IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 987 of 2009

JOSE ALVARENGA **WENDY HERNANDEZ**	**CLAIMANTS**
AND	
MADRID CRUZ	**DEFENDANT**

Hearings
2010
22nd June
12th July
30th September
15th November
15th December

Mr. N.V. Dujon SC for the Claimants.
Dr. Elson Kaseke for the Defendant.

LEGALL J.

JUDGMENT

The Accident

1. In the town of Belmopan, there is a road running north to south named Constitution Drive. There is another road that runs west to east and

ends at Constitution Drive, making a T shaped junction, and this road is named Forest Drive. At one side of Constitution Drive, there is a drain constructed for irrigation purposes and which connects to Forest Drive.

2. On the night of 18th July 2009, at about 7:50 p.m. the defendant was driving in a north to south direction along Constitution Drive in motor pickup truck licence No. CZL-C-15763. In the truck, with the defendant, was his common-law-wife, Maria Varela, who was sitting next to the defendant in the front seat; his ten year old daughter, Lucely Cruz, who was sitting at the back behind the defendant; and a friend of the defendant, Rodney Griffith who was sitting behind Maria Varela. Riding a motor cycle No. CY-M-0558 along Constitution Drive in the opposite direction of the truck, was the No. 1 claimant. Sitting on the motor cycle, behind the driver on the passenger seat was the second claimant, both of whom are friends.

3. The truck and the motor cycle collided, and the claimants suffered injuries to their legs and other parts of their bodies. As a result of the collision and injuries, the claimants brought the present claim against the defendant for damages for personal injuries for negligence, and for special damages, interest and costs. The defendant also filed a counterclaim against the No. 1 claimant for $8,000. for damage to the defendant's truck.

4. The task of the court is to decide how the accident happened and whether there was negligence by any of the parties. This task is made

difficult because although the witnesses purport to have seen the same accident, there are opposed versions of how it occurred. The witnesses in the defendant's truck gave a version consistent with his evidence; while the passenger on the claimant motor cycle, the second claimant, gave a version consistent with the rider of the motor cycle.

5. The defendant's version, supported by adult passengers in his truck, was that he was driving his truck in a north to south direction along Constitution Drive; and on reaching the T junction of Constitution Drive and Forest Drive, he stopped his truck, put on his indicator light showing an intention to turn left into Forest Drive, and while at that stationary position, the motor cycle, ridden by the No. 1 claimant, coming from the opposite direction at a speed of about 45 to 50 miles per hour, with its head light on, and as the motor cycle reached his truck which was stopped, the motor cycle swerved and hit his truck on the left front bumper and grazed the left front side of the truck. As a result of the collision, the defendant swore that the "motor cycle flew into the air and landed on the left side of the road about 10 to 15 feet away from the stationary truck." The head lights of the truck, according to the defendant, were bright, and there were street lights from a nearby Police Training School which made good visibility, and which enabled the defendant to see the motor cycle approaching his stationary truck.

6. The defendant's version of the accident was supported by the evidence of his common-law-wife, and his friend Rodney Griffith in material respects, namely that the truck stopped; the indicator light to

turn left was on; the motor cycle was travelling about 45 – 50 miles per hour; visibility in the area was bright; the motor cycle swerved and hit the stationary truck on the left front fender and bumper and grazed the left side of the truck; and the motor cycle flew into the air and landed on the road 10 to 15 feet from the stationary truck.

7. The claimants gave a different story. The No. 1 claimant said he was riding his motor cycle with the No. 2 claimant on the passenger seat along Constitution Drive going in the opposite direction to the truck; and on reaching the junction of Constitution Drive and Forest Drive, a pickup truck coming from the opposite direction along Constitution Drive turned left in the path of the motor cycle in an attempt to enter Forest Drive, and the truck hit the motor bike on the left side, and also hit his left leg which caused extreme pain resulting in him loosing consciousness. When he regained consciousness, he found himself in a drain on his side of Constitution Drive. His friend, the 2nd claimant swore to the same effect in her witness statement.

8. Before examining the evidence to determine who is speaking the truth, I ought to mention that it was suggested to the No. 1 claimant in cross-examination by learned counsel for the defendant, that the No. 1 claimant attended a party with the other claimant before the accident, which was denied by the No. 1 claimant. It was also put to the said No. 1 claimant that there was a bar, called Lacaceda Bar, at Belmopan, which is situated close to and behind Scotia Bank, located on Constitution Drive, which the No. 1 claimant admitted.

9. But the said claimant denied a further suggestion that the No. 2 claimant was working at the Lacaceda Bar and he picked her up from there. The No. 1 claimant further denied the suggestion that the No. 2 claimant was working at the bar as a waitress on the day in question. The evidence of the No. 2 claimant herself is that she graduated from the Belize Christian Academy with honours in June 2008 and had applied through the Mexican Embassy in Belize for a scholarship to study International Relations. At the time of the accident, she said she was employed by Vanguard Security in the post of concierge at the Mexican Embassy in Belize, while her application for the scholarship was being processed. The police report states that she is a Secretary. There is no evidence, not even from the defendant or his witnesses to support the suggestion that the No. 2 claimant worked at a bar or that the claimant attended a party on the date in question or that the claimants were imbibing in any alcoholic beverage on the date in question.

How the accident occurred?

10. Now let us return to the question as to who is speaking the truth as to how the accident occurred. Cpl. Guzman, who investigated the accident, tendered his report and a sketch plan in evidence. In his report he states that: "From police investigations, Jose Alvarenga appears to be at fault." In cross-examination he said he came to this view because the No. 1 claimant was on the wrong side of the road. But he admitted that he did not see the accident. He said the claimant should have been on his right side of the right lane of Constitution Drive, but he was travelling on his left on that right side lane. He

came to this conclusion because of the debris he saw on the road when he visited the scene. The debris, as indicated on the sketch plan, is in the middle of Constitutional Drive, scattered on parts of both lanes, according to the plan. I do not see any legal basis for a police officer, who is not an expert witness and who has not witnessed the traffic accident, but having investigated it, to state in his report his opinion as to who was at fault for the accident. It is the function of the court, having heard all the evidence to decide who is at fault. The police officer may in his report say who should or should not be charged based on his investigations, but the officer should leave the decision as to who was or was not fault to the courts.

11. According to the sketch plan some of the debris were on the lane of the claimant and some on the lane of the defendant in the middle of Constitution Drive. But we do not know if anyone interfered with the debris prior to Cpl. Guzman's arrival at the scene, or whether traffic on the road had an effect on the location of the debris prior to the arrival of Guzman. If the debris came from the collision, it indicates that the collision occurred partly on the claimants lane and partly on the defendant's lane. The location of the debris on the sketch plan does not show clearly, in my view, which of the opposing versions of the accident is correct.

12. It also came out in evidence that the No. 1 claimant was not the holder of a licence to ride a motor cycle; nor was the cycle he was riding covered under a policy of insurance. There is evidence also that the said claimant at the date of the accident had just about four

months experience as a rider of the motor cycle. These matters raise the suggestion that the No. 1 claimant was not capable of riding the motor cycle in a satisfactory manner and was therefore the cause of the accident. But the claimant said that even though he did not have a licence he could control the motor cycle and that he was not at fault for the accident. On the basis that the No. 1 claimant was coming from a bar or party; and that he did not have a licence and did not have much riding experience, and that the court should believe the defendant, the court was urged to find that the No. 1 claimant was the sole cause of the accident and therefore his version of the accident ought not to be accepted as true.

13. Let us consider the defendant's version of the accident. A defence and counterclaim were filed on 7th January, 2010, and in neither was it claimed, on behalf of the defendant, that the truck stopped or was stationary when the accident occurred. In his witness statement made on 1st June 2010, about six months after the accident, the defendant states that the truck was stationary when the motor cycle collided to it. If the defendant truck had stopped then why it was not stated in the defence and counterclaim, since the claimant in the statement of claim dated 11th December 2009, which the defendant saw before filing the defence and counterclaim, stated that the defendant drove or attempted to drive his truck across the path of the first claimant's motor cycle.

14. The claimants under Part 34 of the Supreme Court (Civil Procedure Rules) 2005 served a request for information on the defendant. The request is as follows:

> "REQUEST
> IS IT NOT THE CASE
> (a) That at the material time referred to in the pleadings it was your intention to turn your vehicle left from Constitution Drive into Forest Drive.
> ANSWER No."

The defendant signed a certificate at the second page of the Request dated 15th April, 2010 that his answer was true.

15. At the trial, under cross-examination, the defendant said his answer in the Request was a mistake because he did not understand the question asked by his lawyer. He said he thought his lawyer was telling him that he turned to the left and that is why he answered "No." But if he did not understand the question which was being read to him by his lawyer, why did he not mention this to his lawyer who would have certainly read it over to him or give him the question to read himself. The defendant's friend, Rodney Griffith, in cross-examination said that, "the truck was about to turn; but did not turn." This would seem to suggest that there was some intention to turn, which would be inconsistent with the answer in the Request, but consistent with the defendant's evidence that he "put his indicator on evincing an intention to turn into Forest Drive." But in the defendant's evidence in cross-examination he said: "I did not intend to turn," which again

is inconsistent with his witness statement in which he swore that he stopped his vehicle and put on his indicator "evincing an intention to turn into Forest Drive."

16. The common-law-wife of the defendant said in evidence that the truck stopped at the junction, waiting for the motor cycle to pass. But she also said in cross-examination that "by colliding to the side of the motor cycle it propelled the motor cycle into the drain." That may be understood to mean that the truck collided to the side of the motor cycle, and it propelled the motor cycle into the drain. If this is correct, it is doubtful that the truck stopped or stationary at the time of the accident. Moreover, the defendant's evidence as to the location of the debris is inconsistent with the evidence of Guzman, who in the sketch plan said the debris was around the middle of the road. But the defendant swore that the debris was on the right side of Constitution Drive.

17. There was no report from the police as to where on the vehicles the damage was done. The defendant said that his left fender, left front bumper, left front headlight and left side of the bonnet of the truck were damaged. The middle of left side of the motor cycle was damaged according to the claimant. Photographs of the damaged motor cycle were tendered in evidence, one of which showed damage around the middle of the motor cycle. A photograph of the truck was also tendered showing damage to the left front fender and bumper. The defendant and witnesses say that the motor vehicle swerved and

hit the truck. Did it swerve away from the truck to avoid hitting it, or did the motor cycle swerve into the stationary truck?

18. The main question is whether the defendant intended to turn left into Forest Drive, and was in the process of turning left when the accident occurred. Considering the evidence above in relation to the claimants, also the evidence above of the defendant and his witnesses, and based on my observation of the demeanour in the witness box of the claimants and the defendant and witnesses, and how they answered questions, I do not believe the defendant that he had stopped at the junction when the accident occurred. I believe the defendant intended to turn his truck left into Forest Drive, and was in the process of doing so when the collision occurred.

Negligence

19. The question now is whether the defendant was negligent. Was there a duty on the part of the defendant to exercise reasonable care to prevent injury to other persons using the road? The evidence in this case shows clearly that the defendants had a duty to exercise reasonably care. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons: see ***Glasgow Corporation v. Muir 1943 A.C. 448, at p 457; Donoghue v. Stevenson 1932 A.C. 562 at p 580***; and ***Fardon v. Harcourt Livington 1932 A.E.R. 81***.

20. But before deciding the issue of negligence, the court must bear in mind the well known and often articulated views of Lord Pearson with respect to the burden of proof in the celebrated ***Henderson v. Harry E. Jenkins 1969 3 A.E.R. 756 at p766*** –

> "In the action for negligence, the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails."

21. I am satisfied, on a balance of probabilities, that the defendant failed to discharge his duty to exercise reasonable care when driving on the road to prevent injury to the claimants because the said defendant while driving his truck intended to turn and was in the process of turning into Forest Drive when the collision occurred involving the claimant's motor cycle, and caused injuries to the claimants and damage to the motor cycle.

22. **<u>Contributory Negligence</u>**

The No. 1 claimant said that he was travelling at 35 miles per hour. There is the evidence of the defendant and his witnesses, that as a

result of the collision, the motor cycle flew into the air and landed on the left side of the road about 10 to 15 feet away. This evidence has not been contradicted by the claimants. I accept this part of the defendant's evidence. For the motor cycle, as a result of the collision, to have flown and landed 10 to 15 feet away, it had to be going at a higher speed than claimed by the claimants, bearing in mind that the truck was turning, and there is no allegation that the truck was speeding on the turn. I do not accept on the evidence that the claimant was travelling at 35 miles per hour. He was going at a faster speed than that.

23. In order to establish contributing negligence it must be shown that the claimant in riding his motor cycle at night "was careless of his own safety." "A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might be hurt himself and in his reckonings he must take into account the possibility of being careless": see ***Nance v. British Columbia Electric Railway Co. Ltd. & 1951 AC 601***, ***at page 613; and James v. Livox Quarries Ltd. 1952 2 QB 608***.

24. The question the court must ask for the purpose of deciding whether or not contributory negligence is established is whether the facts, which were known by the claimant, would have caused a reasonable person in the position of the claimant, to realize the danger. In order to establish contributory negligence of the claimant, it is essential for the respondent to establish that the injury to the claimant was partly caused by his omission to take that degree of care which the circumstances of

the case required. In ***Caswell v. Powell Duffryn Associates Colleries Ltd 1940 AC 152,*** Lord Wright said that it was a question of degree of care which the circumstances required the claimant to take; and the court would have to draw a line **"**where mere thoughtlessness, or inadvertence or forgetfulness ceased and where negligence began."

25. All that is necessary to establish contributory negligence is to prove to the satisfaction of the court that the injured party did not, in his own interest, take reasonable care of himself; and contributed, by his lack of care, to his own injury. Where a person is part author of his own injury, he cannot call on the other party to compensate him in full: see ***Nance v. British Columbia Electric RY Co. Ltd. 1951 AC 601***, ***at p 611*** and ***Associated Industry Ltd. v. Kumar Ragnauth 1982 W.I.R. 249 at p 251.***

26. I think on the facts of this case the No. 1 claimant was guilty of contributory negligence taking into consideration that he was not a licensed driver, with only months of experience as a driver, and that he drove his motor cycle at a speed at night around the middle of his lane on Constitution Drive, rather than on his right side of the said lane, I hold that he contributed to the accident and his resulting injury. I do not find contributory negligence in the No. 2 claimant. She said she did not know whether he had a licence. She presumed he had a licence because she saw him riding the motor cycle "all the time." At the time of the accident she was not in control of the motor cycle. Doing the best I can on the evidence before me I find that the

No. 1 claimant contributed twenty percent to the accident and his injuries.

Damages

27. I must now consider the question of damages. I must consider general damages which need not be specially pleaded. Then I have to consider special damages which must be specially pleaded. Under the heading general damages, much guidance has been given by ***Wooding C.J.*** in the hallmark decision of ***Cornilliac v. St. Louis 1965 7 W.I.R. p. 491***. The learned judge enumerated several considerations which a judge should bear in mind when making an assessment of general damages involving personal injuries as follows:-

> "(i) The nature and extent of the injuries sustained;
> (ii) The nature and gravity of the resulting disability;
> (iii) the pain and suffering which had to be endured;
> (iv) the loss of amenities suffered; and
> (v) the extent to which consequentially, the appellants pecuniary prospects have been materially affected."

28. These are the items or heads which I have to consider in assessing general damages. I consider (v) above as meaning loss of earning capacity, because this loss is assessed under general damages. I must also consider, for convenience, the relevant facts under each item or head. I must, however, bear in mind that though it is convenient to

itemize the different heads, in the end judgment is given for a single lump sum as damages for pain and suffering and loss of amenities.

29. But I observe in ***Johnson v. Sterlings Products Ltd. 1981 30 W.I.R. 155***, George CJ itemized the heads above and gave an amount under each head. Wooding C.J. in ***Cornilliac*** however, adopted a different approach and did not disclose an amount under each head above, but gave a total figure under all the heads as damages for pain and suffering and loss of amenities. The reason Wooding C.J. gave one figure for all the heads was because, according to him, **"**the nature and extent of the injuries inflicted cannot be disassociated from the physical disabilities which are their permanent result, nor are they unrelated to the pain and suffering which have had to be endured."

30. This approach of Wooding CJ is supported by Lord Denning CJ in ***Fletcher v. Auto Car and Transportation Ltd 1968 2 A.E.R. 726***. Lord Denning expressed disagreement with arriving at a figure under each item and adding them up, because of the risk of overlapping, a point which Wooding CJ clearly had in mind when he made the pronouncements above. For these reasons, I adopt the position of Wooding CJ and would give one total figure under all the heads as damages for pain and suffering and loss of amenities. But I must consider for convenience the relevant facts under each head. The facts under each head are as follows:

(i) **Nature and extent of injuries sustained**

31. After the accident the claimants were taken to the Western Regional Hospital at Belmopan and later transferred to the Karl Heusner Memorial Hospital, Belize City, where they received medical attention. Two doctors attended the claimants – Dr. I Roberts and Dr. John Waight. Dr. Waight gave evidence and produced a report on his assessment of the claimants on 12th and 14th September, 2009 and giving the nature of their injuries.

32. The No. 1 claimant sustained a closed fracture of the left femur as well as small abrasions to the left shoulder and left hip and a small laceration to the posterior aspect of the head. The fracture was treated by internal fixation with a plate and a total of thirteen screws. The report states that the full recovery of the No. 1 claimant should not be anticipated before a period of one year has elapsed, and that the claimant would not be medically fit to engage in his physically demanding occupation, in the construction industry, during the one year period. Dr. Waight pointed out that this was a "best case scenario. The fracture may, however, not unite as anticipated."

33. On a subsequent assessment made on 8th May, 2010 it was found that the No. 1 claimant had abnormal movement of the left thigh which was accompanied by swelling. On examination it was found that the fracture had not united and the plate inserted in the leg had broken. He was re-admitted to hospital on 22nd April, 2010 and a further surgery was done and the "left lower limb immobilized in a fiberglass cast." He was discharged a couple days later after the surgery. Dr. Waight

concluded with respect to his re-assessment dated 8th May, 2010 as follows:

> "The left lower limb is now supported in a fibre glass cylinder and he is weight – bearing on that member in an effort to promote callus formation leading to union of the fracture. Said measures may achieve the intended objective; but, should union not occur, further surgery in the form of another internal fixation procedure and the application of a bone graft may then become necessary. It should also be noted that union of the fracture may not even then occur. It is my view that Mr. Alvarenga remains medically unfit for remunerative employment for a period of one year since his last surgical procedure."

34. In relation to the No. 2 claimant Dr. Waight found that she had sustained "a closed minimally displaced fracture of the right ischio-pubic ramus of the pelvis" and "compound fractures of the left tibia and fibula." The doctor found that the No. 2 claimant was unable to ambulate and her movement depended on her being physically carried by family members. The doctor expressed the view that the fracture might fail to unite and that it might eventually lead to below the knee amputation. The claimant went to the USA and had four surgeries there in connection to her injuries; but the nature of the surgeries were not given in evidence. At the date of the trial, there is no evidence of amputation.

(ii) **Nature and gravity of the resulting disability**

35. The No. 1 claimant would not achieve full recovery before a year and would not be fit for physically demanding work in the construction industry during this period. There is a possibility that the fracture may not unite. As pointed out above further surgery may be needed. After the second surgery he could only walk with crutches. After the accident he was unconscious for a while. With respect to the second claimant movement was difficult after the accident and she would need medical treatment for a period of two years and would be unable to engage in remunerative employment during this period. She has testified in court that she had to wear a cast on her left leg until 15th October, 2010; and that she would have to use crutches until that date. She states that she would be able to walk better after that date.

(iii) **Pain and suffering**

36. The claimants state that they suffered extreme pain. The No. 2 claimant has testified at the trial that she still suffers pain in her ankle which hurts very much and it hurts when she stands on the floor. She also states that when the weather changes she experiences considerable pain in her leg and hip. The No. 1 claimant said at the trial that he was still feeling pain.

(iv) **Loss of amenities**

37. The term loss of amenities has been defined as a "loss of pleasure of life or a diminution of the injured person capacity to enjoy his accustomed lifestyle on account of the injuries which he has sustained": see ***George CJ Johnson v. Sterling Products*** above. The No. 1

claimant states that before the accident he played football and went swimming and hunting, but he could not do these things after the accident. The No. 2 claimant says before the accident, she liked to go dancing, and attended functions to improve her public relation skills; but after the accident she cannot go dancing, and stopped attending functions because her condition has become the focal point of conversation, which disturbs her.

(v) **Loss of earning capacity**

38. Loss of earning capacity is an award or compensation made by the court because of the injured person disadvantage in the labour market. It is compensation for the diminution, due to the injury, of the earning capacity of the injured person. There is a difference between loss of earning capacity and loss of future earnings. In ***Fairley v. John Thompson Ltd. 1973 2 Lloyd's Report 40***, Lord Denning explains the difference –

> "It is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages."

39. The No. 1 claimant was born on 29th June, 1988. He was 21 years at the date of the accident. He was not married. Prior to the accident he was employed at Caribbean Investors Ltd. at a weekly salary of

$190.00. He said in his witness statement dated 25th May, 2010 that he had not been able to work since the date of his injury, and his ability to earn a living has been affected. In his evidence in court on 22nd June, 2010 he said he got a job at a cement mixture factory where he operated a computer in a sitting position. No evidence of the salary from this job was given. But he said he was no longer in that job as it has been taken over by some Korean people. He cannot move much because of his injury, and he says he has to recuperate before he could work again. He also said he could not operate a computer now because he would be required to move. There is sadly no evidence concerning the nature of his educational and other skills, if any, and the different kinds of employment which he could undertake bearing in mind his injuries. There is also no evidence as to the percentage of his disability.

40. The No. 2 claimant was born on 25th January, 1991. She was eighteen years at the date of the accident. She is unmarried and has no children. At the date of the accident she was employed by Vanguard Security Service in the post of concierge at the Mexican Embassy in Belize. She is a graduate of the Belize Christian Academy, and prior to the accident had applied for a scholarship to study International Relations. Her scholarship plans are delayed because of the injury. Her salary at the time of the accident was $225.00 per week. Due to the injury she is not employed. There is no evidence of the percentage of her disability.

41. I must consider that it is highly likely that if the injury had not occurred, the claimants may have still been in employment earning their weekly salaries. I must also bear in mind the ordinary contingencies of life, such as sickness, accident or dismissals from the job. Considering the evidence in this case, including the injuries, and doing the best I can, I reach a compensation figure of $13,000.00 for loss of earning capacity of the No. 1 claimant and $14,000.00 for the No. 2 claimant. I have to make it clear, though, that I do not suggest that these figures are mathematically correct. I am assessing loss of earning capacity as part general damages not computing special damages. I am evaluating prospects, and the amounts I award under this heading are a broad general estimate: see Wooding CJ in ***Cornilliac*** above at p 494.

42. I must now assess and consider the other items or heads above and arrive at a final award as general damages. I consider the severe fractures, the nature and gravity of the injuries, the pain and suffering, the period of their hospitalization and the loss of amenities. In order to arrive at an amount as general damages, I should also consider the amount of general damages awarded by the courts for similar injuries in order to understand the range of awards in this type of case. But I must bear in mind the reservations expressed by the Privy Council with respect to comparing awards. ***Lord Carswell in Seepersad v. Persad and Another 2004 64 W.I.R. 378 at page 385*** said.

"The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms."

43. I now turn to comparable awards made in other jurisdictions:

1. In ***Stevens v. Dean Shanger Oxide Works 1981*** **(unreported)** ***Kemp & Kemp Revised Edition 1982 vol 2 para 12-305***, the injury was serious to the left foot of a male person aged 48 – general damages of £18,000.

2. ***Jones v. Houldar Marine Drilling July 1990 see Kemp & Kemp above para 13-014***. Fracture of left ankle – general damages – £16,000.

3. ***Morgan v. London Borough of Tower Hamlets, October 1988*** see ***Kemp*** above para 13-019. Fracture of left ankle – general damages £7000.

4. In ***Paterson v Rotherham Health***

Authority 1987. See ***Kemp v. Kemp*** above para 12-406. Serious fracture of left tibia – general damages £18,500.

These cases were decided in England more than 20 years ago and the awards were made in British pounds.

5. In the Caribbean there is the Jamaican case of ***Gravesandy v. Moore 1986*** above – serious injury to his left leg – general damages $50,000.

44. There is an element of speculation in awarding general damages in this kind of case. **Canberry JA in United Diary Farmers *Ltd v. Goldbourne*** recognized the difficulty in making these awards. "In making awards," he said 'the courts do their part to measure the incomprehensible or the immeasurable (e.g. pain and suffering, or loss of amenities), but there is a stage at which this ends and sheer speculation begins": See ***Gravesandy v. Moore above at p 228***.

45. I bear in mind the above awards were made in a different currency, and that the awards were made more than 20 years ago. I also consider the facts and circumstances of this case, and that I must award general damages that are fair and reasonable. Doing the best I can, bearing in mind the injuries suffered, I arrive at a figure for general damages the amounts of $55,000.00 for the No. 1 claimant and $50.000.00 for the No. 2 claimant. These amounts include the amounts awarded for loss of earning capacity. Twenty percent must be deducted from the amount of $55.000, on the basis of the No. 1

claimant's contributory negligence, which I have found above, leaving a balance in the amount of $44,000.00 as general damages. I therefore award to the No. 1 claimant the amount of $44,000.00 as general damages for pain and suffering and loss amenities. I also award the amount of $50,000.00 as general damages for the No. 2 claimant.

Special Damages

46. According to the No. 1 claimant his medical expenses came up to $1,093.50. The No. 2 claimant claimed medical expenses in the amount of $5,061.96. These amounts have not been disputed by the defendant. I therefore award special damages to the No. 1 claimant in the sum of $1,093.50 and special damages to the No. 2 claimant in the sum of $5,061.96.

The Counterclaim

47. The defendant filed a counterclaim against the No. 1 claimant for $8,000.00, the cost of repairing the truck. Since I find that the defendant was 80% the cause of the accident I award to the defendant 20% of his counterclaim. In other words he contributed by his negligence 80% to the damage to his truck. I therefore award to the defendant the sum of $1,600.00 on his counterclaim.

The Balance

48. Rule 42.11 of the Supreme Court (Civil Procedure Rules) 2005 states:

"42.11 (1) This Rule applies where the

court gives judgment for specified amounts both for the claimant on the claim and the defendant on the counterclaim.

(2) If there is a balance in favour of one of parties, it may order the party whose judgment is for the lesser amount to pay the balance.

(3) In a case to which this Rule applies, the court may make against the claimant and the defendant (whether or not it makes an order under paragraph (2) –

(a) a separate order as to damages; and

(b) a separate order as to costs.

Conclusion

49. The defendant was negligent which resulted in the accident and injuries to the claimants. But the No. 1 claimant contributed to the accident and his injuries to the extent of twenty percent. Taking into consideration the contributory negligence of the No. 1 claimant, general damages are awarded to the No. 1 claimant in the sum of $44,000.00, and to the No. 2 claimant in the sum of $50,000.00. Special damages are awarded to the No. 1 claimant in the sum of $1,093.50 and to the No. 2 claimant in the sum of $5,061.96. The defendant is granted judgment on his counterclaim against the No. 1 claimant in the sum of $1,600.00. Acting under Rule 42.11 (2) above the defendant to pay the No. 1 claimant the balance of $43,493.50.

50. I therefore make the following orders:

(1) The defendant shall pay damages for negligence to the No. 1 claimant in the sum of $43,493.50 and to the No. 2 claimant in the sum of $55,061.96.

(2) The defendant shall pay to the claimants interest on the said sums at (1) above at the rate of 6% per annum from 18th July, 2009 until the said sums are fully paid.

(3) Defendant to pay costs to the claimants, to be agreed or taxed.

Oswell Legall
JUDGE OF THE SUPREME COURT
15th December, 2010