 I remind myself that calculation of general damages is not a science and can only ever be an approximate relationship between injury and money.
- 25 Overall, I assess the injury occurring on 22.07.15 as creating likely lifelong daily distress, and has contributed to diabetic ill health through weight gain. Being more serious than the **McPherson** case, adjusted for inflation, I assess appropriate general damages at \$20000ec, increased by a further \$3000ec owing to how it will complicate Aspin's diabetes, being a total of \$23000ec with interest accruing at the rate, as agreed by counsel, of 4%pa from the date of judgment.
- 26 In sum, liability being conceded, adding together special and general damages, I order that the award in total is \$30376.15ec with interest as appropriate.
- 27 In addition, the Ministry must pay Aspin's reasonable costs.
- 28 Moreover, *obiter*, it seems to the court this is an uncomplicated case which ought reasonably to have settled without need of a court judgment. What seems to have inhibited discussions has been the application of an erroneous formula to awards by the office of the Attorney General as argued by Counsel Daley, expressed in para 17 of her helpful skeleton argument dated 12.07.18. It was there suggested that a previous award should be adjusted to a present value by applying the following formula: *'Award at the time x Montserrat's current consumer price index ÷ Montserrat's consumer price index rate at time of the award'*. This cannot be right as it had the effect of reducing the size of awards with the passage of time, rather than increasing them in line with inflation. While the court commends Ms Daley's diligence and good faith, observing there has simply been an error of maths, it is hoped that future discussions in other cases will not become similarly confused.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

17 September 2018