

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

Claim No. SVGHCV2013/0183

Between:

WINSTON MC MILLAN

Claimant

And

CLIFREN WARREN

1st Defendant

OSBORNE ANDREWS

2nd Defendant

WINSTON MARS

3rd Defendant

Before:

Master Fidela Corbin Lincoln (Ag.)

On Written Submissions:

Ms. Patricia Marks of counsel for the Claimant

Mr. Duane Daniel of counsel for the Defendants

2015: June 25

JUDGMENT

- [1] **CORBIN LINCOLN M (Ag):** The claimant suffered personal injuries, loss and damages as a result of a motor vehicle accident caused by the negligence of the defendants. Judgment on admissions was entered against the defendants with damages to be assessed.

General Damages

- [2] The legal principles governing the assessment of general damages are well established. The main factors to be taken into account are:

- (1) the nature and extent of the injuries sustained;
- (2) the nature and gravity of the resulting physical disability;
- (3) the pain and suffering endured; and
- (4) the loss of amenities; and
- (5) the impact on the claimant's pecuniary prospects

1. Nature and Extent of Injuries

- [3] The claimant states that he suffered injuries to his chest, lower back and neck as a result of the accident which occurred on 13th August 2010.
- [4] The claimant was examined by Dr. M Varunny at his private office on 14th August 2010, the day after the accident. A medical report from Dr. M. Varunny, dated 19th August 2010, states:

"He sustained blunt injuries to ® lateral chest and neck. He also sustained many bruises, abrasions and minor cuts on both legs. He had them cleaned and drained at A&E.

*On my examination I had found serious blunt injury esp to ® side chest. Hence Chest xrays and neck xrays were ordered. The chest xray revealed ® sided plural effusion (that is fluid in the ® lung). Chest xray also revealed ® lower zone lung pneumonitis. There was no rib fractures and no pneumothorax. **Neck xray revealed degenerative orteo arthritis. But this is not due to the accident. He will need at least a months rest to recover completely from these injuries. "***
(emphasis mine).

2. The nature and gravity of the resulting physical disability

- [5] The claimant was re-examined by Dr. Varunny on 13th September 2012, almost two (2) years after the accident. Dr. Varunny's medical report, dated 13th September 2012, states:

“ Today after a thorough examination his @ lung is healthy and functioning normally. All his bruises have healed completely. In other words he has regained his health and he is ready and fit to work.”

[6] The claimant's evidence is that since the accident he has been plagued with a wide range of ailments including headaches, the inability to hold objects, fainting, daily neck pains, swollen neck, difficulty bending and turning his neck and chest pains. The claimant does not say whether he informed Dr. Varunny of these numerous ailments when he consulted him in September 2012 – more two years after the accident. I note that Dr. Varunny's medical report dated 13th September 2012 does not state that the claimant made any complaints of the many ailments which he now states beset him since the accident.

[7] In any event, in the opinion of Dr. Varunny, the claimant had fully regained his health and was fit to work by September 2012

[8] The claimant's evidence is that he was not satisfied with Dr. Varunny's report since *“as up to that time and to date I continue to suffer from my injuries.”* The claimant states that he could not afford to see a specialist and it was not until 2012 when he received assistance from his lawyer to consult Dr. Perry DeFreitas.

[9] On 10th December 2013, more than three (3) years after the accident, the claimant was examined by Dr. De Freitas. Dr. De Freitas's report, dated 21st December 2013, states that the claimant was seen on 10th December 2013 and complained of right-sided neck pain radiating down the top of his back and right shoulder pain especially when using his arm. The report states further that:

“Examination revealed that he had decreased range of motion of the neck in all directions with tenderness along the upper part of the Right Trapezius Muscle as well as tenderness at C4 to T4 with the area between C5 and C6 very tender.

The right shoulder also had limited range of movements in all direction with slightly wasted and weaker muscles compared to the left. There was tenderness on the anterior aspect of the right rotator cuff.

X-rays of the cervical spine shows evidence of Degenerative Disease especially at C 5-6 with disc space narrowing. X-ray of the shoulder showed no obvious problems.

He was then referred to get physical therapy...along with a course of anti-inflammatory medications and exercise for his neck and shoulder.

As a farmer and landscaper...these injuries can be quite limiting plus the fact that they are now quite chronic can impact him achieving full recovery”

[10] It is not clear from Dr. DeFreitas’s report whether he reviewed Dr. Varunny’s earlier reports but, like Dr. Varunny, he found the claimant to be suffering from a degenerative disease. However, unlike Dr. Varunnuy, he does not opine as to the cause of the degenerative condition which he found the claimant to be suffering from three (3) years after the accident.

[11] Dr. Varunny examined the claimant immediately following the accident and clearly stated that a neck x-ray disclosed that the claimant was suffering from degenerative osteoarthritis which was not caused by the injuries sustained in the accident. The claimant states that he was informed that all his medical reports were forwarded to Dr. DeFreitas. If so, and Dr. DeFreitas was of a different opinion regarding the cause of the claimant’s degenerative disease then, in my view, it would have been incumbent on him to say that expressly and give reasons for his differing opinion. As it stands, Dr. DeFreitas has not opined as to the cause of the claimant’s degenerative disease or stated whether the injuries sustained in the accident exacerbated or had any impact on his existing degenerative disease. The medical evidence in this case can be contrasted with the case of **Danny Bramble v William Danny et al**¹ where there was clear medical evidence that the whiplash injuries sustained by the claimant aggravated his existing degenerative joint disease.

[12] In the circumstance I find that there is no medical evidence that the degenerative disease or the neck mobility issues diagnosed by Dr. DeFreitas were caused or exacerbated by the injuries sustained in the accident.

¹ ANUHCv1999/0106

- [13] Dr. DeFreitas's medical report also states that the claimant complained of right shoulder pain especially when using the arm and that the right shoulder had a limited range of movement. The claimant's evidence is that he suffered injuries to his chest, lower back and neck². He gave no evidence that he sustained a shoulder injury as a result of the accident. Neither of the reports prepared by Dr. Varunny state that the claimant sustained an injury to his right shoulder or complained of any resulting shoulder pain. The claimant's first recorded complaint of a shoulder pain is when he visited Dr. DeFreitas three (3) years after the accident. Dr. DeFreitas does not opine as to the cause of the shoulder pain and resulting mobility issues complained of but states that an x-ray of the claimant's shoulder did not disclose any obvious problems. The evidence does not in my view establish that the claimant's shoulder pain and associated mobility issues were caused or exacerbated by the injuries sustained in the accident.
- [14] The claimant may very well have been experiencing the ailments he states but the medical evidence presented does not support his assertion that the ongoing ailments he gave evidence of or his condition as detailed in Dr. DeFreitas's report were caused by the negligence of the defendants. Such evidence in my view is critical to establishing a causal link between the breach of duty and the damages alleged. Evidence of this nature is even more important in the face of a medical report in 2012 stating that the claimant had regained his health and was fit to work.
- [15] Having considered the evidence before me, I find that the injuries sustained by the claimant as a result of the defendants' negligence were a blunt injury to the right chest, and neck, bruises, abrasions and minor cuts on both legs. The injuries caused fluid in his lung and lower zone lung pneumonitis. The evidence shows that the claimant made a full recovery from these injuries by 2012.

² Paragraph 4 of the claimant's affidavit

3. Pain and suffering and Loss of Amenities

- [16] The claimant suffered bruises and abrasions on his leg as well as blunt chest and neck injuries when a mini bus owned by the defendants and driven by the 1st defendant struck a lamppost. He was taken to Georgetown Hospital and then to Milton Cato Memorial Hospital. The claimant states that there was no doctor at the hospital and he therefore discharged himself. He visited Dr. Varunny the following day because he continued to experience pain. Dr. Varunny opined that the claimant would need to rest for at least one month to recover. It is clear that the claimant would have experienced some pain and suffering as a result of his injuries.
- [17] The claimant's evidence is that prior to the accident he dived for recreation. Since the accident he has been unable to dive as he used to. The claimant states further that as a result of not working he had difficulty looking after his three children who depend on him for their daily needs, which frustrated him.

4. Impact on Pecuniary Prospects

- [18] The claimant's evidence is that prior to the accident he was employed as a farmer and landscaper and would sometimes dive and sell his catch. The claimant states that as a result of the injuries sustained in the accident he had to stop his farming and landscaping job, as he could not perform these jobs. He is currently employed at Bally and Bally Investments and earns between \$60.00 to \$70.00 per day.
- [19] The claimant has not led evidence of where he was employed, when he ceased employment and how much he earned prior to the accident. In any event, the evidence of Dr. Varunny is that the claimant was fit and able to work when he was examined in 2012. In the circumstance I find that there is insufficient evidence that the injuries sustained as a result of the negligence of the defendants impacted the claimant's pecuniary prospects.

Quantification of General Damages

1. Pain Suffering and Loss of Amenities

[20] 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”.³

[21] Counsel for the claimant submits that the claimant should be awarded general damages in the range of \$60,000.00 to \$80,000.00. Counsel cites the cases of **Peter Douglas v Sean Roberts and Maurice O’Garro**⁴ and **Aubrey Smith v Calvert Fleming and Alvin White**⁵.

[22] Counsel for the defendants submit that \$7,500.00 is an appropriate award for the claimant. Counsel relies on the cases of **Helious Trocard v Nigel Edmund and Kurt George**⁶ and **Louis v St. Omer et al**⁷.

[23] In the **Peter Douglas** case, the medical report stated that the claimant had developed long term degenerative disease of the cervical spine initiated or otherwise exacerbated by the injury he sustained in the accident. There was also evidence that the claimant would

³ CCCA Limited v Julius Jeffrey SVGHCVAP2003/0010

⁴ SVGHCV2010/0125

⁵ AXAHCV0050/2008

⁶ DOMHCV2008/0206

⁷ SLUHCv2001/0586

require long term physical therapy. Similarly, in the **Aubrey Smith** case the medical evidence showed that the claimant's pre-existing cervical spondylitis and degenerative condition were exacerbated by the injuries received in the accident. The claimant was also required to undergo surgery.

[24] In this case, there is no evidence that the claimant's degenerative condition was caused or exacerbated by the injuries sustained in the accident. The claimant's condition did not require any surgical intervention nor was he hospitalized. The nature and extent of the injuries and the resulting disability of the claimants in the cases cited by counsel for the claimant were far more severe than that suffered by the claimant in this case. Accordingly, in my view, an award to the claimant should be significantly less than that awarded to the claimants in those cases.

[25] In **Louis v St. Omer et al** ⁸ the claimant suffered a laceration of the scalp and left shoulder, ligamentous injury to the left thumb, a sprained shoulder and a laceration of the left forearm from which a piece of glass had to be removed under local anesthesia. All the injuries healed in 4 weeks with no complications. The claimant was awarded \$7, 500 for pain, suffering and loss of amenities in 2005.

[26] In **Asquith Mc Lean v Sheldon Bynoe** ⁹ the defendant struck the claimant with a cinder block to the left side of his head. The claimant sustained a 4 cm laceration to the left region of his scalp, was treated and discharged but was subsequently admitted and remained in hospital for six (6) days for observation after complaining of headaches, vomiting and light headedness. The claimant was awarded the sum of \$15,000.00 for pain, suffering and loss of amenities in 2009.

⁸ SLUHCV 2001/0586

⁹ SVGHCV 2006/463

[27] In **Helious Trocard v Nigel Edmund and Kurt George**¹⁰ the claimant, who suffered abrasions to his hand and lip and generalised body tenderness and made a full recovery, was awarded \$7,500 in 2010.

[28] In **Dean Enville A.K.A Brian Enville v The Attorney General of Saint Vincent and the Grenadines et al**¹¹ the claimant was hospitalized for a few days following an assault and battery. The claimant was assessed and managed on multiple occasions for the same complaints at district clinics for a period of five years and was diagnosed with chronic exacerbated soft tissue inflammation of the left groin and cremasteric musculature. The claimant stated that his sexual performance had decreased since the incident, which impacted his relationship with his girlfriend. The claimant was awarded \$20,000 in 2014 for pain suffering and loss of amenities. The award included an uplift for aggravated damages.

[29] 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.”

[30] Having considered the awards made in the cited cases, the facts of this case and giving an uplift for the incidence of inflation I find that \$10,000.00 is reasonable compensation to the claimant for pain, suffering and loss of amenities.

[31] Interest at of 2 ½ % is awarded from the date of service of the claim to the date of judgment.

¹⁰ DOMHCV2008/0206

¹¹ SVGHCV 2008/0326

¹² BVIHCV2008/0183

Loss of Earnings

- [32] Counsel for the claimant submits that the claimant was employed as a landscaper and farmer prior to the accident and suffered a long period of unemployment as a result of the injuries sustained. Counsel submits that a global figure of \$10,000 would be reasonable compensation to the claimant for loss of earnings.
- [33] Loss of earnings is capable of exact estimation and should be pleaded and proved as special damages. In **Brown's Bay Resort v Luca Pozzoni** ¹³ the Court of Appeal, following, **The Attorney General for Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al**, ¹⁴ held that the well established principle that special damages must be specifically pleaded and proven was not absolute. Thus the Court of Appeal upheld the learned trial judge's decision to award damages for lost revenue based on the written and oral evidence of the claimant notwithstanding the absence of any supporting documents.
- [34] In this case the claimant has neither pleaded nor given any evidence of where he was employed prior to the accident, his earnings prior to the accident or of the period for which he remained unemployed as a result of his injuries. In the circumstance I find that there is insufficient evidence upon which I can award the claimant damages for loss of earnings.

Special Damages

- [35] The claimant pleaded special damages of \$350.00 for the cost of medical care and \$100.00 for a police report. The claimant's evidence is that in addition to the special damages pleaded he incurred the cost of \$75.00 for a medical report by Dr. Perry DeFreitas dated 21st December 2013 and \$45.00 for an x-ray.
- [36] The defendants have agreed to pay \$410.00 but dispute that it is liable to pay for the medical report by Dr. Perry DeFreitas, the x-ray or any other costs incurred after the

¹³ ANUHCVP2010/0033

¹⁴ ANUHCVP2004/0022 (delivered 6th February 2006, unreported) ¶

medical report of Dr. Varunny's dated 13th September 2012. The defendants dispute these costs on the ground that these costs could not be connected to the motor vehicle accident. The defendants submit that it is unreasonable for them to pay for costs incurred by the claimant for medical reports and/or treatment after September 13, 2012 as the claimant was declared to have regained his health by that date.

[37] The claimant states that even after his consultation with Dr. Varunny he continued to experience pain and discomfort. Notwithstanding that the medical report produced following the examination does not clearly establish that the claimant's medical condition at that time was caused or contributed to by his injuries sustained in the accident, it was not in my view unreasonable for the claimant to consult a doctor if he was experiencing pain which it appears to have attributed to his injuries sustained in the accident. It was also reasonable for the claimant to obtain an updated medical report for his claim. Receipts support the claimant's claim for \$75.00 for Dr. Perry DeFreitas's medical report and \$45.00 for an x-ray and I therefore have no hesitation in awarding these costs to the claimant.

[38] The evidence of the claimant is that he is asking the court to award "*damages as stated in my claim form along with the sums paid for the medical report of Dr. Defreitas...and x-ray fee*". The claimant pleaded special damages of \$450.00. Dr. De Freitas's report and the x-ray amount to \$120.00. The total sum being claimed as special damages is therefore \$570.00. The defendants admit liability for \$410.00 and give a breakdown of the specific costs for which liability is accepted. This leaves the sum of \$160.00 in dispute. The costs of Dr. De Freitas's report and the x-ray amount to \$120.00. Save for the costs of Dr. Defreitas's report and the x-ray the claimant has not provided a breakdown of the sum claimed as medical care and I am therefore unable to ascertain what medical expense the remaining \$40.00 in dispute is referable to.

[39] Based on the evidence before the court including the defendants' admission of liability for the sum of \$410.00 I award the claimant the sum of \$530.00 as special damages.

[40] Interest is awarded on special damages at a rate of 2 ½ % from the 8th August 2013, the date of filing the claim, to 25th February 2015, the date judgment on admissions was granted.

[41] In summary it is hereby ordered that the defendants shall pay the claimant;

(1) \$10,000.00 for pain suffering and loss of amenities with interest at of 2 ½ % from the date of service of the claim to the date of judgment.

(2) \$530.00 as special damages.

(3) Interest is awarded on both sums from the date the claim was filed to the date judgment on admissions was granted.

[42] The claimant is awarded prescribed costs.

Fidela Corbin Lincoln
Master (Ag.)