

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2016/0186

BETWEEN:

FAE ANN JAMES
(by her mother and next friend Linda Welsh)

Claimant

and

RANDY THOMAS

Defendant

Before:

Master Jean M. Dyer (Ag)

Appearances:

Ms. Hazel Hopkins of Counsel for the Claimant
Ms. Sheriba Lewis of Counsel for the Defendant

2017: September 28

ASSESSMENT OF DAMAGES

- [1] **DYER, M. (Ag):** This is an assessment of damages in respect of personal injuries. It arises out of a Judgment on Admissions obtained by the Claimant against the Defendant on the 28th September 2016 for damages to be assessed. The assessment of damages came on for hearing on the 23rd January 2017 but was adjourned to the 26th January 2016. Ms. Hopkins thereupon informed the Court that the Claimant was relying on the evidence and submissions before the Court and would leave it to the Court to assess the damages. The Defendant likewise relied on the submissions filed herein. He however elected to exercise his right to cross examine the Claimant.

Factual Background

- [2] The brief facts of the claim giving rise to the assessment of damages are that while the Claimant, who is a student at the St. George's Seventh Day Adventist Primary School, was attempting to cross the road in Tanteen in St. George's with her sister, on their way from school, she was struck by a vehicle driven by the Defendant. The Claimant was 7 years old at the date of the accident, 14th May 2014. With the impact, the Claimant fell to the ground and according to her, she wet herself because she was very frightened. When she fell to the ground she was in a lot of pain in her leg. She was unable to stand and walk independently. She noticed that there was a lot of blood on her white school socks. There was a cut on her lip and also a bruise on the right side of her face. Her mother testified that when she saw her at the scene of the accident, she noticed that there was a bone protruding from the side of her leg out of the skin and that she was still bleeding. The Claimant was crying.
- [3] The Claimant was taken to the General Hospital. She was stabilized, treated and admitted. X-rays showed displaced fractures of the left distal tibia and fibula. She underwent surgery to reduce the fractures, and an above-knee cast was applied. She was discharged three (3) days later on the 17th May 2014. She was still unable to stand or walk independently and had to be carried in order to get about. She was also unable to attend school for the remainder of the school term.

The Claim for Damages

- [4] As a result of the accident and her consequent injuries, the Claimant is seeking compensation for personal injuries she sustained in the accident. As the Defendant chose not to defend this claim, he is liable in tort to compensate the Claimant for the pecuniary and non-pecuniary losses suffered by her as a result of the Defendant's negligent driving. The Defendant seemingly accepts the sum sought as special damages but challenges the amount claimed as general

damages. The Court is now required to assess the quantum of such compensation which is payable to the Claimant for the injury, loss and damage suffered by her.

Special Damages

- [5] The Claimant claimed Special damages totaling \$680.00 as the costs of X-rays, babysitting fees and the police record. The claim for special damages was conceded by the Defendant in the legal submissions filed on his behalf herein on the 28th November 2016. The Defendant however seemingly challenges the claim for reimbursement of \$600.00 which was spent by the Claimant's parents for three (3) months of babysitting on the ground that no supporting documents have been adduced by the Claimant and there is no explanation as to why such evidence was not forthcoming. This issue need not detain this Court given the Defendant's concession which he will not be allowed to resile from. I therefore award the Claimant the sum of \$680.00 as special damages.

General Damages

- [6] The Claimant relies on the cases of **Sherma Mathurin v. Rain Forest Sky Rides Ltd**; (where an award of \$150,000.00 was made to a 26 year old Claimant for pain and suffering and loss of amenity for 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); multiple grazes and bruises to the forehead and right upper limb); **Bernice Jeremiah et al v. Royston Gilbert et al**¹ (where an award of \$80,000.00 was made to the First Claimant who suffered sternal contusion, a displaced intra-articular fracture of the left proximal tibia and left knee effusion resulting in several surgeries for pain and suffering and loss of amenities); **Patrick Morille v. Paul Pierre and Joseph**

¹ Claim No. GDAHCV 2008/0038.

Ramnal² (where an award of \$80,000.00 was made to a claimant who suffered a broken tibia and fibula which later became infected and required multiple and extensive surgical intervention); **Ann Robertson v. Attorney General**³ where a 70 year old Claimant was awarded \$60,000.00 for pain and suffering and loss of amenities where she sustained an open fracture of the left fibula and tibia as well as abrasion on the same leg); and **Soraya Lewis (by her mother and next of kin Lily Lewis) v. Eardley Browne** (where a 6 year old Claimant was awarded \$29,000.00 for pain and suffering and loss of amenities where she suffered fractures of the distal ends of both the tibia and fibula of the left leg with displacement as well as laceration of the same leg) and seeks an award in the sum of \$45,000.00 as general damages for pain and suffering and loss of amenities.

- [7] The Defendant challenges the amount claimed for general damages. The Court is therefore now required to assess the quantum of the compensation which is payable to the Claimant for the injury, loss and damage suffered by her.
- [8] General damages are those which the law implies and are losses which cannot be precisely quantified, so they are not specially pleaded. The legal principles governing the assessment of damages are well established and were laid down by Wooding CJ in the *locus classicus* **Cornilliac v. St. Louis**.⁴ The main factors to be taken into account in assessing general damages 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 suffered; and (v) the extent to which the Claimant's pecuniary prospects have been affected. In considering these principles, the medical evidence takes a pivotal place as well as the evidence of the Claimant and her mother as to her pain and suffering and loss of amenities.

² Civil Suit No. 230 of 1994 (Grenada).

³ Claim No. GDAHCV2009/0338.

⁴ (1965) 7 WIR 491.

- [9] An award of general damages should not aspire to be “perfect compensation”.⁵ This is because “[t]here is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial”. In the final analysis, this Court is called upon to make a reasonable and just award for the loss suffered having regard to the factors outlined above and to awards for similar injuries in cases from its own jurisdiction as well as from jurisdictions with similar socio-economic structures.

The Nature and extent of the Claimant’s injuries

Medical evidence of the Claimant

- [10] To set the proper foundation for determining the quantum to award and put the Claimant’s case in context, it is necessary from the outset to look at the evidence adduced by her. Dr. Kester Dragon, Medical Director of St. George’s General Hospital, provided the medical report of the Claimant’s visit to the Hospital as the doctor who treated her was no longer in Grenada. It reveals that the Claimant was admitted to the General Hospital on 14th May 2014 after she was stabilized and treated. There was no loss of consciousness. X-rays showed displaced fracture of the left distal tibia and fibula. The report confirms the treatment that the Claimant’s mother spoke of. The Claimant needed surgery to repair her fractured bones. She was taken to the operating theatre on the following day. Her wound was cleaned, her fractures were reduced, and an above-knee cast was applied. The Claimant was discharged on the 17th May 2014 but continued thereafter as an outpatient. Her last documented consultation was on the 6th August 2014. Her fractures had healed 100% and there was little swelling. She was discharged from the clinic and advised on exercises which could be done by her at home. There was no medical evidence of permanent damage to the Claimant. There is thus no

⁵ See *Scott v The Attorney General* [2017] UKPC 15 at para. 17.

acceptable evidence of resulting physical disability before me as no further (recent) medical evidence was tendered by the Claimant.

- [11] It was the Claimant's submission that the injuries suffered by her should be classified as serious. No authority was furnished for this proposition. The Defendant disputed this and urges the Court to rely on **Judicial Studies Board Guidelines for the Assessment of Damages in Personal Injuries Cases 7th edn** and find that the Claimant's injuries are simple fractures and soft tissue injuries and are to be classified as less serious leg injuries. I accept the Defendant's submission that the injuries should be classified as less serious leg injuries. It is also consistent with the learning in *MUNKMAN DAMAGES FOR PERSONAL INJURIES AND DEATH* (5th ed.) at page 123-124 where the learned authors classify "... a broken leg or arm from which the plaintiff recovers completely, or the everyday case of a plaintiff who is knocked down by a motor car and escapes with bruises and abrasions" as minor injuries. The Claimant's submissions which classify a fracture as "serious" is accordingly rejected.

Claimant's pain and suffering and loss of amenities

- [12] With respect to the healing of the injuries, the Claimant testified that when she was in the hospital she experienced pain in her leg. After she was discharged from the hospital her *"foot was in a full cast for a long time; about six (6) weeks. It was difficult for me to move my foot and I could not go to school. I had to be lifted in order for me to move about. After I went back to the hospital six weeks after the accident, the doctor put my foot in a shorter cast for another two (2) weeks. I missed my school exams, but the teachers put me up in Grade 2"*. In her own words, *"Up to today, whenever I run or jump on my toes I get pain in my ankle. It also hurts when I climb up stairs. Since the accident I have had nightmares of falling and being badly injured and dying"*. Of particular interest were her responses under cross-examination, which is documented hereunder: -

Ms. Lewis: *Is your name Fae Ann James?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *How old are you?*

The Claimant: *I am nine (9) years old.*

Ms. Lewis: *Where do you live?*

The Claimant: *I live in Mama Cannes, St. Andrew.*

Ms. Lewis: *Do you still attend school at St. George's Primary School?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *What grade are you in?*

The Claimant: *I am in Grade 4.*

Ms. Lewis: *You enjoy school?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *What colour house are you in at school?*

The Claimant: *I am in red house.*

Ms. Lewis: *You have games time in school?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *And you take part in games time at school?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *Your school has a sports day?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *You take part in sports day?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *Do you run for your red house?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *Do you have high jumping?*

The Claimant: *No, you mean long jump?*

Ms. Lewis: *Do you have long jumping?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *Do you take part in long jumping?*

The Claimant: *Yes, Miss.*

Ms. Lewis: *You've gotten medals in sports?*

The Claimant: *Yes, Miss.*

- [13] The Claimant also seeks an award for loss of amenities. The Claimant's mother testified that the Claimant was unable to stand or walk when she was discharged from the hospital. This is not surprising as the full cast had been applied to immobilize her leg. She had to be carried in order to get about because her movement was restricted. Her foot remained in the full cast for about six (6) weeks. When the full cast was removed it was replaced with a shorter cast which was removed two (2) weeks later. The Claimant experienced discomfort in her leg during the period that both casts were on her leg. The Claimant was unable to attend school in order to write her end of year exams.
- [14] According to her mother, *"The Claimant's ability to enjoy the simple youthful pleasures of childhood has been affected by the injury she sustained in the accident. The Claimant experiences pain around her ankle whenever she runs or jumps on her toes. She also has pain whenever she ascends stairs. I know this because I have noticed her grimacing and limping whenever she engages in those activities and she has complained to me about this on several occasions"*.
- [15] As the Defendant contends, no updated medical evidence was adduced by the Claimant to explain her continued discomfort. This is most unfortunate. It bears repeating here that such independent evidence is very critical to establishing a causal link between the breach of duty and the injury and/or loss alleged by the Claimant. It is unacceptable that the evidence as to the long-term impact of the accident on the Claimant comes from her and her mother. Firstly, this evidence is self-serving. Secondly, damages for loss of amenities are designed to compensate the Claimant for the physical disability sustained as a result of the incident and the effect of that disability on her enjoyment of life. The authorities establish that unquestionably the evidence of the physical disability must come from a doctor or other health professional. The medical evidence before this Court

establishes that the fractures were 100% healed and the Claimant was released as an outpatient and advised on exercises she could do at home.⁶

- [16] The Court can nonetheless make an award under this head since as a rule, *"[d]amages may be awarded for the loss of the pleasures or amenities of life, either permanently – by the loss of a leg, for e.g. – or temporarily – as by mere detention in hospital or in bed for a period. This is a distinct element altogether from pain and suffering, or from loss of earning power"*.⁷ Whilst there is no medical evidence of permanent disability in this case, the medical evidence points to certain temporary loss of amenities suffered by the Claimant as detailed above at paragraph 19.

Court's Findings and Conclusions

- [17] I do not find most of the authorities which were supplied by the Claimant to be comparable. The Claimant seemingly recognizes this as she is only seeking ½ of the sums awarded in those authorities. The cases relied on by the Defendant are also not very helpful as they are now dated. The Defendant also relied on the 7th edition of the **Judicial Studies Board Guidelines for the Assessment of Damages in Personal Injury Cases** and contended that the Claimant's injuries fall within the bracket which goes up to £5,000.00. The Privy Council has recently held in **Scott v The Attorney General**⁸ that general damages (for pain, suffering, and loss of amenity) should be assessed by local Courts, applying local judgment, local standards, local values, and local expectations, but not by making 'cost of living' adjustments on a 'finger in the air' basis. I therefore ought not to apply the JSB Guidelines if there are comparable awards from this jurisdiction.

- [18] I accept that the case of **Ann Robertson v. Attorney General** (which also emanated from Grenada) bears the closest resemblance to the case at bar

⁶ There is no evidence as to whether such exercises were ever done by the Claimant.

⁷ See **Munkman on Damages For Personal Injuries and Death** (11th edition) pages 46-47.

⁸ [2017] UKPC 15 (appeal from the Bahamas).

although not exact on the injuries. The Court in that case awarded the Claimant the sum of \$45,000.00 for pain and suffering and an award of \$15,000.00. The Claimant had testified that the accident had adversely affected her daily life and caused her to essentially become a hermit because she was fearful of using her left leg because of pain. She adduced no medical evidence to corroborate this. The Court noted at paragraph 11 of the decision that it was regrettable that *"the very serious nature and the continuity and the effect of the injuries as alleged have in no way been substantiated by any medical support which would be fundamental to being accepted as factual as it is only an expert who could ascertain the majority of these assertions"*. I am mindful that this award was made in 2010 and as such should be adjusted for inflation.

[19] From my own research I found the Trinidadian case of **Nimrod Joseph v. Roy Edwards & Presidential Insurance Company Ltd**⁹ which was decided in 2012. The Court in that case in determining what was a reasonable award to be made to a Claimant who had sustained injuries including a fracture of right tibia and fibula considered Trinidadian authorities including the following: -

- **Thom v Dyaram**¹⁰ where for a fracture of the tibia and fibula an award was made in the sum of \$4,000.00; as adjusted to December 2010 to \$116,990.00.
- **Phillips and Phillips v Neptune and Edwards** (2nd plaintiff)¹¹ where Permanand J awarded \$15,000.00 for a fracture of the right lower tibia and fibula; operation to ankle; as adjusted to December 2010 to \$90,181.00.

⁹ Claim No. CV 2006-00500.

¹⁰ HCA 153 of 1971.

¹¹ HCA No 1577A of 1981.

- **Ryan v Williams**¹² where Bourne-Hollands J awarded \$10,000.00 for fractures of the tibia, fibula and femur of the right leg; as adjusted to December 2010 to \$170,075.00.
- **Jaikaran v Sadeek**¹³ where an award of \$10,000.00 was made for fractures of the right tibia and fibula; as adjusted to December 2010 to \$74,798.00.

I have had regard to both the similarities and differences of the cases cited above, with a view to arriving at a just, reasonable and adequate award for the instant Claimant.

[20] I accept that the Claimant suffered pain from the time of the injury as she did not lose consciousness. I also accept that she continues to be plagued by pain when she engages in certain activities such as running and jumping. It is of note that this pain has not, based on the Claimant's evidence during cross examination, prevented her from participating in sporting or other recreational activities. It is also reported in Dr. Dragon's Report that the Claimant's fractures have healed 100%. There is no medical evidence that her injuries impacted on her *"ability to enjoy the simple youthful pleasures of childhood"* as her mother alleges. The lack of medical evidence in this regard is taken to mean that any permanent loss of amenities sustained by the Claimant was either non-existent or insignificant.

[21] I also accept the Claimant's evidence that she was so frightened upon the impact that she (suffered the indignity of) urinating on herself. The Claimant who was only seven (7) years would have also endured the trauma of seeing her *"bone protruding from her leg and through the skin"*. I also accept that she would have been uncomfortable with a heavy cast on her foot for some six (6) to eight (8) weeks. The Claimant was also denied the amenity of looking after herself for eight

¹² HCA 1473 of 1972

¹³ HCA 67 of 1980.

(8) weeks while wearing the full and short cast. During that period she relied on her parents' assistance and that of her caretaker Daphne Bascombe in the performance of regular functions. She had to be lifted to move about.

- [22] Having regard to the nature and extent of the injuries, the young age of the Claimant, all the circumstances outlined above, the prior awards and the dates thereof, I consider it fair and reasonable in all the circumstances to make the award sought by the Claimant in the sum of \$45,000.00 for her pain, suffering and (temporary) loss of amenities.

Interest

- [23] Interest on the special damages is awarded at the rate of 3% per annum from the date of the accident to the date of this assessment. Interest on the general damages for pain suffering and loss of amenities is awarded at the rate of 6% per annum from the date of service of the claim to the date of this assessment. The entire award attracts statutory interest from the date of this assessment to the date of payment in full.

Costs

- [24] Liability was not disputed by the Defendant. The parties were however unable to amicably resolve the issue of quantum. Costs are awarded to the Claimants which are to be prescribed costs at the rate of 45% of the full prescribed costs (the matter having not reached beyond the defence stage) pursuant to CPR 65.5 Appendix B and C.

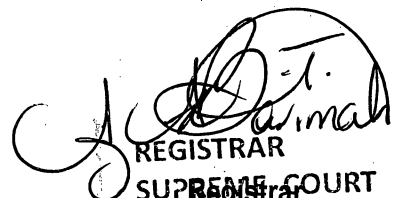
Conclusion

- [25] In summary, the award of the Court is as follows:-

1. Special damages to the Claimant in the sum of \$680.00 with interest at 3% from the date of the accident until the date of this assessment and thereafter at the statutory rate until satisfaction.
2. General damages to the Claimant in the sum of \$45,000.00 with interest at 6% from the date of the accident until the date of this assessment and thereafter at the statutory rate until satisfaction.
3. Costs are awarded to the Claimant on a prescribed basis at the rate of 45% of the full prescribed costs.

Jean M. Dyer
Master (Ag.)

By the Court


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