

**THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

Claim No. DOMHCV2015/0139

Between:

CHRISTOPHER NED JOACHIM

Claimant

And

DAMIEN FRANCIS LUKE

Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Ms. Saudia Cyrus for the Claimant

Mr. David Bruney for the Defendant

2016: March, 22

Assessment of Damages - Subdural Hematoma – No serious Resulting Disability – Nursing Care – Pre-Trial Loss of Earnings

JUDGMENT

[1] **CORBIN LINCOLN M:** On 1st October 2014 the claimant, who was a passenger in a motor vehicle owned and driven by the defendant, suffered personal injuries, loss and damages as a result of a motor vehicle accident caused by the negligence of the defendant. Summary judgment was entered against the defendant with damages to be assessed.

- [2] The claimant filed affidavits and submissions. The defendant did not comply with the order to file affidavits and submissions and neither he nor his counsel appeared on the date fixed for the assessment of damages.

SPECIAL DAMAGES

- [3] The claimant pleaded special damages of \$6,690.00 broken down as follows:

(1) Medical Report	\$150.00
(2) Medical Expenses	\$140.00
(3) Nursing Care - 12 weeks at \$300.00 per week	\$3,600.00
(4) Loss of Earnings - 28 days @\$100 per day	\$2,800.00

- [4] The only evidence given with respect to the pleaded claim for special damages is contained at paragraphs 43 and 44 of the claimant's affidavit where he states:

"I am asking the Court to award me compensation in the sum of \$6690.00 being monies I spent and lost as a result of the injuries suffered by me.

I have an adopted daughter whose name is Agnes Adams. She built a house in St. Joseph and I was suppose to paint it for her. We had agreed that she would pay me \$100.00 per day. I lost that job because of the accident"

- [5] It is well established that damages must be pleaded and proved.¹ The claimant has not provided any oral or documentary evidence with respect to the claim for the cost of the medical report and medical expenses. Consequently, I make no award with respect to these claims.

Loss of Earnings

¹ Ashcroft v Curtin [1971] 1 WLR 1731.

- [6] With respect to the claim for loss of earnings for 28 days, while the claimant has led evidence as to the daily rate agreed with his adopted daughter, he had led no evidence regarding the length of time this job was agreed or anticipated to last. Consequently there is no evidence to support the basis of the claim for loss of earnings for 28 days as pleaded. In the absence of such evidence I award the claimant nominal damages of \$1,000.00 for loss of earnings.

Nursing Care

- [7] The evidence of Gaious Lazar, the claimant's son, is that in December 2014 he was summoned to his father's house and he found him lying on the floor. He had to help him to stand, give him a bath and help him to bed. The following day he and his sisters had to help him to bathe and dress before taking him to the hospital. While the claimant was hospitalised he assisted him by bringing things for him like a change of clothes, food, juices and fruits. After the claimant was discharged he continued to help him by carrying water for him to bathe, going to the store to buy groceries and going to the farm in Carholm about twice a week for him since he could no longer go there. He would help him to harvest crops like tannias and yams and weed and spray the grass. After a while he noticed that his father was getting better and could do some things on his own. He provided nursing care for over three months.

- [8] The learned authors of **Halsbury's Laws of England**² state:

"Where the injured plaintiff is cared for, not by professional, paid carers, but by volunteers, whether members of his family or otherwise, the award of damages will reflect the value of the services provided. The value of such gratuitous services may be determined either by applying the cost of buying such care on the open market, or by assessing the loss of income suffered by a carer who has given up

² (4th edn reissue) vol 12 (1), para 898

paid employment to care for the plaintiff, or a combination of the two. A plaintiff who receives damages for services rendered by another holds the relevant amount on trust for that other."

[9] The word "care" may attract different labels. *"It may be child minding: attending the child when, but for the illness, it would not be necessary. It may be nursing care in the narrow sense: helping to the lavatory, administering medicine, changing the bedding, or cleaning up after an accident. It may be care (or attendance) in the wider sense: being at the bedside, to provide comfort and support to an ill child. These different roles all fall within the generic term "care and attendance" or (where the provision is by a parent and not a professionally engaged carer) "gratuitous care".*³

[10] Awards for gratuitous care are not only reserved for very serious cases⁴ but the care given must be over and above that which would have been given in the ordinary course of family life.

[11] There is no evidence that Mr. Lazar or any other family member had to give up employment and thus lost income to help care for the claimant before or after his discharge from hospital. The claimant has pleaded a loss of \$300.00 per week for nursing care for 12 weeks but no evidence has been led to substantiate the pleaded loss at a rate of \$300.00 per week or a basis provided for the use of a rate of \$300.00 per week.

[12] There is evidence that Mr. Lazar provided some care to the claimant and therefore it would not in my view be just to make no award for nursing care. In **Greer v Alston's Engineering Sales and Services Ltd**,⁵ Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from **McGregor on Damages**, 13th Edition, paragraph 295:

"Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary

³ McDuff J in *Giambrone and others v JMC Holidays Ltd* (formerly *Sunworld Holidays Ltd*) [2003] 4 All ER 1212):

⁴ *Giambrone and others v JMC Holidays Ltd* (formerly *Sunworld Holidays Ltd*) (No 2) [2004] 2 All ER 891

⁵ [2003] UKPC 46

situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but of absence of evidence of the amount of loss."

- [13] Thus notwithstanding the absence of evidence to prove a loss of \$300.00 per week I award the claimant nominal damages of \$1,000.00 for nursing/domestic care.

GENERAL DAMAGES

Principles for Assessing General Damages

- [14] The legal principles governing the assessment of general damages are well established. The main factors to be taken into account are: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering endured; the loss of amenities suffered; and the extent to which the claimant's pecuniary prospects have been affected

(1) Nature and Extent of Injuries Sustained

- [15] The claimant was born on 6th August 1944 and was 70 years old at the time of the accident.
- [16] On 1st October 2014 the claimant was the front seat passenger in a van owned and driven by the defendant when an accident occurred. The claimant's evidence is that his face hit the dashboard causing injury to his face. He realized that his mouth was bleeding and that he had lost a tooth. He was taken to the St. Joseph Health Center by the police where he was treated and then taken to Princess Margaret Hospital. The claimant's evidence is that he was examined at the hospital and x-rays of his head, chest and face were done. He felt

a lot of pain and his chin had a cut. He received stitches both inside and outside of his mouth and was discharged with pain medication.

[17] The claimant did not tender any medical report regarding his diagnosis or treatment received at the hospital on 1st October 2014.

[18] The claimant states that when he returned home he continued to experience pain. The right side of his face was stiff and he was getting headaches. He used to do everything for his 79 year old wife who is senile but after the accident he noticed that his senses were affected and he could not manage the way he used to. He noticed several other changes such as loss of balance, forgetfulness, lack of concentration and difficulty seeing through the left eye which was red. As a result he consulted Dr. Victor Emanuel, a private doctor, around December 2014.

[19] Dr. Victor Emanuel's evidence was contained in an affidavit. His evidence is that he examined the claimant on 16th December 2014 and noted that:

"He had the classic signs of a cerebrovascular accident (stroke) with right sided hemiplegia. This means that half of his body was significantly paralysed on the right side both his upper and lower limb. It may not be complete but it is a term used in referring to stroke. Also he was hypotonic; meaning that he had some diminished tone in his right limbs. Therefore, his limbs were flaccid as opposed to normal or spastic...He was dysarthric. This means that his speech was somewhat slurred and his words not clear....he was hyperreflexic which means that his reflexes were exaggerated...he had diminishes power on the entire right side."

[20] X-rays of the skull revealed no fractures or abnormality and, not being satisfied, Dr. Emanuel ordered the claimant to have a CT scan.

[21] The claimant's evidence is that he did a scan at Princess Margaret Hospital and was admitted on the same day.

- [22] A medical report by Dr. Korak Frederick states that the claimant was admitted to the hospital on 18th December 2014 and diagnosed with a left Frontoparietal Subdural Hematoma. Due to the evolution of the illness and the severity of the hematoma surgery was performed on 19th December 2014 to drain the hematoma. The report states that the claimant recovered well from the surgery and could have neurological defects post trauma. The claimant was discharged on 24th December 2014.
- [23] Dr. Victor Emanuel's evidence is that he next saw the claimant on 15th January 2015 when he was informed of the claimant's surgery. He states that when he examined the claimant he exhibited no signs of a stroke and *"all situations were reversed. He was not hypotonic; his tone was returned to his right limbs. He was no longer dysarthric; his speech was fine. There was no hemiplegia: his power returned to the right side. I concluded that the mass compressing his brain was the cause of the Cerebrovascular Accident (stroke) resulting from the vehicular accident. Therefore once the blood clot was relieved from his brain he was fine."*

(2) The Nature And Gravity Of The Resulting Physical Disability

- [24] Dr. Emanuel states that once an injury to the brain is suffered there may be prolonged symptoms although one may not necessarily suffer any disability. He states that it is possible that the claimant *may* experience paraesthias (abnormal sensations) occasionally or frequently and that it is not unusual for the claimant to experience headaches although they may not be severe or disabling.
- [25] The claimant states that he continues to get occasional headaches for which he takes paracetamol, his face pricks at certain times during the day especially around the eyes and nose, he is unable to open his eyes when the sun is hot and he continues to feel

heaviness in his chest. There is no evidence of the claimant suffering any serious resulting disability.

(3) Pain and suffering and Loss of Amenities

[26] The claimant's evidence is that he experienced pain immediately following the accident and thereafter continued to suffer pain and discomfort which resulted in him seeking further medical treatment. While recuperating following the surgery he felt pain but not as severe as before. Following his discharge from the hospital he was not in much pain but would get giddy and suffer occasional headaches. His son had to help him to bathe and also carried water for him.

[27] He could not go to his farm every day as he did prior to the accident and had to be assisted by his son. He can no longer jog every morning and bathe in the river as he did prior to accident.

(4) Impact on Pecuniary Prospects

[28] Save for the claim with respect to loss of earnings lost by the time of the trial and pleaded as special damages, there is no medical or other evidence of the claimant's injuries affecting his pecuniary prospects.

[29] The evidence of Mr. Lazar is that he had to assist his father by taking care of his farm after the accident. There is however no medical evidence that the claimant's resulting symptoms would affect his ability to farm or paint.

Quantification of General Damages for Pain Suffering and Loss of Amenities

[30] The court exercises its discretion in determining the quantum of damages that would be fair and reasonable compensation in all the circumstances. In determining how to exercise

its discretion on the question of general damages for personal injuries it is well established that:

*"In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further a field. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge's discretion".*⁶

[31] Counsel for the claimant submits that an award of \$155,000.00 being \$140,000 for pain and suffering and \$15,000 for loss of amenities would be reasonable compensation. Counsel cites a number of cases including the cases of **Vaughn Manner v Tashayla Weekes** (a minor)⁷ where the claimant's award was reduced to \$15,000 for pain and suffering and \$10,000 for loss of amenities by the Court of Appeal; **Yvonne Francis v Josph Pestaina**,⁸ where the claimant was awarded \$13,000.00 for pain and suffering only; **Asquith McLean v Sheldon Bynoe**,⁹ where the claimant was awarded \$15,000.00 for pain and suffering and loss of amenities; and the Trinidad and Tobago case of **Ian Sieunarine v Doc's Engineering Works**¹⁰ where the claimant was awarded TT\$322,650.00 in December 2010 which counsel states is the equivalent of EC\$141,320.70.

[32] Counsel submits that the claimant's case can be differentiated from **Yvonne Francis** because the claimant in that case did not undergo any surgery or have any side effects and differentiated from **Asquith McLean** because the claimant in this case had to undergo

⁶ CCCA Limited v Julius Jeffrey SVGHCVAP2003/0010

⁷ CA 2003/0027

⁸ ANUHCV2007/0294

⁹ SVGHCV2006/0463

¹⁰ HCA 2387/2000

a surgical procedure and spent 8 days¹¹ rather than 6 days in hospital. Counsel submits that the injuries sustained and symptoms experienced by the claimant in **Vaughn Manner** are similar to those of the claimant and, presumably therefore, that case is a good guide as to the quantum that should be awarded in this case.

[33] Counsel submits further that the claimant in **Ian Sieunarine** sustained a compound fracture of the left temporal bone and hematoma, underwent an emergency craniotomy and suffered right sided weakness, seizures, headaches, personality change, noise intolerance, blurred vision, slurred speech and poor memory and that this disabilities are similar to the resulting physical disabilities suffered by the claimant in this case.

[34] In **Darel Christopher v Benedicta Samuels dba Samuel Richardson & Co** ¹² Hariprashad-Charles J stated:

“It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff’s necessary medical care, operations and treatment.”

[35] In my view the injuries and resulting disability suffered by the claimant in **Ian Sieunarine** were more extensive and severe than the claimant in this case. In any event, for the purposes of consistency, I prefer to consider comparable cases from within the Eastern Caribbean, once available, in making a determination of what is fair and reasonable compensation.

¹¹ The medical report of Frederick states that the claimant was admitted to the hospital on 18th December 2014 and discharged on 24th December 2014 – a total of 7 days.

¹² BVIHCV2008/0183

[36] I agree that the nature and extent of the injuries suffered by the claimant in this case and his treatment were more severe than that of the claimant in **Asquith McLean** and have taken into consideration the award in **Vaughn Manner** and the fact that the award in **Yvonne Francis** did not include an award for loss of amenities.

[37] In **Sheldon Jules v Brent Williams**¹³ the claimant suffered multiple injuries including internal bleeding, fractures to the facial bones and wound to the face. The claimant was hospitalised for 9 days and was operated on to deal with the internal bleeding. At the time of his admission to the hospital it was noted that there was severe deformity of the face. The claimant was referred to a plastic and reconstructive surgeon since it was discovered that the claimant had "*malocclusion, inability to open his mouth and loss of sensation of his lower lips.*" The medical report diagnosed fracture of several bones in the face. The claimant had to undergo further surgery and the appearance of his face was permanently altered. The claimant, who was 26 years old and an amateur boxer who represented his country, was awarded \$55,000 for pain and suffering and \$45,000 for loss of amenities in 2012. The nature and extent of the injuries, the resulting disability and loss of amenities in this case were in my view far more severe than that suffered by the claimant in this case and these significant differences must be reflected by a significantly lower award.

[38] In this case, most of the symptoms experienced by the claimant in the months following the accident were alleviated by the surgery. In fact, the evidence of Dr. Emanuel is that when he examined the claimant after the surgery he exhibited no signs of a stroke and "*all situations were reversed.*" The claimant's evidence is that his only ongoing complaints are occasional headaches, face pricks, difficulty opening his eyes whenever the sun is hot and heaviness in the chest which can sometimes last for days. There is not in my view any evidence of serious and lasting disability as a result of the injuries sustained in the accident.

¹³ DOMHCV2009/0018

[39] With respect to the loss of amenities, the claimant's evidence is that he is no longer able to jog and swim. The claimant does not say why he is no longer able to jog or swim. I note that there is no medical evidence to support the implied assertion that the claimant's inability to jog and swim is due to the injuries sustained in the accident or that his ongoing symptoms would prevent him from jogging and swimming.

[40] While there are cases where the court has quantified damages separately under each head, the general practice is to grant a global sum for general damages for pain and suffering and loss of amenities rather than to quantify damages separately under each of these heads or to disclose the build-up of the global award.¹⁴ However it is "*critical to keep these heads firmly in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.*"¹⁵

[41] Having regard to all the circumstances, I find that **\$30,000.00** is reasonable compensation to the claimant for pain, suffering and loss of amenities.

[42] In summary, the claimant is awarded damages as follows:

1. Loss of Earnings	\$ 1,000.00
2. Nursing Care	\$ 1,000.00
3. Pain, Suffering and Loss of Amenities	\$30,000.00

[43] No pre - judgment interest is awarded having regard to the case of **Dominica AID Bank v Mavis Williams**¹⁶ which held that in this jurisdiction the court has no power to award pre-judgment interest.

¹⁴ Cornilliac v St. Louis (1965) 7 W.I.R. 491 per Sir Hugh Wooding CJ at 494 G-H,; Heidi Binder v Patrick Mcvey et al BVIHCV2005/0006

¹⁵ Heidi Binder v Patrick Mcvey et al BVIHCV2005/0006 at paragraph 63

¹⁶ DOMHCVAP2005/0020

[44] The claimant is awarded prescribed costs.

Fidela Corbin Lincoln
Master