

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2012/1025

BETWEEN:

JOSEPH JOSEPH

Claimant

and

[1] PETER HILTON

[2] CATHERINE DAVID

Defendants

Appearances:

Mr. Gerard Williams for the Claimant

Mrs. Cynthia Hinkson- Ouhla for the Defendants

Ruling on Assessment of Damages

2017: June 29

1. **ACTIE M:** On 28th April' 2016, the claimant obtained summary judgment with damages to be assessed. The matter now comes for the assessment of damages.

Background

2. On 5th December, 2010, the claimant was a passenger on a motor vehicle driven by the first defendant and owned by the second defendant. The claimant was admitted to the hospital with severe neck pain. He underwent surgery on the third day of admission for open reduction and inter-spinous wiring with bone grafting. He was discharged 2 days post-surgery and had to wear a hard cervical collar for about 3 months.
3. On April 4, 2011, the claimant's injuries were described as severe tenderness posterior aspect of his neck; grade 4/5 in both lower limbs; subluxation of C4- C5 vertebrae. Upon further review on October 11, 2011, he was diagnosed that the 4th cervical vertebrae had shifted about 10% over C5.

4. The claimant continued to suffer discomfort over shoulders with back and some neck stiffness. The report stated that the claimant was expected to improve within a year but with permanent discomfort producing a permanent disability of about 15%. A further medical review on 1st June 2016 describes the claimant's complaints of stiffness and discomfort over his neck, shoulders and upper back with decreased power in his right upper limb. The back pain was aggravated by prolonged standing. The claimant was assessed with 25% disability.

Loss of Income

5. The claimant, a shop owner and bartender, 48 years at the time of the accident, is now 53 years at the date for the assessment. He claims for loss of income in the sum of \$118,680.00. He provided statements of income for three months prior to the accident with a gross average monthly income of \$7000.00 less expenses in the sum of \$5280.00, with a net monthly income of \$1720.00.
6. Counsel for the defendant challenges the net amount claimed as being too precise and should be discounted by 25% for Income Tax and NIC contributions. Counsel referred the court to the decision in **Peterson Cheddi v Regis Martyr et al**¹¹, where the claimant sued for loss of earnings on an average weekly wage of \$275.00 but did not provide any evidence of income tax payments. Edwards J at paragraph 45 stated:

“Even though loss of earnings is always calculated on the basis of net earnings, there was no evidence from Mr. Chedi concerning income tax payments or other statutory deductions. Concerning this omission, I am mindful of the dictum of Ronald Luckloo J.A. in **Heyliger vs Lakeram Deokaran** (unreported) cited in **BIBI Shamina and another vs Sampat Dyal and others** (1993) 50 W.I.R) 239 at page 244 A- B

(c.... as the burden of proving quantum of loss is on the plaintiff, proof of all the factors necessary to arrive at the quantification of the loss should necessarily fall on him. If tax is not to be deducted the burden should be on the plaintiff to prove that factor just as it should be on him to prove the quantum of taxation if tax is

¹¹ SLUHCV 1996/0715 delivered on 29th January 2004

deductible.... It is the tax payer or potential tax payer who should be able to say what quantum of tax if any is deductible from his income”.

7. Edwards J, in arriving at figure for loss of earnings, took into account the lack of evidence on the fiscal statutory deductions and reduced the amount of the sum for loss of earnings by 25%.
8. Counsel for the defendants urged the court to reduce the amount claimed for loss of wages by 25% in keeping with the authority. The starting point is that the claimant before this court was self-employed and is not under an obligation to pay NIC contributions. Secondly, I note that the decision in **Peterson Cheddi** was delivered in 2004. I take judicial notice that the Income Tax legislation has been amended to exempt persons earning a monthly income of \$1533 and annual income of \$18,400.00 from payment of income tax.
9. The claimant's net annual income falls just a little over the exemption. His tax range depends on allowable deductions such as dependents. The onus was on the claimant to provide the court with his taxable income which he has failed to satisfy. Accordingly, I will reduce the net pay by 10% to compensate for income tax. In the circumstances the claimant is awarded the net monthly income of $\$1720.00 \times 19 \text{ months} = \$118,680.00 - 11,868.00 (10\%) = \$106,812.00$.

Loss of Future Earnings

10. The claimant claims for loss of future earnings in the sum of \$404,440.00 on the net annual income.
11. Counsel for the defendant contends that whilst the claimant can no longer run the business, he was under an obligation to mitigate his losses by employing someone to continue the business.
12. The claimant, in response, states that he employed someone in an attempt to continue the business but had to eventually close the business as it was operating at a loss after payment of wages.
13. 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.

14. 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 accident². The amount awarded is to be discounted taking into account the contingencies, vicissitudes and imponderables of life.
15. The claimant, 53 years old, is a self-employed shop keeper with a possible retirement age of 65 years. Counsel referred the court to the decision in **Gloria Lake v Antigua Commercial Bank**³ where a 58 year old with a working life of 65 years was awarded a multiplier of 4. Counsel for the defendant on the other hand suggests a multiplier of 4.
16. I am of the view that a multiplier of 9 is reasonable in keeping with the decision in **Gloria Lake v Antigua Commercial Bank**. I will allow the net annual income less 10% for the income tax payment making an annual income of $\$1720 \times 12 = \$20,640.00 \times 9 = \$167,184.00 - 16,718.40$ (10%) = $\$167,184.00$. The amount is further reduced by 10% to take into the vicissitudes and contingencies and imponderables of life making a final sum of $\$150,465.00$.

General Damages

17. General damages are usually determined by taking into consideration the principles set out by Wooding CJ in the seminal case of **Cornilliac v St Louis**⁴ 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.

² *Franlyn Lloyd v Phillip* Civil 79 of 1991(St .Kitts)

³ *AnuHCV1999/0123* delivered on

⁴ *Cornilliac v St Louis* (1965) 7 WIR 491.

18. An award of damages for pain and suffering and loss of amenities is incapable of exact estimation.

The court must strive for consistency by using comparative cases tailored to the specific facts of the individual case. Lord Hope of Craighead in **Wells v Wells**⁵ 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”.

19. The claimant claims general damages for pain and suffering and loss of amenities in the sum of \$100,000.00. Counsel referred the court to decisions from the Republic of Trinidad and Tobago and the decision **Elizabeth Dale Celestine v Theobald Ventour**⁶.

20. Counsel for the defendant suggests an award in the range of \$60,000 to \$70,000.00 as an appropriate award. The defendant cites the case of **Anita Tobitt v Grand Royal Antiguan Beach Resort Limited**⁷. The claimant was diagnosed with prolapsed of lumbar inter-vertebral disc/lumbo-sacral disc with diminished sensation in the dermatome distribution of L5 S1. The claimant was diagnosed with an 8% permanent disability. The court in 2010 awarded general damages in the sum of \$100,000.00.

21. The court is usually guided by awards made in comparable injuries in jurisdictions having similar social and economic conditions. I am guided by the decision in **Kathleen McNally v Eric Lotte and CITCO (BVI) Ltd**, Rawlins J. as he then was stated;

“The practice is to grant a global sum for general damages for pain and suffering and loss of amenities, considering these against the background of the nature and extent of the injuries sustained and the nature and gravity of the resulting impairment and physical disability.”

22. The purpose of the compensation awarded in a person injury matter is to put a claimant as much as possible in the same position that he/she would have been in had the accident not occurred.

⁵ [1998] 3 All ER 481

⁶ GDAHCV2007/0530

⁷ ANUHCV2006/0026 delivered on 13th October 2010

23. An updated medical report of Dr. Richardson St. Rose dated 1st June 2016, describes the claimant with some stiffness and discomfort over his neck, shoulders and upper back with decreased power in his right upper limb. The back pain was aggravated by prolong standing. The report further stated that the claimant will be unable to continue playing his favorite sport of football and cricket, neither will be able to continue to work as a bartender. The injuries were described as permanent with 25% permanent disability. It is obvious that the claimant's earning capacity and quality of life has been seriously diminished as a result of the accident. I note the court in **Anita Tobitt v Grand Royal Antiguan Beach Resort Limited** awarded \$100,000.00 to the claimant with 8% permanent disability. I am of the view that the award of \$100,000.00 claimed by the claimant who has a 25% permanent disability is reasonable in the circumstances and I so allow.

Order

24. In summary it is ordered that the defendants shall pay the claimant the following awards:

(1) Special Damages

- i. Loss of Income in the sum of \$106,812.00 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

- i. Pain and suffering and loss of amenities in the sum of \$100,000.00 with interest at the rate of 6% from the date of judgment to the date of payment in full.
- ii. Loss of Future Earnings in the sum of \$150,465.00

(3) Prescribed Costs in the sum of \$34,277.70 on the global sum of \$355,277.00.

**Agnes Actie
Master
By the Court**

Registrar