

THE EASTERN CARIBBEAN SUPREME COURT
SAINT KITTS AND NEVIS

THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2008/0128

BETWEEN:

TRAVIA DOUGLAS

Claimant

and

[1] SHIVOUGHN WARDE

1st Defendant

[2] DWIGHT WARDE

3rd Defendant

[3] NAGICO
(National General Insurance Corporation)

5th Defendant

Appearances:

Mr Courtney Abel of Caribbean Associated Attorneys for the Claimant

Mr John Cato for the 1st and 3rd Defendants

Mr Denzil Hinds, of the Law Offices of Sylvester Anthony for the 5th Defendant

2012: July 06
2012: October 16

DECISION

[1] **THOMAS J:** On 19th March 2010 Mr Justice Francis Belle rendered a judgment in this matter in favour of the Claimant Travia Douglas, against the 1st Defendant, Shivoughn Warde and the 3rd Defendant, Dwight Warde. The learned trial also ordered that the matter be scheduled for assessment of the damages by the Registrar of the High Court. The actions against the 2nd Defendant, Javid Warner and the 4th Defendant, Dominoes Pizza Limited were dismissed with the costs to the said Defendants. However, the Court also

ruled that the Claimant contributory negligent, but without a finding as to the extent of such contributory negligence.

[2] In very brief outline the facts are that on 18th March 2007 the Claimant was a front seat passenger in a vehicle driven by the 1st Defendant and owned by the 3rd Defendant. The vehicle was involved in a traffic accident with another vehicle. The Claimant was injured and resulted in permanent paraplegia.

[3] In her amended Statement of Claim filed on 22nd September 2008 the following reliefs were pleaded

- “(a) Special damages in the sum stated in the schedule attached;
- (b) General damages;
- (c) Damages for personal and psychological injuries suffered by the Claimant;
- (d) Interest pursuant to statute from 18th March 2007 and continuing at 5%;
- (e) Costs;
- (d) Such further or other relief as the Court deems fit”.

[4] On 28th October 2011 this Court gave further directions for the assessment of damages and for the filing and service of legal submissions with authorities on or before 23rd March 2012. Such filings were only effected by the Claimant, and at a hearing of the assessment on 6th July 2012 the decision was reserved. It is significant to record that, in particular, no submissions were filed on behalf of the 5th Defendant.

Special Damages

[5] In written submissions filed pursuant to an Order of the Court under this broad head, the contention is that the sum of \$201,749.24 to the date of 17th February 2012 is claimed and should be awarded.

[6] By way of exhibits to her witness statement the Claimant provides evidence relating to two broad heads: 1. Loss of earnings and 2. Loss of clothing, equipment aids and appliances and transportation.

[7] It is common ground that the rule regarding special damages is that such damages must be expressly pleaded and proven¹. The matter of the different items of special damages must now be considered and analyzed.

Loss of Earnings – Claimant

[8] It is already accepted that there is no contention that the Claimant earned EC274.09 per week, EC\$1187.75 per month and EC\$14,253.00 per year.

[9] The evidence which the Court accepts is that the Claimant last worked at her place of employment on 18th March 2007 so that the loss of earnings would run from 19th March 2007 to the date of the commencement of the trial.

[10] Under this head the claim is for 256 weeks to yield EC\$70,167.04 with respect to the period 19th March 2007 to 12th February 2012. But the significance of the latter date is not clear to the Court. However the rule is that the damages for loss of earnings run from the date after the incident to the date of the commencement of the trial, being 23rd November 2009. Therefore, on the evidence the Claimant is entitled to 48 months at \$1187.75 per month. This works out to be \$52,261.00.

Loss of Earnings – Claimant's mother

[11] The Claimant's mother is Gloria Griffin who worked at Amory Enterprises for a weekly wage of \$386.00². The amount of \$25,562.00 with respect to the loss of wages during the time when she had to assist the Claimant in her helpless condition. Such assistance is addressed by the Claimant in her witness statement.

[12] The period claimed is 1st January 2011 to 17th February 2012 which is long after the initial events both locally and in Trinidad³. Instead, the Court calculates loss of earnings for the

¹ See: *Perestrello E Companhia v United Paint Co Ltd* [1969] 3 ALL ER 478

² Core Bundle of Documents – Exhibit TD1(V)

³ It is to be noted that the schedule of Special Damages was filed on 19th January 2012 but loss of earnings is up to the date of 12th February 2012.

same period as the Claimant, being 19th March 2007 to 23rd November, 2009 – a total of 140 weeks. This amounts to \$16,984.00.

Medical Expenses

[13] The particulars given under this sub-head are as follows:

(a)	Loss of clothing	\$400.00
(b)	Medical Expenses (St. Kitts)	\$1,386.00
(c)	Accommodation (Trinidad)	\$6,304.50
(d)	Medical expenses (Trinidad)	\$118,800.00
(e)	Two (2) days spent in JN France General Hospital	\$500.00
(f)	Transportation to and from the hospital – 152 days x \$40.00	\$6,080.00
(g)	Massage Therapy 06/07 – 10/08 74 massages x \$65	\$4,810.00
(h)	Massage Therapy 11/08 – 11/09 74 massages x \$75	\$12,825.00
(i)	Massages Therapy 11/09 -12/09 9 massages x \$65	\$585.00
(j)	Equipment	\$579.00
(k)	Aids and Appliances	\$600.00
(m)	Pampers and Wipes June 07 – Feb 17, 2012 57 months x \$270	\$15,390.00
(n)	Medicare cream June 07 – Feb 17 th 2012 - 171 weeks x \$50	\$8,550.00
(o)	Medicated soap and powder June 07 – Feb 17 th 2012 – 171 weeks x \$70	\$11,970.00
(p)	Disinfectant June 07 – Feb 17, 2012 171 weeks x \$70	\$11,970.00

(q)	Nurse to change catheter	
	June 07 – Feb 17, 2012 – 171 weeks x \$30	\$5,130.00
(r)	Catheters – June 07 – Feb 17 2012	
	44 weeks x \$18.82	\$828.00
(s)	Urine bags June 07 – Feb 17 2012	
	57 months x \$23.52	\$1,340.64
(t)	Antibiotics June 2007 – Feb 17 2012	
	44 weeks x \$100	\$4,400.00
(u)	Medical Report (Dr Jeffers)	\$500.00
(v)	Medical Report (Dr Lawrence Rawlins)	<u>\$1,500.00</u>
	TOTAL	\$205,944.29

Reasoning

[14] There can be no doubt that the items claimed for purposes of special damages are common to a person who has become permanently paraplegic. And as mentioned before the Claimant has filed extensive documentation to support her claim. However, in some respect the documentation is somewhat unsatisfactory and will be dealt with in due course.

[15] The Claimant herself in her witness statement alludes to this fact. This is the relevant part of her evidence:

“24. I have been shown the schedule of special damages prepared in this claim, from the information provided by me. I can confirm that the items costs set out in the schedule were incurred by me or on my behalf as a direct result of the accident. Some of the expenses are ongoing I refer to a copy of these receipts and invoices marked TD1.

25. I am unable to locate receipts for my loss of clothing aids equipment and travel expenses. However, I have been able to recall the costs of these items. I refer to the document marked TD2 attached to this statement”.

[16] Although with respect to special damages strict proof is required, the Court can accept that with respect to minor items purchased in the past proof may be difficult. On the other hand, the Claimant make mention of inability to find receipts for travel expenses, but again this is

not fatal as the fact of travel can be inferred from the general context of the incident and the medical treatment both in St. Kitts and Trinidad.

[17] The claims for medicated cream, soap, powder and disinfectant are weakened by the fact that no supplier is named and the amounts claimed are in someone's handwriting. But as indicated before, these items are common and necessary in the context paraplegia.

[18] On the evidence therefore, the Court is satisfied that the Claimant is entitled to the \$205,944.24 in special damages for medical expenses for the period 18th March 2007 to 19th March 2010 is a total of 44 months.

General Damages

[19] In the sphere of general damages multiplier and multiplicand are of central importance. And for this reason it is necessary to elaborate thereon.

Multiplier and Multiplicand

[20] In plain terms the multiplier is a quantity by which a given number is to be multiplied. It is central in the award of damages and the Claimant's age and working life form the basis for arriving at the multiplier⁴.

[21] In this connection the following guidelines were enunciated in **Alphonse v Ramnauth**

"In determining the multiplier a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects are that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must bethat the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident.

[22] It is considered that the multiplier arrived at in **Fenton Auguste v Francis Neptune** is in total alignment with this case in that the ages are identical, being both the time of the

⁴ See for example *Moriarty v McCarthy* [1978] 2 All ER. 213 – paraplegic of 24 years gives a multiplier of 15; *Hunter v Severs* [1994]

accident and the medical consequences were the same permanent spinal injuries to the spinal cord with certain secondary consequences.

[23] In the **Fenton Auguste** case the Court of Appeal treated the appellant as having a working life of up to 65 years and fixed the multiplier at 18.

Multiplicand

[24] As regards the multiplicand the following principle was laid down in **Cookson v Knowles** that in arriving at that figure the basis should be the least amount the Claimant would have earned if she had continued to work without being injured.

[25] The uncontradicted evidence is that the Claimant earned based on regular hours \$1187.75 per month⁵.

[26] In sum therefore, for the purposes of this case the multiplier is 18 and the sum of \$14,253.00 represents the multiplicand.

[27] Central to the assessment of damages is the nature and extent of the injuries suffered by the Claimant. The sources of this evidence are the medical reports of Dr Cameron Wilkinson and Dr Peter Poon-King.

[28] Dr Cameron Wilkinson's report says in part as follows:

“Significant findings were:

- Paraplegia with sensory level of T1 T2 she was assessed as having a spinal cord injury possible secondary dislocation of C7 on T1.

She was treated with high dose steroids for 24 hours with no improvement in symptoms.

CT Scan done revealed

- Fracture of the body and laminae of C7
- Fracture of the traverse process and right laminae of T1

The family has been informed that the spinal cord injury secondary to dislocation of C7 or T1 is permanent and therefore the resultant paraplegia is permanent”.

[29] Dr Peter Poon-King details the following:

⁵ See exhibit TD1 to the witness statement of Travia Douglas

"Ms Douglas has been an impotent for approximately the last eight weeks following spinal injuries which she reportedly sustained following a road traffic accident in St. Kitts. She has undergone cervical spine surgery (insertion of rods and screws/unlocking reduction) on 3/4/07 and has grade 3 to 4 power in her upper limbs, but unfortunately sensation below the waist. There has been no change in the motor strength of her lower limbs which are paralyzed (ie grandeo). The (Prognosis for lower limb recovery is not good. However, the rehabilitation process continues and sitting balance is satisfactory. She will not be able to transfer but it is anticipated that with continued exercise, she will be able to achieve this. She is able to feed herself and with help and grooming but it is dependant in other activities of daily living.

A urinary catheter is in situ and is changed monthly (mother has observed but has not yet changed the catheter herself). Bowel movements are spontaneous. Skin condition is good.

Investigations have included MRI of cervical spine..., hb11.1 g/dl, WBC and platelets as well as UECR and LFT all normal. Blood group is Group A Pos.

Recommendation

- 1) Arrangements for acquisition of the following have been made
 - Hospital bed
 - Ripple mattress
 - Transfer board
 - Wheelchair
- 2) Reports will be obtained from
 - Nurse in charge
 - Physiotherapist
 - Neurosurgeon (Mr Bedaysie)

Follow up in St. Kitts will be done by Mr Bedaysie

It would also be wise to have nursing follow up arranged re: teaching mother about catheterization.

Dr Peter Poon-King".

[30] The recommendations of Dr Lawrence C. Rawlings cover a wide spectrum of issues relating to the Claimant. In his Medical Summary the following is part of what he records:

"In order for her to maintain her physical and mental well-being several measures will have to be instituted. These include:

- 1) The purchase of a motorized wheelchair
- 2) The use of a water mattress for decubitus ulcer prevention (the mattress to be replaced at intervals)
- 3) Bathroom railings to be installed
- 4) Construction of wheelchair ramps
- 5) Increasing the width of doorways to allow passage and turning of a wheelchair. All rooms and passages should be wide enough to provide an adequate turning radius for a wheelchair.

- 6) Continued physiotherapy (for strengthening of the upper extremities and to provide passive exercise for the lower extremities and to provide passive exercise for the lower extremities.
- 7) Occupational therapy and job training for gainful employment either at home or at an outside location.
- 8) Catheter care and replacement
- 9) General nutritional and dietary support.
- 10) Care for her fecal incontinence (daily)
- 11) Although she is theoretically capable of becoming pregnant, she no sensation in the lower two-thirds of her body, has no bladder control, and is unlikely to engage in sexual intercourse, pregnancy is a remote possibility.
- 12) It is quite possible that she could have some elements or bouts of depression as a result of her general disability".

[31] In the celebrated case of **Cormilliac v St Louis**⁶, Chief Justice Hugh Wooding enunciated the following factors which must be taken into account in assessing general damages:

- 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 been endured
- d) The loss of amenities
- e) The extent to which, consequently the persons primary prospects have been materially affected.

Nature and extent of injuries sustained

[32] The reports from the two doctors involved in treating the Claimant was quoted above so that at this juncture it suffices rendered a paraplegic at age 21. In her witness statement the Claimant said that the accident happened quickly and in the end she was on the grass and could not move.

Pain and suffering and loss of amenities

[33] These two factors are usually considered together because of their close relationship

Submissions

[34] Learned counsel for the Claimant, Mr Courtney Abel, in part submits the following:

⁶ [1965] 7 WIR 491

"It is submitted that the case of *Auguste v Neptune* is directly applicable to the present case to pain and suffering and loss of amenities. But it was decided some 15 years ago. Based on *Heil v Rankin* [2000] 2 WRC 1173 uplift through February 2012 it is submitted that to keep pace with cost of living, inflation rates and other changes since then an appropriate award under this heading would be \$312,234.69 (\$115,021.49 for pain and suffering and \$197,213.20 for loss of amenities)⁷".

[35] The case of **Fenton Auguste v Francis Neptune** involved 21 year old person who as a result of an accident became paraplegic. In the High Court the award for pain and suffering and loss of amenities was \$55,000, but on appeal this was increased to \$200,000.00.

[36] Justice of Appeal Singh reasoned thus: "In computing this sum, I considered \$75,000.00 a reasonable award for pain and suffering. This involved consideration of the nature and extent of the injuries sustained the appellant's personal awareness of pain and his capacity for suffering. For loss of amenities I considered the sum of \$125,000.00 reasonable. This involved consideration of the nature and gravity of the resulting physical disability, the fact of the deprivation which is a substantial loss, whether or not the appellant is aware of it".

[37] In **Cletus Dolor v Alcide Antoine et al**⁸ a case involving a quadriplegic, Madame Justice Heriprashad-Charles in considering the award of damages for pain and suffering and loss amenities had this to say:

"34. Obviously, damages for pain suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering.

36. In terms of loss of amenities, it is authoritatively settled that is in respect of the objective loss of amenities that the damages will be determined. Hence loss of enjoyment of life and the hampering effect of the injuries in the carrying out of the normal social life and personal routine of life, with the probable effect on the health and spirits of the injured party are all proper considerations to be taken into account. Amongst the loss of amenities of life, there are to be considered: the injured persons inability to engage in indoor or outdoor games, his dependence, to a greater or lesser extent, on the assistance of others in daily life, the inability to copy

⁷ The cases cited *Auguste v Neptune* [2000] 56 WIR 229 and *Cletus Dolor v Alcide Antoine et al* SLUHCV2001/0555

⁸ Claim No SLUHCV2001/0555

by looking after, caring for and rendering the accustomed services to a dependent; his sexual impotence, any prejudice to the prospects of marriage and his inability to lead the life he wants to lead before the injuries”.

[38] In the above-mentioned case the learned trial judge awarded \$100,000.00 for pain and suffering and \$150,000.00 for loss of amenities. At the same time, the Claimant in the said case, Cletus Dolor, was a quadriplegic and was 27 years old at the time of the accident.

[39] In seeking to arrive at an award for pain and suffering and loss of amenities the Court adopts the following dictum of Lord Hope of Craighead in **Wells v Wells**⁹:

“The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. At that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable, cases as represents the Court’s basic estimate of the plaintiff’s damage”.

[40] The foregoing is not a new principle it merely reiterates an old principle in recent times. Thus, the Court agrees with learned counsel that the case of **Auguste v Neptune** is on point in many important respects. The most important being the age of 21 and the resulting paraplegic condition. The latter facture renders Cletus case distinguishable in that the Claimant in that case was a quadriplegic.

[41] But it is common ground that **Auguste v Neptune** was decided some 15 years ago so that the rate of inflation must be considered in making the award.

[42] There is no direct evidence of the level of pain endured by Travia Douglas but she did say in her evidence that after the brief moments of the accident she could not move which turned out to be the loss of movement below the waist. And she has remained that way.

[43] In terms of loss of amenities the Claimant’s evidence is that:

“I was an active person living a normal life and I had a boyfriend with whom I enjoyed an active and normal sexual life and had way expectation to live a normal life, working to take care of myself and eventually managing and eventually raising

⁹ [1998] 3 All ER 481

a family¹⁰. I also enjoyed going out and socializing with my friends. I enjoyed participating in sports and watching football¹¹".

[44] Further evidence is provided by Dr Derreck M. Jeffers who says that the Claimant's sexual organs have not been affected, however due to her condition she will not be able to enjoy sexual activity.

[45] The following is an extract from Dr Derreck M Jeffers Report:

"With normal menstrual cycles and physical examination there seem to have been no impairment of her reproductive system. However, her paraplegia will significantly impair her voluntary involvement in sexual activity and enjoyment. The presence of the in-dwelling transu catheter can also affect body perception. Paraplegia has not been shown to negatively impair pregnancy outcome but there has been an increase of cesarean section¹²".

[46] Though not stated by the learned doctor the condition of the Claimant, by implication is likely to affect her relationship with a person of the opposite sex and by prospects of marriage.

[47] In all the circumstances of the Claimant's case and having regard to the award in **Alphonso v Neptune** and 15 years that have elapsed since that award, the Court will apply a 30% increase in keeping in normal rise in inflation.

[48] On that basis the award for pain and suffering is rounded off at \$100,000.00¹³; and the award for loss of amenities is \$170,000.00¹⁴.

Loss of future earnings

Submissions

[49] Learned counsel for the Claimant places emphasis on the nature of the injuries and the proposition that she is not likely to be re-employed.

¹⁰ Witness statement filed 6th January 2012 pursuant to an Order of the Court dated 28th October 2011.

¹¹ Witness statement filed on 3rd November 2008 pursuant to a Case Management Order dated 18th September, 2008

¹² See Claimant's Medical and Architectural Reports at page 3

¹³ The actual calculation is \$97,500.00

¹⁴ The actual calculation is \$162,500.00

[50] After referring to the principles relating to the multiplier and multiplicand learned counsel goes on to submit the following:

"Applying these principles to the present case, the Claimant had a probably working life expectancy of up to 62-65 years averaging about 40 years more working life. The Claimant was at the age of 21 when the incident occurred and is currently, at the date of the trial at about 26 years. As such following the assessment given by the learned Satrohan Singh JA in the 1997 appeal decision of *Auguste v Neptune* 56 WIR 229 ...the appellant suffered spinal injuries and was rendered paraplegic a multiplier of 18 was substituted for a multiplier of 15. It is therefore submitted that the appropriate multiplier applicable to the present case is 18".

[51] It has already been determined that the multiplier in this on this case is 18 and the multiplicand is \$14,253.00. These variable yield damages for loss of future earnings of \$256 554.00.

Cost of future care

Submissions

[52] The submissions on behalf of the Claimant on this head of general damages are these:

"62. The medical report of Dr Rawlings does not indicate that Ms Douglas will require the need for a qualified nurse but done to the extent of her injuries, the Claimant will until the time of her passing require constant care and assistance.

63. Someone has to be there to provide with her nutritional and dietary needs as well as help unto and out of wheelchair. She would also need someone to look after her personal hygiene due to her lack of mobility and her urinary and fecal incontinence (to change and replace her urinary catheter once every month. Her care assistance is presently being provided by her mother who has had to give up her full time job in order to provide the full time care which the Claimant needs and is supplemented to some extent by other family members.

[53] The submissions end with the proposition that since the Claimant's mother worked at American Bakery at a monthly salary of \$1,672.67 now the primary catheter this should be reflected in damages.

[54] The Court agrees. And therefore using the multiplier of 18 multiplicand of this \$14,253.00 amounts to \$256,590.00.

Antibiotics

- [55] It is submitted that the Claimant needs antibiotics to prevent any urinary infection which cost EC\$100.00 every six weeks.
- [56] The Court accepts this submission and therefore for one year (52 weeks) the treatment would be required 8.66 times multiplied by \$100.00 equals EC\$866.00. Using the multiplier of 18 the amount is \$15,588.00. This amount is awarded as damages.

Pampers catheters and urine bags

- [57] Pampers, catheter and urine bags are mentioned in the medical evidence given the Claimant's circumstance.
- [58] According to the submissions and the evidence cost of papers is \$270.00 and \$3240.00 annually. Applying the multiplier of 18 the award is \$58,320.00.
- [59] The cost of a catheter is \$18.82 every six weeks and annually the costs is \$18.82 x 8.66 yielding \$16,298.00. And applying the multiplier of 18 the award of danger is \$2,933.64.
- [60] The monthly cost of a urine gas is \$23.52 and annually \$282.24. And applying the multiplier of 18 the award of damages is \$5080.32.

Doctor visits physical and massage therapy

Doctor visits

- [61] The only indication of doctor visits is contained in the medical report of Dr Peter Poon-King in which it is stated that "follow up in St. Kitts will be done by Mr Bedaysie". There is no mention of a fee.
- [62] In the submission a monthly fee of \$30.00 is advanced which amounts to \$360.00 annually. However, the Court considers that this fee is entirely unrealistic given that Dr Bedaysie as the evidence suggested that he is not a St. Kitts or Nevis doctor and the amount to be awarded is a one-off payment. As such, the Court considers that \$100 monthly is more

appropriate. Thus the annual amounts would be \$1200.00 and applying the multiplier of 18 award is \$21,600.00.

Physical therapy

[63] There is evidence that a weekly fee of \$35.00 was charged in 2007. This is the amount claimed which means that the annual fees will be \$1820.00 and applying the multiplier of 18 – the amount is \$32,760.00.

Massage therapy

[64] A weekly fee of \$75.00 is claimed for massage therapy. This differs from the fee of \$65.00 paid with respect to June 2007 and October 2008¹⁵. However, the Court accepts this fee given the underlying principle that it is a single lump sum payment for the rest of the Claimant's life.

[65] Using the figure of \$75 the annual amount would be \$3900.00 and when the multiplier of 18 is added the award is \$70,200.00.

Reconstruction of the Claimant's home

[66] The submissions in this regard are that the estimate cost of the reconstruction was assessed at \$69,522.00 by Mr Oflyn Rogers, Architectural Technologist. On the other hand, the estimated cost of repairs and cosmetic upkeep every 5 years will be necessary. It is further submitted that when the multiplier of 18 is applied the repairs and cosmetic upkeeps will be necessary 3.6 times at the rate of 20% of the replacement value of the home modification costs. This according to the submissions amounts to \$50,055.89.

[67] There is nothing in the evidence to contradict these submissions based on the estimates.

[68] The total damages for reconstruction and repairs amounts to \$69,522.07 plus \$50,055.89 – a total of \$119,577.96.

¹⁵ See exhibit TD1(E), Core Bundle of Documents. However a fee of \$75 was paid during the period November – December 2008 and January – November 2009 – schedule of special damages p.53

Adjustable bed, ripple mattress and pillows

[69] With respect to the adjustable bed the submission is for such a bed at a value of \$9,162.68 with a warranty of 5 years to be replaced 3.6 times in 18 years. The damages sought amounts to \$32,985.65.

[70] The adjustable (hospital) bed is a recommendation of Dr Peter Poon-King. In this regard the submission is that the cost is \$1500.00 with a three year warranty to be replaced 6 times over the period of 18 years. The total cost is \$9,000.00.

[71] The Court accepts the submissions and the award is \$9000.00.

Pressure ulcer prevention

[72] There are submissions in relation to this item with the damages sought being \$20,967.68.

[73] The origin of this submission is unknown as it is not a recommendation of Dr Peter Poon-King. This amount is therefore disallowed.

Cervical spine support pillow

[74] According to the submission, the cost of this item is \$322.45 with a 3 year warranty to be replaced 6 times over the period of 18 years equals \$20,967.96.

[75] Although there is no recommendation with respect to this item, the Court accepts that a special pillow for a paraplegic is reasonable.

[76] The award for the fitting cervical spine support pillow is \$20,967.96.

Motorized wheelchair

[77] This is one of the recommendation of Dr Lawrence C Rawlins which follows from the Claimant's condition.

[78] Further, according to Dr Peter Poon-King, the Claimant has grade 3 to 4 power in her upper limbs after spine surgery.

[79] According to the submission on this item, the cost is \$13,965.20¹⁶ with a five year warranty to be purchased/replaced 3.3 times over 18 years equals \$50,274.72.

[80] There is also a submission on a pressure reducing cushion and cushion cover at a cost of \$1323.13¹⁷ with a two year warranty to be purchased approximately 9 times over 18 years.

[81] The Court has no difficulty with these two items and the award is \$62,182.89

Mobility scooter, handicapped minivan and patient lift

[82] It is common ground that the purpose in awarding damages is to put the Claimant back in the position he or she would have been but for the event giving rise to liability¹⁸.

[83] In her supplemental witness statement the Claimant addresses the items:

- “(c) A mobility scooter and its accessories, before the accident I use to enjoy going in and out of stores either shopping or sightseeing to be able to just frequent places and areas of St. Kitts I enjoyed so much and to be able to partake of these old habits and activities which one would take for granted would be so uplifting to me.
- (d) A patient lift, this would assist my mother who is my primary caregiver in being able to lift me safely and appropriately and not strain herself, ultimately preventing further injury to myself.
- (e) A handicapped equipped minivan, currently my parents are unable to take me to places I have to call for a van service. To be able to have a wheelchair accessible minivan that is redesigned to fit my personal needs and permanent setback, would prevent me from feeling as depress[ed] as I do on some days because I am unable to accompany family and friends to neighbouring places”.

[84] The Court is satisfied, in the absence of any contrary evidence that the Claimant has made out a case for patient lift and a handicapped equipped minivan, but not for a mobility scooter. In this regard it is the reasoning of the Court that the motorized wheelchair can be used to get in and out of stores and sightseeing with the help of the handicapped minivan.

[85] The awards are as follows:

¹⁶ See quotation in Exhibit TD4: Statements, Quotations and Invoices

¹⁷ Ibid

¹⁸ McGregor

- (a) handicapped equipped minivan EC\$133,899.24 with a 5 year warranty to be purchased 3.3 times over 18 years equals \$482,037.26¹⁹
- (b) patient lift \$20,284.97 with a 2 year warranty to be purchased/replaced 9 times over 18 years equals \$182,564.72

Shipping costs

- [86] The estimated cost of shipping a 40 ft container, according to the submissions, from the United States including validation, is \$19,330.85. There is however no documentation.
- [87] In the circumstances the principle that the Court must do the best it can in the face of incomplete evidence by making the best it can given the circumstances²⁰.
- [88] The award for shipping and validation is \$20,000.00.

Contributory negligence

- [89] In his judgment on liability in this matter Mr Justice Francis Belle ruled that the Claimant was contributorily negligent. Unfortunately having heard the evidence and assessed the witnesses the learned trial judge did not further rule on the extent of the Claimant's contributory negligence.
- [90] Contributory negligence is essentially carelessness on the part of the Claimant to take care of herself which combines with the defendant's negligence or breach of duty in bringing about the Claimant's damage. It is a failure on the part of the person injured to take reasonable care of himself in his own interest²¹.
- [91] In the case of **E v H**²² concerned, in part contributory negligence in that the Claimant, whose vehicle was struck from behind, was not wearing a seat belt and she suffered severe whiplash Smellie CJ held that a reduction of 10%, rather than the customary 15%, to 20% was appropriate for the Claimant's contributory negligence to reflect the debatable

¹⁹ See quotations in Exhibit TD4 – Statements, Quotations and Invoices

²⁰ See: *Biggin Co v Permanite Ltd* [1950] 2 All ER 859 *Ashcroft v Cubin* [1971] 3 All ER 1208

²¹ See for example: *Jones v Livox Quarries Ltd* [1952] 2Q, 3608, 615

²² [2000] CULR 347

extent to which the seat belt would have operated in the way designed and intended, given the fact that the driver's seat did separate from the chassis of the vehicle.

[92] Also in **Froom v Butcher**²³ the principle was re-stated in relation to the driver and front seat passenger at the Court went on to rule that the damages should be reduced by 25%.

[93] Learned counsel for the Claimant has submitted that in this case the damages should be reduced by 15%. The Court does not agree for the following reasons: 1. The accident occurred in 2007 when the matter of wearing seat belt was common. 2. The Claimant on her own evidence for these proceedings does a lot of travelling in vehicles. 3. There is no evidence of any defect in the seat belt apparatus. 4. The Claimant was an adult at the time of the incident. It is reasonable to infer that the 1st Defendant developed great speed between the Marriott Hotel and the scene of the accident given the events that ensued. Therefore the Claimant should have taken steps to safeguard herself.

[94] It is the determination of the Court that the damages should be reduced by 20%.

Liability to pay damages

[95] The result of the trial on liability in this matter is that the Court determined that the 1st and 3rd Defendants were liable in negligence. At that stage the 5th Defendant was not a party to the proceedings. However, on the application by the Claimant for an interim payment, which was successful, Nagico was added to the proceedings as the 5th Defendant and undertook to pay the sum of \$231,000.00 to the Claimant which was in fact paid by Nagico.

[96] The Court draws the reasonable inference that the payment by the 5th Defendant acknowledges this execution of a policy of insurance with the 3rd Defendant, the owner of one of the vehicles involved in the accident.

[97] It is some importance to note that following the directions for the filing of submissions given by this Court on 28th October 2011, no submissions were filed by the 5th Defendant. And it

²³ [1976] Q.B. 286

is of further importance to note that on 18th May 2012 the 5th Defendant made application to be removed from proceedings. The application was denied. Even further, at all Chamber hearings, with one exception²⁴ leading up to directions for assessment. Nagico, represented by learned counsel, Mr Denzil Hinds, appeared amicus until it was joined as a party to the said proceedings. Plus there were no application by the 5th Defendant after it was made a party to the proceedings, except to be removed as a party.

[98] In all the circumstances it is the determination of the Court that the 1st, 3rd and 5th Defendants are jointly and severally liable to pay the damages to the Claimant.

Interest

Special Damages

[99] Interest on the special damages shall be at a rate of 3% per annum from the date of the incident, being 18th March 2007 to 23rd November 2009 – the date of the commencement of the trial.

General Damages

[100] Interest at the rate of 6% per annum is awarded on the damages of \$270,000.00 for pain and suffering and loss of amenities from the date of the service of the claim form, being 26th June 2008, to the date of the commencement of the trial – 23rd November 2009.

[101] No interest is awarded on any of the other head of general damages.

Costs

[102] The Claimant is entitled to her costs to be calculated in accordance with Part 65.5 of CPR 2000.

²⁴ Nagico did not appear at the Chamber hearing on 27th May, 2011.

ORDER

[103] IT IS HEREBY ORDERED AND DECLARED as follows:

1. The Claimant is awarded special damages in the following amounts:
 - a. Loss of earnings – Claimant: \$52,261.00
 - b. Loss of earnings – Claimant's mother: \$16,984.00
 - c. Medical expenses: \$209,607.50
 - Total Special damages \$218,852.50**
 - a. Pain and suffering and loss of amenities: \$100,000.00 + \$170,000.00 = \$270,000.00
 - b. Claimant's loss of future earnings: \$256,554.00
 - c. Claimant's future care: \$361,296.72
 - d. Antibiotics: \$15,558.06
 - e. Pampers, catheters and urine bags: \$58,320.00 + \$2933.64 + \$5080.32 = \$66,333.96
 - f. Doctor's visits: \$21,600.00
 - g. Physical therapy: \$32,760.00
 - h. Massage therapy: \$70,200.00
 - i. Reconstruction and repairs of the Claimant's house: \$119,577.96
 - j. Adjustable bed, ripple mattress and pillows: \$32,985.65 + \$9,000.00 + \$20,967.96 = \$62,953.61
 - k. Motorized wheelchair and pressure reducing cushion: \$50,274.72 + \$62,182.89 = \$112,457.61
 - l. Handicapped equipped minivan and patient lift: \$482,037.26 + \$182,564.72 = \$664,601.98
 - m. Shipping costs: \$20,000.00
2. The damages awarded to the Claimant shall be reduced by 20% on account of the Claimant's contributory negligence.

3. Interest on the amounts awarded at special damages shall bear interest at the rate of 3% per annum from the date of the incident, being 18th March 2007 to 23rd November 2009, the commencement of the trial.
4. Interest on the award of \$270,000.00 for pain and suffering and loss of amenities shall be at the rate of 6% per annum from the date of the service of the claim form, being 26th June 2008 to 23rd November 2009, being the date of the commencement of the trial.
5. No interest is awarded on the other heads of general damages.
6. The Claimant is entitled to her costs to be calculated in accordance with Part 65.5 of CPR2000.

Summary total of damages awarded

Special damages: \$281,484.24

General damages: \$1,192,310.50

Total \$1,473,794.74

Reduced by 20%: \$1,473,794.74

\$294,758.94 = **\$1,179,035.80**

Addendum

[104] The documentation to support some of the heads of general damages are wholly inadequate in some instances. For instance with respect to the matter of antibiotics the 'invoice' is in someone's handwriting rather than an invoice from a pharmacy. Same applies to the items such as pampers and urine bags. The 'invoice' is also in someone's handwriting. What has saved the day for the Claimant are the recommendations of Dr Peter Poon-King and especially those of Dr Lawrence Rawlins.

[105] The Court notes that the items such as a minivan in being imported from the United States and presently it was a left had drive. This is likely to create serious problems to get the wheelchair in and out given the legal requirement for vehicles to drive on the left side of the road.

Errol L Thomas
High Court Judge (Ag)