

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: BVIHCV2015/0088

BETWEEN:

KESLAR DAWSON

Claimant

and

STEPHANIE GEORGE

Defendant

Before:

Eddy Ventose

Master [Ag.]

Appearances:

Ms. Valerie Gordon for the Claimant

Dr. Alicia Johns for the Defendant

2016: November 29
2017: January 11
February 3 (reissued)

JUDGMENT

1. **VENTOSE, M. [AG.]:** The matter before the court is one for assessment of damages following the entering of summary judgment in favour of the Claimant by the court on 11 November 2015 with damages to be assessed. Both the Claimant and Defendant have filed submissions and authorities on the assessment of damages as ordered by the court on 11 November 2015.

Background Facts

2. The background facts as outlined in the statement of case of the Claimant, Mr. Keslar Dawson, a prison officer, are as follows. On 10 April 2013 the Claimant claimed against the Defendant damages for injuries, pain and suffering, and loss of amenities caused by the negligence of the Defendant in an accident that took place on 18 October 2013. The Claimant was sitting in his motor vehicle waiting in a long line of traffic. The Claimant's vehicle was approximately five (5) feet behind the Defendant's vehicle. The Defendant then reversed her vehicle and it collided with the Claimant's vehicle causing damage to the vehicle and injuries to the Claimant. The Claimant claims among other things general damages in the sum of US\$45,000.00, special damages of US\$8,794.00 and future medical expenses to be assessed.
3. The Claimant's evidence is taken from the witness statements and the medical reports exhibited to the statement of claim filed on 10 April 2013. The Claimant was diagnosed with the following injuries: (1) blunt trauma to the left knee; (2) trauma to the left shoulder, left supraclavicular tenderness involving left posterior scapular; and (3) trauma to the left wrist.

Special Damages

4. No authority is needed for the well-established principle that special damages must be specifically pleaded and proved. The Claimant claims the sum of US\$3,605.00 for the repairs to his vehicle and the sum of US\$5,250.00 for loss of use of the vehicle from 19 October 2013 to 31 January 2014. The Claimant also claims the sum of US\$4,149.00 for medical and other expenses incurred.
5. The Defendant objects to the sum of US\$3,370.00 for legal fees claimed as part of special damages. I agree with Counsel for the Defendant that this amount has no place in the special damages claimed by the Claimant. Any amount for legal expenses will be determined in accordance with the CPR on completion of the assessment of damages. The Defendant agrees with the sum of US\$3,605.00 for the repair of the vehicle. An Invoice from J.E. O'Neal & G.A Cobham dated 23 October

2013 supports this claim. The amount of US\$3,605.00 is allowed. The total out of pocket expenses, for which receipts were provided, is US\$769.00 and is also allowed.

6. The Claimant also claims US\$5,250.00 for loss of use of the vehicle. Counsel for the Defendant states that the amount is unreasonable because: (1) the period for which loss of use is being claimed is inordinately long having regard to the Claimant's legal duty to mitigate his loss; and (2) there is no evidential basis for the Claimant's claim of US\$50.00 per day for loss of use of the vehicle. I agree with Counsel for the Defendant that the period of time is inordinately long and that a reasonable period of time is six (6) weeks. Counsel cited the decision of *Davis v Crump* (ANUHCv 2009/0598 dated 6 May 2011) where the court awarded nominal damages of \$1,500.00 where the claimant could not substantiate the claim for loss of use. However, in that case the claimant had access to the company vehicle while his Jeep was being repaired. There was no evidence in the case at bar that the Claimant had access to a company vehicle. In all the circumstances, taking into account the period of six (6) weeks within which the Claimant could have gotten his vehicle repaired, the amount awarded for loss of use is US\$2,100.00.
7. The total amount awarded for special damages is US\$6,474.00 (US\$3,605.00+ US\$2,100.00+US\$769.00).

General Damages

8. The *locus classicus* on general damages for personal injuries is *Cornilliac v St Louis* (1965) 7 WIR 491 where Chief Justice Sir Hugh Wooding stated that:

[T]he several considerations which [a] learned judge [must] bear in mind when making his assessment [are] as follows: (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had to be endured; (iv) the loss of amenities suffered, and (v)

the extent to which, consequentially, the appellant's pecuniary prospects have been materially affected.

9. It has been stated that general damages are damages which will be presumed to be a natural or probable consequence of the wrong complained of; with the result that the claimant is required only to assert that such has been suffered (*Charles v Corridon* (SVGHCV 2002/0506 dated 3 June 2014)).

The evidence of the Claimant

10. The Claimant suffered the following injuries as a result of the accident: (1) blunt trauma to the left knee; (2) trauma to the left shoulder, left supraclavicular tenderness involving left posterior scapular; and (3) trauma to the left wrist. In the medical report of Dr. Stephen Patrick dated 28 October 2013, he states that the examination of the Claimant showed: (1) left supraclavicular tenderness involving left posterior scapular; (2) reduce range of motion in internal rotation and flexion of left shoulder and (3) left suprapatellar knee mild tenderness with no limited range of motion. Dr. Patrick's overall assessment was: left shoulder knee injury secondary to motor vehicular accident. In his medical report dated 18 November 2015 Dr. Christoph Ahrens states that the injury sustained by the Claimant from the accident aggravated or exacerbated the Claimant's pre-existing condition. Dr. Ahrens also states that the impact of the accident resulted in a complete tear of the anterior cruciate ligament (the "**ACL**"), which is the most important stabilizer of the knee joint.
11. The medical evidence of Dr. Klas Buring dated 11 February 2014 states that the Claimant "sustained blunt trauma to **his left knee which was previously injured** and he also suffered traumas to his right wrist and left shoulder" (emphasis added). In another undated medical report from the Eureka Medical Clinic it is stated that: (1) the Claimant has a history of diabetes which is controlled by diet; (2) the Claimant's knee was injured when he twisted it when he slipped on the floor in his house; (3) an MRI taken on 4 October 2011 showed likely bucket-handle medial meniscus and ACL

rupture; and (4) Dr. Nagy Darwish operated on the Claimant in late October 2011 at the Bougainvillea Clinic.

12. In the report of Dr. Christoph Ahrens dated 24 November 2014, he states as follows:

The status of this knee prior to injury is well documented, as Mr. Dawson had a previous minor twisting of his knee at home. This led to a tear of the medial meniscus. He had an MRI scan confirming this injury and a surgery (arthroscopy), to remove the torn part of the meniscus.

It was also noted on the MRI scan and surgery, that there was already pre-existing degeneration (arthritis).

The Submissions

13. Counsel for the Claimant submits that following the accident the Claimant was on sick leave for five (5) weeks. Counsel also submits that when the Claimant returned to work he was only able to perform light duties and has not been able to resume normal duties as a prison officer. Counsel for the Claimant states that the Claimant is restricted to duties that do not require him to be mobile and that he is required to wear a knee brace on a daily basis. Counsel also states that the Claimant's promotional prospects have been impacted as a result of the injuries arising from the accident.
14. Counsel for the Claimant relies on the following Caribbean cases in support of the sum of US\$45,000.00 as general damages which should be awarded to the Claimant for the injuries suffered: (a) *Morillo v Forbes* (BVIHCV 2003/005 dated 20 February 2006); (b) *Dawson v Claxton* (BVICVAP 2004/023 dated 23 May 2005); (c) *Tortola Yacht Services Limited v Baptiste* (BVICVAP 2008/016 dated 22 June 2009); and (d) *James v Lewis* (ANUHCV 2007/0403).
15. In all the above-mentioned cases, the injuries suffered by the claimants were more extensive than those suffered by the Claimant in the case at bar; in particular, in

Tortola Yacht Services Limited v Baptiste there was 20% whole body impairment of the claimant and in *Forbes v Morillo* the claimant's overall impairment as a result of her injuries was assessed at 19% whole body impairment. The injuries suffered by the Claimant in the case at bar are not as extensive as those suffered by the claimant in *James v Lewis* (ANUHCv 2007/0403 dated 31 July 2009).

16. The Counsel for the Defendant submits that the sum of US\$45,000.00 claimed by the Claimant for general damages is not reasonable and proportionate to the nature and extent of injuries suffered by the Claimant.

The Analysis

17. In relation to the nature and extent of the injuries sustained, the Claimant suffered a complete tear of the ACL, supraclavicular involving posterior scapular and trauma to the left wrist ligament. In respect of the nature and gravity of the resulting physical disability, the Claimant would have to undergo surgery to his knee, would need to wear a knee brace and would have to undergo knee replacement surgery. However, the Claimant's knee was already injured from an incident in 2011. In relation to pain and suffering, the Claimant avers that his knee is unstable and he suffers from pain and that the injury to his wrist still affects him with stiffness and pain from time to time. Dr. Christoph Ahrens in his report dated 24 November 2015 states that the impact of the accident resulted in a complete breach of the ACL ligament, which is the most important stabilizer of the knee joint. In his view, this had dire consequences for the Claimant's knee function and pain: the knee is now unstable, gives way and hurts a lot more.
18. In respect of the loss of amenities suffered, the Claimant states that he is unable to perform his full duties as a prison officer and that he has been on light duties because his mobility has been affected by his injuries. In relation to whether his pecuniary prospects have been materially affected, the Claimant states that his promotional prospects have been impacted since he cannot perform full duties as a prison officer. The affidavit of David Foote, Superintendent of Prisons, supports the Claimant's view

that his lack of mobility may affect his prospects for promotion in the 2016 round of promotions. In this regard, Counsel for the Defendant counters that the Claimant would have had mobility issues since 2011 when he first injured his knee. The evidence of the Claimant, as mentioned above, shows that “there was already pre-existing degeneration (arthritis)”.

19. I have considered the pleadings, witness statements, medical reports and other evidence and the oral submissions made by Counsel for the parties. I have also reviewed the submissions made by Counsel for the parties and the cases discussed therein. There was little by way of evidence to substantiate the factors that must be taken into account in assessing general damages, for example, in relation to loss of amenities, the Claimant did not provide evidence as to exactly how the accident changed his lifestyle except to note that he was put on light duties at work.
20. In relation to the pre-existing injury, Counsel for the Defendant cites the case of *Taylor v Weston Area Health Authority* [2003] All ER (D) 50 where the trial judge discounted the amount payable by approximately 30% because the Claimant had Crohn’s disease prior to the injuries suffered. Of critical importance in the case at bar is the Claimant’s medical evidence that his knee would have degenerated anyway but at a slower rate had the accident not occurred. Taking into account the evidence of the Claimant at [11] to [12] above, any damages payable to the Claimant should be discounted by 25% by virtue of his pre-existing condition.
21. Taking into account all the circumstances, the Claimant is awarded the sum of US\$6,000.00 as damages for pain and suffering and the sum of US\$12,000.00 as damages for loss of amenities. The award payable is US\$18,000.00 less 25% totalling US\$13,500.00.

Future medical expenses

22. The Claimant avers that he would need to wear a knee brace to stabilize his knee and the knee brace would need to be changed each year. The Claimant also avers

he would need to have a knee replacement surgery. The Claimant therefore claims the sum of: (1) US\$5,000.00 for a knee brace over a period of five (5) years; and (2) US\$25,000.00 for the knee replacement surgery. The Claimant avers that the costs of the knee replacement surgery in the British Virgin Islands and the knee braces are as stated by Dr. Christoph Ahrens in his medical report dated 18 November 2015.

23. Counsel for the Claimant submits that the knee replacement surgery is necessary and cites the decision of *James v Lewis* (ANUHCv 2007/0403 dated 31 July 2009) in support. In that decision, Harris J stated (at [43]) that:

It cannot be said that the additional surgeries that the claimant is desirous of having are merely fanciful. He is the victim - the patient - the injured - and would be best placed, with a knee-joint injury of this nature, to know whether he has healed or not. It is not desirable that he be first awarded the cost of attending a medical assessment and then made to return to the court for a further sum for the cost of the further surgeries when they are ordered by the doctor. Mindful of avoiding any prejudice to either party, a judgment here that brings final closure to this matter is desirable. On all the evidence, it is more likely than not, that the claimant would require at least one (1) additional surgery.

24. I accept the evidence of Dr. Ahrens that the Claimant would need knee replacement surgery and the knee braces. However, any amount awarded is to be discounted by 25% owing to the Claimant's pre-existing condition. These are as follows: \$5,000.00 + \$25,000.00 = US\$30,000.00.

25. The total amount payable for future medical expenses is US\$30,000.00 less 25%, which totals US\$22,500.00.

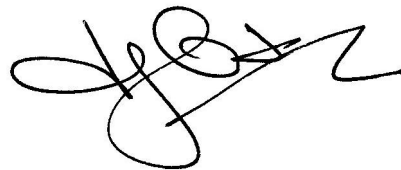
Conclusion

26. IT IS HEREBY ORDERED as follows:

- (1) The Claimant is awarded special damages in the sum of US\$6,474.00.
- (2) The Claimant is awarded general damages in the sum of US\$36,000.00 (US\$13,500.00 + US\$22,500.00).
- (3) The Claimant is entitled to prescribed costs based on the total award of damages of US\$42,474.00.

27. The Claimant is entitled to interest at a rate of 5% on the sum of US\$42,474.00 from the date of assessment until payment.

28. I wish to thank Counsel for the parties for their helpful submissions and authorities.

A handwritten signature in black ink, appearing to be 'Eddy Ventose', with a stylized, cursive script.

Eddy Ventose
Master [Ag.]