

**IN THE SUPREME COURT OF BELIZE, A.D. 2015**  
**CENTRAL DISTRICT COURT**

**CLAIM NO. 550 of 2014**

**BETWEEN:**

**KELVIN AGUILAR**

**Claimant**

**AND**

**DAVID WANG**

**Defendant**

<b>Before:</b>	<b>Hon. Madam Justice Shona Griffith</b>
<b>Dates of Hearing:</b>	<b>19<sup>th</sup> March, 2015</b>
<b>Appearances:</b>	<b>Mr. Mark E. Williams for Claimant.</b>
	<b>No appearance by or on behalf of Defendant</b>

**DECISION**

**Introduction**

1. This is an ex parte assessment of damages for personal injuries arising out of a default judgment obtained by the Claimant Kelvin Aguilar against the Defendant, David Wang on 27<sup>th</sup> October, 2014 for damages to be assessed. The default judgment was obtained upon the Defendant's failure to file an acknowledgment to the claim which had been filed on the 2<sup>nd</sup> October, 2014. The application for assessment of damages, made pursuant to Rule 16.2 and filed on 31<sup>st</sup> October, 2014 was served on the Defendant on the 12<sup>th</sup> November, 2014. Following directions given by the Court the assessment of damages was heard on 19<sup>th</sup> March, 2015. The Defendant made no appearance at any stage of the proceedings.
2. The brief facts of the claim giving rise to the assessment of damages are that on 30<sup>th</sup> April, 2014 at around 10pm, whilst riding his blue Piaggio motorcycle, registration number MC-2131 along the Philip Goldson Highway in the vicinity of the Haulover Bridge, the Defendant as owner and driver of a grey and white Buick Endeavour SUV with registration

number BCC 39938, struck the Claimant on his motor cycle, causing him damage, injury and loss. The Claim was for damages for personal injuries including general damages for pain and suffering and loss of amenities; special damages pleaded in the amount of nine thousand seven hundred and thirty eight dollars and seventy cents (\$9,738.70) for loss of earnings, medical expenses and for the loss of his motorcycle. At the hearing the Claimant amplified his affidavit evidence which included medical reports on his injuries, receipts and other proof of his alleged pecuniary losses. The Court now delivers its written decision on the assessment of damages in favour of the Claimant.

### **The evidence in support of the claim**

#### The Medical Evidence.

3. As a result of the accident the Claimant says he sustained injury to his left radius (forearm) and middle right femur (thigh). The Claimant presented a medical report dated 12<sup>th</sup> August, 2014 of one Dr. Eliesere Bernal, Orthopaedic Surgeon, attached to the Karl Heusner Memorial Hospital which described the Claimant's injuries as *'an open comminuted displaced fracture of the left radius and close fracture of the middle one-third right femur.'* The injury, treatment and prognosis described by the doctor were as follows:-
  - (i) 1<sup>st</sup> May, 2014 – *'a surgical lavage of the open comminuted left radius fracture'*
  - (ii) 9<sup>th</sup> May, 2014 – *'an external fixator was placed on the right radius'* and *'intramedullary nailing and wiring'* was done to the right femur.
  - (iii) 11<sup>th</sup> June, 2014 – *'the external fixator was removed from the left radius'*.
  - (iv) The patient would have *'permanent disfigurement to the left wrist and functional impairment which may require permanent physiotherapy assistance'*.
  - (v) Further that *'patient also has intramedullary nail in the right femur that will need to be surgically extracted in two years time'*.
4. A further medical report was presented from Dr. Francis D. Smith, described as an orthopedic consultant. The Claimant was examined by Dr. Smith on 3<sup>rd</sup> December, 2014 who observed that the Claimant *'...walked with an obvious limp and complained of a*

*deformity and pain of his left wrist'. The physical examination of the Claimant revealed 'a left wrist with a prominent left ulnar styloid process, a healed scar on the ulnar aspect and widening of the wrist, compared with the right wrist. X-rays revealed a mal-union of the distal left radius with radial deviation. The wrist lacked 10° full flexion and 20° full extension.'* Dr. Smith expressed the view that corrective surgery would improve alignment and function of the left wrist. Particularly he stated '*...It is my view that osteotomy (re-breaking) of the distal radius at the fracture site, reduction of the fracture fragments, cancellous bone grafting and internal fixation with a T-plate and screws would improve alignment and function of the left wrist.'*

5. With respect to the healing of his injuries, the Claimant testified that he spent a total of 15 days in hospital after the accident and had to undergo physical therapy. The medical report of Dr. Bernal indicates that he underwent three surgeries and the Claimant indicated that he experienced severe pain and discomfort for which he required pain killers as much as four months after the accident. On visual presentation the Court observed the Claimant's gait as having a pronounced limp in the right leg. The Claimant described his leg as weakened by the surgical cut and that to date he experiences pain in his upper side (demonstrated in the witness box as the side of his abdominal section) from where the rod was inserted and more difficulty walking in cold weather. The Claimant did not keep up with his physical therapy treatments as it was too painful and clarified that it was not that the rod was to be removed in two (2) years, but that the rod in his leg could not be removed before two (2) years from insertion and its removal depended on how well his leg had healed.
6. From the witness stand the Claimant also demonstrated the injury to his left forearm where the Court observed a noticeable scar along the length of his forearm, a lump at the wrist and deformity in shape compared to the right forearm. According to the Claimant, following the accident he was unable to grasp anything with his left hand up to about three and a half months after the accident, thus he required help in ordinary tasks although he is right handed and had to undergo very painful physical therapy to regain any strength in his hand.

The Claimant also by manipulating the bone in his forearm, demonstrated what he termed was a lack of stability in the bone which still restricts the use of his arm. The Claimant expressed his desire to correct the injury to his hand hence the reason for him consulting with Dr. Smith who submitted the report in relation to the benefit of corrective surgery to improve the alignment and function of his forearm. The Claimant testified that the surgery could be performed in Belize but he lacked the finances to undergo it at the current time. The cost of the surgery is estimated at (provided by Belize Medical Associates) eight thousand, three hundred and sixty-six dollars and sixty-seven cents (\$8,366.67).

#### The effect of the accident

7. As stated before, the Claimant says he experienced severe pain as a result of the injuries to his right leg and left forearm. In respect of the forearm he says the bone was showing through his flesh when the accident happened. After the accident for three and a half months the Claimant was unable to grip anything with his left hand, he couldn't open a bottle cap. He was used to helping his parents around the house and in their business, but could no longer do chores for them or himself. For example the Claimant says, he could no longer operate the weed whacker to cut the grass, or even hold a broom or shovel. Although now he can grip and hold these items the Claimant says he is not able to do any of the chores as he previously did. The Claimant testified that he feels badly about not being able to assist his parents and around the house as he did before.
8. Further, the Claimant testified that he was a very active person who played sports, particularly football and went hunting and fishing regularly. In his words *'I used to be a very fast person, one of the strongest persons. I have become the weakest and slowest person.'* He is forced now to watch, the Claimant says, with respect to the football games and recreational activities he no longer is able to enjoy. Additionally, the Claimant used to play music at his church, which he started doing about 10 years prior to the accident. Although the Claimant has now been able to resume playing his instruments he describes his ability in terms that he *'cannot move as fast'* as he used to move.

9. The Claimant at the time of the accident had been employed at Caribbean Tyres, Belize City since 2010 where he started as a warehouse attendant and remained for approximately two years but at the time of the accident he was doing customer service. On his return to work after the accident he was placed as a Workshop Supervisor which entailed supervision of the company's mechanical jobs that came into the workshop. He was unable to keep that position for very long because, as he described, he '*could not stand the pain*'. The duties as workshop supervisor required him to stand for long periods during the day, seeing to customers and the Claimant was unable to stand for very long nor was he able to move around the way he needed to in order to help the workers under his supervision. He could not do any of the physical work such as mounting or de-mounting tyres or stooping to look at the cars, which he used to do before alongside his workers. The Claimant therefore was as he put it, 'accommodated' because of his condition in the post of Inventory Supervisor so that he could be seated in carrying out his duties. This post was however described as desk work and not as satisfying to him as the duties he carried out before the accident which allowed him to be on the floor, interact with customers and assist the workers he supervised.

The claim for damages.

10. The Claimant firstly claims medical expenses in the sum of one thousand, seven hundred and eighty-eight dollars and ten cents (\$1,788.10), comprising medical supplies, medication, medical bill from the Karl Heusner Memorial Hospital and physiotherapy. The Claimant also claimed a total of six thousand, seven hundred and fifty three dollars and fifty cents (\$6,753.50) as loss of earnings as a result of his absence from work after the accident for a period of four (4) months and one (1) week. His rate of pay he stated, did not change after the accident and his claim was made based upon a monthly salary (paid bi-weekly) in the sum of \$1,542 including overtime and bonus pay. A claim for the loss of his motorcycle was also submitted in the sum of three thousand, one hundred and twenty-five dollars ((\$3,125.00).

The total special damages claimed was therefore eleven thousand six hundred and sixty-six dollars and sixty cents (\$11,666.60) although the amount pleaded was nine thousand seven hundred and thirty eight dollars and seventy cents (\$9,738.70).

11. The claim for general damages for the injuries suffered by the Claimant was \$60,000 for the injury to the forearm, taking into account the permanent disfigurement and functional impairment and \$30,000 for the fracture to his leg. The sum of \$15,000 was claimed as loss of amenities and earning capacity. The total award for general damages put forward to the Court is therefore \$105,000.

### **The Court's Consideration**

#### Principles to be applied.

12. The first point to note in an assessment of damages is of course the fundamental principle that damages are compensatory and the aim thereof is to restore the Claimant to the position he or she would have been in but for the wrong committed<sup>1</sup> – in this case the accident caused by the Defendant. Following upon this principle, is the classification of the two broad heads of general and special damages. The former represents loss which cannot be specifically quantified and measured in monetary terms, quantification of which is usually regarded in terms of the guidelines set out in the classic West Indian authority of **Cornilliac v St. Louis**<sup>2</sup> per Wooding CJ. In making an assessment of general damages, the Court is obliged to consider the assessment according to the following:-

- (a) *The nature and extent of the injuries sustained;*
- (b) *The nature and gravity of the resulting physical disability;*
- (c) *The pain and suffering which had to be endured;*
- (d) *The loss of amenities suffered; and*
- (e) *The extent to which consequentially the plaintiff's pecuniary prospects have been materially affected.*

These guidelines have served as the foundation of the Courts' assessments of general damages in the Commonwealth Caribbean and this Court will be likewise guided by this approach.

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<sup>1</sup> Munkman on Damages, 2004, 11<sup>th</sup> Ed. Pg 1.

<sup>2</sup> [1965] 7WIR 491

It can be noted that in English judgments these guidelines encompass three broad heads under which general damages are usually classified – viz – pain and suffering, loss of amenities and loss of future earnings or earning capacity. In assessing the claim the Court will consider the evidence in accordance with the guidelines but paragraphs (a) – (c) can be grouped and considered together.

13. On the other hand, special damages, which need to be specifically pleaded, represents those pecuniary losses capable of precise quantification which a claimant is entitled to recover in order to be returned to the position he would have been were it not for the accident caused by the defendant. These losses are usually loss of earnings, medical expenses and treatment and loss or damage to property. There is a requirement that special damages must be specifically proved, meaning that a claimant is required to substantiate his claims for any monetary loss sustained or outstanding. In assessing this aspect of the claim, the Court will be considering the extent to which the Claimant has substantiated or in other words, proved his pecuniary losses.

### **Findings on the Evidence**

#### Special Damages.

14. The Claimant was found to be an honest and straightforward witness who at no time sought to exaggerate his injuries or his experiences. Albeit the only witness for his case, his claim was supported by two medical reports which the Court accepted into evidence along with receipts of the medical expenses claimed, with slight differences in what was ultimately proved. The medical bill from the Karl Heusner Memorial Hospital was in the amount of \$1,663.50. This amount is accepted. The amount of \$189 for medical supplies and medication is accepted as evidenced by two receipts from James Brodie & Co. Ltd. The motor cycle claim is accepted but in the sum of \$2,800 which the Claimant says he paid for the cycle. An estimate for a new cycle of the same brand and model was exhibited in the sum of \$3,125. The Court accepts the evidence of the Claimant that he did not purchase the cycle as a new cycle.

15. With respect to the loss of earnings, the Claimant submitted current pay slips which the Court accepted as evidence of his earnings, particularly based on his testimony that his salary had not changed after the accident. Even though the Claimant did not present evidence of his earnings prior to the accident, on a balance of probabilities, given the difficulties the Claimant experienced in executing his duties subsequent to his return to work after the accident, it is doubtful that he could have enjoyed an increase in salary. The amount awarded however, is lower than the amount claimed, as in the first instance there was no deduction made from the claim submitted for income tax or social security deductions. Additionally, the pay slips contained a deduction termed 'CTW outstanding balance', that was not explained and a payment for 'vacation pay' that was cancelled out as a deduction which was also not explained. The award must be to compensate the Claimant for his loss thus the Claimant cannot be paid more than he was entitled to receive, thus the Court can only make its award based upon the evidence presented by the claimant. For the calendar month of February, the total pay of the Claimant was \$870.66 which is therefore used as the rate to calculate the 4 months and 1 week's loss of earnings. The Court accepts the Claimant's evidence of a quarterly bonus paid to all employees in the sum of no less than \$200 every three months.

#### General Damages

16. The Claimant's evidence as to his pain and suffering and loss of amenities following the accident is accepted. The Claimant underwent three operations, spent 15 days in hospital and required medication to manage his pain for several months after the accident. The wound to the Claimant's wrist involved a broken bone which was exposed and protruded out of his skin. The fracture to the leg required placement of a rod which must remain for no less than two (2) years. Given that the Claimant was able to return to work in 4 months the degree of pain by that period is found to be minor, but given the nature of the injuries and the Claimant's description of not being able to perform routine household chores, abandoning physiotherapy because it was too painful and requiring 3.5 months to regain use of his fractured hand, the degree of pain and suffering immediately in the aftermath of the accident is taken to be significant.

17. There was no degree of disability addressed by the medical reports in relation to the Claimant's fractured leg but the Claimant is accepted as having an impairment to his right leg as he now walks with a noticeable limp. There must therefore be an element of minor disability attributed to his leg injury which is supported by the Claimant's inability to perform tasks and enjoy leisure activities as he did prior to the accident. With respect to the Claimant's fractured hand, there is clear medical evidence and the visual presentation of the forearm as demonstrated by the Claimant whilst giving evidence, as to a resulting disability and deformity. The degree of disability assessed by Doctor Smith, who examined the Claimant on 3<sup>rd</sup> December, 2014, just over 7 months after the accident, was a lack of flexion of 10°, which the Court understands to mean that the wrist can bend only to 90 degrees of its full range of movement. Additionally, the wrist lacked 20° full extension, which the Court understands to mean that the wrist could only straighten to 80 degrees of its full capacity. This is regarded by the Court as a minor disability, but it is found and acknowledged that there also must be recognition of the noticeable deformity in a young, single and previously active man. The medical evidence was that the disability and deformity could be improved (not eliminated) by further surgery. The Claimant cannot be compensated both for the disability and cost of further surgery, therefore no assessment shall be considered for future medical expenses but the assessment will reflect the element of the resulting disability and noticeable deformity to the forearm.

18. With respect to the Claimant's loss of amenities, the Court accepts the Claimant's evidence that before the accident he led an active and physical lifestyle which he is no longer able to do - particularly, involving activities such as playing football, fishing, hunting and performing household chores. The Court also accepts that the Claimant engaged in music as a serious hobby and his ability to and enjoyment of playing the keyboards is reduced. The Claimant's enjoyment of activities is also considered in respect of his work as the Claimant testified as to his inability to perform his duties in the same manner as he was prior to the accident. Particularly, the Claimant testified that he had to be given a desk position as inventory supervisor in order to accommodate his inability to stand for long periods, move around in order to interact with customers, but most

importantly to physically perform tasks involved in the sales and vehicle service aspects of his employer's business. In an overall assessment of the Claimant's loss of amenities, the Court is most struck by the Claimant's testimony which was given with sincerity and conveyed a true sense that he led an active and satisfying life prior to the accident and he is deeply cognizant of and saddened by the fact that his life will never be the same. The loss of amenities suffered by the Claimant is found to be significant.

**Quantification**

19. Special Damages – the special damages found in favour of the Claimant are as follows:

(i)	Medical Expenses –		
	Hospital Bill	\$1663.50	
	Medication and Supplies	\$ 189.00	<b>\$1852.50</b>
(ii)	Loss of Earnings,		
	4 months @ \$870.66 x 4	\$3482.64	
	1 week @ \$870.66 ÷ 4	\$ 217.66	
	Quarterly bonus	\$ 200	<b>\$3900.30</b>
(iii)	Loss of motorcycle -		<b><u>\$2800.00</u></b>
	<b>Total</b>		<b><u>\$8552.80</u></b>

20. General Damages

(i) **Pain and suffering and resulting disability** – the claimant is found to have suffered an open fracture to his left wrist with resulting minor disability on flexion and extension; a comminuted fracture to his right thigh bone with resultant disability evidenced by a noticeable limp. The Claimant required three surgeries, and requires further surgery to remove the rod placed in his leg and corrective surgery to improve the appearance and alignment of his wrist and forearm. The degree of pain and suffering as a result of the surgeries, nature and extent of injuries is assessed as severe at least for the two months following the accident, diminishing to a point that the Claimant was able to return to work after four months. The Claimant however still suffers from pain associated with his injuries, particularly

the placement of the rod in his leg, the operating site and the instability in his wrist.

- (ii) Learned Counsel for the Claimant made a quantification based on English authorities. There are a few Belizean authorities available for comparative purposes which for obvious reasons are preferably utilized as the basis of quantification. The Court considers two personal injuries awards made by the Supreme Court in 2014. The first is **Albert Idelfonso v Ercelia Wagner & Gabriel Villafranco**<sup>3</sup> in which the Claimant therein suffered a closed fracture of the upper arm bone and open fracture of his right thigh bone. The Claimant underwent two surgeries, was treated with nail fixation of both fractures and given six months to recuperate. The Claimant suffered complications from a bone infection of the fractured thigh and was further hospitalized. The Claimant remained with a disability in the form of a limb length discrepancy of 2 inches which resulted in a limp, severe restriction on flexion of his knee and a noticeable pelvic tilt. The Claimant required corrective surgery to restore the length of his thigh bone affected by the bone infection and was unable to walk long distances and some 9 months after the accident had not been able to return to work or carry out previous activities. The award for pain and suffering together with loss of amenities in this case was \$50,000.
- (iii) The second case examined is **Pamela Watson, Glegg Watson & Joyce Frankson v Ricardo Palma & Belize Transit Services Ltd.**<sup>4</sup> The injuries in this case included head trauma, pulmonary bruising, fracture of the distal left clavicle (collarbone), injury to left shoulder, rib fractures, displaced fracture to the left acetabulum (hip bone socket) with central dislocation of the left hip. There were several more fractures and injuries suffered by the Claimant, in addition to lung infection whilst hospitalized and the medical evidence assessed the Claimant with significant permanent residuary disability estimated at 70% of total person. It goes without

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<sup>3</sup> Claim No. 131 of 2014, Supreme Court Belize.

<sup>4</sup> Claim No. 74 of 2014, Belize Supreme Court.

saying therefore that the nature and extent of injuries suffered in this award were of far greater severity than the Claimant's in the instant case. The purpose of considering this award therefore is to establish an upper ceiling for the quantification in the instant case along with a measure for comparison of the degree of seriousness and severity of the injuries involved. The award in favour of the Claimant for general damages for pain, suffering and loss of amenities was \$200,000.

- (iv) In relation to the first award – **Albert Idelfonso** – whilst the leg fracture and resultant disability to the leg were more serious than the Claimant's leg injury in the instant case, the Claimant's additional open fracture, resulting deformity and disability to his forearm places in the Court's view, the totality of the Claimant's injuries herein above that of the Claimant **Idelfonso**. Additionally, the Court regards the evidence in relation to the loss of amenities suffered by the Claimant as being more detailed and of greater effect in the instant case. The total award for general damages for pain and suffering and loss of amenities is thus to be greater than the \$50,000 awarded in *Idelfonso*.
- (v) On the other hand, the Claimant's injuries, resulting disability and loss of amenities can in no way compare to that suffered in **Joyce Frankson** thus it follows that the award must be significantly less than the \$200,000 awarded therein. Considering the two awards at the extremes, it is considered that the instant case is closer to **Idelfonso** than to the upper ceiling in **Frankson**. A fair award having regard to the nature and extent of injuries suffered, pain and suffering and loss of amenities is therefore \$75,000 plus an additional \$7,000 for the disability and deformity and further medical expenses to remove the rod in his leg.
- (vi) There was some evidence from which the Court could have inferred that the Claimant would suffer a loss of earning capacity but there was no evidence presented to support a quantification. Particularly, the Claimant whilst unable to perform the same tasks which he performed prior to the accident, did not suffer a reduction in salary after being reassigned to duties to accommodate his inability

to stand for long periods or perform strenuous physical activity. In the circumstances there is no award given for future loss of earnings based on reduced earning capacity. The total award for general damages is therefore \$82,000.00.

### **Final Disposition**

21. The Claimant is awarded the following as damages for personal injury and loss arising out of the motor vehicle accident caused by the Defendant on 30<sup>th</sup> May, 2014.

- (i) General Damages in the sum of **\$82,000.00**
- (ii) Special Damages in the sum of **\$8,552.50**
- (iii) Prescribed costs to be calculated on the total award of damages which is \$90,552.
- (iv) Pre-judgment interest from the date of filing the claim to the date of judgment at the rate of 3%.
- (v) Post judgment interest at the statutory rate of 6% from the date of judgment until payment.

Dated this 15<sup>th</sup> day of April, 2015

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Shona O. Griffith  
Supreme Court Judge.