

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

DOMHCV2005/0029

[CIVIL]



BETWEEN:

PETER WINSTON

Claimant

and

DIANNE TELEMAQUE

Defendant

Before:

The Hon. Justice Brian Cottle

Appearances:

Mrs. Gina Dyer- Munro for the Claimant
Mrs. Hazel Johnson for the Defendant

[2011: November 23rd
[2012: September 10th

JUDGMENT

- [1] COTTLE J:** The claimant sustained personal injuries in a motor vehicle accident for which the defendant was entirely responsible. This is the assessment of damages due to him to compensate him for his loss and injuries. At the time of the accident the claimant was 30 years of age. At the date of assessment he was 36 years. The significant injuries the claimant suffered was to his spine. The MRI showed evidence of an annular tear at L4/5 level and disc protrusion causing right lateral recess stenosis. At L5/S1 level there was also mild diffused annular bulging with minimal narrowing of the right lateral recess, a potential site for nerve root irritation or impingement
- [2]** The claimant's injury required surgical management. Strangely, though the claimant consulted with Mr. H Bedaysie, Consultant Neurosurgeon in 2005, it was not until July 2008, some 6 years after

the accident that Mr. Bedaysie performed surgery on the claimant. He says that up to that time he endured extreme pain which was not alleviated by rounds of physiotherapy, chyroblocks, acupuncture and spinal manipulation.

- [3] In December 2008 the claimant went back to Mr Bedaysie for a report and follow up treatment. He was administered an injection of lignocaine and depomednol to manage reported myofascial pains. Mr. Bedaysie thought he was 60% improved after surgery and expected maximum medical improvement could take up to 2 years. When he was again seen in 2011, Mr. Bedaysie thought that he had attained maximum medical improvement and assessed his permanent partial disability at 50% and his whole person impairment at 15%.
- [4] At the time of the accident the claimant was employed as a Customs and Excise officer performing guard duties. His basic salary was \$1,280.35 per month. By April 2009 this had increased to \$1,788.75. In his Affidavit in Support of the assessment the claimant also says that his average overtime earnings were \$1,100.00. In support of this he annexed a letter, not on official Government stationary, signed by Edison Labad for the acting Comptroller of Customs. He did not adduce any evidence of this from the Accountant General's Department who are responsible for payment of salary.
- [5] The accident occurred on 27th March 2002. The salary slip exhibited for March 2002 revealed absolutely no payment for overtime. It is difficult to see why the claimant would not have exhibited any official pay slips showing his level of overtime worked. This loss was pleaded as special damages.
- [6] The claimant also swore that he supplemented his income by operating a taxi. His earnings in that regard are put at \$14,000.00 per year. No documentary evidence was led in support of this. Under cross-examination he explained that this figure was an estimate. He did not report any earnings from that source to the Inland Revenue Department. I feel sure that the claimant would not have defrauded the income tax authorities. I am also sure that he would not wish to involve the court in any such activity.
- [7] In the circumstances, I find this item of loss claimed has not been established. Fortifying my view of this is the fact that he took no steps to hire anyone to operate this lucrative taxi business while he was incapacitated. Had there been income, it is unlikely that he would not have taken measures to preserve as much of this revenue as he could.
- [8] The claimant also says that he did not receive any salary from August 2008 to April 2009 as he was ill and unable to work. He totals this at \$14,032.10 or \$1,754.12 per month. In his cross-examination he reveals for the first time that over this period he was paid benefits from the Dominica Social Security. The statutory rate of payment of sickness benefit is fixed at 60% of the salary of the worker. His loss then could only be 40% of the salary not received or \$5,612.84.
- [9] Eventually on 12th February 2010, a Medical Board concluded that the claimant was incapable of performing his duties. He was medically boarded off.
- [10] There are other items of special damages pleaded. Some \$1,200.00 was pleaded and particularized for physiotherapy and chiropractor services. These are items which were capable of

being proven exactly. Unfortunately the claimant has given the court no assistance in this regard. The claimant filed a schedule of special damages. He claimed \$10,800.00 for transportation to the beach to swim twice daily on three days a week. A further sum of \$32,400.00 was claimed as the cost of transport to the Soufriere sulphur springs three times a week. The claimant did not produce any evidence to show that these activities were medically necessary or in any way related to the treatment of his back injury.

- [11] He also claimed \$3,600.00 for expenses concerning his diet. I can see no reason to compensate him for this item. Expenses which have been proved to my satisfaction include \$1,408.05 for medication, \$226.00 and \$1,882.00 in travel related expenses and \$2,172.00 in medical bills. This amounts to \$5,687.05.

General Damages

- [12] The principles which the court considers in making awards for personal injuries are well known. These are neatly encapsulated in the judgment of Wooding C.J in the Cornilliac v St. Louis case 7 WIR 491. They do not bear repeating. The claimant suffered a disc prolapse. He had it surgically repaired. Mr. Bedaysie, the Neurosurgeon, says that his whole person impairment is at 15%. The claimant says he experienced back pains after the accident. He was placed on sick leave for 6 weeks after the injury. Because the pain persisted the claimant attended Dr. Hendricks Paul a local surgeon who sent him to Antigua for a CT scan. The claimant continued to work and it was not until 2005 that he again attended on Mr. Bedaysie. He says that he still experienced pain.
- [13] In his pleadings the claimant averred no specific loss of amenities. In his Affidavit in Support the claimant testified that his girlfriend, with whom he lived from 1997, has left him since 2010. This he attributes to his inability to provide for her financially. He says that his sexual performance has suffered. He also claims to have been an avid player of football, cricket and basketball. His playing of volleyball, cards and dominoes he says has also been curtailed. I am not clear where he would have found the time for these activities while working many hours overtime, pursuing his part time trade of taxi driver, and taking care of the many domestic chores he claims to have performed.
- [14] While it may well be that the claimant's quality of life has been adversely affected by his injury; the obvious exaggeration by the claimant leaves this court hesitant to accept his evidence as to loss of amenities. The court also notes that, claims of adverse effects on his sexual performance notwithstanding, the claimant is the father of a 5 year old son. The claimant also says that his disability now makes it necessary to have a full time care giver for the rest of his life. This is not supported by any of the medical opinions which have been led in evidence.
- [15] In the case of David Robin and another v Attorney General DOMHCV2003/0141 this court made an award for pain and suffering and loss of amenities to a claimant of \$30,000.00. That claimant suffered injuries very similar to the present case and had to undergo the same surgical procedure performed by the same doctor. I am content to do likewise and award the present claimant the sum of \$40,000.00 for pain, suffering and loss of amenities.

Loss of future earnings

- [16] The claimant has lost his ability to perform his job. His net salary was \$1,649.75. The claimant, now 36 would probably have worked until he was 60. With the assistance gleaned from the authorities cited by both counsel I am content to adopt a multiplier of 13. The award under this head is therefore $\$1,649.75 \times 12 \times 13$ making \$257,361.00. But this total must be further discounted by 10% because the claimant now receives as a lump sum what he would have otherwise earned over several years,
- [17] It is also necessary to fix a discount to reflect the vicissitudes of life. Counsel for the claimant suggests the rate of discount in this regard should be 4%. No authorities were cited in support of this proposed rate. In DOMHCV2004/0268 Gemma Clarke v Roberts Nicholas and another a decision from Dominica, Master Lanns adopted a discount of 10% to "cater for the contingencies of life". I will do likewise. Discounting the sum of \$257,361.00 by 20%, gives a result of \$205,888.80 to be awarded to the claimant under this head.

Future Medical care

- [18] Mr. Bedaysie recommends review visits every six months. Based on the evidence adduced by the claimant, one visit to Trinidad to see Mr. Bedaysie cost him \$1,362.00 in airfare and US \$228.00 for medical consultation without the cost of the MRI. I conclude that each visit would cost the claimant some \$2,000.00. Allowing for 5 years of visits that amounts to \$20,000.00 there was also an interim payment of \$32,696.30 which the claimant has received.

The Final Award

Special damages	\$5,612.84
Loss of earnings	\$3,687.05
	\$11,299.89

General Damages

Pain, suffering and loss of amenities	\$ 40,000.00
Loss of future earnings	\$205,888.80
Future medical care	\$ 20,000.00
Subtotal	\$277,178.69
Less payment	\$ 32,696.30
Total	\$244,482.39

Costs:

Prescribed costs on the award in the amount of \$33,060.00 are awarded to the claimant.

Interest is awarded on the global award at the rate of 5% per annum from judgment to payment.



Brian J. Cottle
Brian Cottle
High Court Judge