

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANGUILLA

Claim Number: AXAHCV2001/0059

Between

CELINA FLEMING

Claimant

And

PHOENIX FLEMING

Defendant

Before:

Master Cheryl Mathurin

Appearances:

Caribbean Associated Attorneys for the Claimant

Ms Paulette Harrigan for the Defendant

2006: October 18th,
2008: January 23rd

ASSESSMENT OF DAMAGES

- [1] **MATHURIN, MASTER:** It would be remiss of me not to mention the length of time it has taken to deliver this assessment and to apologise for any inconvenience it may have caused. On the 28th August 1999, the Claimant, Ms Fleming, who was 35 at the time, was seated in the back of a pick up truck driven by the Defendant, Mr Fleming. Ms Fleming fell out of the pick up when Mr Fleming was negotiating a corner and as a result suffered several injuries, some of which are permanent and she has claimed in this action damages for those injuries which she alleges were caused by the negligence of Mr Fleming. Mr. Fleming filed no defence to the Claim and Judgment in Default was consequently entered against him on the 23rd October 2002. An application to set aside this Judgment was later dismissed and the Parties were subsequently asked to file submissions as to the quantum of damages that should be awarded to Ms Fleming for her injuries and loss.
- [2] On the question of general damages, the law is settled. The case of Cornilliac v St Louis (1965) 7 WIR 491 is the locus classicus on this point and Wooding CJ set out the considerations to be borne in mind in assessing general damages;

- (a) The nature and extent of the injuries sustained

- (b) The nature and gravity of the resulting physical disability
- (c) The pain and suffering experienced
- (d) The loss of amenities if any
- (e) The extent to which pecuniary prospects are affected

[3] Further, applying the principles in **Heeralall v Hack Bros.** (1977) 15 WIR 117, the law expects an award of fair compensation, fair to Ms Fleming for what has happened to her through the negligence of the Mr Fleming and fair for the Mr Fleming to pay for such negligence. Such damages cannot be perfect compensation, but it will be fair compensation for her injuries and for the social, economic and domestic consequences to her. I must consider therefore, the nature and extent of the injuries that Ms Fleming sustained and the effect that this has had on her health. I must also consider her past pain and suffering, any future pain and suffering that she will experience and any curtailment in her living that the injury has produced.

[4] The first medical report submitted by Ms Fleming and prepared by Dr Madhu Thottambeti on the 8th August 2000, reveals that upon examination after the accident, Ms Fleming was "*stuporous with Glasgow Coma – scale 11/15*" with external injuries as follows;

- “1. *Eyelids were swollen and conjunctival congestion present over right side*
- 2. *Punctured wound present over right side of face*
- 3. *Abrasions over both wrists*
- 4. *No bony or Body deformity was present.*”

[5] Ms Fleming was released shortly after the accident and referred to the Surgical Clinic at the Out Patients Department of the Princess Alexandra Hospital. The medical history on the file reveals that Ms Fleming visited Dr Gibbs in St Martin on the 24th June 2000. At that time, his report states that when he saw her, she complained of amnesia, abnormal equilibrium, dizziness, falling down and facial pain. In conclusion in his report, Dr Gibbs stated that she had a fracture of the maxillary bone, occipital hematoma and a lesion of the face under the right eye. He diagnosed her with mental disorder describing Ms Fleming as "*strange acting, talkative, disorganized, anemia*" Dr Gibbs also diagnosed a neurological disorder as "*dizziness, numerous falls, weakness, drowsiness*" and stated that her disability was total, not being in any normal physical working condition.

[6] On the 16th December 2000, Dr Gibbs certified that Ms Fleming was suffering from a sequelae of skull brain traumatism with headaches and dizziness with blackouts and unconsciousness and that this was a disablement which was likely to remain permanent and hence that she was likely to remain permanently incapable of work as a result.

[7] In the latest medical report on file from Dr Gibbs on the 28th August 2006, he states that clinical repercussions since the accident include dizziness, drowsiness, intermittent loss of memories, obesity and loss of monthly periods. He states that this is a consequence of severe cranial traumatism and refers to the reports submitted and mentioned herein before.

[8] Ms Fleming in a witness statement dated the 8th May 2003, speaks of the pain following the accident. She relates the problems she had with dizziness and falling down and difficulty in remembering things, she also talks of the loss of sensation in her hands and states that she has not menstruated since the accident. Ms Fleming also states that she has not been able to go back to work since the accident as she can not move around as she used to and is afraid of what she would do on a job. Prior to the accident, Ms Fleming states that she used to go dancing and that she no longer does this. She also states that she is unable to do much housework and cooking as she would drop things and has even burnt herself. She says she would love to go back to work but she is afraid of the "senseless stuff" that she would do at the job. The quality of her life has undergone a dramatic change.

[9] Counsel for the Defendant has filed very detailed submissions in relation to the quantum of damages and I have taken into consideration several factors which would necessarily exclude the points she makes in relation to the analysis of the doctors' reports and Ms Flemings injuries.

- (a) The claim was not defended and hence there is no dispute of the facts or the evidence in support of the claim
- (b) CPR 2000 Part 10.6 details additional specific procedures to be followed in relation to the defence of a claim for personal injuries where medical reports are attached to the claim and are disputed
- (c) CPR 2000 Part 12.13 limits the matters to which a defendant can be heard unless a judgment in default is set aside to
 - a. an application for default judgment where the claim is for some other remedy as the court considers the claimant to be entitled to on the statement of claim
 - b. Costs
 - c. Enforcement of the judgment
 - d. The time of payment of any judgment
- (d) The defendant by consent in the order of the 12th December 2002, agreed to the admission of the doctors' reports without the calling of the doctors.

It is therefore not open to Counsel for the Defendant at this point to raise points on the , medical findings or qualifications of the doctors and as such these submissions will be disregarded to the extent that they question the credentials of the doctors or their diagnoses.

[10] In all the circumstances, I consider as a reasonable award of general damages the sum of EC\$80,000.00.

SPECIAL DAMAGES

Loss of Earnings

- [11] Ms Fleming claims loss of earnings from the date of the accident on the 29th August 1999 to the date of the filing of the claim on the 11th October 2001, a period of 110 weeks. She claims that she earned EC\$450.00 per week as a Restaurant Manager. She subsequently states in her witness statement of 8th May 2003 that at the time of the accident she was a restaurant assistant manager and that she earned between US\$80.00 and US\$120.00 per week service charge of approximately US\$118.00 per month. A letter from the Social Security Board in May 2004 states that Ms Fleming's earnings for the month of August 1999 were EC\$947.30 which suggests an average that month of EC\$236.00 or US\$87.00 per week.
- [12] Counsel for the Defendant has referred me to the discrepancies in the evidence of the Claimant however, I am persuaded that whatever she did, she earned a salary at the time of her accident and the Social Security Board satisfies me that she was employed at Ripples at the time. I also accept Ms Fleming's evidence that she earned service charge of approximately US\$118.00 per month and set as a reasonable average, her weekly earnings, at US\$90.00 per week. I would therefore average her weekly income inclusive of service charges at US\$120.00 or EC\$321.60 per week. Counsel for the Defendant did point out that there is no evidence that Ms Fleming attempted to work after the accident, however, the Claimant has exhibited a Medical Certificate of Permanent Incapacity for Work dated the 16th December 2000 and has received Invalidity Benefits from the Social Security Board from 18th December 2000 to May 8th 2004.
- [13] I therefore calculate Ms Fleming's lost earnings between from time of the accident to the date of the filing of the claim to be in the sum of EC\$33,446.40. From this sum I will deduct the invalidity payments paid to her from December 2000 to the date of the filing of the claim in October 2001 in the sum of EC\$6,900.00, the final amount under this head being EC\$26,546.40

Traveling and medical expenses

- [14] Ms Fleming claims US\$572.00 for twenty three return trips from Anguilla to St Martin as well as bus fares to and from the doctor's office. She also claims medical expenses in the sum of EC\$8,110.22. Counsel for the Defendant submits that Ms Fleming has submitted no referral to see a doctor in St Martin. In addition she has submitted no evidence that she even traveled to St Martin. It does however appear from the medical reports of Dr Gibbs, that he saw her on the 9th September 1999 and the 16th December 2000. There is also evidence that Ms Fleming did a CT scan and chest X-ray and paid for these on the 11th September 1999 and also there are three receipts from a showing that Ms Fleming paid out \$US 403.75 around that time in St Martin.
- [15] The evidence in support of the claim for these expenses is poor. It is unintelligible and has different writings on the prescriptions and it is difficult to say the least, to ascertain if, how or when if any payments were made. Some of the receipts pre date the actual incident and there is no evidence of travel expense. The claim is not sufficiently or satisfactorily proven to a great extent. Upon perusal of the evidence and having regard to the submissions, the following expenses will be awarded as special damages under this head. I accept that the Claimant did indeed St Martin to see Dr Gibbs, there is evidence that she

had seen this doctor before and to visit St Martin from Anguilla is not an unusually exorbitant way of life for most persons from Anguilla and as such I award the sum of US\$200.00 or EC\$533.60 as a reasonable award to meet the travel expenses.

[16] The following medical expenses will be awarded;		
(a) Hospital charges in Anguilla and 10% late fee	EC\$749.76	
(b) CT scan and chest X-ray		US\$191.00
(c) Hospital charges in Anguilla	EC\$ 75.40	
(d) Prescription		US\$103.75
(e) Doctor's fees		US\$150.00
(f) Full body scan		US\$150.00
(g) Anguilla Hospital	EC\$ 16.50	
(h) Anguilla Dental Unit	EC\$ 15.00	
(i) Friendly Island Drug Store		US\$ 12.45
(k) Anguilla Dental Unit	EC\$ 10.00	
(l) Friendly Island Drug Store		US\$ 25.35
(m) Doctor's fees		US\$650.00
(n) Anguilla Hospital	EC\$10.80	

Total	EC\$877.46	US\$1,282.55

The accepted rate of exchange between the parties is 2.68. US\$1,282.55 x 2.68 = EC\$3,437.23. The award of special damages for medical expenses is EC\$4,314.69 and when this is added to the award for travel expenses of EC\$533.60, the total award under this head is EC\$4,848.29

Loss of Future Earnings

- [17] I accept the evidence of the Claimant and Dr Gibbs that she has been unable to work since the accident and is incapable of work in the future. The parties have agreed that a multiplier of 12 is acceptable in the circumstances taking into account the imponderables and vicissitudes of life. Ms Fleming's earnings have been averaged at EC\$321.60 per week which would amount to EC\$1,286.40 monthly. Using a multiplier of 12, I would therefore calculate her loss of future earnings in the sum of EC\$1286.40 x 12 months x 12 years in the total sum of EC\$185,241.60. This figure is discounted to reflect the invalidity payments from November 2001 to May 2004 in the sum of EC\$20,280.00 which amounts to EC\$164,921.60. This figure is further discounted by 10% to take into account the lump sum payment which leaves a total award of EC\$148,429.44.

Future Medical treatment

- [18] The claim under this head is unsubstantiated by any evidence and as such an award is disallowed.

Interest and costs

- [19] Interest is awarded to a claimant in a personal injuries case on the sum awarded for special damages from the date of the accident to the date of the assessment. Interest on this sum is calculated from the date of the service of the claim form to the date of assessment at the rate of a short-term investment. After judgment, the claimant is entitled to the full amount awarded at the statutory rate of 5%.
- [20] Costs in this claim are as prescribed under Part 65.5(1) of the Civil Procedure Rules 2000. This claim was determined by default judgment on the 22nd November 2002. The damages to be awarded are EC\$80,000.00 general damages, special damages of EC\$31,394.69 and loss of future earnings of EC\$148,429.44 amounting to the sum of EC\$259,824.13 in total. In keeping with Appendix B, costs amount to EC\$47,482.41, which is to be reduced to 60% as the claim concluded prior to trial but included the assessment of damages. This amounts to costs in the sum of EC\$28,489.45 which sum is further discounted in accordance with Civil Procedure Rules 2000, Parts 65.5(4) and 64.6(4),(5) and (6) to reflect time elapsed and non compliance by parties with the order for assessment to the sum of EC\$20,000.00.

Summary of Order

- [21] In summary, the following is the order on the assessment of damages:-
1. The defendant will pay the sum of EC\$80,000.00 as the global award for general damages to the claimant.
 2. The defendant will pay, in addition, the sum of EC\$31,394.69 as special damages to the claimant for loss of earnings and medical and travel expenses
 3. Additionally, the defendant will pay future loss of earnings to the claimant in the sum of EC\$148,429.44
 4. The defendant will pay interest at the rate of 3% on the sum of EC\$31,394.69 from the date of the accident on 29th August 1999 to date of the hearing of the assessment on 24th October 2006
 5. The defendant will pay interest on the total judgment sum of EC\$259,824.13 at the rate of 5% per annum from 24th October 2006 until payment.
 6. The defendant will pay costs in these proceedings in the sum of EC\$20,000.00



**CHERYL MATHURIN
MASTER**