

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANGUILLA

AXAHCV2020/0020

BETWEEN:

GENEA BROWN-GUSTAVE

Claimant

and

**KENVIS GUMBS
SANDRA YORK GUMBS**

Defendants

Appearances:

Ms. Jacinth Jeffers for the Claimant

Ms. Navine Fleming for the Defendants

2021: July 19, 20;
October 5.

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] **GILL, M.** By a claim in negligence filed on 26th March 2020, the claimant seeks damages for personal injuries allegedly suffered as a result of a motor vehicular accident.

Background

- [2] The claimant, Genea Brown-Gustave, of Maryland, United States of America, is a medical student, at the time attending the Saint James School of Medicine in Anguilla. The accident occurred at about 7:25 p.m. on 16th June 2019 while she was driving to her Anguilla residence. She was involved in a head-on collision with a vehicle driven by the 1st defendant, Kenvis Gumbs and owned by his mother, the 2nd defendant, Sandra York Gumbs. At the time of the accident, the claimant was forty-six (46) years old.

- [3] The claimant was transported to the hospital by ambulance with certain injuries. In addition, her car was extensively damaged.
- [4] By her claim, she seeks special damages, general damages, interest and costs.
- [5] On 8th June 2020, the claimant obtained judgment in default of defence for an amount to be decided by the court.
- [6] The claimant's injuries are set out in the statement of claim as follows:
- (a) Temporomandibular injury (jaw injury) with associated persistent facial swelling (right side of face);
 - (b) Right tinnitus (ringing in ear);
 - (c) Mild mid-frequency sensorial hearing loss (right ear);
 - (d) Right nasal valve collapse;
 - (e) Right Eustachian tube dysfunction and retracted right tympanic membrane;
 - (f) Fractured teeth;
 - (g) Severe upper thigh bruising to both thighs; and
 - (h) Lipoma on right upper thigh.
- [7] On this assessment, the claimant seeks the following damages:
- i. Damages for pain and suffering and loss of amenities in the sum of US\$80,000.00;
 - ii. Future medical expenses in the sum of US\$38,388.00;
 - iii. Special damages for past medical and related expenses in the sum of US\$24,258.32.

General damages

- [8] The well-established legal principles to be followed in awarding damages in personal injury cases were laid down by Sir Hugh Wooding CJ in **Cornilliac v St. Louis**.¹ The main factors to be taken into account are (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the extent to which pecuniary prospects are affected.

The nature and extent of the injuries sustained

- [9] The claimant's injuries are set out in the statement of claim as above at paragraph 6.

¹ (1965) 7 WIR 491

Causation

[7] Whereas the default judgment is conclusive of the issue of the liability of the defendants for negligence, a major issue in this matter is whether the injuries suffered by the claimant were as a result of the accident of 16th June 2019.

[8] In order to determine this issue, it is necessary to set out the claimant's injuries and examine the opinions of the medical experts called by the parties. The injuries complained of by the claimant can be placed into three (3) major categories:

- i. Ear and nose injuries
- ii. Teeth and mouth injuries
- iii. Leg/hip injuries

[9] The claimant was transported to hospital by ambulance from the scene of the accident experiencing ringing in her ear, pain in her chest, chin, jaw bone, mouth and both thighs. There is no evidence that she was admitted to hospital.

Ear and nose injuries

[10] The claimant's evidence is that on 18th June 2019, because of persistent ringing in her ear and decreased hearing she was experiencing, a CT scan was done on her head.

[11] The claimant states that on 22nd June 2019, owing to the lack of specialist care for her injuries in Anguilla, she travelled to Maryland, U.S.A. for her ear and jaw injuries. On 24th June 2019, a week after the accident, her ear examination was conducted by Dr. Angela C. Stonebraker, of Cumberland Valley ENT Consultants, Maryland, USA, who diagnosed her with sensorial hearing loss. Dr. Stonebraker's medical report is exhibited.

[12] On 24th July 2019, the claimant had a consultation with Dr. Ellis Webster, an otolaryngology/head and neck surgery physician, who is the owner of Island Comprehensive Health Centre in Anguilla. According Dr. Webster, she presented with persistent right ear fullness and right nasal obstruction (not being able to breathe on the right side of the nose), right mild sensorineural (nerve damage) hearing loss (SNHL), right Eustachian tube dysfunction (sense of fullness or pressure in the ear), right tinnitus (a noise in the head the patient only hears), dizziness. His examination of her ear, nose and face

showed right tympanic membrane retraction, right mild SNHL, right alar collapse with inspiration, turbinate hypertrophy and right mild facial swelling. He observed that she needed a myringotomy (surgery to relieve pressure in the eardrum) and a tube in the right ear which he performed on 6th December 2019. Dr. Webster's expert opinion is that the hearing loss is permanent and can progress. If medical intervention does not work, over time, the claimant would need a hearing aid. In March 2020, the tube was still in place. Dr. Webster provided the claimant with a Plan of Care for right nasal valving (collapse of the side of the nose). He recommended a right latera implant or a spreader graft with septal or auricular cartilage.

- [13] It is Dr. Webster's expert opinion within a high degree of medical certainty that the claimant's symptoms of dizziness, right hearing loss, right tinnitus, right Eustachian tube dysfunction, right facial swelling and right nasal valving with obstruction are due to the motor vehicle accident she was involved in on 16th June 2019. His oral evidence is that the airbag could have caused the tinnitus and damage to the ear drum.
- [14] The defendants question Dr. Webster's opinion on the basis of his evidence that the deploying of an airbag could have caused some of the injuries the claimant complained of. They argue that there is no evidence that the claimant was hit in the face with an airbag. Further, in relation to a visit to Dr. Webster by the claimant on 1st November 2019, the defendants observe that he made findings and diagnosed the claimant with certain conditions but he failed to tell how he carried out or if he carried out any examination of the claimant. His diagnosis included the history of the claimant and statements she made in relation to her hearing and the noise in her right ear.
- [15] The evidence is clear that on the night of the accident, the claimant complained of issues with her ear, jaw and mouth. Her witness statement shows that at the time of the collision, the airbags deployed. There is no evidence that on that night, she complained of anything to do with her nose. She states that she travelled to Maryland for her ear and jaw. Just over a month after the accident, however, she presented with and was diagnosed by Dr. Webster with nasal injuries. Dr. Webster is of the opinion that the injuries he saw, including those involving the nose, were as a result of the accident on 16th June 2019.

- [16] There is no evidence that the claimant suffered any of the injuries diagnosed by Dr. Webster before the accident. Given Dr. Webster's expertise and his dealings with the claimant, and in the absence of any contrary medical evidence, I accept his conclusion and coupled with the claimant's evidence, I find that the ear and nose injuries suffered by the claimant were caused by the accident on 16th June 2019 which occurred as a result of the negligent driving of the 1st defendant.

Teeth and mouth injuries

- [17] As already stated, on the night of the accident the claimant experienced pain in her jaw bone and mouth. She claims that her teeth were fractured by the accident. In relation to those injuries, she was treated in Maryland, USA by Dr. Anuja Ohri Parikh, a general dentist. Dr. Parikh saw the claimant on 1st October 2019, three and a half months after the accident. The claimant presented with pain in her temporomandibular joint (TMJ) explained by Dr. Parikh as a joint connecting the lower jaw bone to the skull. She also had fractured and cracked teeth and exhibited tinnitus in both ears. The occlusion (upper teeth coming together with the bottom teeth) was off, and there was a pop and click in her TMJ (when she opened and closed her mouth there was a noise). Dr. Parikh states that after a comprehensive examination, she developed a treatment plan including treating the upper arch and restoring the cracked and fractured teeth with full coverage crowns. "Full coverage restorations were used to restore the fractured teeth, occlusion, and TMJ." An occlusal splint guard was fabricated for the claimant to stabilize the occlusion. Dr. Parikh opines that it is important to restore the lower arch to bring the occlusion to ideal fixation and to help with the TMJ. The claimant, she says, is in need of full mouth restoration. The estimated cost for restoration of the lower arch is US\$26,000.00.
- [18] Dr. Parikh's report, although addressed to the court, does not give her opinion on the cause of the claimant's injuries to show any correlation between the accident and the injuries. In fact, the report gives no history of the claimant at all. It is in her oral evidence, in answer to the court, while generalising that these types of injuries are caused by various kinds of trauma, Dr. Parikh's evidence is that the injuries she saw in the patient are consistent with a motor vehicular accident.

[19] The defendants rely on the expert evidence of Dr. Lindel H. Brookes, a prosthodontist, who was contacted to provide a second opinion with respect to the claimant's claim. Notwithstanding that he is called by the defendants, in the statement of truth at the end of his witness statement, Dr. Brookes confirms that he understands that it is his duty to give impartial information to assist the court and that his duty is not to any of the parties but to the court.

[20] On 20th March 2020, Dr. Brookes conducted a clinical examination of the claimant at his private practice at the Caribbean Implant Restorative Centre in Anguilla, which is owned and operated by him. He also had sight of a report on her by Dr. Parikh. He gave a detailed account of his findings and analysis of the claimant's condition in his witness statement as well as his oral evidence. In the last two paragraphs of his witness statement, Dr. Brookes concludes as follows:

"15. Facial trauma can be very extensive involving multiple soft tissue injuries and bone fractures. My clinical evaluation of this patient does not show any abnormalities that could be attributed to an accident involving severe facial trauma.

16. My assessment was without any x-rays or other records that would show the results of the accident. The clinical evaluation of the position and articulation of the teeth does not show any evidence of any abnormality that could possibly be related to an accident involving the face. The fractures of teeth or crowns and the mall alignment [sic] of the lower anterior teeth is not accident related but a result of the upper arch rehabilitation."

[21] Dr. Brookes' evidence is that the injuries suffered by the claimant with respect to the TMJ and the cracked and fractured teeth were not as a result of the motor vehicular accident on 16th June 2019. In his oral evidence, Br. Brookes expanded by indicating that the doctor who restored the claimant's teeth created a problem for the claimant, the unhealthy occlusal scheme. That did not come from the accident, he stated. It is Dr. Brookes' opinion that the restorative rehabilitation of the claimant's teeth may not have involved the necessary diagnostic analysis needed prior to commencing the rehabilitation procedures. He explained that if an airbag deploys in one's face, it is unlikely to cause injury to the TMJ or fractured teeth. He stated that if the object is hard, it would knock out those teeth. He was adamant that those teeth could not have been fractured in the accident. He made it clear that he did not need X-rays to make his assessment, that is, to evaluate a fracture.

He disagreed that he was unable to make a credible evaluation of the claimant eight months after the accident.

[22] Dr. Brookes told the court that there is nothing wrong with the claimant's lower arch according to Dr. Parikh's own chart, and there is no need for restoration of the lower arch, as recommended by Dr. Parikh. According to his witness statement, the occlusal relationship observed in the claimant "would necessitate orthodontic treatment to correct the lower anterior teeth and have the upper anterior crowns done over to correct the anterior/posterior incisal edge position of the upper teeth to achieve better harmony of the TMJ and the neuromuscular system". His evidence is that upon examination of the claimant, there was no clicking or popping of the TMJ.

[23] Dr. Brookes' conclusion was read by the court to Dr. Parikh when she gave her oral evidence. She disagreed with his conclusion completely. She could not speak to what Dr. Brookes saw, but maintained that the injuries she saw in the claimant were consistent with a motor vehicular accident.

The conflicting experts' evidence

[24] In a situation like this, the court is required to resolve the issue of causation. For guidance on the approach to be taken in such circumstances, I turn to the case of **Rawle Hannibal v The BVI Health Services Authority**.² As in the instant case, that case involved conflicting evidence of two medical experts. It provides an analysis of the principles to be considered in the resolution of conflicting expert evidence.

[25] At paragraph 26 of the judgment, Baptiste JA stated the appropriate approach as explained in **Barclays Bank PLC v Christie Owen & Davies Limited**,³ that "it is not simply a matter of which expert is preferred. The court is enjoined to make a judgment as to the expert witness, the weight to be placed on different aspects of their evidence and the assistance to be derived from it, and then reach its own conclusion".

² BVIHCVAP2017/0002

³ [2016] EWHC 2351 (Ch)

[26] His Lordship went on, at paragraph 27, to endorse the pronouncement of Robson AJA in **Alsco Pty Ltd v Mircevic**⁴ as follows:

“...judges are not to resolve such conflicts by purporting to develop their own expertise and substitute their own opinion for that of the experts. Instead, the judge will find a basis for preferring the evidence of one expert over another such as: which opinion best aligns with the primary facts the judge finds; which opinion appears to be more credible; a comparison of the qualifications, expertise or experience of the competing experts; which expert appeared to be the most objective and the responses of the expert under cross-examination.”

[27] Further, at paragraph 28, Baptiste JA stated that Ellis J. (the learned trial judge), was alive to the fact that a pivotal tipping point in the case was the expert testimony, which radically differed on critical points significantly bearing on the issues that concerned the court, and it was the court’s duty to resolve the conflicting testimony. Her Ladyship was guided by Bingham LJ in **Eckersley v Binnie**⁵ who stated:

“In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reason.”

[28] Baptiste JA concluded, at paragraph 40, that the trial judge was correct not to “simply choose one expert over another”, and instead, carry out “an evaluation process in respect of the competing opinions”.

[29] Applying the principles set out by Baptiste JA in **Rawle Hannibal**, I am mindful of the caution not to accept Dr. Brookes’ opinion over Dr. Parikh’s simply because he is a specialist and she is a general dentist.

[30] I note from Dr. Parikh’s curriculum vitae that her training allowed her to provide comprehensive and full mouth restoration skills and she completed courses on occlusion, complete wax up, dental photography, patient record taking and treatment planning. Additionally, I note that she has established her private practice in two locations in Virginia,

⁴ [2013] VSCA 229

⁵ [1988] 18 Con LR 1

USA since 2001, providing services including preventive dentistry, bleaching, children's bridgework, dentures and partials, porcelain veneers and full mouth restoration procedures ("highly complex and significant revenue generator for the practices").

[31] Dr. Brookes has been practicing dentistry for thirty-seven (37) years. He completed three (3) years of specialty training in prosthodontics and is a certified prosthodontist, which involves the examination and assessment of a patient's intra and extra oral findings that are abnormal, indicating the need for rehabilitation of the mouth to proper occlusion and function. Dr. Brookes taught courses at the Meharry Medical College School of Dentistry, Nashville, Tennessee, USA, focusing on the restoring of the mouth including the replacement of missing and/or fractured teeth to normal occlusion and functioning of the TMJ and the surrounding musculature.

[32] Obviously, the court must consider that although Dr. Parikh is qualified and competent to give expert evidence on the subject matter of the claimant's teeth and mouth injuries, this is Dr. Brookes' specialty. However, a major area of concern for the court on the issue of causation is Dr. Parikh's own evidence. The court is trying to determine whether the injuries seen by Dr. Parikh, on the requisite standard of proof, that is, on a balance of probabilities, were caused in the accident of 16th June 2019 that occurred by the already established negligence of the 1st defendant. As mentioned earlier, Dr. Parikh's report does not give a history of the claimant. There is no statement in the report concerning the accident in question, or any other accident, or indeed any other kind of trauma that could be attributable or contributory to the claimant's injuries. It appears that the doctor's report is geared towards providing, apart from the diagnoses and treatment, the costs involved in addressing the claimant's injuries, and not their cause.

[33] It is noteworthy that other doctors who saw the claimant after the accident mention other complaints of hers not within their specialty, but nothing about her teeth and mouth injuries. Her primary care physician Dr. Jennifer Janus, whom she visited on 24th June 2019, a week after the accident, noted the vehicle crash and diagnosed her with pain of right thigh, hematoma and poor concentration. The claimant notified Dr. Janus of the ringing in her ear for which she planned to see the ENT specialist that afternoon. Dr. Nesly

Clerge (hip/thigh), apart from pain in her thighs, noted her complaints to him of right-sided tinnitus, hearing loss, dizziness and facial pain. His report, which is dealt with next, speaks to the accident as well. Dr. Stonebraker also referenced the accident of a week earlier and noted no abnormalities on her examination of the claimant's oral cavity.

[33] Dr. Parikh's oral evidence did little to convince the court that the accident on 16th June 2019 was the cause of the claimant's injuries. While opining that the relevant injuries are consistent with a motor vehicular accident, she provided other kinds of trauma as possible causes, and fell well short of establishing a causal link between the motor vehicular accident of 16th June 2019 and the claimant's teeth and mouth injuries. This may well be in keeping with the expert's duty to the court to give assistance and not partial information. On Dr. Parikh's evidence, I am not satisfied that the claimant has discharged the burden of proving that she would not have suffered the damage to her mouth and teeth "but for" the negligence of the 1st defendant.⁶

[34] Dr. Brookes' evidence, on the other hand, goes into detail as to how he came to the conclusion that the claimant's teeth and mouth injuries could not have been caused by an accident involving facial trauma. Further, on the clinical examination he conducted on the claimant on 20th March 2020, the patient is not in need of the lower arch restoration. In addition to my finding in relation to the deficiencies in Dr. Parikh's evidence on causation, for the reasons I have outlined, I prefer Dr. Brookes' expert evidence over that of Dr. Parikh's. Apart from the fact that Dr. Brookes is much more qualified than Dr. Parikh in this area of dentistry, I find his evidence much more credible and better aligned with the facts surrounding the claimant's teeth injuries. He was assertive in his findings in sharp contrast to Dr. Parikh's somewhat cautious and unconvincing approach.

[35] Based on the foregoing, I will disallow all amounts claimed in respect of the teeth and mouth injuries.

Leg/hip injuries

[36] The patient assessment form of the hospital shows that on the night of the accident, the claimant complained of pain in both thighs. Dr. Nesly Clerge, chiropractor, of the Pain &

⁶ See *Sienkiewicz v Greif (UK) Limited* [2011] UKSC 10, per Lord Phillips at paragraph 16

Rehab Clinic, LLC, Martin Luther King Ave, Washington DC, USA, examined the claimant on 24th November 2020, over a year and five months after the accident. She reported to him with right thigh and hip pain. She showed him pictures of bruising which she said she suffered as a result of the accident on 16th June 2019. Dr. Clerge's report states that this was "dermal ecchymosis over the proximal and anterior aspect of the right thigh ranging from the medial to the lateral border of the right thigh". This is consistent with the findings from an imaging report from an ultrasound conducted on the claimant's right leg on 6th July 2019. Dr. Clerge noted the results of an MRI conducted on 7th November 2020 which showed "partial thickness undersurface tear of the anterior superior acetabular labrum; low grade strain of the right quadratus femoris, mild hamstring tendinosis, and possible ischiofemoral impingement". His diagnosis is:

- (a) Pain in right hip;
- (b) Stiffness of right hip, not elsewhere classified;
- (c) Acetabular tear of the right hip.

[37] In relation to causation, Dr. Clerge's report states as follows:

"Based on an assessment of her history, along with her subjective complaints, objective findings, and other test results, it is evident from a standpoint of medical certainty, that her right hip/thigh pain did result from the accident onset of 6/16/19."

[38] Dr. Clerge recommends six (6) weeks of physical therapy treatment at an estimated cost of US\$2,880.00.

[39] Taken together with the claimant's evidence, I accept Dr. Clerge's opinion and I find that the claimant's hip/thigh injuries were caused by the accident on 16th June 2019.

Lipoma

[40] The claimant states that she developed a lipoma (a fatty lump) on her right upper thigh from the impact on her leg from the accident. She says that on 16th December 2019, she was advised by Dr. Oleksande Rakovets to undergo surgery to remove the lipoma, which was scheduled for 22nd January 2020. However, she states that as she is unemployed, she could not meet the cost of the surgery and continues to live with the lipoma.

- [41] Apart for the words of the claimant, there is no medical evidence as to the cause of the lipoma. Therefore, I am not satisfied that the lipoma emerged as a result of the accident. Further, it is noteworthy that Dr. Clerge, who saw the claimant on 24th November 2020, makes no mention of it in his report, although he notes the claimant's other issues such as tinnitus, hearing loss, dizziness and facial pain. Any amounts claimed in respect of a lipoma are disallowed.

Conclusion on causation

- [42] Based on the foregoing, the claimant has satisfied the court that her ear and nose injuries and hip/thigh injuries were caused by the accident in which she was involved on 16th June 2019 as a result of the negligent driving of the 1st defendant. I am not so satisfied as the claimant has not discharged the burden in relation to her teeth and mouth injuries. I will proceed with the assessment on that basis.

The nature and gravity of the resulting physical disability

- [43] The permanent mild hearing loss in the claimant's right ear with the likelihood of progression is a major consideration for the court. Dr. Webster testified that over time, she would probably need a hearing aid if medical treatment does not work. The claimant says she continues to wear the tube that was inserted in her ear to assist with her hearing.
- [44] As a result of her hip injury, the claimant states that she was unable to sit for long periods. Dr. Clergy's prognosis is that it is more than probable that daily activities may cause aggravation to her symptoms.

The pain and suffering endured and loss of amenities

- [45] Under this head, the claimant seeks an award of US\$80,000.00.
- [47] On the night of the accident, the claimant complained of ringing in her ear, pain on the right side of the chest, chin, jaw bone, mouth and thighs.
- [48] Dr. Webster's evidence is that when he first saw the claimant, she presented with persistent right ear fullness and right nasal obstruction, not relieved by Xanax, nasal steroids, antihistamines or decongestants. She later underwent a myringotomy and had a tube inserted in her right ear. Her hearing loss and tinnitus may be permanent with hearing

distortion, noise and muffled hearing. On 1st November 2019, she was still complaining of dizziness, headache and hearing loss.

[49] Dr. Webster's evidence further shows the claimant's difficulty in breathing as a result of the right nasal obstruction, which he says will be persistent unless she has a surgical procedure to stiffen the right side of her nose.

[50] Dr. Clerge in his medical report indicates that on 24th November 2020, the claimant complained of pain in her right thigh and hip which she stated she experienced since the time of the accident, with varying degrees of alleviation and exacerbation. He listed her chief complaints as follows:

1. Intermittent right thigh aching pain that radiates into right hip. Additional complaints for this region include stiffness. Severity level 5/10. This complaint is aggravated by sitting.
2. Intermittent right-sided hip aching pain. Additional complaints for this region include stiffness. Severity level 5/10.

[51] The claimant states that she had excruciating pain in her chest and legs for one (1) week after the accident and that the pain then changed to severe soreness on touch and flexion, or whenever she applied weight to her legs for about eight (8) weeks post-accident. She says she continues to experience pain and discomfort to her right leg. The pain in her hip continues to bring her discomfort. Hearing loss continues to impact her daily life and causes her discomfort and distress as it results in her having difficulty hearing at low levels from one side and speaking loudly unintentionally. She also complains of headaches, dizziness and the ringing in her ear and continues to experience the discomfort of wearing the tube in her right ear and fears it might be permanent. Further, she has continued difficulty breathing related to the unresolved nasal issues on the right side of her nose.

[52] I am aware of the need to strive to make an award in keeping with comparable cases. As stated by Lord Craighead in **Wells v Wells**:⁷

⁷ [1998] 3 All ER 481

“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 basic estimate of the plaintiff’s damage.”

[53] The claimant relies on several authorities to justify the award sought, US\$80,000.00, which is about EC\$215,000.00. The defendants use the same cases to demonstrate why a much lower sum should be awarded if the court is satisfied that the claimant has proved that her injuries were in fact as a result of the accident of 16th June 2019. In that case, the defendants submit that in line with similar awards (none of which they have not provided to the court), a reasonable award should be in the range of EC\$30,000.00 to EC\$50,000.00.

[54] In **Bonny Alexander v Stanislaus Smith and Another**,⁸ as a result of a motor vehicular accident, the claimant suffered multiple and life-threatening injuries including multiple left rib fractures, comminuted left femur fracture, head and facial trauma and mandibular fracture. He was hospitalised for nineteen (19) days. He suffered constant pain and underwent multiple surgeries and procedures including the removal of his spleen, insertions of screws and insertion of a tube in his chest for drainage, and had extensive physiotherapy. He was able to perform most activities but suffered pain when standing for prolonged periods. Owing to pain in his left thigh, he walked with a slight limp. The court awarded him EC\$100,000.00 for pain and suffering and EC\$40,000.00 for loss of amenities.⁹

[55] The claimant in **Dawn Noel v Don John**¹⁰ was the front seat passenger in a vehicle which collided with a wall. She was hospitalised for eight (8) days and spent two (2) months recovering at home. Her injuries were: (1) facial laceration approximately 15 cm long; (2) laceration to the right lower lip approximately 10 cm long; (3) intraoral laceration of approximately 20 cm in the right cheek; (4) comminuted fracture of the right maxilla-malar complex; and (v) comminuted fracture of the right anterior region of the mandible or jaw bone. She lost 3 permanent teeth and suffered loss of function of the facial muscle due to

⁸ SLUHCV2017/0280, delivered March 9, 2018

⁹ The court reduced the award by 15% for contributory negligence but this was reversed on appeal and the Court of Appeal awarded the full amount of \$140,000.00. See SLUHCVAP2018/0016

¹⁰ GDAHCV2011/0568, delivered December 21, 2012

permanent damage of the facial nerve. She underwent emergency surgery in Grenada and 3 other surgeries in Barbados. The court took into account among other things, the substantial facial scar and the loss of feeling in the face of the claimant, a woman in her twenties, and awarded her EC\$160,000.00, being EC\$110,000.00 for pain and suffering and EC\$50,000.00 for loss of amenities.

[56] An award of US\$100,000.00 in general damages for pain and suffering and loss of amenities was made in **Garna O'Neal v Steadroy Matthews**.¹¹ The claimant, a registered nurse and acupuncturist, who resided and worked in the USA, was on vacation in her native Tortola, when, as a pedestrian, she was struck and dragged several feet by a large vehicle known as a "Safari Bus". Medical reports showed her injuries as 8 broken ribs, a collapsed lung, removal of her spleen, laceration of her liver, a broken right arm, chipped tooth, incontinence, extensive burns and scarring on her abdomen and arms, scarring on her thighs due to removal of skin for skin grafts, and permanent titanium plates in her arms. She was first admitted to the intensive care unit and placed on a ventilator and then airlifted to another territory where she was hospitalised for three (3) months. She underwent multiple surgical procedures. Her ability to practice in her profession was severely diminished as her arms were weakened and deformed. The Court of Appeal affirmed this part of the order of the learned master and declined to interfere with the discretion exercised by the court in the assessment of general damages for pain, suffering and loss of amenities.¹²

[57] In **Sheldon Jules v Brent Williams and Another**,¹³ the claimant was struck by a motor vehicle and sustained multiple injuries including fractures to the facial bones, wound to the face, multiple abrasions to the iliac fossa and the limb, wounds to the left arm and elbow involving muscle, no bone, and internal abdominal injuries. He was hospitalised for nine (9) days. His face was severely deformed and required reconstructive surgery. Arch bars and a metal plate were inserted in his face. The claimant, 26 years old at the time of the accident, described his ordeal as involving considerable pain and the appearance of his face was permanently altered. In 2012, the court awarded him EC\$55,000.00 for pain and

¹¹ BVIHCV2013/153, delivered November 27, 2015

¹² See Steadroy Matthews v Garna O'Neal BVIHCVAP2015/0019, delivered January 16, 2018

¹³ DOMHCV2009/0018, delivered June 12, 2012

suffering and EC\$45,000.00 for loss of amenities, total general damages of EC\$100,000.00.

[58] In 2009, the claimant in **Randy James v Leroy Lewis and Others**¹⁴ sustained multiple injuries as a result of a motor vehicular accident. He was rendered unconscious for about five (5) days with facial injuries, injury to his right eye; injury to his right ear, fracture of both bones in the right forearm, and severe internal de-arrangement of the left knee. He was hospitalised for four (4) months. He had several surgeries and he deposed to ongoing pain. His face was scarred with visible injuries to his forehead and eyelashes. He was employed as a security guard but became handicapped on the job market as a result of his injuries. He was awarded EC\$70,000.00 for pain and suffering and EC\$60,000.00 for loss of amenities.

[59] The injuries in the cases cited were much more severe than in the instant case. The claimant concedes that this case does not fall on all four squares with those cases but submits that they are instructive insofar as the claimants suffered multiple injuries. The claimant makes the point as the court stated in **Bonny Alexander**,¹⁵ “Where multiple injuries are sustained there will be an immediate loss of amenities and an accumulation of pain and suffering.”

[60] Based on the injuries that I have found were caused by the accident of 16th June 2019, I accept that the claimant has experienced considerable pain. Notwithstanding the fact that I will not allow damages for the injuries identified by Dr. Parikh for the reasons already stated, I accept that the claimant suffered pain which she complained of on the night of the accident in relation to her mouth, chin and jawbone as well as her chest and thighs. The damage to her nose and ear are quite significant in that they affect her breathing and hearing. Though not life-threatening, these injuries are certainly life-altering. To date, she suffers from impaired hearing which may worsen and become permanent. The hip injury affects her daily activities and is aggravated when she sits for long periods. The claimant states that her life has been severely affected by this accident financially, physically and emotionally and her career path has been derailed.

¹⁴ ANUHCv 2007/0403, delivered July 31, 2009

¹⁵ SLUHCv2017/0280 at paragraph 15

[61] Bearing in mind the cases cited by the claimant involve more serious injuries than suffered by the claimant in the instant case, but taking into consideration most are of some vintage and there should be some regard to inflation, I am of the view that fair and reasonable compensation to the claimant for pain and suffering and loss of amenities is US\$40,000.00, equivalent to EC\$108,102.00.

Future medical costs

[62] The claimant seeks US\$38,388.00 in damages for the cost of further medical treatment as follows:

- i. Six (6) weeks of physical therapy treatment (hip) – US\$2,880.00
- ii. Restoration of lower arch of teeth – US\$26,000.00
- iii. Tympanoplasty – US\$4,000.00
- iv. Right spreader graft with septal or auricular cartilage – US\$4,000.00
- v. Lipoma surgery – US\$1,500.00

She states that she has been unable to access treatment to date as she is unemployed and cannot afford to do so.

Physical Therapy

[63] In order to achieve the goals set by Dr. Clerge to restore functional independence and tolerance for normal activities of daily living, and to restore strength and stability to the affected regions, he recommends rehabilitative care including physical therapy twice weekly for six (6) weeks at an estimated cost of US\$2,880.00. Having determined that the claimant's hip injuries were caused by the accident of 16th June 2019, I accept Dr. Clerge's recommendation and I will award the claimant accordingly.

Tympanoplasty

[64] Dr. Webster's evidence on this is that the tube he inserted in the claimant's right ear should extrude spontaneously. He states that there is a small risk of persistent tympanic membrane perforation when the tube extrudes and this would require tympanoplasty (repair of the eardrum) if it occurs, at a cost of US\$4,000.00. The tube is still in place so that in my view, there is a high degree of uncertainty whether the claimant will need this surgery. Given the small risk of perforation involved, I will disallow this amount.

Right spreader graft septal or auricular cartilage

- [65] The claimant's last visit to Dr. Webster was on 5th March 2020. He testified that he could not state whether she still needed this procedure without examining her. The claimant's evidence is that the issue with her nose is still there and she intends to do the procedure recommended by Dr. Webster to open up the right side of her nose. Given the doctor's evidence in his report that the claimant will have nasal obstruction with difficulty breathing unless she has the procedure to stiffen the right side of her nose, and the fact that she has not had the surgery, it is not unreasonable to conclude that she still requires it. On that basis, I will award the claimant the US\$4,000.00 she claims for the spreader graft.

Restoration of lower arch (teeth) and lipoma surgery

- [66] I will make no award for future medical costs for these items as I have already determined that the claimant has not established the teeth injuries or the lipoma were caused by the accident of 16th June 2019.

Special damages

- [67] It has long been established that special damages must be pleaded, particularised and proved.¹⁶
- [68] In the statement of claim, the claimant claims special damages in the sum of US\$35,954.33/EC\$96,652.43. A schedule including special damages claimed was filed with the claim. In her second of two (2) witness statements and in submissions, she made certain deductions and now seeks US\$24,258.32 in special damages.
- [69] Included in the compensation sought as special damages are expenses (supported by receipts) incurred by the claimant in relation to her studies as a medical student. She states that because of her injuries, pain, discomfort, medical treatment and travel that was required in the months following the accident, she was unsuccessful in three (3) of her college courses, namely, Pharmacology, Epidemiology and Pathology. These courses ran from June to September 2019. She disputed her Pathology grade and obtained a passing grade in that subject.

¹⁶ See *Ilkiw v Samuels* [1963] 2 All ER 879 per Lord Diplock at 890

- [70] The claimant's evidence is that she was able to continue her studies in the other two (2) subjects from the period July to September 2019 by hiring a tutor at a cost of US\$2,500.00 or EC\$6,720.50. In order to avoid having to re-sit those two (2) subjects, she says she sat a placement test offered by the college at the end of the semester at a cost of US\$1,200.00 or EC\$3,225.96.
- [71] She goes on to state that she was successful in Epidemiology but unsuccessful in Pharmacology. She explains that this caused a delay of four (4) months (a semester) for the completion of the medical program as she had to retake Pharmacology. Therefore, she claims the cost of rental accommodation and a car for the four (4) additional months at a total cost of US\$4,200.00 or EC\$11,290.00.
- [72] There is no medical evidence before the court that the claimant's injuries prevented her from attending classes or that she was excused from so doing so that she needed to hire a tutor. I agree with the defendants that the claimant has failed to provide anything for the court to make an informed decision that there is a nexus between her injuries resulting from the accident and her failure in her exams. Further, if she hired a tutor at considerable expense, her blame may well be misplaced. The defendants point out that the claimant's own evidence reveals that she was a C-average student. The defendants direct the court to a medical report of the claimant's primary physician, Dr. Jennifer Janus, who examined her on 24th June 2019 and found that despite the fact that the claimant expressed some concern about ADHD (attention deficit hyperactivity disorder), as she was "finding it difficult to focus while studying as she trains to become a physician's assistant", Dr. Janus found that her finding of poor concentration did not meet the criteria for ADHD at that time. Her pre-accident position of having mood disorders in the past were related to the "stress of caregiving her now deceased ex-husband".
- [73] I am not satisfied on the evidence in this case that the claimant's failure in her exams, with the need to incur expenses to prolong her stay in Anguilla, is a consequence of the injuries she sustained in the accident of 16th June 2019. Therefore, any expenses claimed in relation to this contention will not be allowed.

[74] The defendants also take issue with the claimant's claim for medication purchased allegedly to manage her pain when there is no evidence they were prescribed for her. US\$211.00 is claimed for medication and other pharmaceutical goods for pain management and inflammation. This is exhibited by two (2) receipts. One is from a Walgreens outlet for four (4) items bought on 1st October 2019, each listed as FSA RX, for US\$179.31, and the other from Costco on 24th June 2019 for two (2) items listed as PHARM RX for US\$31.69. The court takes note that Rx is an abbreviation for prescription. The claimant explained that the prescriptions were taken from her when she filled them. Dr. Janus' plan, in her report on seeing the claimant on 24th June 2019, included sparing use of Norco for additional pain control with respect to her thigh pain. Dr. Stonebraker's plan, on the same day, included a trial of Prednisone. Therefore, the purchase of the items on that date convinces me that the purchases from Costco were for medication prescribed for the claimant in relation to the injuries she sustained in the accident on 16th June 2019. I will award the US\$31.69 claimed. However, the transaction on 1st October 2019 for US\$179.31 at Walgreens appears to be in relation to dental work performed by Dr. Parikh on that day. As stated before, expenses in respect of the claimant's teeth will not be allowed.

[75] The defendants submit that the claimant has failed to prove that her trips to the US were necessary as a result of the accident. As mentioned earlier, the claimant states that owing to the lack of specialist care in Anguilla, she travelled to the US to seek medical attention in relation to ear and jaw injuries. Evidently, there are medical experts in Anguilla suitably qualified to attend to the claimant's injuries. In fact, she resorted to Dr. Webster for the injuries to her ear and nose. Whereas the travel expenses claimed for trips to see Dr. Parikh only will not be awarded, in my view, the claimant cannot be faulted for wanting and choosing to return to her home in Maryland soon after the accident to get medical treatment and advice. I will allow her travel expenses for the first trip after the accident when she was attended to by her primary care physician, Dr. Janus, and Dr. Stonebraker for her ear issues.

[76] I am somewhat confused as to the amount claimed for the rental of a car after the accident. The claimant's evidence is that on the date of the accident, she was driving a car

she rented from her landlord at US\$250.00 monthly. After the accident in which that car was damaged, she rented a different car from Island Wheelz Ltd. on or about 18th July 2019 at a cost of US\$300.00, that is US\$50.00 more than the rental with her landlord. She states that the rental sum reflects a pro rata for July as she didn't rent for the full month. She exhibited a copy of a rental agreement and a copy of a receipt in the sum of US\$1,749.35. However, the rental agreement exhibited shows rental of a car for five (5) months from 7th July 2019 to 6th December 2019 at US\$275.00 per month, which is US\$25.00 more per month than the cost to rent from the landlord. Adding to the confusion is the claimant's claim for rental of a motor vehicle for the additional four (4) months she stayed in Anguilla as a result of her failing her exams. Based on the evidence before the court, I will award the claimant the additional cost US\$25.00 she had to pay to rent a vehicle for four (4) months after the accident.

[77] I will deduct from the claimant's list for special damages those items that I have determined will be disallowed as follows:

- Teeth/mouth expenses related to Dr. Parikh
- travel to Maryland, USA (29th September 2019) - US\$426.30
- crowns to fix fractured teeth (work done to date, in any event, only US\$6,000.00 of the cost of US\$20,677.00 paid) - US\$20,677.00
- travel to Anguilla from Maryland, USA (airfare, taxi fare and ferry, 2nd October 2019) - US\$387.20
- travel to and from Maryland, USA (airfare, taxi fare and ferry, 24th to 27th October 2019) - US\$580.04
- Lipoma consultation (16th December 2019) - US\$26.04
- Expenses claimed for failure of exams
- tutoring services July to December 2019 - US\$2,500.00
- re-sit fees - US\$1,200.00
- house and motor car rentals for four (4) additional months - US\$4,200.00
 - medication and other pharmaceutical goods for pain management and inflammation (1st October 2019) - US\$179.31.

[78] I am satisfied that the claimant has pleaded, particularised and proved the following as special damages:

1. police report - US\$37.19
2. CT scan (18th June 2019) - US\$375.00
3. travel to Maryland, USA (22nd June 2019) - US\$378.75
4. ear examination (24th June 2019) - US\$429.20
5. examination by primary care physician (24th June 2019) - US\$813.00
6. medication for pain management (24th June, 2019) - US\$31.69
7. travel to Anguilla from Maryland, USA (airfare, taxi fare and ferry, 25th June 2019) - US\$503.70
8. ultrasound at Hughes Medical (6th July 2019, right leg) - US\$130.00
9. consultation with Dr. Ellis L. Webster (24th July 2019) - US\$50.00
10. motor car rental at an additional US\$25.00 for 4 months - US\$100.00
11. consultation with Dr. Webster (1st November 2019) - US\$60.00
12. myringotomy procedure (6th December 2019) - US\$300.00
13. medical report of Dr. Webster - US\$500.00

Total special damages - US\$3,708.53

Order

[79] Based on the foregoing, I make the following orders.

The defendants shall pay the claimant as follows:

1. Special damages in the sum of US\$3,708.53.
2. General damages for pain, suffering and loss of amenities in the sum of US\$40,000.00.
3. Future medical expenses in the sum of US\$6,880.00.
4. Interest on special damages at the rate of 2.5% per annum from the date of the accident, 16th June 2019 to the date of assessment, 5th October 2021.
5. Interest on general damages for pain and suffering and loss of amenities at the rate of 5% per annum from the date of service of the claim to the date of this assessment, 5th October 2021.

6. Interest on the global sum at the rate of 5% per annum from the date of this assessment, 5th October 2021 to the date of payment in full.
7. Prescribed costs in the sum of US\$4,552.97.

Tamara Gill
Master

By the Court

Registrar