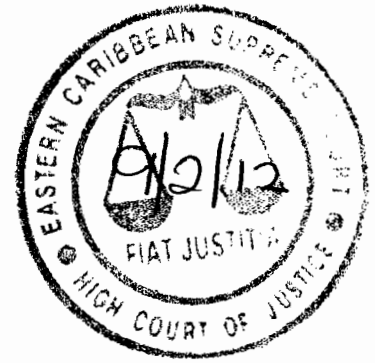


ST VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO SVGHCV20004/329

BETWEEN;

[1] AVALINE O'GARRO
[2] JANICE RICHEY
[3] MAURICE O'GARRO

Claimants

AND

[1] NEIL ROSS
[2] ARTHUR'S TRANSPORT & OR
HEAVY EQUIPMENT RENTAL CO.LTD

Defendants

Appearances:

On the written submissions of
Ms Patina Knights for Claimants

.....
2011: July 25
2012: February 9
.....

JUDGMENT

Introduction and background

- [1] **LANNS, M:** On 12th March 2003, the Second Claimant Janice Richey was driving the third defendant's (Maurice O'Garro), motor vehicle P 630 along the Buccament Public Road, travelling towards the Leewards side of the island. Avaline Ogarro - the First Claimant was a passenger in P 630.

- [2] The first defendant Neil Ross was driving the second Defendant's motor truck - T8990 towards Kingstown, when in the vicinity of Buccament Bay a collision occurred between the two vehicles. Avaline O'Garro and Janice Richey sustained injuries and P630 was extensively damaged.
- [3] The Claimants brought suit against the Defendants for damages alleging negligent driving by Neil Ross, and on 4th March 2008, Her Ladyship Mde Justice Gertel Thom entered judgment for the Claimants against both Defendants for damages and costs to be assessed. This is the assessment.
- [4] The Defendants have failed to comply with the order of Master Tabor, (Ag), requiring them to file submissions in response to the submissions of the Claimants; so this assessment proceeds on the affidavit evidence, documents, and submissions filed on behalf of the Claimants.

THE FIRST CLAIMANT: AVALINE O'GARRO

- [5] Avaline O'Garro (Avaline) was 30 years old businesswoman at the time of the accident. She was born on 7th January 1973. As a result of the accident, she sustained a fracture of the acetabulum with dislocated right and all range of motions to the right hip was restricted and very painful.
- [6] Avaline was hospitalized for one month at the Milton Cato Memorial Hospital. She was placed in skin traction and rehabilitated with crutches. Following her discharge from the hospital, Avaline attended at the outpatient clinic and orthopedic surgeon on a monthly basis.
- [7] In her affidavit in support of the assessment, Avaline says that at present, she walks with the assistance of a cane, and wears a knee brace to keep the knee of her injured leg in place. She says that she has incurred medical and travel expenses; she has had to hire domestic assistance, she has lost income; she is unable to work and still experiences a lot of pain. She takes pain relieving medications but they sometimes make her feel

nauseated; she will require hip replacement surgery every 10 to 15 years; she can no longer engage in certain activities as she was accustomed.

Special damages

- [8] In her Statement of Claim, Avaline pleads a total of \$63,161.17 as special damages made up as follows:

(i)	Prescriptions	\$ 787.77
(ii)	Post nursing care	\$ 1,875.00
(iii)	Care-taking services@ \$375 pm for 6 months	\$ 2,250.00
(iv)	Domestic and cleaning services @\$250 pm for 5 months	\$ 1,250.00
(v)	Loss of income to date \$4,000 pm for 14 months	\$56,000.00
(vi)	Medical expenses including medical bills, x-ray Hospitalization	\$ 648.40
(vii)	Incidentals, travelling, damaged clothing	<u>\$ 350.00</u>
		\$63,161.17

- [9] I am satisfied that Avaline has strictly pleaded, and proved to my satisfaction; and is entitled to special damages in the sum of **\$7,161.17** in relation to all the items listed above excluding item (v) - loss of income which I shall address below.

- [10] Loss of Income: As a general principle, a Claimant is entitled to be reimbursed for any earnings loss caused by the Defendant's negligence from the date of the accident to the date of trial. For her loss of earnings from her apparent self employment, Avaline claims 14 months loss of salary at \$4000.00 per month. In paragraphs 20 and 21 of her supporting affidavit Avaline says:

"20. I was forced to temporarily cease operating my business of trading clothing, food, items and goods for a period of 14 months following the accident.

"21. Prior to this accident I received an income of \$4000.00 per month from this business and thus the 14 month halt to my business resulted in a total loss of \$56,000.00 and the loss of several customers

- [11] This aspect of the claim for special damages presents some difficulty. In fact, apart from her mere say so, there is nothing to support or substantiate this claim. Avaline does not exhibit any documents (social security contribution, bank records etc) to indicate her pre-

accident level of income. Avaline has a duty to mitigate her loss. If she chooses not mitigate that loss, she cannot mulct the Defendant in damages. It might have been financially viable to have hired someone to run the business in the same way she hired three persons to render domestic care and general assistance. However, she cannot be penalized for not doing so because there is no evidence that this was a viable option.

- [12] It is the law that special damages must not only be strictly proven but must also be strictly proved.

(British Transport v Gourley, [1955] 3 All ER 803; Bonham-Carter v Hyde Park Hotel (1948) 64 TLR 177 at 178; Cosmos William v The Comptroller of Customs and the Attorney General of St Lucia – Claim No SLUHCv 2006/0259).

- [13] I am not satisfied that Avaline has proven that she earns \$4000.00 per month, and that she closed her business for 14 months.

- [12] Notwithstanding the lack of proof, I consider that the extent of the injuries sustained would have made it impossible for Avaline to work for about 12 months.

- [13] Our courts have held that the fact that a Claimant cannot establish his earnings by way of pay slips and the like is no bar to his recovering special damages. (See **Andre Winter & Another v Charles Richardson** Antigua High Court Civil Appeal No 0125 of 2006, wherein the Court of Appeal was faced with a similar contention. See also **Greer v Alstons Engineering Sales and Services Ltd** (2003) 63 WIR 388 at paragraphs 7, 8 and 9 which is to the effect that notwithstanding the fact that a Claimant cannot prove loss of earnings, he may still be awarded a nominal sum for loss of earnings.

- [14] On the authority of **Greer**, I am prepared to award a nominal sum which is not out of scale for loss of earnings. I therefore assess Avaline's pre-accident earnings at \$3,000 per

month for 12 months. This computes to **\$36,000.00**. I award that amount as loss of earnings.

[15] Summary of special damages awarded

(i)	Prescriptions	\$ 787.77
(ii)	Post nursing care	\$ 1,875.00
(iii)	Care-taking services@ \$375 pm for 6 months	\$ 2,250.00
(vii)	Domestic and cleaning services @\$250 pm for 5 months	\$ 1,250.00
(viii)	Loss of income to date \$4,000 pm for 14 months	\$36,000.00
(ix)	Medical expenses including medical bills, x-ray Hospitalization	\$ 648.40
(vii)	Incidentals, travelling, damaged clothing	<u>\$ 350.00</u>
Total		\$43,161.00

GENERAL DAMAGES

- [16] The principles which guide the court in assessing general damages are laid down in the case of **Cornelliac v St Louis**, [1965] 7 WIR 491. The court has to consider the following: the nature and the extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; loss of amenities; and the extent to which the claimant's pecuniary prospects have been affected.

Pain and suffering and loss of amenities

- [17] In **CCAA Ltd v Julius Jeffrey**, St Vincent Civil Appeal No 10 of 2003, Gordon J.A quoted Lord Hope of Craighead in **Wells v Wells** as saying;

"The amount of the award to be made for pain, suffering and 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."

- [18] Avaline's evidence is that after the accident she was taken to the Milton Cato Memorial Hospital fully conscious and feeling immense pain in her right hip and unable to walk. As her leg was rotated, and flexed by the examining doctor, Avaline felt excruciating pain. An X-Ray was done on her leg. It revealed a fracture of the acetabulum to her right hip and the hip was dislocated. In his medical Report dated 25th March 2003, Dr Arvind Salian

stated that Avaline was doing well in terms of pain and that her fracture dislocation of her right hip was improving with treatment but with a light limp. He opined that Avaline may get future complications like avascular necrosis and post traumatic arthritis of the same hip.

[19] Avaline says that she can no longer go to the movies, or to the beach. No longer can she do her own housekeeping, or keep a vegetable garden.

[20] Avaline's learned counsel suggested a figure of \$150,000.0 for general damages for pain and suffering and loss of amenities. Counsel cited and referred the court to two cases from the OECS:

(1) **Marcel Fevrier and Jenny Fevrier v Bruno Cancham et al** - Claim No 313 of 1989, in which the High Court of St Lucia in 2002 awarded the second claimant aged 25, EC\$150,000 for pain and suffering and loss of amenities for a comminuted fracture of the right femur. She underwent surgery and was incapacitated for 6 months. She had chronic joint pains and there was a 1 inch shortening of her right limb with a 10% partial disability.

(2) **Lincoln Carty v Lionel Patrick and Anor** – Claim No SKBHCV 1998/0054, in which the High Court in St Kitts in 2009 awarded the Claimant \$175,000 for pain and suffering and loss of amenities for a fracture of the right femur, fracture of the pelvis, fracture of right 3rd and 8th ribs posteriorly, laceration and contusion of sciatic nerve in the right leg, permanent dislocation of joint in the sternum, bruising and laceration of front rib cage and cervical strain (neck) resulting in continuous pain and discomfort. The Claimant underwent surgery, during which a steel rod was placed in his femur. He remained hospitalized for 32 days and, on being discharged, he remained home for 6 months. Twelve months after the first surgery, the Claimant underwent a second surgical procedure to remove the steel rod and was away from work for 6 weeks. His right leg is now shorter than the left. He is no longer able to be involved in sports. He uses a cane, because his right knee buckles on a regular basis. He suffered post traumatic stress and severe bouts of depression. His relationship at work suffered. So did his relationship at home. His lack of sex drive caused much strain in his relationship with his wife.

[21] I am mindful of the fact that in the assessment of general damages, the court should strive for a high measure of uniformity of awards as is reasonably practicable, considering first of all awards in comparable injuries given in this

jurisdiction, and further afield if necessary, from jurisdictions with similar social and economic conditions. Counsel has not referred me to any case from St Vincent and the Grenadines containing the general level of awards of damages in that jurisdiction. From my research, I find the following to be useful guides, though injuries are not comparable:

- (1) **Carter v St Clair Latham** Claim No 524 of 2005, the High Court of St Vincent and the Grenadines in 2006, awarded \$60,000.00 for pain and suffering to the Claimant whose leg was amputated after a tractor rolled over him. Further, the court awarded \$50,000.00 for loss of amenities to the Claimant who was an avid footballer and practiced judo in his spare time.
- (2) **Dwight Mayers v Carl Williams and Shell Antilles and Guianas Ltd** Claim No 29 of 2002, the High Court of St Vincent and the Grenadines in 2006, \$80,000.00 for pain and suffering and loss of amenities to the Claimant who had his **dominant** hand crushed between two boats and 2 fingers amputated.
- (3) **CCCA v Jeffrey**, supra, in which the Court of Appeal awarded \$40,000.00 to the Claimant for pain and suffering and \$40,000 for loss of amenities; for a traumatic amputation of his left thumb, compound fractures of the 4th and 5th meta carpal bones with lacerated flexor tendons on the 4th and 5th fingers.

[22] In the instant case, taking all the circumstances of this case into consideration, and the authorities within and without this jurisdiction, I consider that the sum of **\$100,000** for pain and suffering and **\$40,000.00** for loss of amenities is reasonable.

Future Medical Expenses

[23] Avaline claims EC\$135,706 as future medical expenses. She further claims \$7000.00 for airfare for each person. I take it that Avaline is referring to two persons including herself.

[24] In his Medical Report dated 17th May 2005, Mr Derrick Lousaing, Consultant Orthopedic Surgeon opined that Avaline required a right Total Hip Replacement, and he gave an estimated cost of US\$16,392 for that surgery inclusive of accommodation, meals, and ground transportation. It is apparent that the hip replacement surgery is still pending.

[25] Curiously, in paragraph 25 of her supporting Affidavit, Avaline says that she had been advised by Dr Salian and verily believe that she will require future hip replacement

surgeries – at least at least every 10 to 15 years, which would amount to a total of 3 hip replacement surgeries in her lifetime.

[24] While it may be true that Avaline has been so advised, there is nothing in the Medical Reports indicating that Avaline will require 3 hip replacement surgeries. In the absence of any medical evidence to this effect, this statement is of minimal assistance. An updated medical assessment would have been helpful. It is now 8 years since the accident. The last medical assessment was done in May 2005. This assessment comes 3 years after judgment. At the end of the day, however, it is open to the court to make findings contrary to the opinions of experts whether or not their reports are agreed See **Heidi Binder v Patrick Mavey et al** BVI HCV 2005/0006.

[25] That being said, it is not possible, on the material before the court, to form an accurate and verifiable estimate of the future cost of medical treatment because of the conflicting information as to the number of future hip replacement surgeries required to be taken. In any event, much depends on how Avaline has progressed, and how she progresses in the future. Dr Salian was of the view that she was improving. It does appear that there is likely to be some continuing or future expenses even if Avaline continues to improve. In my opinion, the most appropriate way to deal with the matter is to grant a figure that will reflect the possibility of Avaline incurring future expenses for two hip replacement surgeries, using the figure of US\$16,392 as the estimated cost for each surgery. The appropriate figure is **\$88,845.00**.

Loss of future earnings/loss of earning capacity

[26] Ms Knights has not made a case for loss of earning capacity or loss of future earnings. I doubt that an award for loss of earning capacity is available to her in accordance with **Moeliker v Reyrolle & Co Ltd** [1977] All ER 9: which was approved by the Court of Appeal in **Alphonso v Ramnath**:

“The learning from the ... cases is that this head of damage would arise where a plaintiff is, at the time of trial, in employment but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury,

be at a disadvantage in getting another job or equal well paid job. The cases show that it is a different head of damages from an actual loss of future earnings which can be proved at the time of trial."

[27] In paragraph 20, Avaline says that she was forced to "temporarily" cease operating her business. Then in paragraph 22 Avaline says that she is now unable to work. She does not say that her business is no longer in operation. There is no medical evidence as to how the injury would affect Avaline's future working ability. Put another way. There is no evidence as to how the injury sustained by Avaline is likely to affect her future earning capacity.

[28] I do not accept that Avaline is unemployed. I believe that she has resumed operating her business, notwithstanding her impairment, and that her earning capacity has been reduced.

[29] In **Bernice Jeremiah and Talitha Jeremiah v Royston Gilbert et al** GDA HCV2008/0038, the court awarded a global figure of \$25,000 in 2010 for reduced earning capacity in respect of a Claimant who had sustained the following injuries: 1) left leg grossly deformed and swollen; 2) tenderness over the proximal tibia; 3) left knee effusion; 4) tenderness of the chest; 5) complete comminuted fracture of the proximal tibia. I am content to adopt the figure awarded in that case. I therefore award Avaline the sum of \$25,000 for loss of earning capacity.

[30] Summary of general damages

(i)	Pain and suffering	\$100,000.00
(ii)	Loss of amenities	\$ 40,000.00
(iii)	Future medical expenses	\$ 88,845.00
(iv)	Loss of earning capacity	\$ 25,000.00

INTEREST

- [45] The guidelines to be applied are those laid down in **Alphonso v Ramnath** British Virgin Islands Civil Appeal No 1 of 1996:
- [46] No interest should be awarded for general damages on loss of future earning capacity.
- [47] In regard to damages for pain and suffering and loss of amenities, the court should award interest from the date of the service of the claim to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of such evidence of that rate, the statutory rate of interest is to be used.
- [48] In relation to special damages, interest is to be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

COSTS

- [49] The Costs in this matter are to be assessed as prescribed costs under CPR 65.5.

THE SECOND CLAIMANT: JANICE RICHEY

- [50] Janice Richey was a Systems Accountant, employed by the Department of Defence Finance and Accounting Service, in Indianapolis, Indiana, United States of America. She was 53 at the date of the accident. She received initial treatment at the Milton Cato Memorial Hospital by Dr Arvind Salian, the attending doctor. She sustained a fracture through the base of the second metatarsal with light widening between the 1st and 2nd metatarsal. A cast was applied. On a date unknown between 13th March 2003 and 1st April 2003, Janice travelled to Indiana where she apparently attended two doctors there, namely Dr Brett Fink and Dr Michael Swack.

- [51] On 1st April 2003, Dr Brett Fink, Orthopedic Surgeon examined Janice and diagnosed a fracture through the base of the 2nd metatarsal with light widening between the 1st and 2nd metatarsal. The examination also revealed moderate swelling over the midfoot with tenderness all the way across the midfoot at about the tarsometatarsal joints. The first cast was removed and Janice's foot was placed in a Bedsoe cast boot.
- [52] On 4th April 2003 – three days after examination by Dr Frett, Dr Michael Swack examined Janice and diagnosed a fracture through the cuboid, lateral cuneiform, middle cuneiform, medial cuneiform, 4th metatarsal at its base and the 2nd metatarsal at their bases and that there was a possibility of mild subluxation of the 2nd metatarsal at the fracture site.
- [53] A CT scan, X-rays, and operative fixation were done and there were continuous evaluations.
- [54] When Dr Fink examined Janice 5 days after on 9th April 2003, Dr Fink found that there was significant tenderness along the second and third tarsal-metatarsal joints and along the ankle, hindfoot and subtala joint. Assessment of the injury revealed a Lisfranc fracture with currently subacute presentation and surgical treatment was recommended.
- [55] On 29th January 2004, Janice underwent surgery for right open reduction, internal fixation with arthrodesis to the second and third metatarsal joint, implantable bone stimulator and local bone graft.
- [57] I have not seen any updated medical assessment. **The last medical Report is dated 9th April 2003. So the court has no medical pinion as to how Avaline has progressed.**
- [58] Janice seeks special damages amounting to \$101,762.68 made up as follows:

(i)	Travelling expenses	\$ 2,173.00
(ii)	Incidental expenses including damaged clothing	\$ 300.00
(iii)	Post nursing care	\$ 7,884.44

(iv)	Loss of income at date of filing – US\$8,337.28	\$ 22,651.56
(v)	Medical expenses inclusive of hospitalization	<u>\$ 68, 053.15</u>
	Total	\$101,062.67

[59] I am satisfied that Janice has pleaded, proven and is entitled to the sum of EC\$101,062.67 as special damages. I therefore award her that amount.

GENERAL DAMAGES

Pain and suffering and loss of amenities

[60] Janice's injuries are detailed above. I have no doubt that she suffered intense pain at the time of the accident, and after surgery.

[61] In regard to loss of amenities Janice says that the accident has caused her to suffer tremendous loss to her social and personal life. She says that prior to the accident she was a vibrant outgoing and highly sociable person. She often engaged in several 'do -it - yourself' activities around her home, but no longer can she do these activities on her own as she cannot stand for long periods of time without becoming extremely painful. She relies heavily on her son **Matthew Richey** to assist her with certain basic tasks.

[62] There seem to be a dearth of cases of injuries of this type within and without the OECS. Those cited and furnished by Janice's learned counsel are:

- (1) **Marcel Fevrier** (previously discussed) – dissimilar injuries but may be used as a gauge.
- (2) **Paton v Fekade** [2000] 5 QR 7 – a foreign case in which the court awarded £22,500 or EC\$92,250 to the Claimant for a grossly displaced fracture, dislocation of the neck of the third metatarsal, a displaced fracture of the cuboid bone. Skin graft was done and the head of the third metatarsal was removed. The Claimant was hospitalized for 9 days but developed an infection after discharge. Full weight bearing was not possible without crutches until 12 months after the accident. Claimant

would not be able to return to his pre-accident sporting activities save for swimming.

- [63] Learned counsel submitted that the instant case is more aligned to **Paton's** case. Accordingly, counsel invites the court to award \$70,000.00 to the Claimant for her pain suffering and loss of amenities. Undoubtedly, the economic and social conditions in the UK and St Lucia are more favourable than in St Vincent and the Grenadines. In all the circumstances, and on the totality of the evidence, I think the sum of \$60,000.00 is reasonable for Janice's pain, suffering and deprivations.

INTEREST

- [64] I propose to award interest along the same as awarded to Avaline.

COSTS

I propose to award costs on the same basis as awarded to Avaline herein.

THE THIRD CLAIMANT: MAURICE O'GARRO

- [66] Maurice O'Garro (Maurice) seeks special damages of \$15,120.25 which he says represents the amount of damage and loss which he suffered as result of the damages caused to his vehicle P630; which, as previously stated was owned by Maurice and driven by Janice. The amount of \$15,120.25 includes \$75.00 for cost of estimate and \$1400.00 for loss of use.

- [67] The obligation rests on Maurice to prove the special damages which he claims.

- [68] Before the court is an estimate of the cost of repairs. The estimate was prepared by **Jerome Ryan** of Ryan's Auto Clinic & Parts Department. The estimate "MG 1" is dated 27th April 2004. Mr Ryan estimates the cost of repairs at \$13,645.25. I cannot understand why Maurice could not have produced the actual receipt(s) for the amount he actually paid to effect repairs to his car. I am not satisfied that this claim has been sufficiently proved. I am prepared to grant a nominal sum of **\$7,645.25** on the authority of *Greer v Alstons Engineering Sales and Services Ltd*

[69] I award **\$75.00** as claimed for the cost of the estimate as this expenditure was proved to my satisfaction.

[70] As to the amount of \$1400.00 claimed for loss of use for two weeks, there is nothing to substantiate this claim. However, I accept that Maurice would have suffered some inconvenience for lack of use of his vehicle. An award for inconvenience may not be based on sheer speculation. It is a matter of evidence and the best estimate based on it. In the absence of any evidence, I assess lack of use at \$1000.00.

Summary of damages awarded to Maurice

(i)	Repairs to vehicle	\$ 7,645.25
(ii)	Cost of estimate	\$ 75.00
(iii)	Loss of use	<u>\$ 700.00</u>

Total	\$8,420.25
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Conclusion

[71] The court finds, based on the evidence, that the Claimants are entitled to the following awards for damages:

AVALINE O'GARRO

- Special damages in the amount of \$43,161.00, with interest at the rate of 3 per cent per annum from the date of the accident to the date of judgment on assessment.
- General damages for pain and suffering and loss of amenities in the amount of \$120,000, with interest at the 6 per cent per annum from the date of service of the claim to the date of judgment on assessment.
- Loss of earning capacity in the amount of \$25,000.00.
- Costs as prescribed under CPR 5.5 as amended.

JANICE RICHEY

- Special damages in the amount of \$101,062.67, with interest thereon at the rate of 3 per cent per annum from the date of the accident to date of judgment on assessment.
- General damages for pain and suffering and loss of amenities in the amount of \$60,000.00, together with interest at the rate of 6 per cent per annum from the date of service of the Claim to the date of judgment on assessment
- Costs as prescribed under CPR 65.5 as amended.

MAURICE O'GARRO

- Special damages of \$7720.25 for cost of repairs and estimate together with interest at the rate of 3 per cent per annum from the date of the accident to the date of judgment on assessment
- General damages in the amount of \$700.00 inconvenience or loss of use, together with interest at the rate of 6 per cent per annum from the date service of the claim to the date of judgment on assessment.
- Costs as prescribed under CPR 65.5 as amended.

[72] Learned counsel Ms Knights has provided me with very comprehensive and helpful submissions and authorities. Moreover, the way in which counsel has prepared and presented the available evidence and documents in support thereof, certainly made my task easier. I am very grateful for her assistance and industry.


Pearlitta E Lanns
Master