

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2015/0418

BETWEEN:

**[1] TRACY MONDESIR
[2] KAYLA MARSHALL (a minor)
Acting by her mother, Tracy Mondesir legal Tutrix of Kayla Marshall pursuant to
Article 217(1) (c) of the Civil Code of Saint Lucia**
Claimants

and

DYLAN ISAAC
Defendant

Appearances:

Mrs. Lydia Faisal for the Claimants
Mr. Alvin St Clair for the Defendant

2017: July 13

JUDGMENT

[1] **ACTIE, M.:** On New Year's Day, 2013, at about 8:15 a.m., the first and second claimants were walking on the side walk along the Corinth road when the defendant's vehicle veered out of control and collided with the first named claimant. On 27th July, 2015, the claimants obtained judgment in default of defence for an amount of damages to be decided by the court. The matter now comes on for assessment of damages.

Special Damages

- [2] The first named claimant pleaded and counsel for the defendant concedes special damages under the following heads:

- (1) Medical and Miscellaneous expenses - \$12,146.46
- (2) Loss of earnings - \$37,120.00
- (3) Nursing care at 6 months @ \$50.00 a day - \$9000.00
- (4) Cost of future surgery - \$29,590.00
- (5) Cost of treatment of Post-Traumatic Stress Disorder for the second claimant, Kayla Marshall - \$2010.00

Total agreed sum for special damages = \$89,866.46

Cost of Transportation

- [3] The claimant claims the sum of \$6444.00 for transportation. Counsel for the defendant challenged the amount claimed and suggests a reduction by fifty percent (50%). The amount claimed was pleaded, particularized and substantiated with receipts in respect of private transportation to the Tapion hospital and other clinics for consultation and therapeutic sessions. I am of the view that the defendant has failed to justify the request for the 50% reduction of the sum claimed. I am of the view that the nature and severity of the claimant's injuries supports the need for the private transportation for the numerous sessions of the recommended therapy and consultations. Accordingly, I will allow the sum of \$6444.00 as claimed under this head.

General Damages

- [4] The claimant claims general damages in the sum of \$250,000.00 for pain and suffering and loss of amenities. General damages are usually determined taking into consideration the principles set out by Wooding CJ in the seminal case of

Cornilliac v St Louis¹ namely (1) the nature and extent of injuries suffered; (2) Nature and gravity of the resulting physical disability; (3) Pain and suffering endured; (4) Loss of Amenities;(5) extent to which the claimant's pecuniary prospects have been affected.

The nature and extent of injuries suffered

[5] The claimant, 29 years old at the date of the accident, was admitted to intensive care unit at the Victoria hospital, unconscious and combative in moderate to severe painful distress. Her injuries were diagnosed as follows:

- (1) An open fracture of the left olecranon (the bone of the elbow that gives rise the posterior prominence of the elbow) described an open fracture is one in which the soft tissue envelope at the fractured bone surfaces is broken allowing the exposure of the fractured bone ends to the outside environment;
- (2) A closed head injury with an intra-cerebral bleed in the right temporal region of the brain;
- (3) A fracture of the right zygomatic process the right cheek bone;
- (4) An open fracture with bone loss of the right tibia/fibula left bones;
- (5) Soft tissue laceration to the right cheek posterior left elbow, right leg and healed tracheotomy of exterior aspect of the neck.

[6] The claimant underwent wound debridement and toileting with external Fixation and closure of the wound. During her period at the ICU she was fed intravenously and developed several infections. She was discharged on 1st February, 2013.

[7] Dr Hecca Cox in a medical report dated October 11, 2013, stated that the claimant subsequent to her being discharged was assessed as having delayed union of her right tibia and had to be readmitted on 12th May, 2013, for the removal of the external fixator device and placement below knee back slab. The claimant was further readmitted on 21st July, 2013, for elective open reduction and internal

¹ Cornilliac v St Louis (1965) 7 WIR 491.

fixation of her right tibia with a locked intramedullary nail. She was discharged on 21st July, 2013, and was able to ambulate with the aid of crutches. She was recommended to visit a psychiatrist to determine her mental condition as a result of the head injuries. She was readmitted on 19th May, 2015, for the surgical removal of the nail implant in the right tibia and was discharged on 18th June, 2015, with recommendation for follow up care in the orthopaedic outpatient clinic.

[8] Dr. Horatius Jeffers, stated that the open wounds/lacerations during the accident resulted in healed scars to the left cheek, left elbow and right leg and on the tracheotomy site, anterior aspect of the neck. Plastic surgical intervention was recommended to improve the cosmetic appearance present in the scarred areas. The report states that the first claimant had a 35% incidence of developing post-phlebitis limb syndrome (the onset of swelling of the leg secondary to insufficiency of the veins draining the leg) giving rise to chronic pain and swelling of the leg with the possibility of the development of venous ulceration of the ankle region. The claimant's right leg was healed with some 2 centimetres permanent shortening which may cause the development of wear and tear arthrosis of the right ankle joint over time. The medical report gave a total whole person impairment of 34%.

[9] Counsel for the claimant cited the following authorities in support of her claim for general damages:

- (1) **Marcel Fevrier et al v and Bruno Canchan et al**² where the second claimant suffered abrasions and superficial lacerations over her body and a commuted fracture of the right femur. She underwent surgery with a K wire inserted into her femur with a one inch shortening of the right lower limb which produced chronic joint pains in the limb resulting in permanent disability of about 10%. She was hospitalized for three (3) months and remained on sick leave for a further 6 months. The court in 2002

² SLUHCV1989/0313 delivered on 28th March 2002-

awarded general damages for pain and suffering and loss of amenities in the sum of \$150,000.00.

- (2) **Lincoln Carty v Lionel Patrick**³, a claimant, 46 years old involved in a car accident on June 24, 1998, suffered (i) fractured right femur (ii) fractures of inferior public ramous (Pelvis) (iii) fractures of right 3rd to 8th ribs posteriorly (iv) laceration and contusion of the right knee (v) contusion of sciatic nerve in right leg (vi) permanent dislocation of joint sternum (vii) Bruising and laceration of front left rib cage (viii) Cervical Strain (neck). The claimant was hospitalized for 32 days but was subsequently re-admitted on three occasions and underwent further surgical procedures. The court in 2009 taking into account that the claimant had been already received compensation in the sum of \$20,000.00 awarded the sum of \$155,000.00 as general damages.

[10] Counsel for the defendant suggests an award between \$75,000.00 to \$110,000.00. Counsel states that the injuries in **Lincoln Carty v Lionel Patrick** were more severe than the case at bar. Counsel in support cited the following cases:

- (1) **Gerald Khoury v Keithly George etal**⁴ where a claimant, 51 years old, suffered severe deformity of the left leg and ankle with crepitation and abnormal mobility. A closed reduction of the fracture was attempted in Antigua. He was then hospitalized for ten days at a hospital in the USA where he underwent open reduction and internal fixation whereby two metal plates were put in his ankle and fixed by 14 screws. He wore a cast for four weeks and developed osteoarthritis of the ankle. His mobility was

³ Skbhcv0054/1998 delivered on 29th June 2009

⁴ ANUHCv 1999/02499

severely restricted as he could no longer play lawn tennis or exercises which involved landing and jumping. He had difficulty getting in and out of his car, and required therapy for the rest of his life. The court in Antigua in 2004 awarded the sum of \$120,000.00 for pain and suffering and loss of amenities.

- (2) In **Lazarus Philip v Linton Martyr**⁵, an award of \$80,000.00 was made for pain and suffering and loss of amenities. The claimant complained of continuous intermittent dizziness, forgetfulness, slowness and inability to work as a result of head injuries suffered in a motor vehicular accident.

- [11] An award of damages for pain and suffering and loss of amenities is incapable of exact estimation and an assessment must necessarily be a matter of degree based on the facts of each case. The court must strive for consistency by using comparative cases tailored to the specific facts of the individual case. The task of converting the one into the other to arrive at an award of general damages is necessarily artificial, and involves a value judgment. Lord Hope of Craighead in **Wells v Wells**⁶ states:

“The amount of the award to be made for pain, 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 basic estimate of the plaintiff’s damage”.

- [12] The court is usually guided by the range of awards which have been determined in the same jurisdiction or in a locality where similar social, economic and industrial conditions exists⁷.

⁵ SLUHCV2015/0347 delivered on 24th April 2017

⁶ [1998] 3 All ER 481

⁷ Singh (Infant v Toong Fong Omnibus co.Ltd. 1964 All ER 925 at 927

[13] I take into consideration that the claimant was 29 years and in the prime of her life at the time of the accident. I note that the claimant was hospitalized on four different occasions and underwent several surgical procedures. I note the prognosis of 34% permanent incapacity, shortening of her limb, memory loss and the permanent scars all of which clearly impact the claimant's self-esteem. I pay particular attention to the award made in the **Fevrier's** decision emanating from this jurisdiction, where, the claimant suffered a 10% permanent disability compared to 34% disability suffered by the claimant in the case at bar. The award in **Fevrier's** case was made in 2009 and an allowance is to be made for inflation. Taking all into consideration, I award the claimant the sum of \$180,000.00 for pain and suffering and loss of amenities.

Loss of Pecuniary Prospects

[14] The claimant claims loss of pecuniary prospects in the sum of \$145,920.00. It is the evidence that the claimant was employed at Km2 solutions as a Customs Service Representative and earned a monthly salary of \$1280.00.

[15] In his medical report dated 12th July, 2014, Dr. Jeffers, at paragraph 28 stated that "the whole person impairment should not preclude Ms. Mondesir from undertaking gainful employment as a customs broker in the future". However, Dr Jeffers in an addendum dated 16th March, 2015 sought to provide clarification of his report made on 12th July 2014. He stated that "occupation requiring prolong periods of standing, walking, lifting and pushing/pulling is possible now that the right leg fracture has healed. However, due to the ongoing antegrade amnesia, the performance of clerical aspects of work as a custom's broker may be impaired to some degree of permanence".

[16] A claimant is entitled to damages for the loss of earning capacity resulting from the injury. Both earnings already lost by the time of trial and prospective loss of earnings are included. The claimant must provide the court with evidence to support a claim under this head. In **Mitcham Black v The Attorney General of**

Saint Lucia⁸, Hariprashad-Charles J as she then was referred to the test laid down by the Jamaica Court of Appeal in **Gravesandy v Moore**⁹ which states:

“a plaintiff who seeks general damages for loss of earnings must show that there is a real or substantial risk that he may be disabled from continuing his present occupation and be thrown handicapped, on the labour market at some time before the estimated end of his working life. The risk in such a case will depend on the degree, nature, or severity of his injury and the prognosis of full recovery; and the evidence must be adduced as to these matters and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location.”

[17] A claimant is entitled to recover damages for a handicap on the open labour market when he/she can show that as a result of the injuries there is a real risk that he/she will be out of work. The claimant states that she was dismissed from her job as a result of the accident and has not been able to maintain a job since the accident. She attributes her inability to keep a job as a result of her memory loss.

[18] The conventional approach in an assessment of future loss of earnings is the use of the multiplicand and the 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 (multiplier). To reach a figure for the award of a lump sum, the normal method of assessment which is used by the courts, is first to calculate, as accurately as possible, the net annual loss suffered, which is usually based on an average of the claimant's pre-accident “take-home” pay. This is to be used as the multiplicand.

[19] The claimant earned a monthly income of \$1,280.00 x12 making an annual income of \$15,360.00. The claimant was at the age of 29 at the time of the

⁸ SLUHCV 2004/0502 delivered on 19th March 2007

⁹ (1986) 40 WIR 222

accident and 34 years at the time of the assessment of damages with a possible retirement age of 65 years. Counsel suggests a multiplier of 19.

- [20] I am guided by the decision in **Bertha Compton (nee Blaize) Qua Administratrix of the Estate of the late Macrina Blaize) v Dr. Christiana Nathaniel et al**, where the court allowed a multiplier of 15 for a 34 year old and will so apply in the case at bar. Accordingly an award is calculated in the sum of \$7680.00 x15 = \$230,400.00. In making an award the court should always take into account that the claimant is obtaining a lump sum instead of several smaller sums spread over the years and that an award is intended to compensate the claimant for the money he would have earned during his normal life but for the accident¹⁰. The amount awarded is to be discounted taking into account the contingencies, vicissitudes and imponderables of life. Counsel for the claimant suggests a discount of 50% in keeping with the decision in **Alphonse v Ramnath (1997)** 56 WIR 183. Accordingly, an award in the sum of \$115,200.00 is made for pecuniary loss.

Order

- [21] In summary the defendant shall pay the claimants the following awards:
- (1) **Special Damages**
(as agreed) - \$89,866.46
Costs of transportation - \$6444.00
Total Special Damages in the sum of \$96,310.46 with interest at the rate of 3% from the date of the accident until judgment and at the rate of 6 % from the date of judgment until payment in full.
 - (2) **General Damages** in the sum of \$180,000.00 for pain and suffering and loss of amenities, with interest at the rate of 6% from the date of judgment until payment.

¹⁰ *Franlyn Lloyd v Phillip* Civil 79 of 1991(St .Kitts)

- (3) **Loss of pecuniary prospects** in the sum of \$115,200.00
- (4) **Prescribed Costs** on the global sum in accordance with CPR 65.5.

Agnes Actie
High Court Master

By the Court

Registrar