

**EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV 2014/0192

BETWEEN:

MARY JOSEPH

Claimant

and

**[1] ASHA HILL
[2] JERRY HENRY**

Defendants

Before:

Ms. Agnes Actie

Master

Appearances:

Ms. Danielle Edwards for the claimant

Ms. Colleen Grant for the defendants

2015: October 28,
December 1

JUDGMENT

1. **ACTIE, M.:** This matter involves an application for assessment of damages arising out of a motor vehicular accident.

Background

2. On 30th October 2011, the claimant was a front seat passenger on a mini bus which was involved in a traffic accident. The bus was owned by the second defendant and driven by the first defendant. The claimant, 42 years at the time of the accident, sustained a broken leg and other injuries. She was admitted at the Princess Margaret General Hospital where she underwent surgery and was subsequently

discharged. Upon being discharged, she returned to Guadeloupe, her usual place of residence, and was readmitted in hospital in Guadeloupe on 9th November 2011. Dr. H. Tchero, a medical doctor in Guadeloupe, in his medical report stated that the claimant needed urgent admission and on 11th November 2011, underwent urgent surgery which lasted for three hours for extensive cutaneous infection.

3. The claimant's injuries were particularized in a medical report as follows:

- Open fracture type 111- B Gustilo,
- Communitive fracture left tibia and fibia
- Osteomyelitis left tibia
- Palsy common peroneal nerve left lower limb

General Damages

4. The claimant claims the sum of \$220,000.00 as general damages for pain and suffering and loss of amenities.
5. General damages are usually determined taking into consideration the principles set out by Wooding CJ in the seminal case of **Cornilliac v St Louis**¹ 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 and resulting disability

6. The claimant suffered a broken leg and was diagnosed with open fracture type 111- B Gustilo, Osteomyelitis and palsy common peroneal nerve left lower limb. As a result of those injuries, the claimant was left with a shortened left limb and a permanent limp for the rest of her life.

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

Pain and suffering

7. The claimant states that she suffered immense pain while in hospital and after she was discharged due to the injuries and post-surgery infections. The claimant avers that she has been in continuous pain since the accident and according to the medical report, the pain will persist throughout the remainder of her life.

Loss of amenities

8. The medical evidence reveals that the claimant will have a permanent limp and will not be able to stand for long periods. The claimant avers that the injuries left permanent scars on her legs and she is now unable to wear skirts or short clothing as her legs cannot be exposed due to sensitivity to sunlight. The claimant avers that she obtained training to work in the hotel industry but is unable to perform as a result of the injuries suffered.

Extent to which the claimant's pecuniary prospects have been affected.

9. Dr. DeArmas, in his report and oral examination, states that the claimant has made significant recovery from her injuries but will have a permanent limp and will be in constant pain due to the shortened limb. He opined that the claimant will be able to work but will only be able to stand for a maximum period of 4 hours followed by at least two hours rest due to shortened limb and the constant pain.
10. The claimant, in support for the award for general damages, referred the court to the following authorities:-

(1) **Aveline O'Ggarro v Neil Ross**²:- where the claimant in a vehicle accident suffered a dislocated right hip and was hospitalized for one month. She rehabilitated on crutches and had to walk with the assistance of a cane. The court in 2012 awarded the sum of \$120,000.00 for pain and suffering and loss of amenities.

² SVGHCV 2004 /329

(2) **Marcel Fevrier v Bruno Cancho**³:- the court in 2002 awarded the 2nd claimant the sum \$150,000.00 for pain and suffering and loss of amenities for a fractured right femur. She underwent surgery and was incapacitated for 6 months. She had chronic joint pains with a 1 inch shortening of her right limb with a 10% partial disability.

(3) **Gerald Khoury v Keithley George**⁴: - The claimant, 43 years, suffered severe deformity of the left leg and ankle and experienced severe pain and suffering from the physical injuries. He spent four (4) days in hospital in Antigua. Due to the severity of the injuries, he had to seek further medical treatment in the USA. He underwent further medical procedures for open reduction and internal fixation where two metal plates were put in his ankle and fixed by 14 screws. He developed osteoporosis of the ankle which restricted his mobility, as was unable to walk fast at the time of the accident. The court in 2004, awarded \$120,000.00 general damages for pain and suffering and loss of amenities.

(4) **Gemma Clarke v Robert Nicholas**⁵:- The claimant, 27 years, suffered a compound fracture of her right leg. She underwent surgery on the same day with open reduction and internal fixation, along with debridement of the soft tissue. She underwent 34 surgical interventions and was detained in hospital in Dominica and Martinique for a total period of 12 months. She continued as an outpatient for about one year. The injury resulted with the claimant having a permanent limp; inability to flex her right ankle and toes; inability to kneel on the right leg and inability to stoop. In 2009, she was awarded the sum of \$120,000.00 for general damages.

³ SLUHCV 1989/0313

⁴ ANUHCV 199/0249

⁵ DOMHCV /2009 delivered on 20th April 2009

11. The defendant, on the other hand, suggests an amount in the range of \$75,000.00 to \$100,000.00. The defendant relies on the decision in **Gemma Clarke v Robert Nicholas**. The defendant avers that the injuries in **Gemma Clarke** were more severe as the claimant in that case, underwent many more surgical procedures and was hospitalized for approximately one year in contrast to the claimant at bar.

Analysis

12. 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”.

13. I have considered all the circumstances, the injuries, the pain and suffering, loss sustained and the resulting physical injuries. The claimant now has a shortened left limb with a permanent limp. It is the evidence that she has suffered and will continue to suffer lifelong pains. The injuries and resulting physical disabilities will obviously affect her confidence, outward appearance and social interactions. The claimant prospects for gainful employment will undoubtedly be limited as she is now unable to stand for long hours and also will be in perpetual pain.
14. I looked at the comparative case cited and the respective awards made therein. I note especially the decision in **Gemma Clarke v Robert Nicholas**⁷ arising out of this jurisdiction, the Commonwealth of Dominica, where the court in 2009 awarded

⁶ [1998] 3 All ER 481

⁷ DOMHCV /2009 delivered on 20th April 2009

the sum \$120,000.00 to the claimant who suffered a broken leg, underwent 34 surgical procedures, hospitalized for about 12 months and continued as an outpatient for over a year after being discharged. I accept the defendant's contention that the pain, suffering and the resulting physical disabilities in **Gemma Clarke** were more severe than those of the claimant at bar. I take into account the rate of inflation since making the award in **Gemma Clarke** and accordingly, make an award in the sum of \$100,000.00 for general damages comprising \$60,000.00 for pain and suffering and \$40,000.00 for loss of amenities.

Loss of Earning Capacity

15. The claimant seeks damages in the sum of \$150,000.00 for loss of earning capacity.
16. The defendant accepts the principle of law submitted, but takes issue with the lack of evidence in support of the claim for employment or future risk of disability.
17. The conventional approach in an assessment of future loss of earning capacity 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.
18. In order to calculate on the multiplier/multiplicand basis, it was necessary for the claimant to provide reliable evidence as to her pre-accident earning capacity. The claimant submitted a certificate of employment from the general manager of Hotels Salako-PRao, point de la Verdue 97 190 Gosier, Guadeloupe. The document states that the claimant was employed as a waitress on an intermittent temporary basis during the period of 8th October 2010 to 30th September 2011. The court notes that period of employment ended a month before the accident. The letter is silent on

the wages or the rate at which the claimant was paid. The claimant, in her witness statement and oral testimony, stated that the temporary employment was mostly during the peak tourist season during the months of November to April. The claimant avers that she was paid €800 a month but did not provide any evidence such as salary slips, cheque stubs to substantiate her averment.

19. The evidential burden in an assessment of damages lies on the claimant to prove the actual or potential earnings earned prior to the accident and the incapacity to earn those earnings in the future. To undertake the calculation for loss of future earnings, the claimant's earnings history is required, with clear instructions as to what career path would have been followed but for the accident. This is clearly not before the court. The evidence is that the claimant, at the age of 42, had been on a short term placement at the hotel. The letter from her employer is silent on the earnings and the dates of the actual temporary employment. Corroboration of her earnings from her former employer would have been of great assistance. Whether the claimant is able to return to work at all, or with a lower earning capacity, the calculation of the loss earnings claims would be relatively straight forward as the claim is based on what the claimant would have earned but for the accident, measured against the residual earning capacity. The onus of proving what she would have earned had she not been injured and what she was now likely to earn, rested on the claimant throughout. The evidence before the court does not allow me to conclude whether the claimant would have remained in that position throughout and what her level of remuneration in that occupation would have been.
20. Counsel is reminded that in an assessment of damages for loss of future earnings, it is always important to furnish the court with clear information, backed up with evidence of pre-trial earnings, evidence of the nature of work carried out and evidence such as pay slips or bank statements, to demonstrate earnings before the accident.

21. In **Mitcham Black v The Attorney General of Saint Lucia**⁸ Hariprasad-Charles

J as she then was, referred to the test laid down by the Jamaica Court of Appeal in

Gravesandy v Moore⁹ 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.”

22. The medical evidence is that the claimant has made a remarkable recovery and is able to work but will be restricted to standing for a maximum period of four hours. This will obviously impact on the claimant's ability to perform effectively in any sphere of work. The claimant is entitled to damages sufficient to meet her reasonable needs arising from her injuries. In considering what is reasonable for this purpose, the court should have regard to all the relevant circumstances. The purpose of an award is to put the claimant in the position that she would have been if the accident had not happened.

23. The claimant, in the absence of evidence, is not to be compensated or placed in a better financial position than she would otherwise have enjoyed but for the accident. The claimant, in her oral testimony, stated she has not made any attempt to seek alternative employment since the accident. The medical evidence does not suggest that the claimant would be totally handicapped in the labour market, but will however be limited in her capacity to earn. The court accepts that the claimant was in temporary intermittent employment up to one month before the accident but does not accept the uncorroborated evidence of €800 monthly as claimed. The evidence suggests that the claimant had not been in continuous employment. I am of the view that the multiplier/multiplicand basis is inappropriate because of the uncertainty as to what the claimant would have earned over the course of her

⁸ SLUHCV 2004/0502 delivered on 19th March 2007

⁹ (1986) 40 WIR 222

working life but for the accident as the palpable evidence has not been laid to assist the court to calculate the multiplicand.

24. However it was held in **Blamire v South Cumbria Health Authority**¹⁰ that the court can disregard the conventional approach and arrive at a lump sum figure to compensate the claimant for future loss of earnings where there are evidential uncertainties which prevent the court from using the multiplier/multiplicand method to assess damages for loss of future earnings.
25. I take into consideration that although the claimant has made a remarkable recovery and is able to return to work, she would not possess the same earning capacity due to the injuries and the continuous pain. I accept that there are evidential uncertainties which do not allow the court to use the conventional multiplier/multiplicand method and acting on the **Blamire's** principle, would accordingly award the claimant a nominal sum of \$10,000.00 for loss of future earnings.

Future medical care

26. The claimant seeks an award of \$30,000.00 future medical treatment. Dr. De Armas stated that the claimant has made a remarkable recovery from her injuries, but stated that she will continue to suffer pain throughout her life and will be in need of pain killers to suppress the pain. The doctor opined that the need for future surgical procedures for possible infections or osteomyelitis depend on the claimant's immune system. He opined that if the infection reoccurs, it can lead to amputation, but intimated that this cannot be predicted with any certainty as it will all depend on the claimant's health. The claimant cites the authority of **Gemma Clarke v Robert Nicholas** and seeks an award of \$30,000.00 for future care. The defendant suggests an award of \$20,000.00 as an appropriate amount, as the injuries in **Gemma Clarke** were more severe than the injuries suffered by the claimant.

¹⁰ 1993] P.I.Q.R. Q1 CA

27. It is undisputed that the claimant will be in continuous pain for the rest of her life and the possibility of future surgical procedures and the adverse consequences in case of a recurring infection. It is already accepted that the **Gemma's** injuries were more severe than the case at bar and I accordingly accept the defendant's proposal of \$20,000.00 as a reasonable sum for future medical care and I so award.

Special Damages

28. It is trite law that special damages must be pleaded and proved by evidence capable of supporting the conclusions to which the court is invited to reach in the assessment. The claimant claims special damages in the sum of \$13,153.78 arising from the accident. The amounts represent various items comprising of :- (1) \$181.17-Jolly pharmacy; (2)\$495 - head tax travel: (3) \$4020- ticket travel (4) \$766.00- Insurance (5) \$540 Medical report from Guadeloupe (6) \$50- medical report Dominica (7) \$13.81- tax on ticket purchased (8) \$511- ambulance services (9) \$1667.85- physiotherapy massage; (10) \$750- Hotel reservation;(11) \$1644.27 medical services from Dr. Tcherro (12) \$870.00- Princess Margaret hospital (13) \$1643.76- pharmaceuticals.

29. Counsel for the defendant submits that the invoices presented only proved a total of \$617.98 and not \$13,153.78 as claimed by the claimant.

30. I have reviewed the claimant's invoices produced together with the witness statements and am concerned about the way in which the evidence was presented. It is the basic principle that the claimant must prove his case by evidence capable of supporting the conclusions to which the court is invited to come. In an assessment of damages, there is need for evidence and also for an analysis of the evidence in order to make a finding of fact on the amounts claimed. The claimant produced receipts and invoices comprising of amounts for head tax travel, ticket travel, insurance which were allegedly claimed for family members who travelled to assist her in Guadeloupe during her recovery. Most of

the invoices failed to identify the names of the persons for which the amounts are claimed. The claimant failed to provide the ticket stubs, but only provided passport pages with Guadeloupe immigration admitted stamps. Counsel for the defendants challenged the invoices presented for hotel accommodations and avers that those are all unconfirmed bookings usually presented in order to obtain French visas and did not reflect actual confirmations and paid bookings.

31. The court notes that the claimant claimed the sum of \$1667.85 for physiotherapy massage which she had not undergone due to lack of finance. This amount should have been claimed under future medical care as special damages consist of out of pocket expenses and loss of earnings incurred down to the date of trial.
32. I accept that the claimant is entitled to reasonable costs for care givers during recovery. I also accept the oral and witness statements of the claimant's daughters of the care provided to the claimant during the period of recovery. However, I do not accept the invoices for the hotel accommodations as it is the evidence that the claimant resided in Guadeloupe and would have accommodated her daughter at her place of residence and not in a hotel. I accept the counsel for the defendants' contention that the artificial hotel bookings were only to assist the parties in obtaining visas required to travel to the French territory of Guadeloupe.
33. It is always for the claimant to provide the proper documents to avoid the difficulties caused by the inadequate evidence when attempting to prove a claim for special damages. Where a claimant has pleaded the amounts claimed as special damages, but do not provide tangible evidence to prove the amount, it is always open to the court to give consideration to an award of nominal damages since the problem is one of proof but not the absence of loss. The Privy Council in **Greer v. Alstons Engineering Sales and Services Ltd**¹¹ quoting from **McGregor on Damages** 13th Ed at para 295 stated;

¹¹ [2003] UKPC 46 (19 June 2003).

“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 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.”

34. It is accepted that the nature and extent of the claimant's injuries would have necessitated her obtaining assistance during recovery. I accept the evidence both in oral examination and in the witness statements of the care givers during the period of convalescence which would necessitate the obtaining of visas to facilitate travel from the Commonwealth of Dominica to the French Territory of Guadeloupe. The paucity of receipts and better particulars will deprive the claimant of her full entitlements but the court has discretion to award a nominal award in keeping with **Greer v. Alstons Engineering Sales and Services Ltd.** Having reviewed the evidence in submissions and oral testimony, I am of the view that a nominal award of \$5000.00 should be awarded for special damages.

Order

35. In summary, it is ordered that the defendants shall pay the claimant the following awards:
1. An award for general damages in the sum of \$100,000.00 being \$60,000.00 for pain and suffering and \$40,000.00 for loss of amenities.
 2. An award of \$5,000.00 for special damages
 3. An award in the sum of \$10,000.00 for loss of earning capacity.
 4. An award of \$20,000.00 for future medical care.
 5. Interests on the global sum at the rate of 5% from the date of judgment to the date of payment in full.
 6. Prescribed costs in the sum of \$10,125.00 pursuant to CPR 65.5.
36. I wish to thank counsel for their valuable submissions.

Agnes Actie
Master