

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

CLAIM NO. BVIHCV 2004/0058

BETWEEN:

WILLIAM 'BING' MALONE
(by his next friend Orpha Malone)

Claimant

and

JEROME MICHAEL

Defendant

Appearances:

Ms. Asha Johnson of Samuels-Richardson & Co for the Claimant
Ms. Willa Liburd of Oneal Webster for the Defendant

2006: December 6, 15

Judgment on assessment of damages for personal injuries

(Personal injuries – compensation – 6 year old boy involved in road traffic accident – fracture of mid-shaft of left femur with displacement – hospitalized for 4 weeks – complete recovery after 6 months – quantum of general damages)

- [1] **Joseph-Olivetti J:** More than 3 years ago on August 26, 2003 the Claimant, six year old William Malone was crossing the Fat Hogs Bay Main Road, Tortola close to his home when he was struck and knocked to the ground by Mr. Michael's motor jeep being driven by Mr. Michael himself. Judgment in default of defence for damages to be assessed was eventually obtained on October 30, 2006 after a long saga which is not relevant for these purposes. We are here concerned with the assessment of damages.
- [2] At the hearing the Claimant relied on the witness statement of Ms. Orpha Malone, his guardian, filed on October 24, 2006, and by consent the medical reports of Dr. Ian Lewis dated December 2, 2003, Dr. I. V. Ojuro dated July 28, 2006, the Clinical Psychologist's report of Virginia Rubaine dated May 31, 2006 and Dr. Blondel Crosdale's report dated

April 25, 2006. No oral evidence was led and both counsel relied on their written submissions supplemented by oral submissions.

- [3] The issues arising relate to the quantum of the award for general and special damages and in particular whether William sustained any psychological or psychiatric damage and the quantum of costs.

Legal Principles - Assessment of Damages

- [4] The legal principles governing the assessment of damages are well established and the leading authority on this is **Cornilliac v St. Louis (1965) 7 WIR 491**, a case from the Trinidad Court of Appeal which has been followed in this jurisdiction. (See **Alphonso and Others v Deodat Ramnath (1997) 56 WIR 183**) Sir Hugh Wooding CJ listed the main factors to be taken into account as (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects

The Nature and Extent of the Injuries Sustained

- [5] The medical report of Dr. Ian Lewis establishes that William suffered a fracture of the mid-shaft of the left femur with displacement. He was immediately given pain relief and a plaster splinting of the limb was applied and he was hospitalized for one month. Thereafter, he had follow up care until recovery which the Defence conceded was by January 2004.

The Nature and Gravity of the Resulting Physical Disability

- [6] The medical report of Dr. I. V. Ojuro (July 28, 2006) disclosed that the fracture has now healed and the bone has remodeled beautifully. William is not in any distress and has full range of movement of both left hip and left knee with no tenderness on fracture site. The left leg appears longer than right leg by about 1mm. However, the doctor did not say that this hampered him in anyway and I do not consider this a disability/deformity as argued for by his Counsel as the shortening appears *de minimis*. William, now 10 years old, attended at court and the court observed his gait which was not noticeably impaired in any way. In short, it appears that he has recovered fully from his injuries.

The Pain and Suffering and Loss of Amenities

- [7] William had to undergo one operation under general anaesthesia where his skin traction was replaced by a hip spica cast. He was hospitalized from August 26 to September 23, 2003. The cast was removed after 4 weeks at which time he was prescribed physiotherapy and advised to use one crutch for support. The doctor's report indicated that William experienced occasional pain around his left knee up to June 2006. Ms. Malone's witness statement disclosed that William was afraid to use the crutches and that he had to use a stroller at times. No doubt, William suffered a noticeable degree of pain and discomfort throughout.
- [8] No direct evidence was led as to the loss of amenities that William suffered. However, the court can infer from his long period of hospitalization and then the time spent on crutches that he was for that period severely hampered in his movements and from engaging in the physical activities one would expect a small boy of his age to be involved in. Not least of these is the fact that he was absent from school for 3 months and lost the benefits of associating with his peers for that period. The Court considers this loss significant.

Psychological/Psychiatric Damage

- [9] Ms. Johnson for William submitted, based on the reports of Dr. Rubaine and Dr. Crosdale, that William suffered and still suffers from psychological/psychiatric damage (headaches, academic difficulties) attributable to the accident for which he should be compensated as these indicate brain injury. Counsel also claimed the projected costs of an MRI scan.
- [10] Ms. Liburd disputes this claim on the ground that no sufficient causal connection has been established between the academic difficulties and headaches suffered by William and any brain injury arising from the accident. There is no medical evidence on which the court could make such an award. Ms. Liburd submitted that Dr. Crosdale's and Dr. Rubaine's reports do not support any such connection. Dr. Rubaine's report dated May 31, 2006 at para. 2 states as follows '**...the acute onset of William's difficulties commenced from January 2005'** (one and a half years after the accident). Dr. Rubaine concluded that William is withdrawn and apathetic and that his anger/irritability were indicative of an underlying depression that he appeared to be struggling with. This it seems is attributable

to the relationship he has with his father. Dr. Crosdale's report dated April 25, 2006 speaks to '**recent onset of forgetfulness, headache and abnormal behaviour**'.

- [11] The Court is of the view that Ms. Liburd's analysis of the medical evidence is correct. Dr. Lewis, the first doctor who examined William immediately after the accident made no mention of him suffering from concussion or any sort of head injury and no doubt if any signs of possible brain injury had been present they would have been recorded then or surely detected during his stay in hospital and recorded. The teacher's evidence (Mr. Carlisle Scott which was admitted by consent) only speaks to William having forgotten his school work which is not surprising in a child of his age who was absent for a term with no doubt no studies during his convalescence. In hindsight, the school might have been able to work out a programme of home study for him. Bearing these matters in mind I am of the view that the accident did not cause any psychological or psychiatric injury to William.

Quantum of General Damages

- [12] Ms. Johnson submitted that an award in the sum of \$15,000.00 is appropriate for general damages but this figure included brain injury. Counsel relied on an excerpt from **Kemp & Kemp**¹ which disclosed that damages for a simple fracture from which complete recovery was made would range between £4,750.00 - £4,930 (US\$8,550.00 - \$8,874.00). (Using an average exchange rate of US \$1.8 to £1 based on the current fluctuation in the value of these currencies) Counsel also referred the court to two cases cited in Kemp & Kemp and one from Trinidad & Tobago.
- [13] In **Evans v Ministry of Defence (1996)** (reported in **Kemp and Kemp**) the claimant, aged 4 months, suffered a transverse fracture of the mid-shaft of the right femur with minimal displacement. She spent 21 days in the hospital and was able to move it normally one week following discharge. General damages for pain suffering and loss of amenities was awarded at £3,000.00 (US\$5,400.00). **Weir v Smith** was also relied on but I hasten to mention here that this case involved a 21 year old, his injuries and treatment were greater and is therefore not comparable to this case. He was awarded the sum of £9,500.00 (US\$17,100.00) for pain suffering and loss of amenities. In **Martin & Martin v Mohammed & Mohammed (1989)** the claimant, aged 9, was struck by a motor vehicle

¹ Kemp & Kemp, The Quantum of Damages, Vol. 4

and suffered head injury, bruising and a fracture to the right thigh with a 0.5cm leg shortening. Damages for pain suffering and loss of amenities was awarded at TT\$7,300 (US\$1,216.67).

- [14] Ms. Liburd submitted that the injuries suffered by William warrants an award of \$7,000 for general damages. In support, Counsel referred to the case of **Jones (a child) v Morgan (September 1996)** in which the sum of £3,250.00 (US\$5,850.00) (£4,209.36 or US\$7,576.85 – updated value) was awarded to a person who suffered a simple fracture with the leg in a plaster cast for 5 weeks and who took another 2 – 3 weeks to resume walking normally. A complete recovery was made.
- [15] Any compensation awarded is meant to put a claimant in the same position he would have been in had the accident not occurred, in doing so the court is guided by awards for comparable injuries in other jurisdictions having similar social and economic conditions to those prevailing in the British Virgin Islands.
- [16] The injury suffered by William, to my mind, is not one which is at the top end of the scale for such injuries. His injuries do not equate to that of utmost severity to attract such an award. William is not disabled, he does not require further medical attention, he has made a complete recovery and has since returned to the normal activities pursued by a child of his age. I have considered the authorities cited and the most comparable case is **Jones (a child) v Morgan**. No local cases emanating from the BVI have been cited which is regrettable. Taking into consideration the matters to be considered as per the **Cornilliac** case and the authorities I am of the view that US\$9,000.00 represents a fair and reasonable compensation for the injuries sustained by William.
- [17] There is also a claim for interest. An award of interest is generally made on the sum awarded for general damages from the date the claim was served until judgment. The usual rate is 5% per annum which is akin to the rate applicable on judgments. I will therefore award interest on the general damages at that rate and for that period.

Special Damages

- [18] William made a claim for special damages of \$343.00 in his statement of claim. This was for a police accident report and travel expenses for his guardian. At the time of filing the submissions further sums of \$120 for medical reports and \$400 (future medical expense -

MRI scan) were claimed. The sum of \$400.00 for the MRI is not allowed as I have found that no psychological or psychiatric injury has been established. The sum of \$343.00 as pleaded in the statement of claim was not disputed as no doubt Ms. Malone had to incur these. The Defendant did not challenge the claim for \$120.00 for the medical reports either. I pause to say that this is commendable as there is always a cost associated with obtaining such reports whether or not it is pleaded and having consented to the reports being used it was a natural and fair consequence that the costs would not be challenged unless they were exorbitant. The amount claimed is not unreasonable and the court finds that he is entitled to be reimbursed for that amount even if no documentary evidence was produced at the hearing. I award the sum \$463.00 as special damages with interest from the date the claim was filed until judgment at 2% per annum.

Costs

- [19] This issue here surrounds the effect of the Master's order of April 28, 2006 as it related to costs. On the face of the order it was a decision on an application by Mr. Michael to set aside a default judgment dated April 22, 2005 and that he be allowed to defend. His application was successful. In addition to setting aside the default judgment and giving leave to defend the order stated **'the defendant to pay costs to the claimant in the sum of \$2,000.00 to be paid before the first case management conference in the matter'**. Both Counsel were present at that hearing. The costs were subsequently paid. (At this juncture I interject to say that it strikes me as sad that those who had conduct of the case did not ensure that some of those monies were used to obtain further medical attention for the child bearing in mind his reduced circumstances and the fact that the amount of costs was something of a windfall.)
- [12] Ms. Liburd stated that she understood that the costs order was meant to include the entire costs of the action whereas Ms. Johnson contended that this only covered the costs up to that point. The order does not reflect either position. In the future, any agreement of any significance reached by Counsel during the course of a hearing should be recorded and made part of a court order as this would avoid future misunderstandings as to the effect of the order.

[13] As it is, the award of costs was generous having regard to the nature of the application before the Court on April 28, 2006 but there was no appeal and the order stands. However, the only interpretation I can give to the order is that it was meant to cover the costs of the application which was before the court then. I am fortified in this by CPR 2000 Part 65.11 (1) which stipulates that on determining any application other than one at a case management, pre-trial or trial the court must decide which party is to pay the costs of that application, assess the amount of such costs and direct when it should be paid. No doubt the court was guided by the Rule when making its costs order.

[14] Having so found, it follows that the costs which William is entitled to at the determination of this matter cannot be reduced. He is entitled to the costs of this action which fall to be determined under CPR 65.5 (1) and Appendix C item 6 – that is 60% of prescribed costs on a value of US\$9,000.00. By my calculation this amounts to US\$1,620.00 and I so order.

Conclusion

[15] I give judgment for Master William Malone as follows:

- (1) General damages of \$9,000.00 with interest from the date the claim was served (October 20, 2004) to date of this judgment at 5% per annum;
- (2) Special damages in the sum of \$463.00 with interest at 2% per annum from October 20, 2004 to date of judgment;
- (3) Costs of US\$1,620.00;
- (4) In accordance with CPR 23.13 I hereby give the following directions in relation to the compensation award of US\$9,000.00 -
 - (i) the monies are to be paid into court and the Registrar is to hold these monies on an interest bearing account for the benefit of the minor;
 - (ii) \$400.00 is to be given to the guardian for the purpose of an MRI for the minor;
 - (iii) any monies needed by the guardian for William's welfare shall be disbursed upon written application to the Registrar by the guardian, which application shall be supported by relevant documentary evidence.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands