

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT VINCENT

CLAIM NO. SVGHCV2013/0114

BETWEEN:

KATHY BADENOCK

CLAIMANT

AND

COREAS HAZELLS INC.

DEFENDANT

Appearances:

Mr. Joseph Delves of Counsel for the Claimant

Mr. Stanley K. John and Ms. Keisal Peters of Counsel for the Defendant

2014: March 20th

REASONS FOR DECISION

[1] **TAYLOR-ALEXANDER M:** This was an oral decision delivered for which the parties have requested the court's documented reasons. The following is a summary of the court's decision.

- [2] This case came on for the assessment of damages, for the injury, loss and damage suffered by the claimant as a result of an injury she sustained at the premises of the defendant Coreas Hazels Inc. trading as Ace Hardware. The claimant was walking along an isle when she met injury of her big toe. It was sliced on a metal kitchen sink displayed in the defendant's retail outlet. It lay leaned on the floor. The claimed injuries are detailed in her claim and in the report of Dr. Charles Woods.
- [3] The wound healed with an elevated hypigmented, hypertrophic scar and the claimant was forced to have plastic surgery to address these difficulties and the appearance of the scar. She saw Dr. Barry Aussi (MD).
- [4] Damages to the claimant are to be assessed under the heads of general and special damages. **See British Transport Commission v Gourley¹.**

Special Damages

- [5] The special damages were agreed in the sum of \$2,494.55, with the exception of the sum of \$130.00, being a sum for crutches which I have allowed as having been pleaded, particularized and proven by the evidence in the witness statement of the claimant, and thereafter the difference is accounted for by a mathematical discrepancy.
- [6] I have assessed special damages in the sum of \$2,854.68, which includes the agreed sum of \$550.00 for the further surgery required to improve the appearance of the scarring

General Damages

- [7] The claim was for pain, suffering and loss of amenities. The parties are agreed on the factors to which I must have regard in making an award for general damages. See **Conilliac v St. Louis Wooding CJ².**

The following was the relevant medical evidence:—

Dr. Jose Davy

¹ [1955] 3 AER pg 796

² [1965] 7 WIR 491

[8] I have had regard to the medical report of Dr. Jose Davy, which reports a 2cm laceration of the left great toe with moderate bleeding, and her return complaining of decreased range of movement to the left great toe. On examination the patient was only able to elevate to 40 degrees flexion.

Dr Charles Woods

[9] On the 17th September, 2011 the claimant had traverse wounds of the dorsum of the toe and was unable to dorsiflex. There was a laceration of the hallicis longus tendon. It was surgically repaired and her foot was casted post operatively. The cast remained for six (6) weeks. The healing was complicated by post operative wound infection. The patient was expected to recover full function of the toe with no anticipated long-term problems, apart from the surgical scar.

18th February, 2012: Addendum: The claimant was seen complaining of chronic pain to the toe at the MTI joint when wearing shoes, especially high heels. Dr. Woods concluded that the pain experienced may be related to joint stiffness secondary to casting and incomplete rehabilitation. The claimant was directed to undertake exercise and physiotherapy.

Dr. Barry Aussi

[10] Dr. Barry Aussi performed cosmetic surgery to improve the appearance of the scar. The surgery reduced the hypertrophic scar to a normal scar.

Summary of Claimant's submission:-

[11] The claimant submits that the court is to have regard to the following:

- (a) The claimant had three (3) surgeries.
- (b) The injury must be seen as a serious injury which has and will continue to have a lifelong effect on the claimant's life. She has been permanently scarred on her toe. She continues to suffer with chronic pain, with frequent cracking and faces the possibility of arthritis.

Discussion

[12] The claimant states that her social life has been impacted. She is usually active and these activities were curtailed by the injury, and her pleasure of wearing high heels except for brief periods has

had to be reduced. Her counsel submits on the authority of John Moukmai's Damages for Personal Injury and Death that her age as a relatively young person must be factored. The claimant relies on the authority of **Donna Bailey v Cyril Moukram et al Civil Appeal 7 of 1972** to justify an award of \$65,000.00.

I have discounted entirely the consideration of post arthritis on the basis that it is unsupported by the medical evidence as a likely outcome, although I agree it was not ruled out. I consider that the likelihood of arthritis to be too remote for me to consider increasing an award based on unsupported medical evidence.

Submissions of the Defendant

- [13] The defence challenges the analysis of the impact of **Bailey v Moukram**, and the claimant's reasoning as to the likely updated award updated by today's Consumer Price Index (CPI). The defendant's conclusions after a detailed analysis of the CPI and its use by the courts of our jurisdiction and using the CPI for Grenada as at September 2013, was that the award in **Bailey v Moukram** updated under the 2013 CPI would be \$44,446.63. Thereafter, accounting for the differences in the two (2) cases, the defendant submits that a sum of between \$11,111.65 - \$15,556.32 should be where an appropriate award is pegged; such award would be 25% - 35% the degree of comparability of the two (2) cases.

Discussion

- [14] I do not intend to get drawn into the intellectual argument as to the appropriate CPI, for these present purposes I consider it unnecessary. I do not consider the scientific precision in the calculation of and the use of the appropriate CPI to be the foundation from which this award should launch. These age adjusted awards are not the most desirable means of arriving at an award, and in fact the more aged the judgment the more the attempt at scientific precision is defeated. **Bailey v Moukram** is a decision delivered in 1972! I pause to note however, that it would be impractical for an award made in Grenada and presumably made according to the standard of living there, to be updated and its current value assessed using a CPI of a country other than Grenada. I accept the methodology proposed by Elizabeth Law Chambers, and consider the sum of \$44,446.63, as the value of the award updated to 2013. But I have difficulty in using such an aged award.

A consideration of a comparable award in my view is a consideration of all of the factors relevant at that time to the award, made or to be made.

- [15] In awarding damages for personal injury the court must try to achieve consistency, and the circumstances in which an award is made, coupled with the impact on the claimant's life in my view is of no less significance, than the sum allocated for the actual injury sustained. In the Privy Council case of **Singh v Toong Omnibus Co** [1964] 3 All ER 925 the court stated that if a case bears a measure of similarity then it may be possible to find a reflection in them of consensus of judicial opinion. *That is not to say that damages should not be standardized, or that there should be an attempt at rigid classification. It is but to recognize that since in a court of law compensation for physical injury can only be assessed or fixed in monetary terms, the best the court can do is hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.*

That in my view is what is to be achieved in the consideration of comparable awards. That principle would be defeated in the consideration of an award so aged and it is in my view inappropriate after a certain time frame has passed to rely inestimably on the consumer price index.

- [16] Putting that aside I return to the issue at heart, being an appropriate award for the claimant.

Findings

- [17] I have considered the guidelines provided by Wooding CJ, in the application of my discretion. I have considered the evidence of the claimant and the reports and evidence of the attending doctors.
- [18] I note that under the UK system of awards the Judicial College (JC) formerly the Judicial Studies Board (JSB) which usually offers guidelines as to the appropriate range for an injury sustained, categorizes noticeable scars or a single disfiguring scar of (leg)s, (arm)s, (hand)s, back of chest (male) in the bracket of an award of £5,500.00 to £16,700.00 and for single noticeable scar or several superficial scars with some minor cosmetic deficit as attracting awards of between £1,750.00 and £5,600.00.
- [19] I have also considered the following cases from our jurisdiction which offer some comparison:

Elisha Lewis v Worrell John SLUHC2003/0371 (unreported). The claimant was a 35 year old woman who suffered fractures of her left clavicle, ribs, the left superior, pubic ramus and of a number of bones in her left foot during her hospitalization. She suffered a chest infection. She had to undergo secondary suturing on her left foot and surgery of the left clavicle. Her foot remains inverted with hyper sensitivity and tenderness over the skin grafting. She has an overriding left 4th toe from the scar contracture and tenderness in her left heel. She had a dislocated joint and osteoarthritis in the left foot and she was left with serious scarring. She cannot walk without pain or limping and cannot stand for long periods or her foot swells.

She has lost completely the ability to go jogging which she did, walks on the beach which she did every morning; she cannot drive or walk properly up stairs. These are permanent effects of the injury she sustained. She has to wear special open shoes which show her scars and she cannot wear elegant high heels as she used to. She now has intimacy problems due to irritation of the clavicle bone, and she has difficulty wearing clothes with straps due to the scarring of her shoulder. The court in 2005 awarded the claimant 65,000.00.

Rosabel Chambers v Frank Gooding SVGHCV1991/0113. This claimant sustained soft tissue injury and lacerations of her left leg. She was awarded \$6,000.00 in 1998, Baptiste J having found that her pecuniary prospects were unaffected, there was no impairment of pecuniary prospects, and no evidence of physical disability.

[20] In this case and having applied the guidelines, I too find no evidence of impairment of pecuniary prospects and other than a small scar on her big toe, no physical disability. I do not accept the evidence of the claimant that such a small scar can have the debilitating impact on her social activities as she alleges. I award the claimant the sum of \$17,000.00 for General Damages, for a total award of \$19,854.68. Interest is awarded on special damages at the rate of 3% from injury to judgment and on general and special damages from judgment to payment in full at the rate of 6% per annum.

[21] Judgment having been entered in default, costs are for the claimant, calculated at 60% of the prescribed costs.

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