

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES**

HIGH COURT OF JUSTICE

Claim No: GDAHCV2011/0088

Between:

1. Damon Dubois

Claimant

and

1. Matthias Jerome

2. Natasha Joseph

Defendants

Appearances:

Celia Edwards Q.C with her Sabrita Khan of Counsel for the Claimant

**Daniella Williams-Mitchell holding papers for Kim George of Counsel for
the Defendant**

Claimant excused

Representative of the Defendant present

2012: March 7th

JUDGMENT

V. GEORGIS TAYLOR-ALEXANDER, M

ASSESSMENT OF DAMAGES

Brief Facts

- [1] The claimant on the 18th February 2011 filed a claim form and statement of case claiming against the defendants damages for injuries and loss resulting from the negligent driving of the second named defendant that resulted in a vehicular accident on the 9th day of October 2008 at Westerhall in the parish of Saint David in which the claimant was injured. In the defence of the second named defendant filed on the 6th April 2011 the second named defendant admitted liability preferring to be heard on the issues in relation to quantum.

The claimant on the 3rd May 2011 applied for judgment on admission against the second named defendant. On the 4th July 2011 the Master granted judgment to the claimant and gave directions for the hearing of the assessment, directing evidence by affidavit and for witnesses to be available for cross examination. Submissions were further ordered by the 4th August 2011. On the 18th July 2011 it was ordered by consent that the action be discontinued against the first named defendant.

- [2] The matter came on for assessment on the 19th September 2011 and the decision on assessment was reserved.
- [3] On the 9th October 2008, the claimant a right handed 27 year old man was in relatively good health with a previous health history of gastroenteritis. As a result of the accident he sustained soft tissue injuries of the left shoulder, chest, face and knees and a grotesquely displaced closed comminuted right distal radial fracture with dislocation of the right ulnar head. The fracture dislocation required an emergency operation. He was hospitalized for one day.

He was operated on at a later date as the fracture dislocation had slipped and he underwent under general anesthesia, remanipulation surgery. He wore an above elbow plaster of paris cast which was eventually removed on the 2nd December 2008. The impact of the collision caused the airbags to implode stunning the claimant and causing pain and burning to his face and head.

- [4] According to the medical report of Dr. Douglas Noel Consultant Orthopaedic Surgeon, which was annexed to the statement of case, the claimant complained of pain in the left anterior chest and left shoulder which stretches to his left upper limb. He gets pain in his right hand and right wrist which is also stiff and he has difficulty with delicate right hand movements. He cannot lift weights greater than 20lbs, he feels weakened as he cannot flex the fingers and thumb of his right hand with any force. He has pain in the joints of the fingers and thumb and he has numbness in the right thumb.

The claimant had bilateral anterior knee pain which started since the accident but has resolved. He cannot coach swimming, swim now or throw an object properly due to pain in his right hand and wrist. This he says has resulted in a marked reduction in his physical activities. He is unable to mow the lawn or use the weed eater. He has difficulty writing and even jogging sometimes presents difficulty. He claims to have had an assistant assigned to him at work to assist him in completing his assigned tasks.

- [5] At the date of the medical report Dr. Noel found that the facial and knee injuries had fully resolved; the chest and left shoulder pain being soft tissue in nature were expected to be resolved within six weeks of the date of the report. The claimant has been left with a very stiff right wrist with a markedly reduced range of motion and mildly stiff right fingers and thumb, which Dr. Noel concludes will permanently present difficulty with delicate and laborious activities due to the reduced range of motion and pain.

- [6] At the time of the accident the claimant was employed as the Marketing and Sales Manager for Westerhall Estate Limited and was at the material time a student of the University of the West Indies school of continuing studies Grenada, pursuing a Bachelor of Science degree in Management Studies. His injuries caused the delayed completion of his studies for one academic year, which he claims caused a delay in a promised promotion at work.

SPECIAL DAMAGES:

- [7] Special damages is the monetary loss which the plaintiff has sustained up to the date of trial, it must be pleaded, particularised and proved.
- [8] Special damages are allowed as follows:-
- (a) Physiotherapy from 29th December 2008 to the 15th May 2009 (3x per week from December 2008 to March 2009, then once a week)
\$2890.00
 - (b) X-Ray fees (3 @15.00 per X-Ray) \$ 45.00
 - (c) Medical report of Dr. Douglas Noel: No receipt was provided in support of this head. There is however a medical report of the specialist Consultant Orthopaedic Surgeon which provides details of the patient's condition both on the current and future effect. For this I will allow a reasonable sum of \$300.00
 - (d) Medical Consultation: No evidence was provided in support of this head of damage. Without documentary proof I am constrained to not allow this head of damage.
 - (e) Domestic Help: The claimant's presentation of the evidence in support of this award was inadequate. There was little pleading and no justification and proof of the provision for domestic help. The

determination of an award for the loss of household services is always a difficult determination and as such it is incumbent on the claimant to plead sufficiently and provide proof which assists the court in making an appropriate award. The paucity of the pleadings forces the court to engage in hazardous speculation. I cannot allow this award.

- (f) Delayed completion of studies: The claimant's injuries delayed the completion of his studies by a semester for which he was forced to pay an additional \$1950.00 to repeat courses to which he had already paid and was committed. This was not challenged and receipts were provided to substantiate this loss. I therefore allow the sum \$1950.00
- (g) Continuing Physiotherapy: There is today universal acceptance of the sensible and realistic rule that the court must look at the position at the time of judgment and take account of any change in circumstance which may have taken place since the injury was inflicted¹. This is subject to the continuing obligation to prove. The claimant pleaded at paragraph 15 of the statement of case that physiotherapy was to continue. The claimant has filed subsequent evidence in the proceedings but has not provided proof of continuing physiotherapy. I am therefore unable to make any award for continuing therapy.
- (h) Financial loss: As a category of damages ascertainable at the time of filing of the suit this is a category of special damages and is required to be specifically pleaded and proved.

¹ See Mc Gregor on damages seventeenth edition pg [1180] 35-022

The claimant provides that he would have been entitled upon completion of his degree to an immediate increase in salary of \$13,950.00 per year. He further submits that the delay in the completion of his course as a result of his injury denied him the increase of salary for a period of one year.

I have no doubt that a claimant is entitled to damages for the loss of his earning capacity resulting from the injury, and that includes earnings lost by the time of trial and prospective loss of earnings. I am also satisfied that the methodology for assessing this loss is by finding the difference between the increased earnings and the lesser earnings, and by multiplying this figure by the number of years the loss of earning power existed.

The difficulty the court faces is in its determination on the particulars of facts of this case; whether there has been any or any sufficient proof of the claimant's entitlement to an increased salary on the completion of his degree. This issue is of tremendous importance and could have easily been substantiated by evidence from the claimant's employers, or with evidence of the company's policy on the determination of salary. Instead the court is left to speculate as to the legitimacy of this claim. The claimant has shown that his salary at the time of filing of these proceedings had increased, but there is not a scintilla of evidence to show that this increase was as a result of the successful completion of his degree.

The absence of documentary evidence undermines the basic principle of proof and the issue becomes too speculative to allow an award. The claim for financial loss is disallowed.

General Damages

- [9] I have considered the following guidelines in assessing an award of general damages: - (a) the nature and extent of the injuries suffered; (b) the nature and gravity of the resulting physical injury; (c) the pain and suffering which had to be endured; (d) the loss of amenities suffered; and; (e) the extent to which consequentially the claimant's pecuniary prospects have been materially affected²
- [10] I have had recourse to the medical report and considered that while the soft tissue injuries have healed, the claimant a right handed young man has a markedly reduced range of motion in his right wrist. This has curtailed the claimant's socially active lifestyle that existed prior to the accident including playing volleyball, swimming, coaching swimming and basketball and the mildly stiff right fingers and thumb has compromised his undertaking delicate and laborious activities. He had to undergo intense physiotherapy and wore a plaster of paris cast while his injury healed. I have not been presented with any medical evidence which indicates the present nature if any of the disability.
- [11] For the purposes of comparison of awards of general damages, I have initially looked at awards from the OECS jurisdiction given the similarities in social and economic conditions to the assessment of such damages and awards by the court in Trinidad and Tobago.
- [12] I am also guided by the dicta of Lord Hope of Craighead in **Wells v Wells (1998) 3 AER 481** wherein he observed:-

² See Cornilliac v St. Louis (1965) 7 WIR

“The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the Court’s best estimate of the plaintiff’s general damages”

[13] I have considered the following authorities from the OECS:-

Morson v Lewis ANUHCV2005/0166 the Court in 2007 awarded a 62 year old retired caregiver the sum of \$20,000 for severe injuries to her arm resulting in a comminuted fracture at the union of the middle and lower thirds humerus, tenderness of the arm and stiffness of the elbow.

Kariyama Abdul V Michael Armstrong GDAHCV1990/0124 a case emanating from this jurisdiction where the claimant suffered injury to her right shoulder resulting in the lateral end of the clavicle being prominent; there was gross shoulder deformity with a genuine step between the lateral end of the clavicle and the acromion. Plain X-rays of the right shoulder revealed a complete separation of the acromio-clavicular joint. There was much pain and tenderness. Routine tasks ordinarily presented a problem. She was awarded 14,000.00 in 2003.

Mandissa Jacob v Boniface Romulus SLUHCV2006/0457 in 2010 a 20 year old who suffered abrasions to the left side of the face, forehead, back of right elbow, left hand and back of left shoulder; contusion to the lower rib cage; comminuted fracture of the mid shaft of the humerus; traction neuropia of the left median nerve, was awarded \$60,000.00. After seven months post injury the claimant's injuries could not be deemed to have reached Maximum Medical Improvement for the purpose of impairment assessment and disability evaluation with regard to employment, although the abrasions to the face back and limbs had healed and did not present any functional deficit.

The claimant would not have been able to perform all tasks related to her occupation (a sales assistant) for a minimum period of 5 months post injury and heavy lifting for 10 months post fracture. Full function of left elbow and shoulder joints had returned following an intensive programme of rehabilitative physiotherapy.

Laura Marrocco v The Attorney General of Antigua and Barbuda

Claim Number ANUHCV0240 In 2007 a 67 year old female fractured her right distal radius and distal ulna and a traverse fracture and bicondylar non-displaced tibia plateau fracture of the right knee. Ms Marrocco was hospitalized in Rhode Island and was eventually transferred to a rehabilitation centre to improve and strengthen the function of her arm and leg. She stayed there for two and a half months. She could bear no weight on her right side, she had to be fitted with a hinged knee brace that she describes was extremely uncomfortable and painful. After being discharged, she had to use a walker for six months. She states that because of her injuries, she is no longer able to perform certain activities for any length of time without experiencing pain and discomfort. She was awarded \$60,000.00.

Denise Sayers v Paul Boatswain Civil Suit No 2002/329

where in 2003 the court award 36,000.00 in general damages to a 19 year old district nurse whose listed injuries were swelling of the forehead, abrasions of the forehead leaving scars, injury to the right elbow, injury to the right wrist, injury to fingers, severe comminuted fracture subluxation to the right elbow and head injuries. Pins were placed in her arms and she underwent further surgery. There was a 50% chance of osteoarthritis and she may have required total elbow replacement. Her pecuniary prospects were affected in that she may have had to stop work as a nurse.

And the following authority from the court of Trinidad and Tobago:-

Case No. 1549/68 Eastman v PSTC where on 7th March 1970 where an award of \$5,000 as general damages was made for fracture of a wrist, serious laceration of knee and other lacerations which when updated and converted to 2010 would equate to EC60,000.00.

Counsel for the Defendant urges me to place these cases into context and to consider the loss of pecuniary prospects and permanent partial disability in those cases receiving higher awards as distinguishable for the present case where despite the submissions of the claimant on the loss of amenities, this is not supported by the medical report as there is limited evidence of permanent damage resulting from the injury and unsubstantiated loss of pecuniary prospects.

[14] Taking all matters into consideration including the age of the claimant, the extent to which his job prospects have or have not been affected, the injuries and the extent of long term disability suffered by the claimant, I make an award of \$27,500 which in my view, represents fair and reasonable compensation for the injuries sustained.

[15] In summary my award is for the sum of \$5185.00 for special damages together with interest thereon at the rate of 6% per annum from the 9th October 2008, the sum of \$27,500.00 in general damages together with interest thereon at the rate of 6% from the 6th April 2011 and prescribed costs of \$2941.65.

Master Taylor-Alexander