

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2010/0423

BETWEEN:

CASEY PIGOTT
SHERRIAN PIGOTT

Claimants

and

VELELOMA POTTER
VERNON POTTER

Defendants

Appearances:

Mr. Loy Weste and Ms. Lisa Weste for the Claimants
The Defendants not appearing or represented

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2012: February 17
April 26
May 30
August 23
.....

JUDGMENT ON ASSESSMENT

[1] MICHEL, J: By claim form and statement of claim filed on 1st July 2010, the Claimants (Casey Pigott and Sherrian Pigott) instituted proceedings against the Defendants (Veleloma Potter and Vernon Potter) seeking damages for personal injuries and loss caused by the negligent driving of

the Second Defendant as the servant and/or agent of the First Defendant. The particulars of the injuries suffered by the First Named Claimant are as follows: severe headache, swollen and tender right thigh and mid-thigh level, dislocated right lower limb in external rotation and severe closed fracture of the mid shaft of the right femur. The Claimants also claim special damages of \$4,205 for medical expenses of the First Claimant and \$9,700 for the replacement value of the Second Defendant's vehicle.

- [2] On 6th October 2010, a judgment in default of defence was entered against the Defendants for damages to be assessed.
- [3] By notice of application filed on 13th January 2012, the Claimants applied for an order that there be an assessment of the damages.
- [4] On 17th February 2012, the Court ordered the Claimants to file evidence on affidavit, together with supporting documents and authorities and brief submissions with respect to the assessment, by 9th March 2012; service of the Order of the Court and the documents to be filed by the Claimants were ordered to be served on the Defendants on or before 16th March 2012; leave was given to the Defendants to respond on or before 6th April 2012; and hearing of the assessment of damages was fixed for 26th April 2012.
- [5] On 26th April aforesaid, the Claimants presented themselves to be cross-examined, but there was no appearance of or for the Defendants.

- [6] At the hearing, Counsel for the Claimants conceded that an award for loss of amenities would be affected by an award for future medical expenses, but did not concede that it would affect an award for loss of earning capacity.
- [7] On a recall of the matter on 30th May 2012, the Claimants formally entered into evidence the affidavits filed by them on 9th March 2012. In response to questions by the Court, the First Claimant agreed that the disabilities and impairments to which Dr Singh referred in the medical report of 20th April 2010 are the result of the shortening of his right leg and that if the deformity in his right leg is surgically corrected then the disabilities and impairments to which Dr Singh referred would no longer be with him. He also agreed that he could not be compensated for both the deformity and for the cost of surgically correcting it. He also testified that his employer has never told him, indicated to him or suggested to him that he will fire him, drop him or terminate his services because of the injuries which he sustained.
- [8] In his affidavit evidence, the First Claimant alleged that on or about 22nd January 2009, he was injured in a motor vehicle accident as a result of which he sustained the following injuries:
- (a) Severely comminuted fracture of the right femur;
 - (b) Entire right lower limb in external rotation;
 - (c) 1/2" 1.25 cm shortening of right lower extremity;
 - (d) 15 degrees of angulation/ mal-union at the fracture site of the injured femur;
 - (e) 45% permanent physical impairment of the right lower extremity;
 - (f) 18% permanent physical impairment as a whole person.

- [9] As a result of his injuries he will require a special shoe to wear with a heel raise of 1cm to 1.5 cm for the rest of his life and he will develop post traumatic degenerative joint disease as he grows older, which will increase the percentage of permanent physical impairment in future.
- [10] The First Claimant alleged that he incurred medical expenses for physiotherapy, surgery, medication, consultation and medical reports (totalling \$2,885) for which he seeks compensation. He alleges too that – according to Dr K.K. Singh – the cost of correcting his femoral deformity (the deformity of his left leg) evidenced by his leg length discrepancy (the shortening of the leg) is between US\$70,000 and US\$90,000. He asserts that he does not want to walk with a limp for the rest of his life and so he wishes to get the surgical procedure performed. He claims the sum of US\$80,000 or EC\$216,000 for future medical expenses.
- [11] In his affidavit, the First Claimant described in great detail the severe pain he endured from immediately after the accident of 22nd January 2009 to 28th January 2012 following surgery the day before. He also described his inability to walk without crutches for a few months after the accident in January 2009 and his switch to a cane for assistance in walking until around March 2010. He has since then been able to walk without crutches or a cane, but he now walks with a visible limp. He had remained hospitalised at the Mount St. John's Medical Centre from 23rd January to 11th February 2009 but did physiotherapy from March 2009 until about April 2010. He continued to experience intermittent pain and discomfort during this period, including extreme pain in the course of the actual physiotherapy sessions. Even now (at the date of his affidavit on 9th March 2012) he still cannot sleep on his right side, he feels pressure being applied to the rod in his upper thigh and hip and it is uncomfortable and painful for him to rest. He also cannot move his hips or gyrate his waste because he has limited flexibility and rotation in his hips. He is concerned that this limitation

will affect his future sexual experiences. He also swore that he can no longer participate in BMX bicycle stunts as he did before, nor can he run or play beach cricket or sports with his friends as he once did. His involvement in social activities has been extremely limited since the accident and this is a source of frustration to him. He has to put a half-inch sole in his shoe to balance his walk since without it he walks with a limp. He has an unsightly foot-long scar on his right leg, which is an embarrassment to him.

[12] For his pain, suffering and loss of amenities, the First Claimant claims the sum of \$120,000.

[13] The First Claimant also made a claim in his affidavit for loss of earning capacity. He alleged that he was 24 years old at the date of his affidavit of 9th March 2012; he repeated his impairments as a result of his injuries and provided information on the nature of his employment, his earnings from his employment, and his employment prospects generally. He alleged that there is a real chance that due to his discomfort in performing his job as a result of his injuries he would have difficulty in obtaining gainful employment as a skilled labourer on the job market and, because his skills and education are driven towards manual labour only, he believes that he is at a serious disadvantage in finding employment in an equally well-paid job. He also indicated an interest which he had in joining the police force which can no longer be pursued because he could not now perform the tasks involved in the training of a police officer.

[14] The First Claimant claims \$60,000 for loss of earning capacity.

[15] In her affidavit filed on 9th March 2012, the Second Claimant corroborated some of the evidence of the First Claimant and alleged that her 1998 Suzuki Swift was severely damaged in the accident of

22nd January 2009 and the vehicle was adjudged to be a write off. The pre-accident value of the vehicle was assessed at \$9,700 and the post-accident value at \$800. She therefore claimed special damages of \$8,900 for the loss of her vehicle.

[16] Both Claimants provided documents (including medical reports, receipts and estimates) to substantiate allegations made in their affidavits.

[17] In written submissions filed on behalf of the Claimants, Counsel for the Claimants sought to reaffirm and justify the various amounts claimed by the Claimants.

[18] The claim for special damages of \$2,885 in respect of the medical expenses of the First Claimant was pleaded and proved and is therefore allowed.

[19] The claim for special damages of \$8,900 in respect of the loss to the Second Claimant of the net value of her written-off motor car was also pleaded and proved and is also therefore allowed.

[20] With regard to the claim for future medical expenses, I note that Dr Singh did not regard the corrective surgery as being necessary, but stated that if the First Claimant intends to correct his femoral deformity and the leg discurbancy he could do surgery in the future. I also understand Dr Singh to be saying in his final medical report on the First Claimant that he (the First Claimant) can function in his present occupation (as a foreman and draftsman) after correction of his leg length discurbancy by a shoe raise locally, which was advised in an earlier medical report. It is to be noted as well that Dr Singh stated in his report that the corrective surgery will possibly be done overseas and may cost approximately US\$70,000 to US\$90,000 in North America.

- [21] Dr Singh was not called by the Claimants as a witness, nor did he swear to any affidavit in the matter, so that all that the Court has available to it is the medical reports of Dr Singh and, on this particular issue, only the medical report dated 5th March 2012.
- [22] What emerges from this medical report is that the First Claimant need not have the corrective surgery; he can function in his job without it and only requires a shoe raise to be done locally; the estimate provided for the corrective surgery is a guesstimation by Dr Singh rather than an estimation by the hospital or doctor likely to perform the surgery; the cost provided is in respect of the surgery being performed in North America, as opposed to countries with cheaper but yet high-quality medical personnel and facilities, including Cuba.
- [23] In those circumstances, although it would appear that the First Claimant need not undergo this expensive surgical procedure for him to be able to function effectively (at least in his workplace, if not in other more private locations) the fact is he is (as of now) a 25-year old young man who is entitled to decide that he does not want to live the remainder of his life with a deformity (even though a manageable one) occasioned by the negligence of another, and that he requires that other to finance the cost of his corrective surgery. I will however peg the award at the lowest end of Dr Singh's scale, because it is still open to the First Claimant not to do the surgery at all or to do it in a better-priced location than North America.
- [24] An award of \$189,000 (equivalent to US\$70,000) is therefore made to the First Claimant for future medical expenses.

[25] With regard to the claim for pain and suffering and loss of amenities, Counsel for the Claimants cited three cases – Marcel Fevrier et al v Bruno Canchan¹ et al and Sherma Mathurin v Rain Forest Sky Rides Ltd². (both out of St. Lucia) and the Trinidadian case of Wilson Frank v Charles Mc Earneney³.

[26] In Marcel Fevrier v Bruno Canchan¹ there were two claimants involved, both of whom suffered significant injuries. The first claimant (Marcel Fevrier) sustained a fracture of his left leg, fractures of the toes of both feet, a fracture of the right hip and a fracture of the right knee, which resulted in tremendous pain and hospitalization for two months, plus another four months at home in bed for most of the time suffering and unable to move around. He was awarded \$50,000 for pain and suffering and loss of amenities. The second claimant in that case (Jenny Fevrier) suffered excruciating pain on her right thigh and on the right side of her head and a drop in the thigh where it was broken, resulting in hospitalization for three months and a further period of six months at home during which she was unable to walk because of the fracture of her right femur, which also caused her to suffer pain to her spine and shortening of her right leg, resulting in the right side of all of her shoes having to be raised to compensate for the shortening of her leg and her inability to enjoy too much dancing and other outdoor activities as she was accustomed to do. She was awarded \$150,000 for pain and suffering and loss of amenities.

[27] Looking at the Fevrier case and the pain and suffering and loss of amenities suffered by the two claimants in that case, it would appear that, but for the shortening of the right leg of Ms Jenny Fevrier, the injuries suffered by the First Claimant in the present case were more proximate to

¹ Saint Lucia Civil Suit No. 313 of 1989

² Saint Lucia Civil Suit No. 551 of 2008

³ Trinidad and Tobago Civil Appeals No. 1876 of 1971

those suffered by Mr Marcel Fevrier. Marcel Fevrier, however, was hospitalized for three months, as opposed to the three weeks that the First Claimant was hospitalized for. In the Fevrier case, Mr Fevrier was also confined to bed for a further four months after his discharge from the hospital, during which period his suffering continued. The First Claimant in the present case experienced intermittent pain and discomfort after his discharge from the hospital and was thereafter able to walk, albeit with the assistance of crutches or a cane for a period of about one year after his discharge from the hospital.

[28] I did not find that the injuries to the claimant in *Sherma Mathurin v Rain Forest Sky Rides Ltd*² to be comparable to the injuries to the First Claimant in the present case; Ms Mathurin's injuries (for which an award was made for \$150,000 for pain and suffering and loss of amenities) were far more severe than those of the First Claimant.

[29] In the *Wilson Frank* case from Trinidad, the claimant's injuries were to both her left leg and her right foot, with shortening of the left leg and limitation of movement of the left ankle joint. The claimant in that case was awarded EC\$125,000 for pain and suffering and loss of amenities.

[30] In terms of the present case, I find that the injuries to the First Claimant were most proximate to those of the first claimant in *Marcel Fevrier v Bruno Canchan*¹, except for the leg shortening. Mr Fevrier's injuries did however appear to be more serious than those of the First Claimant, requiring as it did three months of hospitalization and a further three months of confinement to his bed. There is too the fact that the First Claimant's condition, particularly the deformity to his left leg, is correctible and he has been awarded the sum of \$189,000 to correct it. Taking all of these factors

into consideration, including the ten-year difference in time between the award in the High Court in the Fevrier case and the award in the present case, the First Claimant is awarded the sum of \$50,000 for pain and suffering and loss of amenities, along with the \$189,000 awarded to him for corrective surgery.

[31] With regard to the claim for loss of earning capacity, I do not consider that there is any basis for an award under this head. The First Claimant is employed as a foreman and draftsman; he continues to be employed in this capacity over three years after he sustained the injuries for which he is being compensated; he is trained in drafting and construction and excelled in his training and graduated at the top of his class in drafting at the Antigua and Barbuda Institute of Continuing Education; he is largely free of pain now and he will be provided with the means to correct his remaining deformity; he has testified that there is no indication whatsoever that his present employer, who stuck with him during his period of hospitalization and recuperation, has any plans to discontinue his services; I do not regard his earning capacity in the field in which he is trained and experienced to be affected. I do not attach any weight to the evidence of the First Claimant's impaired capacity to pursue an occupation completely removed from his training, experience and natural ability. To quote him - from paragraph 42 of his affidavit on assessment of damages – "I am very good with my hands but this [meaning drafting and construction] is the only industry of work that I know."

[32] My order is as follows:

1. The First Claimant is awarded special damages of \$2,885 for medical expenses incurred by him.
2. The Second Claimant is awarded special damages of \$8,900 for the loss of her motor car.

3. The First Claimant is awarded general damages of \$189,000 for future medical expenses and \$50,000 for pain and suffering and loss of amenities.
4. The Claimants are awarded interest on the special damages at the rate of 2.5% per annum from 22nd January 2009 to 23rd August 2012.
5. The First Claimant is awarded interest on the general damages from 1st July 2010 to 23rd August 2012.
6. The First Claimant is awarded 60% of the prescribed costs on \$241,885.
7. The Second Claimant is awarded 60% of the prescribed costs on \$8,900.
8. Interest is payable to the Claimants on the amount awarded to each of them at the rate of 5% per annum from the date of this judgment to the date of payment.

Mario Michel
High Court Judge