

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CLAIM NO: SVGHCV2006/0375

BETWEEN:

DAVID BALCOMBE

CLAIMANT

AND

VAUGHN LOWMAN

DEFENDANT

Appearances:

Ms. Patricia Marks of Counsel for the Claimant

Mr. Joseph A Delves of Counsel for the Defendant

2012: April 25th

2012: May 7th

DECISION ON ASSESSMENT

MASTER V.GEORGIS TAYLOR-ALEXANDER:

Background facts

- [1] On the 23rd day of December 2005, the claimant was walking down the Georgetown public road in Saint Vincent when he was struck by the defendant, who it was established at trial, negligently

drove his vehicle causing it to collide with the claimant causing him injury that resulted in the traumatic amputation of his right arm from the area above the elbow. The claimant was hospitalised for six days during which time he was given an emergency transfusion of blood, was operated on and terminalisation of the stump of his arm was performed. He was recommended for the fitting of a prosthetic limb.

- [2] The claimant filed an action in the High Court on the 1st of September 2006 and by judgment of Thom J delivered on the 2nd of April and 27th of May 2008, the defendant was found liable for the injury loss and damage suffered by the claimant with damages to be assessed.
- [3] By application filed on the 25th August 2008, the claimant applied for assessment indicating that he was in position to prove damages. The application was supported by the affidavit of the claimant. Affidavits in response to the application were filed by Vaughn Lowman and Leon Edward. Submissions were filed by both parties.
- [4] The application came on for hearing 10th October 2011 whereon the defendant lead evidence of the defendant, in support of his affidavits and vigorously cross examined the claimant. The claimant chose to stand on the affidavit evidence already filed in the proceedings.
- [5] The following represent the courts conclusions on assessment of damages after reviewing the pleadings; the judgment of Thom J dated April 2nd and May 28th 2008; the application for assessment and affidavit in support; the affidavits in response of the defendant; the testimony on examination and cross examination, the submissions of the parties, both written and oral.

Quantum of Damages

- [6] The claimant's statement of case, sets out the particulars of special damages at paragraph 7 under the following headings and values:-

Damage to clothing and costs of the medical report

- [7] These sums totaling \$140.00 are unchallenged by the defendant and are awarded in full.

Nursing care

- [8] Reference was made to nursing care in the affidavit of the claimant filed in support of assessment at paragraph 10. I am constrained to make any award in special damages on the basis that the claimant has not pleaded or provided any evidence in support of this heading. Support of this proposition is found in the well established authority of **Ilkiw v. Samuels**¹ per Diplock L.J. that; *“special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized.....it is plain law.....that one can recover in an action only special damage which has been pleaded and, of course proved”*.
- [9] The claimant's counsel submits that given the nature of the claimant's injury he will be permanently disabled and will require nursing care and/or assistance from family members his whole life. The claimant counsel submits that nursing care/ assistance should be considered in the assessment of general damages. I agree.

Loss of earnings

- [10] The claimant alleges that he had a pre accident earning capacity of \$60 per week as a farmer and \$80.00 per week as a mason. Counsel for the defendant launched an incisive attack on the evidence of the claimant challenging the credibility of his evidence of employment past, current and future and suggesting that the claimant lead a lifestyle devoid of gainful employment. The defendant led evidence of 47 year old Leon Edwards who knew the claimant from the time he was a boy. Leon Edwards testified that once upon a time fifteen years ago the claimant worked with the claimant's father who had been a farmer and the claimant had helped his father plant and reap bananas. Edwards supported the submission of the defendant that the claimant was not employed.
- [11] The claimant's evidence in support of employment is admittedly weak. He has not provided evidence of salary slips, statements, evidence or any other documentation in support of employment. Leon Edwards testified that he as a banana farmer would get a receipt from the banana purchasing company, every time he sold them bananas. The claimant was unable to

¹ [1963] 1 WLR 991 at 1006

provide these receipts. Many persons engage in odd jobs, or day jobs, what we traditionally knew to be a bob-a-job, proof of which is difficult to provide, as it is often paid in cash.

- [12] The fact that a claimant cannot establish his earnings by way of pay slips is no bar to his recovering special damages². Our courts have applied the reasoning in Greer v Alstons Engineering Sales and Services Ltd³ and have made nominal awards in circumstances where evidentiary proof was difficult. This is implicit in the dicta of Barrow J in The Attorney General of Antigua and Barbuda v Cyril Thomas Bufton

“The failure of a claimant or counsel to provide evidence of value does not mean, however, as counsel for the Government seemed to think, that the court is inescapably driven to refuse to award any amount for an undoubted loss”

Is this a case for a nominal award?

- [13] As a species of special damages the claim for loss of earnings is to be strictly proven. It is established that the court can consider in the absence of proof a nominal award. McGregor on Damages 17th edition at paragraph 10-004 states:

‘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.’

- [14] While I am satisfied of the courts ability to award nominal damages in circumstances where loss has been shown but not proven, I am not satisfied that the claimant in this case has given cogent evidence to establish loss. I am not convinced that he was in fact employed in any way, even to do odd jobs. I therefore make no award as to loss of earnings.

² The Attorney General of Antigua and Barbuda v Cyril Thomas Bufton Civil Appeal No.22 of 2004

³ (2003) 63 WIR 388

General Damages

- [15] In assessing general damages our court has approved the seminal authority of the court of appeal of Trinidad and Tobago Court of **Cornilliac v St. Louis**⁴ and accepted the factors stated by Wooding CJ which are to be taken into account in assessing general damages. Those factors are (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects.
- [16] In terms of general damages for pain, suffering and loss of amenities, Learned counsel for the claimant suggested a figure of \$80,000 for pain and suffering and \$120,000 for loss of amenities and cited the cases of **Agustine Biscette v Club Mediterranee**⁵, **CCAA v Jeffery**⁶ **Abdul Woodley v Eastern Caribbean Metals Plastics Industries Limited**⁷, **Bernard Warner v Eustace Coates and Roy Browne**⁸ and **Eddeion Ballantyne v Donald John**⁹
- [17] Learned Counsel for the defendant, on the other hand, suggested a singular figure of \$60,000 for pain, suffering and loss of amenities and similarly cited the following authorities in support: **Agustine Biscette v Club Mediterranee**, **CCA v Jeffery** and **Eddeion Ballantyne v Donald John**.
- [18] I have considered the pleadings, witness statements and all of the medical and other evidence which came from the reports and the oral and written evidence. I have reviewed the submissions of counsel for the parties on the quantum of general damages for pain, suffering and loss of amenities and the authorities cited in support.

⁴ [1965]7 WIR 491

⁵ High Court decision SLUHCV200/645

⁶ Civil Appeal No.10 of 2003.

⁷ High Court civil Suit SVGHCV2003/163

⁸ High Court Civil Suit ANGHCV1996/237

⁹ High Court decision SVGHCV1993/277

[19] Very little evidence was provided to assist the court in assessing the extent of the pain and suffering, loss of amenities and diminution in pecuniary prospects, I have considered that the claimant a 33 year old man at the time of the accident, led an active social life, albeit he is categorized by the defendant as being for the most part an alcoholic. I have considered that the amputation of his right hand would have resulted in some permanent disability and disfigurement compromising his ability to do household and other chores, and odd jobs about his home. His quality of life has been reduced and he claims that even the performance and regularity of sex life has been compromised. I have considered the assistance that he would continue to require throughout his life as a result of his disability. This court considers that a figure of \$115,000 for pain, suffering and loss of amenities is appropriate in the circumstances.

Future loss of earnings

[20] As regards the assessment of general damages in respect of future loss of earnings, there are a number of uncertainties, which include such matters as the employability of the claimant, his prospects of obtaining employment and the normal hazards of life. This is compromised by the variation in earnings, as the claimant has never been in stable consistent employment.

[21] The general approach to computation for loss of future earnings is to use the multiplier/multiplicand method.

The multiplicand

[21] 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.

[22] It is claimed by the claimant that he earned \$60.00 per week farming and \$80.00 per week as a mason. There is no documentary evidence to prove the claimant's contention which was perceptively challenged by the defendant.

- [23] As I see it, the claimant was a sporadic worker engaging in odd jobs when these were available. I am conscious of the principles enunciated in Cookson v Knowles¹⁰ that for the purpose of arriving at the multiplicand, the basis should be the least amount that the claimant would have been earning if he had continued working without being injured.
- [24] There is some unchallenged evidence that the claimant helped in the slaughtering of animals during festivities, and that at one time he operated as a farmer. There is evidence that he assisted his mother in her shop and I am prepared to conclude that he earned approximately \$300 monthly from the odd jobs that he performed. In the circumstances I am prepared to fix the multiplicand at \$3,600 annually.

The Multiplier

- [25] The claimant counsel has suggested a multiplier of 15 years given a normal working life of 65. I take into account the many contingencies, vicissitudes and imponderables or uncertainties of life and the fact that the award is intended to compensate for money that he would have earned during his working life, I would fix a multiplier of 13.
- [26] Using a multiplier of 13 and a multiplicand of \$3,600.00 the award under this head is \$46,800.00.

Future Medical Expenses

- [27] Dr. Charles Woods concluded in his report that the claimant's quality of life would improve if he were fitted with a prosthetic limb. I agree with the counsel for the defendant that evidence of the costs of the prosthetic limb ought to have been provided to the court by the claimant. Not surprisingly there has been a paucity of evidence supporting this claim and every head of damage which has made this assessment tedious. Counsel for the claimant in her submissions suggests that the court can make an order as was done in Auguste Biscette v Club Mediterranee (ante). I

¹⁰ (1979) AC 556

am more inclined to bring finality to the proceedings between the parties and instead make an order of \$15,000.00 to cover the costs associated with obtaining and fitting the prosthetic.

Interest

- [28] Pre judgment interest: on special damages at the rate of 3% from the date of the accident to the date of judgment; on general damages for pain suffering and loss of amenities at the rate of 4% from the date of service of the claim form to the date of judgment.

Post judgment interest: On special and general damages at the rate of 6% per annum from the date of judgment to the date of payment.

Summary and Order

- [28] The total damages which I award to the Claimant for his personal injuries, loss and damage consequent upon the accident is as follows: Special damages \$ 140.00; Pain and suffering and loss of amenities \$ 115,000.00; Future loss of earnings \$46,800; Future medical expenses \$15,000.00. I further award the claimant prescribed costs pursuant to CPR part 65.5 on the sum \$176,940.00

**V.GEORGIS TAYLOR-ALEXANDER
HIGH COURT MASTER**