

**EASTERN CARIBBEAN SUPREME COURT  
COMMONWEALTH OF DOMINICA**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. DOMHCV 2014/0079**

**BETWEEN:**

**CURVIN COLAIRE**

Claimant

and

**[1] ATTORNEY GENERAL OF COMMONWEALTH OF DOMINICA  
[2] SERGEANT PHILSBERT BERTRAND**

Defendants

**Before:**

Ms. Agnes Actie

Master

**Appearances:**

Mr. David Bruney of counsel for the claimant

Ms. Joelle A. V Harris, Solicitor General, for defendants

---

2015: April 13;  
June 5.

---

**JUDGMENT**

[1] **ACTIE, M.:** This matter involves an application for assessment of damages.

**Background**

[2] The background facts as outlined in the statement of case filed by the claimant on 6<sup>th</sup> March 2014 are as follows. On the morning of 14<sup>th</sup> November 2013 the claimant left his home walking towards his parents' home holding a cutlass in his hand. Having reached the general area of his parents' home he leaned against an exposed concrete column. He observed the 2<sup>nd</sup> defendant, one of two police officers in civilian clothing, walking towards his house. The claimant heard the 2<sup>nd</sup>

defendant say “look him” and then said to the claimant “you I come for”. The claimant responded “if it is me all you come for, look me”. The 2<sup>nd</sup> defendant cranked the M16 assault rifle which he was holding and taking aim shot the claimant who was still leaning against the exposed concrete column causing a loud explosion. The bullet struck the claimant in his stomach. The claimant was transported by the two officers to the Marigot Hospital on a police pick up van and then transferred to the Princess Margaret Hospital where he remained for 12 days.

### **Special Damages**

[3] The claimant claims the sum of \$7,500.00 as special damages for loss of earnings for 75 days from 15<sup>th</sup> November 2013 to 28<sup>th</sup> February 2014 at \$ 100.00 a day. No receipts or salary slips were proffered to substantiate the amount claimed. The claimant relies on the affidavit evidence of his employer, Mr. Stephen Neil Whitcher. Mr. Whitcher deposed that that the claimant was in his employment for over five years as a construction worker and was paid a weekly wage of \$400.00.

[4] It is trite law that special damages must be pleaded and proved. The claimant has not provided any evidence to justify the 75 days claimed for loss of earnings. Mr. Whitcher’s evidence on a five day week amounts to \$80 a day and not \$100.00 as claimed by the claimant. However the claimant avers that he is a self-employed farmer and did some gardening around his home to supplement his wages. As stated above, the onus is on the claimant to not only plead but also to prove his loss and quantum in a claim for special damages. When such evidence is not provided it is open to the trial judge to give consideration to an award of nominal damages. The Privy Council in **Greer v. Alstons Engineering Sales and Services Ltd**<sup>1</sup> quoting from **McGregor on Damages** 13<sup>th</sup> Ed at para 295 stated:

“Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.”

---

<sup>1</sup> [2003] UKPC 46 (19 June 2003).

[5] I accept the evidence of Mr. Witcher and also that of the claimant of his employment prior to the incident. I also accept that the claimant did not resume active life immediately after being discharged from the hospital. The extent and nature of his injuries were such that he would have required time to recuperate. I take into consideration the 12 days in hospital and propose one month (30 days) recovery in the absence of medical certificate. I accordingly make an award of \$80.00 per day for 42 days making a total sum of \$3,780.00.

### **General Damages**

[6] General damages are usually determined taking into consideration the principles set out by Wooding CJ in the seminal case of **Cornilliac v St Louis**<sup>2</sup>. They are (1) the nature and extent of injuries suffered;(2) Nature and gravity of the resulting physical disability; (3) Pain and suffering endured; (4) Loss of Amenities;(5) extent to which the claimant's pecuniary prospects have been affected.

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

[7] The claimant's injuries are particularized in a medical report of Dr. Eduardo Ortiz dated 24<sup>th</sup> February 2014 as follows: -

- Right kidney maceration
- Perforation of ascending colon
- Contusion and perforation of gall bladder
- Perforation of small bowel
- Lesion in the lumbar vertebrae that provoked right leg plogia

The report further states that the claimant was in surgery for three (3) hours. After the surgery the claimant suffered multiple complications: urinary tract infractions, bronchopneumonia, abscess in the back and septic shock with multiple organ dysfunction during the course of treatment. The claimant was placed on medical ventilation for three (3) days, was in a septic shock state for four (4) days and spent twelve (12) days in the ICU department.

---

<sup>2</sup> Cornilliac v St Louis (1965) 7 WIR 491.

### **Pain and Suffering and Loss of Amenities**

- [8] The claimant avers that he experienced severe pain and suffering from the physical injuries. His recovery was painful with multiple complications. He was placed on intravenous drips as he was unable to chew or eat solid foods for twelve (12) days in intensive care unit and became emaciated as a result.

### **Nature and gravity of the resulting physical disability**

- [9] The claimant states that prior to the incident he was able to perform his tasks efficiently. He was able to climb and clean by stretching to high places comfortably. He can no longer do these activities as a result of the incident as he is required to avoid strenuous activities to prevent further deterioration of his health. The claimant claims to have partial paralysis in his right leg which has severely affected his productivity as a construction worker because of pain he often experiences during the course of strenuous physical activities.

### **Loss of amenities**

- [10] The claimant avers that he now takes a longer time to complete jobs which he was previously able to complete effortlessly. He believes that this factor has reduced his attractiveness as a mason and labourer for prospective employment.

### **Award of general damages**

- [11] The claimant seeks an award of damages in the range of \$120,000.00 to \$150,000.00 for pain and suffering and loss of amenities. The claimant in support referred the court to a number of authorities including:

**“Mercedes Delplesche v Samuel Emmanuel De Roche<sup>3</sup>** - the claimant was hospitalized for 4 days after she was knocked down by a vehicle. The claimant sustained trauma to the head and knee, abrasions to the face, laceration to the forehead, nose and lower lip and bleeding from left nostril. The claimant was awarded \$65,000.00 for pain and suffering and loss of amenity.

---

<sup>3</sup> SVG HCV 2012/0014

**Martin Alphonso etal v Ramnath**<sup>4</sup> - the claimant was riding his bicycle when he was struck by a jeep. The claimant suffered injuries to the head, back abdomen and both legs. He suffered a broken rib and fracture of the left ulna, Hemi Paresis of the left hand side of the body, grand mal seizures, urinary incontinence, loss of one leg the claimant was awarded \$121,500.00 or US\$45,000.00 for pain and suffering and loss of amenities.

**Gloria Lake v Antigua Commercial Bank**<sup>5</sup> - the claimant, 58 years old was awarded \$ 100,000.00 for pain and suffering and loss of amenities for injuries suffered to her back as a result walking into a puddle of water and falling. The claimant underwent surgery and obtained some relief but still experienced severe pain and amenities affected.

**Oscar Frederick v Liat Ltd**<sup>6</sup>- the claimant, 59 years old was awarded \$80,000.00 for pain and suffering and \$90,000.00 for loss of amenities where he suffered back injuries as a result of a fall at his work place. He underwent surgery but still suffered complications as a result of his injuries.

[12] The claimant avers that all the cases relied on are similar to the instant case to justify the amount claimed. The claimant avers that he was shot by a high powered Mm16 riffle. The damages suffered were severe with internal injuries to his vital organs namely the kidney, colon, gall bladder, urinary tract and intestines as a result of the incident. He was in a coma for one (1) week with prolonged surgical treatment and suffered many complications and infections. He spoke of the psychological trauma suffered when being transported from the scene by his attackers.

[13] The defendants aver that the claimant has not pleaded any specific loss of amenities. The defendants state that the claimant has failed to produce any medical evidence to suggest that he did not make a full recovery and his inability to perform tasks that he did prior to the incident. The defendants' challenge the amounts claimed and proposed the sums of \$50,000.00 for pain and suffering and \$10,000.00 for loss of amenities. In support the defendants directed the court to

---

<sup>4</sup> Civil Appeal 1996/ 0001.

<sup>5</sup> ANU HCV 199/0123.

<sup>6</sup> ANUHCV 2007/0391.

comparable cases for consideration namely; **Shaunette Thomson et al v Owen Jones et al**<sup>7</sup> and **Augustine Samuel Antoine v The Attorney General of Grenada**<sup>8</sup>.

[14] Having reviewed the cases cited by both parties as useful comparable tools and bearing in mind that each case depends on its own unique facts I am of the view that the recent authority of **Augustine Samuel Antoine v The Attorney General of Grenada** is the most relevant to the facts in the instant case. The claimant in **Augustine Samuel Antoine** was shot by the police. The bullet went through the left flank on the anterior abdominal cavity. He underwent a laparotomy which did not reveal any organ damage. However the claimant eventually developed complications which resulted in extreme neurological injury involving the left sciatic nerve of the left lower extremity which required the use of a permanent walking aide. He was awarded \$80,000.00 for pain and suffering and loss of amenity.

[15] The court notes that the injuries suffered in the **Augustine** case were of less severity than the instant case. In the instant case the claimant suffered injuries to multiple internal organs namely the right kidney, gall bladder with perforation of the colon and bowel. Recovery was complicated by urinary tract infection bronchopneumonia and abscess of back as well as septic shock. However unlike the **Augustine's** case, we have no evidence of permanent or debilitating injury which will hinder the claimant in the instant case from his daily activities. At the assessment the claimant appeared to have made significant recovery. This was confirmed in the medical report. Having taken into consideration the principles on assessment, the injuries suffered I make an award of \$85,000.00 for pain and suffering and \$5,000.00 for loss of amenities.

---

<sup>7</sup> SVGHCV 2012/0138

<sup>8</sup> GDAHCV 2009/0383

### **Loss of Earning Capacity**

- [16] The claimant seeks damages for loss of earning capacity in the sum of \$192,000.00. The claimant states that his productivity and attractiveness have been diminished as a construction worker since the incident. Mr. Witcher in his evidence states that he has not called the claimant to work since the incident. However the court notes that Mr. Witcher's in cross examination admits that he has not had many major construction projects since the claimant's injury.
- [17] The defendants challenge an award under this head as the claimant has failed to prove any damage as pleaded. The defendants aver that the medical evidence adduced does not support the claimant's assertion of future risk of disability. The defendants referred the court to **Mitcham Black v The Attorney General of Saint Lucia**<sup>9</sup> where Hariprasad-Charles J as she then was referred to the test laid down by the Jamaica Court of Appeal in **Gravesandy v Moore**<sup>10</sup> which states:
- “a plaintiff who seeks general damages for loss of earnings must show that there is a real or substantial risk that he may be disabled from continuing his present occupation and be thrown handicapped, on the labour market at some time before the estimated end of his working life. The risk in such a case will depend on the degree, nature, or severity of his injury and the prognosis of full recovery; and the evidence must be adduced as to these matters and also as to the length of the rest of his working life, the nature of his skills and the economic realities of his trade and location.”
- [18] The defendants however submit that if the court considers an award under this head an amount not exceeding \$30,000.00 should be awarded. The court supports the defendants contention that the claimant has not provided any medical evidence to substantiate the impact of the injuries on his future pecuniary prospect. The court is of the view however that the nature of the injuries may provide some level of discomfort. However in the absence of any supporting medical evidence the court is hesitant to allow a substantial award. The onus of proof lies on the claimant at all times in a claim for damages under this head. I

---

<sup>9</sup> SLUHCV 2004/0502 delivered on 19<sup>th</sup> March 2007

<sup>10</sup> (1986) 40 WIR 222

note the concession of the defendants to a nominal award under this head and being so guided I make an award in the sum of \$30,000.00.

### **Future Medical Care**

- [19] The claimant seeks an award of \$75,000.00 for future medical care. Again the claimant has failed to buttress his claim with any evidence. The claimant made reference to the extensive injuries outlined in the medical report of Dr. Edward Ortiz. The claimant contends that he lost one kidney for which he will require pain killers to suppress any future pains related to his injuries. This assertion is not buttressed by any medical evidence.
- [20] The defendants challenge the amount claimed as there is no evidence to establish the loss of a kidney neither the need for future medical treatment. The report of Dr. Ortiz states that the claimant has fully recovered from the injuries. The report is silent on continuing treatment or future medical care. The claimant has not provided a scintilla of evidence to support the need for future medical care. Although the claimant speaks of his limitations as a result of his injuries suffered, there is no medical evidence to guide the court to prove the veracity of his allegations.
- [21] The court notes a practice in assessment of damages where large sums are claimed under various heads without proof. The onus is always on the party seeking compensation to prove his/her claim with palpable evidence. The court cannot be asked to speculate in an assessment of damages. It is not enough for a claimant to say that he/she sustained loss. A party claiming damages must prove his loss, and justify an award for damages. The claimant must satisfy the court both as to the fact of damage and the amount. Lord Millet in the Privy Council decision in **Strachan v. The Gleaner Company Ltd & Anor (Jamaica)**<sup>11</sup> states:
- “....., once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see Pugh v Cantor Fitzgerald

---

<sup>11</sup> [2005] UKPC 33 (25 July 2005)



International [2001] EWCA Civ 307 citing Lunnon v Singh (unreported) 1 July 1999, EWCA. ...If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is *res judicata*. ***The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss” (my emphasis) .***

There being no evidence to substantiate the amount claimed I therefore decline an award under this head.

### **Aggravated and Exemplary Damages**

- [22] The claimant seeks an award of \$50,000.00 for each police officer involved in the incident and relied on the authorities of **Takitota v The AG of Bahamas** and **Razack Mohammed v AG of Trinidad and Tobago**. The claimant alleges that a weapon such the M16 assault rifle is not a suitable weapon for a police officer to use when executing his duties in such an instance. The claimant avers that the use of the M16 as unjustifiable as it is a weapon usually utilized during periods akin to warlike circumstances. The weapon inflicts grievous injury of a type not associated with firearms normally utilized by members of the Commonwealth of Dominica Police Force on the type of duty that the 2<sup>nd</sup> defendant was exercising on that particular day. The court is also asked to consider the circumstances of terror and fear caused to the claimant having been transported by the same officers who shot him in a police marked van.
- [23] The defendants contend that an award of aggravated/exemplary damages cannot be awarded against both police officers as no evidence was pleaded to establish the involvement of the 2<sup>nd</sup> police officer. The defendants suggest an amount of \$5,000.00.

[24] Aggravated and exemplary damages are awarded in the well settled categories as laid down by Lord Delvin in **Rookes v Barnard**<sup>12</sup>. Those categories are (a) where Government officials act in an oppressive manner; (b) where a defendant's conduct is calculated to make a profit from his wrong and (c) where a statute expressly provides. The evidence of the claimant is that the conduct of the 2<sup>nd</sup> was outrageous when he aimed and shot at him with the military type M16 rifle.

[25] The instant case in my view is an appropriate case for an award of aggravated and exemplary damages. The claimant was injured thankfully, not fatally, from all accounts with a highly powerful weapon. The defendants called two police officers as witnesses to give evidence on the species of M16 A1 rifle. Both witnesses acknowledged that the M16 A1 is a very powerful and accurate rifle. The witnesses state that if an officer takes aim with the M16A1, his shot will be fatal. The witnesses contend that the fact that the claimant was shot in the abdomen suggests that the 2<sup>nd</sup> defendant did not take aim. It is curious to note that the 2<sup>nd</sup> defendant was not one of the witnesses called by the first defendant.

[26] From all accounts the rifle used was a high calibre weapon used mostly in warlike circumstances and riots. There is no evidence of provocation or aggression on the part of the claimant neither was there any evidence that the officers' lives were endangered to justify the use of such force. Such atrocious behaviour is unacceptable from a police officer and should be deterred. However I am in agreement with the defendants that a double award should not be made against the two officers as the claim is only against the 2<sup>nd</sup> defendant whom the claimant alleged shot him. The other officer was not named as a party to the suit. I have carefully reviewed the submissions and cases cited and make an award of \$10,000.00 for aggravated and exemplary damages.

### **Order**

[27] In summary the court the defendants shall pay the claimant the following awards:

---

<sup>12</sup> [1964] AC 1129

- (1) An award for general damages in the sum of \$85, 0000.00 for pain and suffering and \$5,000.00 for loss of amenities.
  - (2) An award of \$3,780.00 for special damages.
  - (3) An award in the sum of \$30,000.00 for loss of earning capacity.
  - (4) An award of \$10,000.00 for aggravated and exemplary damages.
  - (5) I award interest on the global sum at the rate of 5% from the date of judgment to the date of payment in full.
  - (6) I award prescribed costs in the sum of in the sum of \$12,040.20 pursuant to CPR 65.5(3)(4)(b)(ii).
- [28] I wish to thank counsel for their helpful submissions.

**Agnes Actie**  
Master