

EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE

GRENADA

CLAIM NO: GDAHCV2011/0568

BETWEEN:

DAWN NOEL

Claimant

and

DON JOHN

Defendant

**Appearances:**

Ms. Cherrelle R. Bain of Derick Sylvester & Associates, for the Claimant

Ms. Ria A. R. Marshall of Henry, Henry & Bristol for the Defendant

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2012: July 2, 25  
December 21.

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**DECISION ON ASSESSMENT OF DAMAGES**

**Background Facts**

- [1] **CENAC-PHULGENCE M [AG.]:** On 14<sup>th</sup> February 2010, at about 12:30 a.m., the claimant, Dawn Noel was a passenger in the vehicle driven by the defendant when the said vehicle was involved in a motor vehicular accident on Lagoon Road, St. George's when it collided with a wall. At the time of the accident, the claimant was seated in the front passenger seat. As a result of the accident, the claimant went into a state of unconsciousness and suffered pain, injury and damage which continues to date. At the time of the accident the claimant Ms. Noel was 24 years old having been born on 17<sup>th</sup> February 1985 and was employed as a ward clerk at the General Hospital where she is employed to date.

- [2] On 2<sup>nd</sup> December 2011, the claimant filed a claim form and statement of claim for general damages for negligence, damages for personal injuries and loss, special damages in the sum of \$10,989.75, costs and interest. The claimant's claim for special damages was \$34,663.17, of which \$23,673.42 was paid by the insurance company as an interim payment. The defendant acknowledged service of the claim on 15<sup>th</sup> December 2011 and admitted the whole claim.
- [3] Judgment on admission was entered by the Registrar on 25<sup>th</sup> January 2012 for the amount of \$10,989.75, the amount of special damages claimed plus interest and costs totalling \$13,495.25. Special damage is therefore not in issue in this assessment. General damages were to be assessed by the master. I find the practice of granting a judgment in respect of special damages while leaving the assessment of general damages to be carried out at a later date most curious. In cases such as this, the assessment should have been in relation to both special and general damages which would have afforded the appellant the opportunity to put in evidence expenses incurred even after the date of the claim and the Court would then have carried out an assessment with respect to special and general damages. I note that there was no evidence led as to other expenses incurred by the appellant although her counsel had indicated that further evidence of special damages would have been provided.
- [4] The claimant filed an affidavit in support of assessment on 15<sup>th</sup> June 2012 pursuant to an Order of the master dated 27<sup>th</sup> March 2012. Counsel for the parties were to file submissions and authorities to assist the Court in relation to the assessment of general damages and these were filed by the claimant on 23<sup>rd</sup> August 2012 and by the defendant on 24<sup>th</sup> August 2012.

## General Damages

- [5] In assessing general damages, the Court is guided by the well-known case of **Cornilliac v St. Louis**<sup>1</sup> which sets out the considerations which must be borne in mind by the court when assessing general damages. Both counsels have made reference to this case in their submissions. Those considerations are:
- (a) the nature and extent of the injuries sustained;
  - (b) the nature and gravity of the resulting physical disability
  - (c) the loss of amenities, if any; and
  - (d) the extent to which, consequentially, pecuniary prospects are affected.

### The nature and extent of the claimant's injuries

- [6] The claimant, Ms. Noel suffered the following injuries as a result of the accident which are detailed in the medical report of Dr. Vibart Yaw, an Oral and Maxillo Facial Surgeon dated 8<sup>th</sup> August 2011 and exhibited to the affidavit in support of assessment filed by Dr. Yaw on 17<sup>th</sup> July 2012. In that report and in Ms. Noel's affidavit in support of the assessment, the injuries are stated as being: (1) facial laceration approximately 15 cm long in the right Zygomatic region;<sup>2</sup> (2) laceration to the right lower lip approximately 10 cm long; (3) intraoral laceration of approximately 20 cm in the right cheek; (4) comminuted fracture<sup>3</sup> of the right maxilla-malar complex<sup>4</sup> and (5) comminuted fracture of the right anterior region of the mandible or jaw bone.
- [7] The claimant was hospitalised for eight (8) days from 14<sup>th</sup> to 22<sup>nd</sup> February 2010 during which time she underwent emergency surgery at the General Hospital. This surgery involved a direct fixation with plate and screws of the mandible fracture, fixation of the right maxilla malar region using a Foley Catheter and toilet

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<sup>1</sup> (1965) 7 WIR 491.

<sup>2</sup> The region of the face outlined by the zygomatic bone (cheekbone, malar bone); the prominence above the cheek.

<sup>3</sup> According to [www.medterms.com](http://www.medterms.com), 'a fracture in which the bone is broken, splintered, or crushed in a number of places.'

<sup>4</sup> The maxilla-malar complex plays a key role in the structure, function and aesthetic appearance of the facial skeleton. See [www.emedicine.medscape.com/article/867687-overview](http://www.emedicine.medscape.com/article/867687-overview).

and suturing of the lacerations. The claimant in her affidavit states that she spent her 25<sup>th</sup> birthday in hospital and that she was traumatized by the accident. Upon her release from hospital on 22<sup>nd</sup> February 2010, the claimant remained at home undergoing partial recovery until 23<sup>rd</sup> April 2010. During that period, the claimant was cared for by her mother, brother and sister who provided her with the necessary care and assisted her in performing her daily fundamentals.

- [8] The claimant had to undergo three other surgeries in Barbados. After the surgical procedures in Barbados the claimant remained on sick leave until 16<sup>th</sup> February 2011. The defendant I think incorrectly states that the claimant underwent three surgeries at General Hospital and one in Barbados. The claimant indicates that to date she continues to experience intermittent pain and discomfort from the injuries which she sustained.

#### **The nature and gravity of the resulting physical disability**

- [9] The claimant in her affidavit states that she is permanently scarred, a fact which is borne out by the medical reports, and suffers discomfort. She experiences an uncomfortable 'freezing up' of the right side of her face whenever she drinks cold liquids or when the weather is generally cold. She says she cannot move the right side of her face very well and the right side is permanently stiff and heavy. The right side of the claimant's face is permanently stiff and heavy as a result of a steel instrument which was surgically inserted in the right jaw. This steel instrument is a permanent and lifelong fixture. In cross-examination, the claimant stated that when using a spoon it falls out of her mouth on the right side as she is unable to feel.
- [10] Ms. Noel further states that whenever she washes her hair or it gets wet she feels extremely dizzy. Dr. Vibart Yaw in his affidavit of 17<sup>th</sup> July 2012 stated that Ms. Noel would be wearing dentures as she had lost three permanent teeth. He said that she would have loss of function of the facial muscle due to damage of the facial nerve, which damage he says is permanent in nature. Dr. Yaw in cross-examination confirmed that he had attended to the claimant from the time of her

accident until her treatment in Barbados and then after Barbados he saw her once in the month of June 2012 when he did a new prosthesis for her. He said that the claimant needed a new prosthesis since the old one had become slack as it was made soon after the accident and after the bone had healed it got slack and needed replacing.

[11] Dr. Yaw also testified that the mandible is fully healed but in relation to the maxilla, even though healed, there is a slight defect due to loss of bone. He stated in his report that he had referred the claimant for plastic surgery and in cross-examination clarified that plastic surgery although able to replace the bone would not cure the damage to the nerve which is of a permanent nature. In terms of loss of function, Dr. Yaw estimated this at about 20%. It is noted that the claimant suffered a comminuted fracture of the right maxilla-malar region which is the region of the face which plays a key role in the structure and aesthetic appearance of the facial skeleton. That in my mind is significant as it suggests that the claimant would be left with some facial deformity as a result of such a fracture.

[12] The affidavit of Dr. Jennifer Japal-Isaacs filed on 17<sup>th</sup> July 2012 with the medical report dated 20<sup>th</sup> June 2012 exhibited in support of the assessment confirmed that she had seen the claimant on 20<sup>th</sup> June 2012. She reports that on examination she observed that the facial scar is still evident and is expected to be permanent. Dr. Isaacs states that the claimant has residual numbness and loss of function of the facial muscle on the right side due to damage to the facial nerve on that side. Like Dr. Yaw she says that this damage is permanent. Dr. Isaacs recommended periodic maxilla facial follow up to assess any developing complications. The defendant submits that this report was done 2 ½ years after the injuries were sustained and the question of the weight to be attached to the evidence of Dr. Isaacs is a matter for the court. The defendant points out that no defence was filed by him and he has not been given the opportunity to independently prove the medical evidence provided by Dr. Yaw. There is no evidence to contradict Dr. Isaacs' evidence which merely confirms and supports Dr. Yaw's evidence. The

defendant had indicated an intention to cross-examination Dr. Isaacs but abandoned this on the date of hearing.

### **The loss of amenities**

- [13] The claimant in her affidavit in support indicates that her life has been significantly altered as a result of the accident and her enjoyment of life reduced. Ms. Noel in her affidavit further states that she was a very active person before the accident; she enjoyed good health and had no significant health concerns. She was an avid netballer and played for Queen's Park Rangers. In fact, the night of the accident was after the first netball community tournament which she had participated in. The claimant states that she considered herself to be an intelligent young woman and was aspiring to become a flight attendant and having a baby. She says she has abandoned all such aspirations since the accident. The defendant in his submissions submits that the claimant has led no further evidence that her injuries have significantly impacted her physical ability to be an active woman.
- [14] Ms. Noel says she is extremely insecure as a result of her scars and this has affected her life drastically. She says she now has a low self-esteem and is very conscious of her injuries. She believes that the facial scars have made her less attractive and consequently she has lost a great measure of self confidence.
- [15] In her affidavit, Ms. Noel states that she is hesitant to resume her pre-accident social life as she is self conscious about the disfigurement of her face. She says she is often bombarded with questions about her facial scars whenever she attempts to go out in social settings.
- [16] It was clear from Ms. Noel's cross-examination that although her injuries have not affected her physical ability to carry out her job, they caused her discomfort in the work environment. She stated that in the beginning people wanted to know what had happened to her and she would feel abnormal especially when she met new people as they would stare at her. She said it was very awkward for her. She recounted how persons would approach her thinking she was a patient rather than

an employee. Ms. Noel indicated that she still feels awkward but she is getting accustomed to it. The defendant points this out in his submissions with respect to an award for loss of amenities, but from the Court's assessment, Ms. Noel appeared to be a positive individual who has attempted to accept her injuries and I therefore do not read too much into her statement that she is accustomed to persons staring or asking questions about her face.

### Assessment guidelines

- [17] In assessing general damages, the court must have regard to recent comparable awards in its own and other jurisdictions with comparable social and economic circumstances to assist in arriving at the quantum of damages which is to be regarded as fair compensation to the claimant. As was stated by Lord Diplock in **Wright v British Railways Board**,<sup>5</sup>

"... non-economic loss constitutes a major item in the damages. Such loss is not susceptible of *measurement* in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on idiosyncrasies of the assessor, whether jury or judge, **the figure must be 'basically a conventional figure derived from experience and from awards in comparable cases.'**" (my emphasis)

- [18] In the case of **Wells v Wells**,<sup>6</sup> Lord Hope of Craighead observed as follows:

"The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All 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 best estimate of the plaintiff's general damages." (my emphasis)

- [19] The approach is therefore to look at comparable cases in making an assessment of damages. In the United Kingdom, the Judicial Studies Board ("the Board") has provided guidelines to assist in the assessment of damages and achieving a measure of consistency in awards in personal injuries claims. The categorisation of facial injuries and range of awards suggested by the Board is particularly helpful

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<sup>5</sup> [1983] 2 All ER 698 at 699.

<sup>6</sup> [1998] 3 All ER 481 at 507.

as it assists in assessing the nature and extent of the claimant's injuries. The Board considers that the assessment of facial injuries is an extremely difficult task, there being three elements which complicate the award. First, while in most cases the injuries described are skeletal, many of them will involve an element of disfigurement or at least some cosmetic effect. Second, in cases where there is a cosmetic element the courts have invariably drawn a distinction between the awards of damages to males and females, the latter attracting the higher awards. Third, in cases of disfigurement there may also be severe psychological reactions which put the total award at the top of the bracket, or above it altogether.<sup>7</sup>

[20] I am also guided by Gordon JA in the case of **Philmore Skepple v Joseph Weekes**<sup>8</sup> in which he quoted with approval the dicta of Singh JA in **Fenton Auguste v Francis Neptune**<sup>9</sup> as follows:

"It is my considered opinion, that the practice of non itemization should be used where it is impracticable to itemise the awards under different heads. This can happen where there is vagueness of the evidence and lack of specific diagnosis of the injury... But where the evidence is such that it is practicable to itemise, such practice should be followed. This is the modern approach, and it is necessary especially when dealing with the issue of interest that is to be awarded under different heads."

The claimant and defendant are entitled to know what is the sum assessed for each relevant head of damage and thus to be able on appeal to challenge any error in assessments.<sup>10</sup>

### **Pain and Suffering and Loss of Amenities**

[21] The claimant submits a figure of \$220,000.00 for pain and suffering and \$90,000.00 for loss of amenities as the appropriate award to be made under this head. The defendant considers that the award for pain and suffering and loss of amenities should be \$52,000.00. The claimant and defendant both helpfully submitted authorities for the court's consideration which I will now consider.

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<sup>7</sup> Guidelines for the Assessment of Damages in Personal Injury Cases, 10<sup>th</sup> edn., Oxford University Press.

<sup>8</sup> Antigua and Barbuda High Court Civil Appeal No. 10 of 2009 (delivered 25<sup>th</sup> January 2010, unreported).

<sup>9</sup> Fn. 4 at p. 5.

<sup>10</sup> See Sachs LJ in *George et al v Pinnock et al* [1973] 1 WLR 118.

[22] In the case of **Philmore Skepple v Joseph Weekes**,<sup>11</sup> the claimant suffered the following injuries: laceration of about 2 cm long in the right supraorbital area with mild ipsilateral periorbital hematoma; fracture of the mandible with displacement and active bleeding, fracture of the hard palate with loss of the upper incisors and canine teeth with active bleeding, dislocation of the right sternoclavicular joint, a bulging deformity in the dorsum of the base of the first metacarpal bones of the left hand with tenderness and limited range of movements, laceration of about 3 cm long in the thenar region of the left hand and tenderness and crepitations in the distal phanax of the ipsilateral thumb, swelling and tenderness of the right shoulder though with full movements and abrasions of about 4 x 1 cm on the anterior aspect of the left leg. The claimant in this case could no longer play basketball because of the pain and he indicated that he felt embarrassed to smile because of the loss of teeth and did not consider himself handsome any longer. The Court awarded \$100,000.00 damages for pain and suffering and loss of amenities which figure was upheld on appeal.

[23] In the case of **Sheldon Jules v Brent Williams et al**,<sup>12</sup> the claimant suffered fractures to the facial bones, wound to the face, multiple abrasions to the iliac fossa and the limb, wounds to the left arm and elbow involving muscle and no bone and internal bleeding due to a wound to the mesentery and a turn mesocolon. The claimant had severe deformity to his face. The claimant was operated on and arch bars were inserted. A metal plate was inserted which remained in the claimant's face. That claimant was 26 years at the time of the accident and was an amateur boxer who represented his country. The Court awarded \$55,000.00 for pain and suffering and \$45,000.00 for loss of amenities giving a total award of \$100,000.00.

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<sup>11</sup> Supra, fn.8.

<sup>12</sup> Commonwealth of Dominica High Court Claim No. DOMHCV2009/0018 (delivered 12<sup>th</sup> June 2012, unreported).

- [24] The claimant also referred to the cases of **Randy James v Leroy Lewis et al**<sup>13</sup> and **Dr. Wezenet Tewodros v Dr. Ganendra Malik et al**<sup>14</sup> which in my opinion do not assist in this assessment since the injuries suffered by the claimants in these cases are not very similar to those suffered by the claimant in the case at bar.
- [25] The Jamaican case of **Duhaney v Electoral Office of Jamaica et al**<sup>15</sup> is instructive as the claimant's injuries though not all the same as Ms. Noel's bear some similarity. The claimant in the **Duhaney** case suffered severe and extensive personal injuries primarily to the head, face and neck. He sustained numerous facial fractures to his cheek bones and jaw bone, concussion, loss of teeth and whiplash injuries necessitating treatment by two Faciomaxillary Surgeons. In that case the doctor confirmed that the area of impaired sensation on the claimant's face indicated injury to the right infraorbital nerve, which was crushed against the facial bones at the time of impact and had healed with a traumatic neuritis which gave rise to the facial discomfort of which the claimant complained. The award made in this case for pain and suffering and loss of amenities was JJS\$8,000,000.00 which is equivalent to EC\$241,800.00.
- [26] The claimant further referred to the Irish case of **Stephen McHugh v Patrick Cunningham**<sup>16</sup> where the claimant suffered leg, facial and dental injuries. I venture to say that I find that the facial injuries in this case are not similar to Ms. Noel's except for the fact that the claimant was left with a scar which was permanent. However the claimant in McHugh had full facial movement but for some diminished sensation just below the scar at the angle of the mouth. The award for pain and suffering was £50,000.00 which is equivalent to EC\$214,719.50.

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<sup>13</sup> Antigua and Barbuda High Court Claim No. ANUHCV 2009/0403 (delivered 31<sup>st</sup> July 2009, unreported).

<sup>14</sup> Saint Lucia High Court Claim No. SLUHCV2009/0746 (delivered 7<sup>th</sup> May 2012, unreported).

<sup>15</sup> Jamaica Supreme Court Suit No. C.L.D. 56 of 2001 (delivered 17<sup>th</sup> September 2009).

<sup>16</sup> [1999] IEHC 157 (12<sup>th</sup> May 1999).

- [27] The defendant submitted the following cases: **Dupont v Wilson**<sup>17</sup> where the claimant, a seamstress aged 25 years, suffered a fracture of the mandible, a laceration of the lower lip, contusion of the right leg, contusion of the right shoulder and loss of all but two teeth on her lower jaw. There was an adherent thickened scar on the lower lip which the specialist thought should be revised by operation if it did not resolve. When seen over the course of the next month the movement of the mouth was improving as well as the scar. Permanent partial disability was assessed at 20% and the award made for general damages was TT\$6,000.00 which is adjusted to TT\$78,002.00 as at April 2007 which is equivalent to EC\$32,944.30.
- [28] In **Kissoon v Lalla**,<sup>18</sup> the nature of the plaintiff's injuries who was a 20 year old male, included dizziness, extensive lacerations to the left side of the face, laceration in the left temporal region severing the temporal artery resulting in extensive blood loss, pain and swelling in the right knee joint, damage to the branches of the left facial nerve, fracture of the left orbit, left molar bone fracture, multiple lacerations in region of the left temple and both sides of the face as well as his upper lip. These resulted in marked scarring, blurring of the vision in the left eye, weakness of the right knee, inability to open mouth fully, facial asymmetry, headaches and flattening molar bone as residual effect of healing. There was also flattening of the left zygoma. General damages were awarded in the sum of TT\$7,000.00 adjusted to TT\$76,910.00 as at April 2007 which is equivalent to EC\$32,384.49.
- [29] In **Sudama v Baldeosingh**,<sup>19</sup> the plaintiff's injuries consisted of a depressed fracture of the maxilla and lacerations of the palate (upper jaw), depressed fracture of the left zygomatic bone (cheek bone), fracture of the mid-symphysis of the mandible, the loss of 2 lower central incisor teeth, one inch lacerations of the upper lip, fractured left shoulder, partial amputation of terminal phalanx of the right

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<sup>17</sup> Trinidad and Tobago, HCA No. 3307 of 1974 (delivered 17<sup>th</sup> July 1975).

<sup>18</sup> Trinidad and Tobago, HCA No. 411 of 1971 (delivered 12<sup>th</sup> December 1977).

<sup>19</sup> Trinidad and Tobago, HCA No. 621 of 1973 (delivered 23<sup>rd</sup> May 1979).

index finger. His permanent partial disability was assessed as 25%. The court awarded TT\$12,000.00 as general damages adjusted to TT\$80,037.00 as at November 2002 which is equivalent to EC\$33,701.18.

[30] In the case of **Hosein v Cromarty and Duprey**,<sup>20</sup> the plaintiff's main injuries were fracture of the lower jaw or mandible in three places and loss of two permanent teeth. The plaintiff was 27 years old and the doctor assessed his permanent partial disability at 25%. He had to have his jaws wired up with maxilla mandibular fixation wires. The court awarded TT\$30,000.00 in general damages adjusted to TT\$171,562.00 as at April 2007 which is equivalent to EC\$72,239.60.

[31] I do not consider the case of **Helious Trocad v Nigel Edmund et al**<sup>21</sup> to be very helpful as the injuries sustained by the claimant in that case are in no way similar to those sustained by Ms. Noel. The defendant urges that although the cases submitted should be a guide in assessing the damages, it is to be noted that the plaintiffs in these cases all suffered other injuries in addition to the facial or dental injuries and so the quantum of damages awarded should reflect this and be lower than that awarded in these cases. I note that although all the authorities from Trinidad and Tobago provide useful guidance, it must be borne in mind that these awards were last adjusted in 2007 and 2002 in one case and any award today must have regard to this and the socio-economic environment. It is also to be noted that the awards in these cases were for general damages as a lump sum and I do not have the benefit of a breakdown of the figure which would have assisted in carrying out this assessment.

[32] The defendant also submits that the assessment of disability ought to be taken into account and regard had to the fact that the loss of function in this case was assessed at 20% by Dr. Yaw which is lower than that referred to in all of the cases with the exception of the **Dupont** case.

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<sup>20</sup> Trinidad and Tobago, HCA No. 1703 of 1972 (delivered 24<sup>th</sup> April 1982).

<sup>21</sup> Commonwealth of Dominica High Court Claim No. DOMHCV2008/0206 (delivered 12<sup>th</sup> May 2010, unreported).

[33] I am mindful that the approach of comparison and adjustment of similar awards in personal injuries cases is not flawless and that each case must be assessed on its own facts. As stated by Rattray J in the Jamaican case of **Duhaney** which I adopt:

"It is readily accepted that no two cases of persons sustaining personal injuries are exactly alike. And yet our system of justice requires that, as far as is possible, there be consistency in awards involving similar injuries. The award of a sum of money as compensation for severe and extensive injuries suffered in an accident, ... can never put a person back in the position he was prior to the accident, nor provide adequate solace for his misfortunes. The unenviable task of the Court is to arrive at a fair money value as redress for a claimant's afflictions, in effect doing what is described as "measuring the immeasurable"."

[34] In the circumstances, I have taken into account the nature and extent of the claimant's injuries which were substantive in nature although confined to her face, the fact that this is a 27 year old woman who is in the prime of her life and has to contend with a substantive scar on her face and the loss of feeling which she experiences combined with the fact that that scar is a permanent feature of her life. Although there was a suggestion that she could undergo plastic surgery, it was quite clear that this would not cure the damage caused to the nerve which has been permanently damaged. It is only fair to assume that any young woman in Ms. Noel's situation would be extremely self-conscious and she must be compensated for the scarring and loss of her self confidence as a result. The claimant's attempts to move on and to accept her plight as evidenced by her statement in cross-examination that she has become accustomed to her injuries and how people react to her should not be used against her in assessing damages for loss of amenities. I have also considered the nature and extent of the resulting disability. I have had regard particularly to the case of **Duhaney v Electoral Board of Jamaica**<sup>22</sup> detailed above where the claimant's facial injuries were substantial.

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<sup>22</sup> See fn.15.

[35] In the circumstances, and having considered all the authorities and the evidence, I consider the sum of \$110,000.00 for pain and suffering and \$50,000.00 for loss of amenities to be an appropriate, fair and reasonable award and I so award.

**Award**

[36] The order on the assessment of damages is as follows:

The claimant is awarded:

- (1) General damages in the sum of \$160,000.00, being \$110,000.00 for pain and suffering and \$50,000.00 for loss of amenities.
- (2) Interest on the sum of \$160,000.00 at the rate of 6% per annum from the date of service of the claim to the date of payment.
- (3) Prescribed costs of \$12,000.00 (being 60% of \$20,000.00, pursuant to Appendix C of Rule 65 **Civil Procedure Rules 2000** as amended).

**Kimberly Cenac-Phulgence**  
Master [Ag.]