

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

COMMONWEALTH OF DOMINICA
DOMHCV2003/0141

BETWEEN:

DAVID ROBIN	Claimant
VIRGINIA PETERS	
and	
ULYSSES AUGUISTE	Defendant
ATTORNEY GENERAL	
FIRST DOMESTIC INSURANCE & CO. LTD	

Before: The Hon. Justice Brian Cottle

Appearances:

Mrs. Gina Dyer for the Claimant
Ms. Hazel Johnson for the Defendant

JUDGMENT

[2010: July 14th
November 25th]

[1] **COTTLE J:** This is an assessment of the damages due to the claimants as compensation for their injuries sustained in a motor vehicle accident and consequential loss. At the trial of this matter judgment was entered for the claimants. This assessment of damages is being carried out on the evidence led by the claimants by way of affidavits and tested by cross-examination. The defendants had no evidence at the assessment.

The first claimant

- [2] David Robin was a fireman. He was also a part-time farmer. He was 41 at the time of the accident. He owned and operated two (2) backhoes and a truck. He also owned and operated a 27 seater bus. He was a registered taxi-driver. Mr. Robin sustained an injury to his back in the accident. The MRI scan revealed posterocentral disc herniation with thecal sac impingement and moderate foraminal stenosis bilaterally at the L4/ 5 level.
- [3] Mr. Robin was referred to Trinidad for specialist treatment. He was seen by surgeon Mr. Henry Bedaysie. Mr. Bedaysie performed a lumbar laminectomy with L4/L5 discectomy and bilateral L4/5 undercutting facetectomies and foraminotomies. After the operation Mr. Robin remained 7days in the hospital. He returned to Dominica and was on sick leave for 6 months. Eventually he was boarded off the public service on medical grounds in July 2005.
- [4] In his affidavit in support of his application for assessment Mr. Robin says that as a result of his accident he can no longer sit or stand for longer than one hour at a time. He can no longer farm. He has sold his 29 seater bus, one backhoe excavator and his truck. He still suffers pain. He is now impotent.

Special Damages

- [5] In his amended statement of claim Mr. Robin pleaded the total of \$43, 909.08 as special damages. Special damages represent expenses which have been incurred already. They are capable of exact proof. For this reason the law requires claimants to strictly plead, particularize and prove all items of special damages in order for these to be awarded. An examination of the items pleaded as special damages reveals unfortunate discrepancies.
- [6] Mr. Robin pleaded \$2,000.00 as medical bills from Dominica. He repeated this claim in his Affidavit of Support because he maintained his claim for \$43,909.08 which included that sum. Under cross-examination he admitted that Dr. Nasiro was the only doctor he attended in Dominica. He paid Dr. Nasiro \$40.00 per visit for 5 visits making a total of \$200.00 not the \$2,000.00 he claimed. Similarly, for his loss of earnings from his employment he claimed 6 months loss of salary at \$3,000.00 per month.

- [7] In fact, scrutiny of his salary slips from the Government of Dominica revealed that his salary was only \$2, 205.78 per month. Interestingly no claim is made for loss of earnings incurred as special damages from his other activities, that is, his farming, bus driving, trucking or excavator operating. He also claims expenses incurred in surgeon's fees and associated hospital expenses in Trinidad. He says that he paid these expenses and was issued a receipt. But no receipt was adduced in evidence. He does exhibit an estimate of the expected cost issued by Consolidated Medical Management of Trinidad who provided the surgical services.
- [8] While the court generally prefers to see receipts rather than estimates it was not suggested to Mr. Robin in cross-examination that the amounts estimated for medical care were not in fact expended. In the circumstances I will allow this amount. I will disallow completely the sums claimed as loss of earnings and medical expenses in Dominica as not being sufficiently proved. My refusal to allow any part of this item claimed also reflects the view that the court formed of the claimant as a man who deliberately inflated the sums claimed in an effort to mulct the defendant in damages. The total awarded for special damages for the first claimant will be \$23, 909.08.

General Damages

- [9] Pain, suffering and loss of amenities.
No special loss of amenities was pleaded by the claimant but the court accepts that there must have been some loss in that Mr. Robin is now precluded from enjoying the simple pleasures of life as he had been able to do before the accident. His present impotence is also to be taken into account here. In Ronald Fraser v Joe Dalrymple et al ANUHCV2004/0513, Michel J examined a number of regional authorities involving claimants who suffered a wide range of personal injuries.
- [10] His excursion was helpful but I do not propose to repeat that exercise. Each case will have its own peculiar set of facts. The authorities serve to establish a broad range. Given the nature of Mr. Robin's injury I am content to award him 30,000.00 for pain and suffering and loss of amenities.

Loss of future earnings

- [11] Usually the amount earned by a claimant at the time of his injury is easily calculable. Salary slips or recent income tax returns can readily demonstrate

the claimant's pre accident level of income. This case presents some difficulty. In the course of his testimony the claimant revealed a penchant for inflating the income he claims to have received. Earlier, under special damages I noted that his claim that he earned \$3,000.00 per month as a fire officer was shown to be inflated by about \$800.00 per month.

[12] Mr. Robin also testified that he owned 2 backhoe excavators – he himself would operate one. This would be on his days off from work or after work. From this he would earn \$10, 000.00 per month. One is left to wonder why he would continue to work as a full time fire officer when he could earn 5 times as much operating one of his backhoes part time. Mr. Robin swears that he farmed part time and earned there from \$1, 200.00. This is now lost to him.

[13] He also owned and operated a truck. Another man helped drive the truck at times. He earned \$7, 000.00 per month from his trucking business. As a registered taxi driver Mr. Robin also found time to operate his 29 seater bus. He carried school children and tourists. He was assisted in this enterprise by one Cecil James. Between then they earned \$7,000.00 per month. The claimant says that one half of these earnings were his each month. Therefore, he earned:

2,205.78 – fireman's salary

1,200.00 – farming income

3,500.00 – bus/taxi driving income

7,000.00 – truck driving income

10,000.00 – backhoe operator income

making a total income of \$23,905.78 each month. He can now only work as a shop assistant earning \$600.00 per month leaving him with a monthly shortfall of over \$23,000.00.

[14] Mr. Robin offered no evidence to substantiate this level of income. He showed no income tax returns. He showed no bank records. And given his earlier noted tendency to exaggerate I reject completely these items of income. As a multiplicand I will adopt the proven sum of \$2,205.78 per month. I reject the other heads of income claimed because they are not substantiated and Mr. Robin did not impress me as a witness of truth.

[15] There is also the small matter of his duty to mitigate his loss. I cannot understand why he could not hire persons to operate his bus, truck and excavators thereby maintaining his earnings and having to only pay a salary

to those he employed. So too he could have done with his farm. It is for these reasons together that I find that he has failed to prove that he earned the amount he claims.

For this 41 year old claimant at the time of the accident I adopt a multiplier of 8. The award for the loss of future earnings is thus $\$2205.78 \times 12 \times 8 = \$ 211,754.88$.

Future Medical Care

- [16] The evidence reveals that Mr. Robin will require future medical care. He will require continued treatment for his back injury. Again Mr. Robin places the Court in a difficult position because of the nature of his evidence. The claimant says he will have to attend Mr. Bedaysie annually and be administered an injection. This he say will cost him \$8,000.00 per year. Mr. Bedaysie supports him in this. However, since his operation, Mr. Robin has been back to Mr. Badaysie for a follow-up visit. The expenses he says he incurred on that visit total \$669.31 US for accommodation, transport and medical services. This amounts to approximately \$1,813.83. He does not say that he then was administered this injection.
- [17] Mr. Robin's doctor testified that it was his practice to issue receipts to patients for all the fees they pay. In the years since his operation Mr. Robin has not produced a single receipt showing cost of his injection. However Mr. Bedaysie in his evidence in his evidence in chief says that he administered an injection in 2009. The claimants receipt for medical services by Mr. Bedaysie in 2009 shows that he paid Mr. Bedaysie \$300.00 TT. Given the state of the evidence, the best I can do is to award Mr. Robin \$1,814.00 for his annual future medical expenses.
- [18] Counsel for the claimant has urged the court not to discount the period over which this award should be given. She says the claimant is expected to live to 70 and as he is now 49, he should be allowed 21 years purchase. I consider that I must discount for the fact that the claimant gets a lump sum now to cover expenses in the future. I will thus allow 15 years purchase under this head. The award for future medical expenses is $\$1,814.00 \times 15 = \$27,210.00$.

The Second Claimant

- [19] Virginia Peters, fortunately, suffered only minor injuries in the accident. She was 44 at the time of the accident. She was a Primary Health Care Nurse. Dr. Paul found a 15 centimeter diameter swelling on the right leg just below the knee. This was very painful and associated with an area of bruising that extended for 30cm from the edges of the swelling. Movements of the neck were limited and painful. X-rays revealed no bone injury. She was treated with analgesics. By the time she was reviewed by Dr. Paul some 15 months after the accident neck movements were free but mildly painful. There was still some mild pain with skin discoloration on the right leg.
- [20] Dr. Paul thought that Ms. Peters may suffer permanent residual symptoms. Dr. Paul signed a witness statement in 2009. He does not say that he examined Ms. Peters after 2003 when he wrote his report. I thus discount his testimony that this claimant has permanent swelling of the leg and restricted neck movements. I reject his suggestion that she will not be able to walk or stand for too long. These conclusions are not supported by his medical report of January 2004. I prefer to accept the findings in his report.

Special Damages

- [21] The second claimant pleaded a total of \$1,000.00 in special damages. She offered no evidence or documents in support of this head of damages apart from her own testimony. The need to strictly plead, particularize, and prove items of special damages cannot be over emphasized. She exhibited no receipts for her x-ray examination. She shows no receipts to demonstrate that she paid Dr. Paul. No documents are adduced showing that she paid for an accident report. No salary slips are produced showing that she received an on call allowance that she lost as a result of the accident.
- [22] I am similarly unsatisfied with the evidence that she paid \$300.00 for home help. My lack of satisfaction in this regard is not improved by the fact that in her Affidavit in Support of assessment, she now seeks to recover \$150.00 per week for an 8 week period under this head making a total of \$1,200.00. This kind of inflated claim is apt to make a court disinclined to accept the evidence of a claimant. Despite the lack of receipts I will award the claimant the cost of her transportation to and from Roseau as well as the amount claimed for meals. The total award for special damages for Ms Peters will be \$200.00

General Damages

Pain, Suffering and loss of Amenities

[23] Ms. Peters injuries are detailed earlier. In Helious Trocard v Kurt George DOMHCV2008/0206 the claimant was awarded \$7,500.00 for pain and suffering and loss of amenities. Ms. Peter's injuries are not wildly dissimilar. I find that she had recovered by the time of her examination in December 2003 by Dr. Paul. However to take into account the possibility that she may have residual symptoms I award her the sum of \$10,000.00 as general damages.

[24] The total award to the claimants is as follows:

First Claimant

Special damages: \$23, 909.08

General damages: \$30,000 + \$211,754.88 + \$27,210.00

Total \$292,872.96

Second Claimant

Special Damages \$200.00

General damages \$10,000.00

Total \$ 10,200.00

Interest

Interest is awarded on the special damages at the rate of 2 ½ % from the date of service of the claim to judgment. Interest on the global sum is awarded at the rate of 5% from judgment to payment.

Costs

The defendants will pay the claimants prescribed costs on the awards.

High Court Judge
His Lordship Brian Cottle