

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: CV0329 of 2010**

**BETWEEN**

**STEPHEN ALLEYNE**

**CLAIMANT**

**AND**

**MAHMED HAVALIVALA  
Trading as MAH TRANSPORT**

**FIRST DEFENDANT**

**JEFFREY SMITH**

**SECOND DEFENDANT**

*Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court*

**2016: February 18**

**March 11**

**June 22**

**2018 February 16**

**Appearances:**

**Mr. Ivan Alert, Attorney-at-Law for the Claimant**

**Mr. Larry Smith in association with Mr. Benjamin Drakes, Attorneys-at-Law for the Defendants**

## **DECISION**

### **Introduction**

[1] This is an application by the Claimant for assessment of damages for negligence, the issue of liability not being in dispute.

## **Background**

- [2] The Claimant's action arose in negligence following a motor vehicular collision which occurred on February 16<sup>th</sup>, 2008 in the vicinity of River Road, St. Michael, in which the motor vehicle registration ZR198 owned by the First Defendant and driven by the Second Defendant collided with the motor cycle operated by the Claimant. As a result of the collision, the Claimant suffered injury, loss and damages.
- [3] The Claimant therefore seeks special damages, general damages, interest, costs and such other relief as the court thinks fit.
- [4] The court must now assess damages under the following heads:
- (i) Special Damages
  - (ii) General Damages
  - (iii) Pain, suffering and loss of amenities
  - (iv) Past loss of earnings
  - (v) Past domestic assistance
  - (vi) Past medical care
  - (vi) Future medical care

## **The Claimant's Case**

- [5] In his witness statement which was accepted as his evidence-in-chief, with the exception of some statements contained therein, the Claimant deposed that he was 37 years old at the time of the accident, having been born on the 15<sup>th</sup> July, 1970. He was employed as a jockey and a

- truck driver. As a result of the accident he was knocked from his cycle and was removed from the scene by ambulance and transported to the Queen Elizabeth Hospital (hereinafter referred to as the Q.E.H.)
- [6] The injuries sustained by the Claimant included soft tissue injuries to his left knee, left ankle, pelvis, hip, back and right wrist. He also received a 6 cm laceration to the forehead and a 1 cm laceration to the upper left eyelid with abrasion.
- [7] According to the Claimant his wounds were sutured and dressed, he was given medication and subsequently discharged with follow up at the polyclinic.
- [8] The Claimant further deposed that some eight months after the accident, at the request of the insurers for the Defendants he agreed to be seen and was examined by Mr. Kwasi Ametewee, whom he saw a total of four times.
- [9] In addition to the Q.E.H. and Mr. Ametewee, the Claimant was also seen by dental surgeon Dr. D. Jordan and Mr. O.F. Weel, a maxilla-facial surgeon.
- [10] The Claimant stated that after the accident he continued to feel pain along his entire left side for a very long time. He was unable to chew on the left side of his mouth, could only consume soft foods and had to drink using a straw – this lasted for about 2 – 3 weeks. After about

6 – 8 weeks he could chew but only on the right side of his mouth and he took in other foods.

[11] According to the Claimant he had to rely on the assistance of friends and family, following the accident. He lived with his cousin Sandra Alleyne at Kensington New Road, St. Michael who after the accident cooked all of his meals every day, washed for him 2 or 3 times a week and cleaned his room every day – this she did for about 3 months or more until he was able to start helping himself. Prior to the accident, he did all of these things himself but now he also had to rely on a nephew Dale Brathwaite to assist with the yard work.

[12] Mr. Alleyne deposed further that he was seen by dental surgeon Dr. D. Jordan, who issued a letter dated 17<sup>th</sup> January, 2012. He confirmed that three of his teeth were affected and that it would cost \$4,000.00 to replace each with implants. He would like to have the teeth taken out and the implants put in but he was unable to afford the costs associated with same. He would also like to have the corrective work done to his face even though Mr. O.F. Weel of Pine Dental Clinic, a maxilla-facial surgeon recommended that since there was no functional damage that the surgery should not be undertaken.

- [13] With respect to employment the Claimant deposed that he worked as a jockey in the early mornings and then as a truck driver – after the accident he was off work in respect of both jobs until August, 2008.
- [14] As an exercise rider with Mr. Victor Cheeseman of Paddock Road, St. Michael he was earning \$150.00 per week exercising horses. He also exercised horses for Mr. Jonathan Simpson of 7 Brighton, St. George where he earned \$300.00 per week. From driving the truck the Claimant estimated that he would take home between \$700.00 – \$800.00 per week. Even though he was not rehired as a truck driver, the Claimant deposed that he did find some work as an exercise rider at the end of August 2008, however between the time of the accident to around the last week of August, he received no income. He is still in pain but he tries to cope with the help of pain medication as he has to work in order to get income.
- [15] Under cross-examination the Claimant said that he no longer resides with his cousin Sandra Alleyne but that he resides at Deacon's Farm, St. Michael where he takes care of his own affairs.
- [16] When questioned with respect to exercising of horses for Mr. Cheeseman and Mr. Simpson and other trainers, the Claimant insisted that he would get to the Garrison Savannah around 5 a.m. and start exercising horses around 5:15 – 5:30 a.m. and would leave

around 9 a.m. He maintained that he was paid \$10.00 per horse and would exercise a horse for about 10 minutes. His earnings therefore varied depending on the number of horses he exercised per week.

[17] He admitted that he had not provided any witness statement from Roy Revellac of Sturges, St. Thomas whose truck he operated and that other than his word, there was no evidence to corroborate that he worked for Mr. Revellac. Nevertheless he maintained that he did freighting until around 7 p.m., later at Christmas and that he was earning about \$1,400.00 a week from freighting and dumping.

[18] Under further questioning, the Claimant stated that he was not aware that Mr. Weel considered the injury to his face as minor but he was aware that the doctor did indicate that surgery was not recommended.

### **The Medical Evidence**

[19] Mr. Haresh Thani, M.B.B.S., F.R.C.S. Consultant, Accident and Emergency Department, Q.E.H. was accepted by the court as an expert witness having regard to his qualifications and experience. After reviewing his witness statement, he testified that he stood by its contents. In his witness statement he deposed that as part of his responsibilities, he supervised other doctors and patients and that the care and treatment given by those doctors to patients were done under

his supervision. He also exercised supervisory responsibilities in relation to the preparation of the medical records of those patients.

[20] Mr. Thani deposed that based on the records of the Q.E.H. he was able to confirm that Stephen Alleyne of Kensington New Road, St. Michael was seen at the Accident and Emergency Department on the 16<sup>th</sup> February, 2008 by Dr. Obinna Nwadibia who was at that time working at the Q.E.H. but no longer resides in Barbados. He further deposed that the Q.E.H. prepared a report dated 2008-05-28 written by Dr. Obinna Nwadibia and issued it under his signature and that this report was a true representation of the examination, care and treatment of Mr. Stephen Alleyne based on the notes made by Dr. Nwadibia.

[21] The report revealed that on examination by Dr. Obinna Nwadibia there was a young gentleman in painful distress immobilized on a spinal board. He had a 6 cm laceration on the left side of his forehead as well as a 1 cm laceration to the left upper eyelid with subjacent abrasion and there was tenderness on palpation at C6/C7 cervical spine. A diagnosis of laceration to the forehead, left upper eyelid and soft tissue injury to the neck and right wrist was made. The patient was managed as per protocol, the wound was sutured and dressed and he was given 1M Ancef – 1 gm, 1M Voltaren – 75 mg and 1M

- Tetanus Toxoid – 0.5 cc. The patient was discharged with planned follow up at the polyclinic.
- [22] Under cross-examination Mr. Thani said that Mr. Alleyne was only seen once at the Q.E.H. but did not agree that the incident merited a single visit at the hospital since the patient was discharged to be followed up at the polyclinic – this was because based on the findings in the report, the injuries were not serious enough to warrant a return to the hospital.
- [23] Mr. O.F. Weel testified that he is an oral maxilla-facial surgeon who had signed a witness statement in this matter and that he stood by the contents of that statement and the report annexed to it.
- [24] Mr. Weel deposed that he saw and examined the Claimant at his clinic on the 12<sup>th</sup> April, 2012. On examination he found that the Claimant had a depressed malar bone (cheek bone) due to a fracture suffered in 2008 following a motor vehicle accident. There was no functional damage but the cheek bone had been fractured in three places and there was an obvious flattening of the left cheek and drooping of the left eye.
- [25] He explained to the Claimant that to correct the deformity would require a major osteotomy or a bone graft to plump out his depressed left cheek and at paragraph 5 and 6 of his witness statement he

elaborated on the surgical procedures and the costs associated with the same. His findings therefore was that “the above patient has a depressed molar bone (cheek bone) due to a fracture four years ago. To correct the deformity it requires a major osteotomy or a bone graft to plump out his depressed cheek. However, the depression is very minor and this surgery is not recommended since there is no functional damage.”

[26] Under cross-examination Mr. Weel conceded that relative to daily functions such as eating, brushing teeth and smiling, these were not affected by the injury. He reiterated that even though the depression was minor, after four years the Claimant was still left with a depression which was cosmetic in nature, however since there was no functional damage, it was his view that surgery was not recommended.

### **The Other Witnesses**

[27] Sandra Alleyne, the Claimant’s cousin of Kensington New Road, St. Michael also testified. With a few exceptions, this witness indicated that she stood by the contents of her witness statement which she signed. Ms. Alleyne deposed that at the time of the accident, the Claimant had been living at her residence for about six months and that he would assist in the chores around the house.

- [28] Ms. Alleyne further deposed that at the time of the accident, the Claimant worked as a jockey and also as a truck driver. He would usually leave home before 5 a.m. and return between 7 – 8 p.m.
- [29] Prior to the accident he washed his own clothes, cleaned and cooked for himself, however after the accident she assisted with those tasks. According to Ms. Alleyne, the Claimant remained off work until the end of August and she was the person who supported, provided and took care of him.
- [30] Under cross-examination, Sandra Alleyne stated that she did not know who owned the truck, as she has never seen any documentation in respect of the vehicle. She also admitted that when the Claimant left home at 5 a.m., she did not go with him and was therefore unable to say with certainty where he went and since she was not at home when he returned in the day, she did not see him doing any of the chores referred to in her witness statement.
- [31] She testified that for three weeks after the accident, the Claimant could not eat “heavy things” like rice.
- [32] Mr. Jonathan Simpson of Brighton, St. George and Mr. Victor Cheeseman of Paddock Road, St. Michael also testified with respect to the employment of the Claimant.

- [33] Mr. Simpson on cross-examination testified the he paid the Claimant a net weekly pay of \$300.00 but admitted that this could not be corroborated because he did not issue any receipt or have any proof to verify same.
- [34] Mr. Cheeseman on cross-examination testified that he paid the Claimant \$150.00 a week and that even though he was a prudent businessman and kept records of expenses incurred in running his business, he did not have any receipts or proof to satisfy the court with respect to his testimony.
- [35] The final witness to give evidence in this matter was Mr. Kwasi Ametewee, a medical practitioner who was a consultant surgeon and orthopedist carrying on a practice at Washington Avenue, Black Rock, St. Michael.
- [36] He testified that in the course of his business he saw and treated the Claimant some six months after the accident, after which he prepared a Medical Report which he signed. He stated in this report that he first saw the Claimant on the 17<sup>th</sup> October, 2008 and then on three other occasions at his office.
- [37] On examination he observed that the Claimant was fit, slim built, walked normally and was conscious and alert. He stood well with no deformity in the spine, neurology was intact in the lower limbs and

- the neck and abdomen examinations yielded no abnormal signs. There was however soreness over the left hip, flexion and rotation were painful and pelvis compression gave no pain.
- [38] With respect to his face there was flattening (depression) of the left side cheek and face below the zygoma with tenderness under the left eye. There was a healed curved superficial cut above the left eye about 1½ inches long but no impairment of vision was found on gross testing.
- [39] X-rays were ordered of the pelvis and left hip and the left knee – these x-rays revealed no evidence of injury or abnormality was seen to the pelvis and left hip. With respect to the left knee, there was no fluid in the knee and neither was any evidence of bony injury seen, however the clinical features in the knee suggested osteoarthritis in its early stages.
- [40] The Claimant was given quadriceps exercises to practice at home on the left knee but no tablets were prescribed at this stage.
- [41] When the Claimant visited for the last time on the 3<sup>rd</sup> December, 2008 examination confirmed the good recovery from the knee and ankle injuries and he was discharged from the clinic but was free to return in case of recurrence of the symptoms.

[42] In summary the doctor concluded that the collision resulted in the Claimant suffering mainly mild to moderate injuries. The soft tissue injuries affected the left knee, left ankle, pelvis and left hip, however the symptoms from the pelvis and hip injuries were in his opinion mild and short lived. There was also a cut above the left eye requiring stitches and possible bony injury to the left cheek and face below the left eye. Since the Claimant had not received any treatment for his face injury over the six months, he doubted if much could be done now to correct the obvious deformity, that is, flattening to the left cheek and face.

[43] In response to counsel for the Defendant in cross-examination the Doctor stated that the finding of osteoarthritis in its early stages would suggest that the osteoarthritis would have been present prior to the accident. It was the Doctor's professional opinion that if the Claimant had received proper treatment after the accident, his injuries would have been resolved.

[44] Having reviewed the evidence the court finds and accepts the following facts:

- i. Prior to the accident on February 16<sup>th</sup>, 2008, the Claimant was a relatively healthy 37 year old man who worked as a jockey and a truck driver. In particular, there is no evidence that he had any chronic illness or suffered from any ailments.

- ii. As a direct result of the accident the Claimant suffered painful soft tissue injuries to his left knee, left ankle, pelvis, hip, back and right wrist as well as laceration to his forehead and upper left eyelid.
- iii. The Claimant was seen by a number of doctors namely Dr. Obinna Nwadebia at the Accident and Emergency Department of the Q.E.H. under the supervision of Mr. Haresh Thani, Consultant, Q.E.H., Mr. Kwasi Ametewee, Consultant Surgeon and Orthopedist who he saw eight months after the accident for a total of four times, dental surgeon Dr. D. Jordan and Mr. O.F. Weel, a maxilla-facial surgeon.
- iv. The court accepts the evidence of these medical practitioners and is satisfied that the opinions of these doctors establish that the Claimant has suffered from the accident.
- v. The court finds that whereas prior to the accident the Claimant was self-reliant and cooked, washed and cleaned for himself, he lost some of that independence after the accident and for some time was dependent on others.

## **THE ASSESSMENT OF DAMAGES**

### **Pain and Suffering and Lost of Amenities (PSLA)**

[45] Under this head the Claimant is seeking \$40,000.00. In support of this quantum his counsel has indicated that the High Courts of Barbados have accepted and applied the Judicial Studies Board Guidelines (JSBG) and relied on the cases of *Allyson Bowen v. Marilyn Nurse and Kenneth Lovell [2005]* Barbados High Court No. 734 of 2001 (unreported), *Carol Griffith et al v Alston Parsons et al [2003]* Barbados High Court No. 2153 of 2000 (unreported) and

Marita Loupa v. Jevan Jutagir [2010] Barbados High Court No. 2090 of 2005 (unreported).

[46] He contends that of the multiple injuries to the various parts of the body sustained by the Claimant the permanent facial disfigurement may be the most serious. He therefore submitted that in the circumstances of this case where the Claimant suffered multiple injuries, the facial disfigurement being the most significant that damages for PSLA should be guided by the bracket of the JSBG with due consideration also being given to the multiple injuries suffered.

[47] Counsel for the Defendants urged the court to take judicial notice that neither the Q.E.H.'s Report nor Mr. Ametewee's Report diagnosed, concluded or supported a finding that the Claimant suffered injury or impairment to his eye or vision as suggested by Counsel for the Claimant in his submissions. In fact, at page 3 of Mr. Ametewee's Report he outlined that "no impairment of vision was found on gross testing".

[48] Likewise Mr. Weel, a specialist in the field of oral maxilla-facial surgery assessed the Claimant's injuries in the following terms: "the depression is very minor and this surgery is not recommended since there is no functional damage.

- [49] He further submitted that based on the medical evidence addressed in this matter, that incurring the expense of an osteotomy is an unreasonable expense and since all the medical evidence states that it is unnecessary, this runs contrary to the Claimant's duty to mitigate his loss and therefore should be rejected.
- [50] He further contends that based on the medical evidence and legal principle in this area, the nature of the Claimant's facial injuries are in line with trivial scarring under the JSBG where it is described as being non-prominent except on close inspection and the quantum of damages in these cases range from £2,300.00 – £2,330.00.
- [51] The Claimant's other injuries to his left knee, left ankle, pelvis and hip have been described as mild to moderate soft tissue injuries and applying the cases of Lamb v. East Yorkshire NHS Trust (2001) reported at 16 – 063 in Kemp and Kemp – and Layland v. Creative Print and Design Ltd. (2005) reported at 17 – 051, the quantum of damages in these cases is £2,500.00.
- [52] He therefore concluded that in light of the foregoing a sum to compensate the Claimant for his pain, suffering and loss of amenities inclusive of his cosmetic deficit should be Barbados \$14,500.00.
- [53] Counsel for the Claimant is also asking the court to address the Claimant's further medical expenses which would cover the fractures

to the Claimant's cheek due to the accident in 2008 and which left the Claimant with a depression in his left cheek bone. According to Mr. Weel, correction of this deformity, however minor it maybe, can be done in two ways – either by an osteotomy or by bone graft – the full cost of the osteotomy is \$25,000.00 and the bone graft is \$5,000.00. He believes that whether or not the facial deformity is to be corrected is a matter entirely in the province of the Claimant and a matter of choice – it cannot be up to the Defendant to state that the Claimant must live with the deformity without any compensation whatsoever. He contends that it is the Claimant's desire to have the deformity corrected and therefore he must be compensated for that deformity on the basis of or to the quantum that will be necessary to correct the deformity. It is also suggested that the Claimant should be compensated for the three implants costing \$4,000.00 each for the three teeth that were damaged as a result of the accident and which he would like replaced.

[54] In arriving at the global figure for the Claimant's pain, suffering and loss of amenities, the court is satisfied that the Claimant's injuries can be considered as follows: (i) the soft tissue injuries to his left knee, left ankle, pelvis, hip, back and right wrist as well as the laceration to his forehead and upper eyelid; and (ii) the depressed, malar bone

(cheek bone) which was due to the fracture of the cheek bone in three places as a result of the 2008 accident and which caused an obvious flattening of the left cheek and dropping of the left eye in addition to the three damaged teeth.

[55] The court has to be mindful when making an assessment for damages under this head PSLA that there is no overlap between the awards and therefore in light of this the court is of the view that the awards for PSLA and future medical care can be dealt with under the same head.

[56] The medical evidence suggests that the Claimant suffered pain as a result of the accident which was clearly not his fault but was caused by the negligent driving of the Second Defendant.

[57] Even though Mr. Weel has indicated that the depression is minor and that surgery is not recommended since there is no functional damage, there is clearly some facial disfigurement for which the Claimant should be allowed to remedy if he so desires.

[58] The court does not find it unreasonable that this relatively young man would want to put himself in the position he was in prior to the accident and therefore does not consider any procedure to correct his facial defects to be unnecessary and/or unreasonable.

[59] In light of the foregoing findings of fact and having considered the submissions of counsel and the authorities which were cited the court is of the view that:

- (i) an award of \$10,000.0 is an appropriate award for the PSLA as it relates to the soft tissue injuries – the case of Cumberbatch v. Atkins, BB 2015, HC13 was especially helpful.
- (ii) an award of \$50,000.00 is an appropriate award for the PSLA as it relates to the facial depression and damaged teeth. This would include the \$25,000.00 for the osteotomy and \$12,000.00 for the damaged teeth – bringing a total of \$60,000.00 for PSLA.

### **Past Loss of Earnings**

[60] From the evidence the court is satisfied that the Claimant was employed as both a jockey/trainer and a truck driver. The only issue which the court has with determining an award under this head though, is the total lack of documentary evidence to substantiate it. The evidence of Jonathan Simpson and Victor Cheeseman was not very useful and there is no evidence apart from the word of the Claimant himself to support the trucking business.

[61] With respect to the jockey/trainer the court accepts that the Claimant was not able to resume this employment until August 2008, therefore for the period February 2008 until August 2008, it is considered that the Claimant should be compensated = 28 weeks @ \$200.00 per = \$5,200.00.

[62] A nominal sum of \$200.00 per week for a period of 12 weeks = \$2,400.00 is considered an appropriate award for the trucking services which the Claimant provided no evidence to substantiate but which the court believes that he did occasionally and not as frequently as has been suggest by him.

### **Past Domestic Assistance**

[63] On the evidence before the court, I am of the view that the Claimant's injuries were moderate injuries which would have resolved themselves in a few months. Under the head of past domestic assistance I award the Claimant the sum of \$2,400.00 that is \$40.00 per day by 5 days per week by 12 weeks. I have considered the local case of *Sandiford v. Prescod (1977) 12 Barb. L.R. 55* at 63 which is authority in this jurisdiction for payments under this head.

### **Medical Expenses**

[64] The following medical expenses in relation to services and reports are accepted by the court:

(i)	Q.E.H.	\$ 375.00
(ii)	Dr. D. Jordan (Dental Treatment)	240.00
(iii)	Mr. O.F. Weel	100.00
(iv)	Mr. K. Amatewee	<u>1,695.00</u>
	<b>Total</b>	<b><u>\$2,410.00</u></b>

[65] It is not disputed that out of this sum of \$2,410.00, \$1,695.00 was already advanced as an interim payment, thereby leaving a balance of \$715.00.

[66] **Summary of the Awards:** In summary, the awards which the Defendants shall pay to the Claimant are as follows:

**GENERAL DAMAGES**

(i)	Pain, suffering and loss of amenities, inclusive of further medical care	–	\$60,000.00
(ii)	Past loss of Earnings	–	7,600.00
(iii)	Past Domestic Assistance	–	<u>2,400.00</u>
	<b>Total General Damages</b>	–	<b><u>\$70,000.00</u></b>

**SPECIAL DAMAGES**

Medical Expenses (Balance remaining) – \$ **715.00**

[67] **Interest:** The above awards will bear interest on the Special Damages at the rate of 4% per annum from the date of the issue of the Writ until today and thereafter at 6% per annum until payment and on General Damages at the rate of 6% per annum from today until payment.

[68] **Costs:** The Claimant shall have his costs certified fit for one counsel to be assessed if not agreed.

**PAMELA A. BECKLES**  
Judge of the High Court