

**SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE**

**SLUHCV2008/0551**

**BETWEEN:**

**SHERMA MATHURIN**

Claimant

**and**

**RAIN FOREST SKY RIDES LTD**

Defendant

**Appearances:**

Mr. Gerard Williams for Claimant

Ms. Vanessa Morgan for Defendant

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2010: July 29;  
August 3.

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**JUDGMENT**

**On written submissions**

- [1] **GEORGES, J [Ag.]:** This is a claim by a tour guide against the Defendant a company incorporated under the Companies Act of St. Lucia for damages in negligence resulting from a gondola accident which occurred about 2:00 p.m. on 27<sup>th</sup> July 2006, at Chassin Babonneau when in the course of an unscheduled evacuation exercise of the gondola the guide lines suddenly gave way causing the Claimant to free fall to the forest floor a drop of about 40 feet where her right leg struck a tree causing her heel to explode on impact. She was as a result severely injured.
- [2] A claim for damages for personal injuries was filed by the Claimant on 3<sup>rd</sup> June 2008, and on 18<sup>th</sup> January 2010, judgment was entered by consent for the

Claimant against the Defendant with damages to be assessed before a Master of the Court on a date to be scheduled by the Court Office. The parties were ordered to file and serve written submissions and legal authorities on quantum within 28 days of the order.

[3] Although it was ordered that this assessment of damages should be heard before a Master it has been placed on my list. And this is not an isolated instance. I could I suppose simply have rescheduled it to be heard before a Master with resultant delay and hardship for the Claimant.

[4] In his legal submissions the Claimant's attorney in adopting Lord Goddard's comments in **British Transport Commission v Gourley (1956) A.C at page 206** divided the Claimant's claim for damages for personal injuries into special damages which have to be specially pleaded and proved and general damages which the law implies and is not specially pleaded. For convenience I propose to do likewise.

### **General Damages**

[5] At the outset reference was made to the landmark case of **Cornilliac v St. Louis (1964) 7WIR 491 at 492** in which Wooding CJ enumerated the five heads under which general damages should be awarded:

- (i) The injuries inflicted and the loss or impairment of the Claimant's capacity before making such recovery as he or she has;
- (ii) The physical disabilities which he or she will bear for the rest of his or her life;
- (iii) The pain and suffering he or she had to endure;
- (iv) The loss of amenities of which he or she has been deprived; and
- (v) The loss of pecuniary prospects in respect of both his or her employment and his or her retirement benefits.

### **The Nature and extent of the injuries sustained**

[6] The medical reports of Dr. Horatius Jeffers is instructive on this aspect of the case. Upon his initial attendance on the Claimant on 27<sup>th</sup> July 2006, at the Emergency Room at the Tapion Hospital his findings were:

(a) Displaced intra-articular open fracture of the low end of the right tibia (the bigger of the two leg bones, extending into the ankle joint) with a fracture of the fibula (the smaller of the two leg bones).

(b) Multiple grazes and bruises to the forehead and right upper limb.

### **The Nature and Gravity of the Resulting Physical Disability**

[7] The Claimant required immediate surgery at the Tapion Hospital. The procedure required the restoring of the joint alignment which necessitated the internal fixation of plates and screws along with bone grafting of the fracture.

The Claimant also sought medical treatment in Martinique. The Claimant has now developed arthrosis (wear and tear) of the right ankle which require surgical fusion which is estimated at \$16,000.00. The fusion of the ankle joint will limit all lateral movement of the foot so as to reduce the risk of further wearing of the joint. The result is a permanent impairment of the right hind foot which has restricted the Claimant's ability to walk long distances, standing for prolonged periods, walking on inclined surfaces or even shoes with heels.

### **Pain and suffering endured**

[8] The Claimant endured pain from the moment of the injury as she remained conscious throughout the incident. Coupled with this is the sight of seeing one's foot bones protruding out of their leg.

The medical report of Dr. Jeffers dated 6<sup>th</sup> February 2009, almost two years later post injury concludes that the management of the Claimant's condition at that time

was in the form of pain medication and rest. Notwithstanding, the Claimant complained of pain throughout.

Also a source of pain was the bone grafting to attend to the fracture of the foot.

### **Loss of Amenities**

[9] Suffice it to say that just about every aspect of the Claimant's everyday life has been affected.

The activities of daily living (ADL) measures a person's impairment and overall ability to perform activities of daily living as a percentage.

As mentioned before the Claimant can no longer do anything which produces pressure on her right ankle joint. The Claimant can no longer take long walks for pleasure nor can she run. She cannot allow her 2 ½ year old daughter to sit on her nor can she carry her around. No longer can she play with her children nor can she enjoy dancing with her husband as she once did. Perhaps the greatest loss of the Claimant is not being able to enjoy to the full extent or to express physically her love for her husband. Engaging in love making is a frustrating exercise as she is limited to a single position of comfort which is free from pain.

Naturally, this has left the Claimant with feelings of inadequacy as she often wonders whether she is losing the interest of her husband.

[10] The bulk of the above is largely the medical reports of the Consultant Orthopedic Surgeon at Tapion Hospital Dr. Horatius Jeffers FRCS who attended the Claimant throughout and whose knowledge expertise and professionalism I accept without cavil in the absence of countervailing evidence. I accept his findings and conclusions in this regard in their entirety.

[11] Counsel for the Claimant referred to a slew of cases out of Trinidad & Tobago as well as this jurisdiction to illustrate the Courts' approach in awarding compensation

to reflect pain suffering and loss of amenities in cases of similar injuries as that under consideration. I have found them most helpful and useful as guidelines bearing in mind that each case inevitably turns on its own facts.

- [12] In 2002, for example d’Auvergne J in **Marcel Fevrier & or and Bruno Canchan et al St. Lucia Civil Suit No. 313 of 1989** awarded \$150,000.00 to the second claimant who suffered a one inch shortening of the right lower limb chronic joint pains resulting in a permanent disability of 10%.
- [13] On the other hand Cottle J in St. Lucia in February 2008, in **Patrick Morille v Paul Pierre and Joseph Rannal SLUHCV 1994/0596** was content to award a Claimant \$80,000.00 for pain and suffering and loss of amenities after having suffered a broken tibia and fibula with infection of the fracture requiring multiple and extensive surgical interventions. Tot homines tot sententiae.
- [14] In the unreported Trinidadian case of **Wilson Frank v Charles Mc Earneney & Co Ltd HCA No. 1876 of 1971** the Court adjusted an award for pain and suffering and loss of amenities to TT\$252,893.00 or approximately EC\$125,000.00 to a 45-year old Ward Sister at the Port of Spain General Hospital who suffered a compound fracture of the left tibia and the right foot which resulted in a half inch shortening of her left leg and limitation of movement of the left ankle joint.
- [15] It is my considered view that that case bears the closest resemblance to that under consideration. In **Ramjitsingh v Gosine (1971) (unreported)** a Trinidad court awarded a 45-year old married women TT\$211, 387.00 or EC\$125.000.00 after having suffered a compound fracture of the left tibia and fibula and femur as well as six inch laceration of the right leg and abrasions to her left shoulder and right leg. That case also bears marked similarities to the instant case and I am persuaded to be guided by them.

- [16] In so doing I bear in mind the factors alluded to in paragraph 5 – 9 and the legal authorities referred to. I also take into account that the Claimant is a 28 year old mother of three young girls and that according to the conclusive medical report of Dr. Horatius Jeffers dated 6<sup>th</sup> February 2009, (Exhibit HJ3) the impairment of the right hind foot and ankle function has given rise to an impairment of 20% in the performance of activities of daily living i.e. restriction in walking distance prolonged standing walking inclined surfaces stair climbing and inability to wear heels and that this was predicted to worsen with time.
- [17] Further post ankle fusion there is a 40% incidence of ongoing right hind and fore-foot pain consequent on degeneration of the joints. In my opinion the prognosis does not in the light of the concluding report look favourable.
- [18] Based on all of the foregoing in my judgment an award of \$150,000.00 for pain suffering and loss of amenities would in the circumstances be meet and I so hold.
- [19] I now turn to Special Damages and will first address loss of pecuniary prospects. In her supporting affidavit the Claimant avers that as a tour guide she earned a salary of \$700.00 per fortnight. That figure is unsubstantiated. In fact there are no documentary exhibits attached to her affidavit. The Defendant's attorney on the other hand submitted a print out of the Employee Payroll Register in respect of the Claimant which shows her average fortnightly salary as \$424.68 i.e. \$849.36 per month which the Court accepts.
- [20] At paragraph 10 of her witness statement the Claimant relates that following the incident (accident) on 27<sup>th</sup> July 2006, at her work place she proceeded on sick leave and so remained for a period of one year and three months during which she and her husband travelled to Martinique for a second opinion from a specialist there which cost \$4,300.40 altogether.

- [21] In a National Insurance Corporation Investigation Report dated 23<sup>rd</sup> March 2007, the Claimant disclosed that during her period of recuperation at home she received full pay from her employer and all her bills were paid by them. She had previously received \$3,261.36 from the NIC which she said the Defendant insisted that she use to finance the trip and medical expenses in Martinique. Upon her return she proceeded on six months maternity leave which ended in early January 2008, whereupon she resumed work with a break for a further medical procedure.
- [22] In paragraph 10 of her statement of claim she averred that she finally returned to work in July 2007, where she was offered the position of cashier which paid a reduced salary of \$500.00 a fortnight. In the closing paragraph of her witness statement the Claimant states that she finally had enough of the Defendant and left the company in June 2008. I pause to observe that there is some confusion over the dates here but the Employee Payroll Register for the period December 2007, to June 2008, shows the Claimant's average fortnightly salary as a cashier as about \$605.37 which I accept.
- [23] Be that as it may Claimant Counsel in his computation of loss of pecuniary prospects used a multiplier of 15 years and a multiplicand of \$16,800.00 (i.e. 12 x \$1,450.00) giving a total of \$261,000.00 in respect of that head of damage.
- [24] At paragraph 10 I pointed out the discrepancy in the Claimant's fortnightly salary as stated at paragraph 10 of her statement of claim. But apart from that I quite frankly do not agree that the Claimant is entitled to any loss of pecuniary prospects having regard to all the circumstances. For the evidence reveals and it cannot be denied that the Defendant company was very generous towards the Claimant throughout her prolonged recuperation as illustrated at paragraph 21 and when she finally resumed work she was offered the position of cashier at a salary which if not greater than was certainly commensurate with what she had previously earned.

[25] Then acting in her deliberate judgment and of her own free will she gave up her job and returned home where she has remained unemployed. Life does have its vicissitudes and one has to make adjustments to cope with them. It is as simple as that. For as I see it the Claimant cannot now expect to sit at home and have money as it were drop into her lap like manna from heaven. She is still a relatively young person who is capable of gainful employment without significant diminution in earnings if at all if she adopts the right attitude. I am firmly of the view that she has been fairly compensated for pain suffering and loss of amenities and she will have to move on from there. So I make no award under that particular head.

[26] At paragraph 6.2 of his written submissions the Claimant's attorney alleged that during her absence on sick leave from August 2006, to July 2007, the Claimant received no salary from the Defendant but received only her National Insurance Corporation contributions which amounted to 65% of her salary.

Salary owed for 12 months \$1,450.00x12	\$17,400.00
Less NIC contributions of	\$11,310.00
Balance owed	<u>\$6,090.00</u>

The Claimant therefore claims a balance of salary owed in the sum of \$6,090.00.

[27] It will be recalled that the Claimant's average fortnightly salary as a tour guide was established as \$424.68 as per Employee's Payroll Register which would translate to \$849.36 monthly. Quite apart from that at paragraph 5 of the NIC Investigation Report dated 23<sup>rd</sup> March 2007, the Claimant is alleged to have informed the Investigating Officer that she received full pay from her employer during her recuperation at home at Fond Assau. That head of claim must be and is accordingly disallowed.

[28] With regard to the trip to Martinique for a second specialist opinion totaling \$4,300.40 there are no supporting documents of this whatsoever so that head of

expenditure has not been strictly proven. In principle therefore I am regretfully obliged to disallow it.

[29] As regards Future Medical Care estimated by Dr. Jeffers at \$16,000.00 for right ankle surgical fusion I will be guided by and accept the opinion of the Consultant Orthopedic Surgeon.

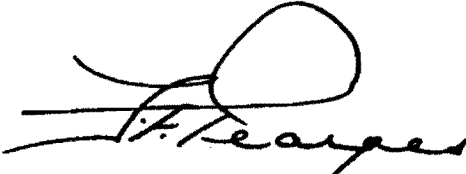
[30] So that in the final analysis judgment will be entered for the Claimant as follows:

<b>General Damages</b>	
Pain Suffering and loss of Amenities	\$150,000.00
<b>Special Damages</b>	
Further Medical Expenses	\$16,000.00
	\$166,000.000
	\$166,000.000

[31] Interest on general damages is awarded at the rate of 6% per annum from the date of service of Claim to date of judgment and thereafter at 6% per annum to date of payment. Interest on special damages at the rate of 3% per annum from date of claim to date of judgment and at the rate of 6% per annum to date of payment.

[32] Costs to be prescribed costs at the rate of 75% of the full prescribed cost (the matter having reached the stage of pre-trial review) pursuant to CPR 65 Appendix C.

Prescribed cost on \$166,000.000 is	\$33,200.00
75% thereof	\$24,900.00
Assessed costs	\$24,900.00



**Ephraim Georges**  
High Court Judge [Ag.]