

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO: SVGHCV2015/108

BETWEEN:

DAVID MOORE

Claimant

and

HUTCHINSON CONSTRUCTION COMPANY LIMITED

Defendant

Appearances:

Mrs. Patricia Marks-Minors for the Claimant
Mrs. Cheryl Bailey for the Defendant

2018: March 26th;
June 7th

JUDGMENT

- [1] **Moise, M.:** This is a claim for personal injury sustained by the claimant during the course of his employment. On 6th July, 2016, judgment was entered in his favour with damages to be assessed. The claimant now presents his application for an assessment of damages. I will first outline the facts on which the claimant relies and then proceed to assess the damages to which he is entitled.

THE FACTS

- [2] The claimant, who is a carpenter and mason by profession, was employed with the defendant company commencing sometime in March, 2012. On 5th September, 2012 he was instructed, along with other employees of the company, to remove some metal railings with vertical metal posts which were sunk into the concrete on the second floor of the Saint Vincent and the Grenadines Community College. It is his evidence that he was supplied with a cutting disc to perform this task, despite his initial request for a jack hammer. He states that although he initially returned the disc, due to the fact that it was deteriorating, it was returned to him with a bigger cutting disk with

instructions to continue the task. Unfortunately, the disk contained no cutting guard and whilst attempting to cut a vertical post, the disk broke and struck the claimant on his lower left leg, causing him severe injury. The claimant describes the pain he experienced as being severe. He was taken to the Milton Cato Memorial Hospital where he was immediately taken to the operating theater. The medical report of Dr. Charles Woods indicates that the disk ***“went through the left leg, severing his tibia and fibula and almost amputating the leg.”*** He underwent two operations and was eventually discharged from the hospital on 5th October, 2012. On 13th December, 2012 he underwent a third surgery for the removal of external fixators which were placed in his leg. A cast was then placed on his left leg and he was to undergo physiotherapy when the cast was removed.

- [3] In the medical report dated 5th November, 2017, Dr. Woods states that the claimant was reviewed on 30th October, 2017. He was ambulant but there was a shortening of the leg, with a resultant limp. There was ***“severe limitation of the dorsal and planter flexion which results in problems with his gait.”*** As a result of this, the claimant’s toes strike the floor as he walks, causing him to use a higher gait when walking. The doctor opined that this situation will be permanent. His permanent disability is estimated to be 10%.
- [4] The claimant states that to this date he still wears an ankle brace on a daily basis. He states that he is reliant on his wife and family members as his mobility is severely limited. During his time in the hospital, and upon his discharge, he was heavily reliant on his wife for assistance. To date he still cannot run, walk at a quick pace or climb inclines, such as steps, without assistance. Of his wife he states that ***“looking after me has become like her job as I constantly require her assistance.”*** He claims that he can longer dance or take long walks. This was a usual pastime of his. His personal and intimate life with his wife has been affected by his injuries.
- [5] The defendant, on the other hand, has attempted to raise doubts regarding the extent of the claimant’s injuries. The defendant filed affidavit evidence of David Sutherland, Amecia Ollivierre and Amanda James to substantiate this assertion. These witnesses claim to have called on the claimant’s residence on 26th January, 2018, as part of a documentary project regarding the claimant’s proposed pig farm. This was part of an initiative between the government of Saint Vincent and the Grenadines and the European Union. The witnesses presented video footage of

the claimant navigating his farm, using a cutlass and extending one end of a measuring tape. He is not wearing a brace as he claims to wear daily and is walking without assistance.

- [6] The claimant was cross examined on the work done on his farm. He states that he has livestock which he sells to butchers. He also admits to selling produce to traders who export them abroad. He states however, that he attempted to start the farm due to the fact that he could no longer work as a result of his injuries. He states, in cross examination, that his wife and son assist in looking after the animals and he supervises. However, it would appear that his desire to start a pig farm has not entirely come into fruition. It is important to highlight the claimant's response in his affidavit dated 23rd March, 2018 where he states as follows:

“... I have not been able to earn a living since these injuries. As a man this has caused me great distress and I am trying to find something to do to earn a living. I heard of this grant the government had and applied for some assistance as we have an old pig pen on the land which I hoped I could use to expand to be something profitable. To date no pig pen has been built and I have heard that there is some issue so I do not even know if this will come into place anytime soon or at all.”

- [7] The claimant was adamant in cross examination that he can no longer perform in his usual job. He admitted to assisting a neighbor with some construction work, but stated that he had to bring his family along to assist, as he cannot perform much of this work himself. In examining the video footage presented by the defendant, the problems with the claimant's gait are quite visible. In fact, the scars of his injuries are apparent. I am not of the view that a few minutes of footage entirely undermines the evidence of the claimant as it relates to the effect his injuries have had on him. He speaks to not being able to run or walk for long distances and to perform on the job. He doesn't claim to be entirely handicapped. Certainly, when I examine the uncontroverted evidence of the medical doctor, who states that this disc almost severed the claimant's foot, I am fully satisfied that these injuries have continued to have a significant impact on his daily life as he has described it. The medical evidence does not say that the claimant is incapable of working. However, it does substantiate the fact that these injuries would no doubt have an effect on his pecuniary prospects. He is a carpenter and mason by profession and the fact that he has attempted to branch off into pig

farming does not mean that the court ought to disregard the fact that he is affected in the performance of his chosen profession.

THE ASSESSMENT OF DAMAGES

[8] I am to consider the factors outlined in the case of **Cornilliac v St. Louis**¹ in assessing the general damages for pain, suffering and loss of amenities to which the claimant is entitled. These factors 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 the injuries had on the claimant's pecuniary prospects. I will examine each one in turn.

(i) The nature and extent of the injuries sustained

[9] It would take but a brief glimpse at the medical evidence in this case to draw one to the conclusion that these are serious, if not severe, injuries. The claimant's foot was almost severed off. The disc cut through his left leg, severing his tibia and fibula and almost amputating the leg. Dr. Woods states in his report that **"due to the tissue and bone loss the healing process was very prolonged."** He was discharged after a number of operations on 5th October, 2012, one month after the date of the incident. The defendant also underwent 3 surgeries and was to attend to a course of physiotherapy to assist with his rehabilitation.

(ii) The nature and gravity of the resulting physical disability

[10] In the medical report dated 25th June, 2014 the claimant's permanent disability was said to be 10%. There is permanent shortening of the left leg. I have already described the effect this has had on the claimant's gait in paragraph 3 of this decision. In his medical report dated 22nd May, 2015, Dr. Woods indicated that the claimant should be fit to return to work, but that weakness in his leg and stiffness in his ankle would limit his mobility. However, on 5th November, 2017, after outlining the physical challenges which the claimant still faces, Dr. Woods opines that these will be permanent as there is **"little one can do to improve the condition of Mr. Moore's leg."**

¹ (1965) 7 WIR 491

- [11] In his evidence, the claimant persists in his assertion that he can no longer work. The work he did prior to this incident involved placing himself in certain physical positions which are difficult for him. However, the medical reports do not go as far as to say that the claimant can no longer work. What is clear, however, is that these injuries have certainly caused a certain measure of physical disability.

(iii) The pain and suffering endured

- [12] The claimant describes his pain as severe and I have no doubt that this is to be accepted, given the extent of his injuries. He states that he never lost consciousness and, as such, was fully aware of the extent of his injuries and the pain he was enduring as a result. During one of his three surgeries he suffered a heart attack. Based on his evidence it is apparent that his pain endures to this day. He has problems walking and has to rely to some extent on his family. There is no doubt in my mind that the claimant would have endured severe pain as a result of this injury for a long time during his period of recovery. His inability to run and walk for long distances without pain and discomfort is well substantiated by medical evidence and I accept his evidence as being truthful.

(iv) The loss of amenities

- [13] The claimant was 55 years old on the date of this incident. He states that he enjoyed long walks and dancing as part of his entertainment and that these have been curtailed as a result of this injury. He is married and claims that this injury has negatively impacted the enjoyment of his conjugal rights. The heavy reliance which he has had to place on his wife and family has certainly had an impact on him. I am satisfied that his life has been generally impacted in the way he has described it.

(v) The impact the injuries had on the claimant's pecuniary prospects

- [14] This is perhaps the main area of contention between the parties in this assessment. I have examined the evidence presented by the claimant regarding his inability to work and do not propose to repeat them now. The medical evidence suggests that the claimant can return to work

but certainly at a reduced capacity. I will consider the claimant's age and the profession in which he is engaged in addressing this limb in the criteria. It would not be unreasonable to conclude that a mason or a carpenter with such limitations on their performance, as the claimant, would naturally suffer a significant impact on his pecuniary prospects.

[15] I turn now to the specific claims for damages made by the claimant.

SPECIAL DAMAGES

[16] At paragraph 15 of his witness statement, the claimant claims a total of \$1,958.00EC in medical expenses. These have been generally substantiated by invoices. The claimant also claims \$648.00 in costs for transportation for which no receipts have been presented. The defendant argues that the claimant would have been reimbursed by the National Insurance Services for some of his medical expenses. The defendant has further argued that \$935.00EC of these expenses was paid by the company. The claimant has made this concession and I would reduce the amount claimed for special damages to take this into account. There are however, outstanding medical costs which have not been paid in the sum of \$310.00EC.

[17] Regarding the transportation costs, I do not agree with the defendant that these should be disallowed. Although the general approach is for a party to prove his losses, the court is well aware that not all expenses are capable of documentary proof. The cost of transportation is one of those areas where the court can award a reasonable sum even in circumstances where the claimant has not presented receipts. The amount claimed is not unreasonable and I would award this sum to the claimant. In total I am satisfied that the claimant has incurred the sum of \$1,958.00EC as special damages for his medical bills and transportation. In the circumstances I would deduct the amounts paid by the NIS as well as by the company and award the claimant the sum of \$958.00EC as special damages for medical expenses and transportation costs.

[18] The claimant also claims loss of earnings under this head of damages. It is clear from the medical reports that the claimant was discharged from the hospital one month after the incident. As late as 13th December, 2012 the external fixators were removed and his leg was placed into a cast. He

was certainly unable to work for an extensive period of time. However, he claims loss of earnings for a total of 1963 days, in keeping with his assertion that he has been unable to work since the date of the incident. He also claims that his monthly income was an average of \$1,788.58EC. At that rate he claims loss of earnings in the sum of \$115,351.61EC. The defendant, on the other hand, argues that the evidence of the claimant's last 3 months of employment indicates that he earned \$1,393.35EC monthly and this figure should be used in calculating his loss of earnings. However, I will allow the claimant's claim as it relates to his monthly earnings. Given the nature of his profession it would no doubt be difficult to provide a precise calculation of his earnings. Although he may have been employed with the defendant for that period of time, it does not undermine his claim that he would earn this amount of money on average without being able to prove all of his earnings by way of salary slips or other written documentation.

[19] It is argued further, that the defendant received the sum of \$248.25 fortnightly in disability benefits from the NIS. This is based on the letter dated 13th December, 2017 from the NIS outlining the employment benefits paid to the claimant from the date of his injuries. The letter indicates that the claimant receives \$238.34EC per fortnight in benefits. This amounts to an annual sum of \$5,720.16EC. Further, as at the date of the letter, the claimant had been paid a total of \$26,336.57EC. This was in addition to the sum of \$16,713.90EC paid to him during the period 5th September, 2012 to 10th September, 2013. In total therefore employment benefits paid to the claimant as at 13th December, 2017 was \$43,050.47EC.

[20] In the case of ***Tortola Yacht Services Limited v Denroy Baptiste***², Rawlins CJ considered an appeal in which one of the grounds of appeal concerned the question of whether the judge ought to have deducted sums paid by the social security board to the claimant, when calculating the loss of earnings. At paragraph 40 of his judgment he states that ***“[i]n making this award, the learned judge correctly did not take into account Mr. Baptiste’s 3 claims for loss of wages under special damages. By his own evidence Mr. Baptiste had already benefited from these payments to him by the Social Security and by the company.”*** In the circumstances the defendant would be correct in arguing that whatever benefits already obtained should be deducted from any award for the claimant's loss of earnings. The defendant also argues, with the

² HCVAP2008/016

claimant conceding, that a total of \$4,409.33EC was paid in wage earnings to the claimant between 20th September, 2012 and 13th December, 2013. These are to also be deducted from the loss of earnings. In the circumstances I have calculated the loss of earnings to be \$67,891.81EC.

GENERAL DAMAGES FOR PAIN, SUFFERING AND LOSS OF AMENITIES

- [21] The claimant refers to the case of ***Violine Joseph v Terese Morris et al***³ where the claimant was awarded \$85,000.00EC for pain and suffering and \$50,000.00EC for loss of amenities for a crushed injury to the right leg, which resulted in amputation. Although I note that in the present case Mr. Moore's leg was almost amputated as a result of the injury, he has, for the most part, recovered without the need for a permanent amputation of his leg.
- [22] The claimant also refers the court to the case of ***Cleos Billiny v. Kevon Jesse-Don Anderson et al***⁴ where the claimant was awarded the sum of \$80,000.00EC for pain and suffering and \$30,000.00EC for loss of amenities. Mr. Billiny was injured in a road accident and sustained a laceration to left parietal scalp, deformity of distal left leg and left elbow, fractures to left tibia and fibula, fractures to left distal humerus and right thumb. Whilst Mr. Billiny's injuries were multiple I am of the view that the leg injuries sustained by Mr. Moore are of equivalent gravity and that this case is a useful guide to the damages which he may be entitled to.
- [23] The claimant also referenced the case of ***Brentlie Charles v. Marcus Corridon***⁵. Although the claimant in that case suffered a fracture of left tibia and fibula, I am not of the view, given the injuries of the claimant that this case is of assistance in assessing the damages which Mr. Moore may be entitled to. There appears to have been many more complications arising out of the claimant's injuries in that case which warranted the amount of damages awarded by the court.
- [24] The defendant refers the court to the case of ***Bute v. Emmons***⁶ in which the claimant suffered from a fracture of the right fibula and tibia. Despite treatment, the claimant suffered from post-surgical infection and was readmitted to the hospital. There was shortening of the claimant's leg

³ ANUHCV2006/0133

⁴ SVGHCV2013/0096

⁵ SVGHCV 2002/0506

⁶ SVGHCV2010/0303

and he was reduced to the use of a walking stick with a noticeable limp. The claimant was awarded \$75,000.00EC for pain, suffering and loss of amenities. I am however of the view that Mr. Moore's injuries were more severe than the claimant in that case and I am satisfied that he is entitled to a higher award under this head of damages.

- [25] In my view, the claimant's injuries are in line with the severity of that of the case of *Cleos Billiny*. In fact, it may be more severe. Mr. Moore's leg was almost severed off. He underwent 3 surgeries and will suffer from the effects of this injury for the rest of his life. I will award the sum of \$85,000.00EC in damages for pain and suffering and \$40,000.00EC in damage for loss of amenities.

LOSS OF FUTURE EARNINGS

- [26] The claimant also claims damages for loss of future earnings. He argues that with a monthly income of \$1,788.58EC he would have earned on average \$21,460.62EC per year. This, he argues, should be used as the multiplicand in assessing his loss of future earnings. He argues further, that given his age, a multiplier of 5 should be used. However, I make 2 observations in relation to this submission. I note that the medical reports do indicate that the claimant would be able to return to work, albeit with some challenges. Whilst I accept that his injury would have an impact on his employment, I am not of the view that he is unable to work. Secondly, the evidence suggests that he receives the sum of \$5,720.16EC in annual employment benefits from the NIS.
- [27] In the circumstances I would adopt the approach of Master Pearletta Lanns (as she then was) in the case of *Cleos Billiny* where she stated that ***"I am called upon to assess the present value of the future risk and award the claimant an amount which I think is appropriate. I think it would be just and reasonable to award the Claimant the sum of \$30,000 based on the reasoning in Moeliker v Reyolle, and Foster v Tyne & Wear."*** The claimant, in the case before me, was 55 years old on the date of this incident. Mr. Billiny on the other hand was 40 years old and much further away from the age of retirement. I am of the view that the sum of \$20,000.00EC is a reasonable sum in damages for the future risk to the claimant's pecuniary prospects.

FUTURE MEDICAL CARE

[28] The claimant requests damages for future medical care. In that regard reference is made to paragraph 53 of the judgment in the case of **Cleos Billingsy** where the master stated that where there is no evidence of the quantum to be awarded the court should recognize the claim by an award which is not out of scale. However, in my view, the claimant must first establish a right to damages for future medical care. In this case, the medical reports do not support such a claim. In fact, the most recent report dated 5th November, 2017 states that there is not much more which can be done about the claimant's condition. Whilst he will be affected by this injury for the rest of his life, there is no recommendation for any future medical care. In the circumstances I will make no such award.

NURSING CARE

[29] The claimant refers the court to the decision of Master Pearletta Lanns in **Cleos Billingsy** where she states that ***"[i]t is the law that if a wife or mother or other member of the family undertakes to provide nursing care, an allowance will be made for the fair value of the services rendered because they are services made necessary by the injury, although the Claimant has made no agreement to pay for them."*** In that case she awarded the claimant damages for nursing care in the sum of \$500.00EC per month. The claimant claims for nursing care services provided by his wife for a period of in excess of 5 years. I am not of the view that this is to be awarded. Certainly, given the gravity of his injuries, the claimant would have relied heavily on his family during his time of recovery. However, the medical reports do not conclude that he is so handicapped so as to necessitate these services for such a long period of time. No doubt the claimant continues to rely on his family for assistance to some extent. However, I am not of the view that this is to the extent which requires an award for nursing care beyond his period of recovery. I am of the view that a period of 12 months at a rate of \$500.00EC is reasonable under this head of damages. I would award the claimant the sum of \$6,000.00EC as reasonable compensation for nursing care.

[30] In the circumstances I would award the claimant the following in damages:

- (a) \$958.00EC as special damages for medical expenses and transportation costs
- (b) \$67,891.81EC as damages for loss of earnings
- (c) Nursing care in the sum of \$6,000.00EC
- (d) Interest on special damages at a rate of 3% per annum from 5th September, 2012 until paid in full;
- (e) General damages for pain and suffering in the sum of \$85,000.00EC and for loss of amenities in the sum of \$40,000.00EC.
- (f) Interest on general damages at a rate of 6% per annum from the date of judgment;
- (g) Loss of Future Earnings in the sum of \$20,000.00EC with no interest;

[31] Prescribed costs is awarded in favour of the claimant.

Ermin Moise
Master

By the Court

Registrar