

**IN THE SUPREME COURT OF BELIZE, A.D. 2009**

**CLAIM NO. 11 of 2009**

**YOLANI REVOLORIO HERRERA**

**CLAIMANT**

**AND**

**(1) NATIONAL TRANSPORT SERVICE LTD.**

**(2) TYRONE GILLETT**

**(3) GERMAN VEGA & SONS LTD.**

**(4) MICHAEL ESCALANTE**

**DEFENDANTS**

Hearings

2009

28<sup>th</sup> September

1<sup>st</sup> October

29<sup>th</sup> October

10<sup>th</sup> December

2010

27<sup>th</sup> January

22<sup>nd</sup> February

22<sup>nd</sup> March

Mrs. Audrey Matura Shepherd and Mr. Dean Molina for the Claimant.

Mr. Hubert Elrington SC for the first and second Defendants.

Mrs. Naima Barrow- Badillo for the third and fourth Defendants.

LEGALL J.

**JUDGMENT**

**The Accident**

1. Yolani Elizabeth Revolorio Herrera, claimant, was born on 20<sup>th</sup>

September, 1981 in Guatemala, but resided with her common-law-husband, Elder Lopez, at Trial Farm Village, Orange Walk District, Belize. The first defendant is a company duly incorporated in Belize and carries on the business of providing transportation throughout Belize by bus. The first defendant has a bus terminal known as the Novelos Bus Terminal, situate at West Collet Canal, Belize City, Belize. The claimant travelled from Orange Walk for purposes of taking a bus from Belize City to Melchor de Mencos in Guatemala to visit her relatives

2. On the 20<sup>th</sup> September, 2007 at about 10:00 a.m. the claimant boarded one of the first defendant buses at the Novelos Bus Terminal. She sat about four seats behind the driver on the left hand side of the bus. Other persons also joined the bus. The driver of the bus was the second defendant who was employed by the first defendant as a driver. The bus, license No. D-4763, left the terminal at about 10:30 a.m. and proceeded along a highway known as the Western Highway heading in the direction of Belmopan City on its way to Melchor de Mencos.
3. Michael Escalante, the 4<sup>th</sup> defendant, was employed as a driver by the third defendant. In the course of his duties, he was driving the third defendant's cargo truck licence No. OW-A-2968 on the said Western Highway heading in the direction of Belize City in the opposite direction of the bus. The bus, while on its way, made several stops to allow passengers to board it or eject from it. Rain had fallen earlier on the highway which became slippery. At about 11:00 a.m. the rain

had subsided to a constant drizzle. At a point on the said highway, known as Mile 36, the bus driven by the second defendant, and the cargo truck driven by the fourth defendant, violently collided on the said highway with fatal and devastating consequences. Four persons died on the spot. Two of them were passengers in the cargo truck and the others were passengers in the bus. Several persons were injured, some very serious and others suffered minor injuries.

4. The claimant fell in the category of the seriously injured. She suffered severe facial injury, including loss of bone in the mandible in the chin area which resulted in severe facial deformity. According to the doctors who examined her, the claimant needed plastic reconstructive surgery, not available in Belize. The doctor also found that the claimant suffered an inability to masticate food and had to be fed for sometime by the use of a tube in her stomach. She also suffered injury to her right hand.
5. The claimant had been asleep on the bus before the accident and had no knowledge of how the accident occurred. When she awoke from her slumber, she found herself at Karl Heusner Memorial Hospital, with bandages on her face and hand and a breathing tube in her neck. The claimant spent eleven days at the Karl Heusner Memorial Hospital, after which, with the assistance of a representative of the first defendant, she was transferred to a private hospital in Belize City – Universal Health Services Ltd. – where she remained until the end of October, 2007 after undergoing surgery on her lower right arm.

6. Dr. Andre Sosa, who performed the surgery on the claimant at the private hospital, recommended that the claimant should go to Rouseveldt Hospital in Guatemala City for further treatment, as such treatment was not available in Belize. In Guatemala City, she was not able to be treated at the Rouseveldt Hospital, but was a patient at the Centro Medico Hospital and attended by Dr. Eduardo Olmstead who, to her surprise, informed her that she was pregnant. She remained in Guatemala City to continue her medical treatment at her own expense. She had her baby on April, 21, 2008, at which time the feeding tube was removed, since she found it easier to swallow liquefied food, rather than using the tube for the purpose. The claimant left Guatemala City on 1<sup>st</sup> June, 2008 and took up residence in Melchor de Mencos, but because of her injuries she was unable to work and fully care for her child.

7. On 6<sup>th</sup> January, 2009 the claimant filed a claim against the defendants. I think I should quote verbatim the wording of the claim.

“The Claimant’s claim is for damages for personal injuries and interest and cost of these proceeding arising out of a collision caused by the Second and/or the Fourth Defendants in the course of their employment for the First and Third Defendants respectively.”

8. It is surprising to the court that the claim omits to mention the words negligence or special damages. The statement of claim however gives particulars of negligence, but instead of pleading in the statement of

claim special damages, which the authorities say must be pleaded, the statement of claim simply states: “Please see attached schedule of special damage.” Submitted with the statement of claim is a document marked “Schedule of Past and Future loss and Expense.” Nowhere in the document do I see the words special damages. Special Damages must be pleaded in the statement of claim and the claim.

**Accident: How Caused?**

9. Several persons gave evidence as to how the accident was caused; and even though all of them swore and professed to have seen the accident, they gave opposed versions of how it occurred. Rene Juarez said that on 20<sup>th</sup> September, 2007 at about 11:00 a.m. he was driving from Belmopan on the Western Highway, behind the truck driven by the fourth defendant. He wanted to overtake the truck at an area called Mile 30 because, according to him, the truck was driving too slow. But he saw the bus driven by the second defendant going in the opposite direction and he decided not to overtake the bus. On approaching a curve on the said highway, he said he could not see the bus, so he pulled out from behind the cargo truck to see where the bus had gone. Then is when he saw, according to him, the bus sliding sideways onto the wrong side of the highway, and the bus collided to the truck. He concluded in his witness statement with the following:

“The accident was caused by the negligence of the driver of the bus who had drove onto the wrong side of the road and failed to steer or control the bus he was driving adequately

or at all so as to avoid colliding with the cargo truck.”

10. This witness testified that when the bus was coming out of the curve on the highway, it started sliding. He also said that he saw the bus taking the curve and it was sliding on the wrong side of the highway and the collision with the truck occurred on the right side of the road when travelling to Belize City from Belmopan.
11. Sgt. Itch prepared a sketch which was admitted in evidence. The witness Rene Juarez said he agreed with what was stated in the sketch. According to the sketch, the accident occurred not on the curve or near to the curve on the highway, but on the straight road some distance away from the curve. At a visit to the scene, the maker of the sketch, Sgt. Itch, showed the location of the vehicles after the accident, which was about 100 yards or more from the curve on the road. Moreover, the witness Rene Juarez testified as follows:

“I was behind the big truck. I cannot see around or above the truck. I could not see under the truck. I could still see the curve from where I was behind the truck. From where I was behind the truck, I could see the bus. It was a clear view.”

12. From the above cross-examination of this witness, it may be argued that it was not likely for him to see how the accident occurred. But further evidence which came out in the cross-examination casts grave

doubts about this witness's credibility and his version of how the accident occurred. This is what the witness said in cross-examination:

“After the accident I drank something with the truck driver. This occurred twice not far from where the accident happened at a place called Amigos. One time at Amigos and the other time at Belize City at a restaurant. The day when the court inspected the accident we went to Amigos. I picked up the driver of the truck at Orange Walk and I took him to the scene in my vehicle. After visiting the scene we went to Amigos and then I took him back to Orange Walk.”

13. He explained that after the court adjourned on 1<sup>st</sup> October, 2009 he and the truck driver and others went to a restaurant in Belize City. Though this witness swore that he did not know the truck driver before the accident, his socializing with him, causes grave doubts about the truthfulness of his evidence that he did not know the defendant before the accident, and also causes grave doubts about the truthfulness of this witness version of the accident. For the reasons above, I do not accept this witness's version of the accident.
14. The other witness is the fourth defendant, the driver of the truck. He said that in approaching the curve on the highway, he noticed the bus was driving on the wrong side of the highway. He too testified that the bus was sliding. He said when he first saw the bus sliding, the bus was about 20 to 25 feet away from him. The evidence of Juarez and

the fourth defendant is similar with respect to the bus sliding on the wrong side of the road. He said he had time to blow his horn, but he did not think about it. He said the truck had gears but he could not gear down. But what is remarkable about the evidence of this defendant is what he said in paragraphs 8, 9, 10 and 11 of his witness statement. In those paragraphs he said that when he saw the bus was on his side of the highway, he looked to see if he could pull off the highway to avoid a collision, but he saw a truck was parked on the right side of the highway, and two men were working on a light post. The defendant continued:

“Upon noticing the parked truck, I told Elvis Gillett and Gustavo Castillo to hold on as there was no where to go but straight ahead. I remember bracing myself for the impact.”

15. Though the road was wet, he should have pressed his brakes rather than “bracing” for the impact. Elvis Gillett and Gustavo Castillo, who were in his truck died at the scene of the accident. So even if the bus did slide to the wrong side of the road, as he and Juarez testified, the defendant’s omission to press his brakes, even though the road was wet and slippery, or to blow his horn, did not exhibit the care which a driver using the road would be reasonably expected to exhibit. But as I said, I do not believe Juarez’s story, which is similar to the fourth defendant’s, that the bus slid to the wrong side of the road.
16. At about 11:30 a.m., on the date of the accident, Insp. David Chi, Sgt. Daniel Itch, who was Corporal at the time, and police constable Victor

Guzman visited the scene of the accident. Sgt. Itch prepared a sketch of what he saw at the time. The sketch was tendered with the consent of all parties and marked D.I. 1. According to the sketch the highway was 23 feet wide. The truck and the bus were on the same side – the right hand side – of the highway on a grass verge when going to Belmopan from Belize City. The engine, which came out of the truck due to the accident, was on the left hand side of the highway when going to Belmopan from Belize City

17. The front of the bus was facing the direction of Belmopan. The truck was facing the direction of Belize City. The front portion of the bus and continuing along the left side front of the bus as far back of the rear wheel was smashed inwards. The front of the truck was smashed inwards, expelling the engine and radiator. The entire front cab of the truck was completely damaged beyond repair.
18. The above evidence of Sgt. Itch as to what he found when he arrived at the scene, gives an indication of the force of the impact and where the vehicles ended up after the accident. Both vehicles ended up on the right hand side of the highway when travelling to Belmopan from Belize City, the same side of the highway the bus was travelling on its way to Belmopan. The location of the damage to the vehicles would also give an indication of the direction of the vehicles when the collision occurred.
19. There were other witnesses who saw the accident. Danny Mesh, a police constable stationed at the time at Belmopan Police Station,

boarded the bus at Novelos Bus Terminal at Belize City about 10:30 a.m. on the day in question to go to Belmopan. He sat in an isle seat at the back of the bus, just over the right rear wheel of the bus. From where he was seated, he said he could have seen directly down the isle of the bus and out of the bus towards the road ahead. This is how he said the accident occurred:

“At approximately 11:15 a.m., as the bus passed a curve somewhere around miles 34 to 35 on the Western Highway, I could see that it was raining.

At this point, I also saw a white truck, which had a container at the back of the cab, coming towards the bus from the direction of Belmopan.

This truck suddenly began to swerve towards the left hand side and it veered directly towards the bus.

The truck later crashed into the left side of the bus and the impact occurred somewhere between where the driver was seated and the middle of the bus.”

20. Mesh’s version of how the accident occurred remained solid and unshaken even after the brief cross-examination. His credibility remained intact. His version of how the accident occurred was supported in some respects by the witness, Kemaka Broaster, a passenger in the bus who was injured in the accident. She testified

that she sat in the fourth row of seats from the front of the bus, and she had a view of the road in front of her. She continued:

“I noticed a truck overtaking some vehicles and in doing so the truck came in the said lane the bus was travelling. .... When the truck came into the bus I was shock. The bus and the truck were in the same lane coming. The truck continued straight into the bus. When the truck was coming into the bus the driver of the bus tried to swerve to the right.”

21. This witness testified that the truck was 14 to 16 feet away from the bus when it started overtaking two sports utility vehicles (SUV's), having overtook a car. She said the truck came out of the lane, overtook the SUV's and came towards the bus. She also testified that the length of the SUV and the car could fit in the courtroom. Learned counsel for the third and fourth defendants submitted that bearing in mind the distance between the truck and the bus – 14 to 16 feet – and the length of the SUV's it was impossible for the truck to have overtaken the SUV's vehicles as this witness said it did, and therefore the witness evidence was “not based on facts.” But there is no evidence of the length of the SUV's even though it was submitted that one SUV was at least 12 feet long. Danny Mesh had testified that when he first saw the truck it was about 50 yards from the bus and at that time there was no vehicle travelling in front of the truck. But it must be noted that he was testifying about when he first saw the truck.

- It must also be noted that the number two defendant had told the police that the truck tried to overtake three vehicles.
22. It was further submitted that Miss Broaster's evidence was concocted by her, because she had testified that she was in shock and therefore her testimony was based on what she heard rather than what she saw. But this witness said in her evidence that what she meant by being in shock was that she could not have believed what had just happened.
  23. I accept the evidence of Danny Mesh as to how the accident occurred. I believe him when he said that the truck swerved towards the left hand side and veered directly towards to the bus. I believe that when the truck veered towards the bus, the bus driver swerved to his right and ended up, after the collision on the grass verge on the right hand side of the highway when travelling to Belmopan from Belize City; and the truck, after having swerved to its left ended up, after the collision on the said right hand side where the bus ended, as the sketch clearly shows.
  24. The damage to the vehicles is indicative of the speed involved. The witness Duncan Smith, a passenger in the bus who was seated at the fifth seat from the driver said that he did not see the accident, but he gave evidence of the speed at which the bus was travelling. He said the bus was travelling on the right hand side of the road. He said the bus was travelling faster than normal. The bus, he said, was going real fast at Mile 30. He said he was waving his hand to slow down in the bus. In his witness statement this is what he said:

“I remember feeling uncomfortable with the speed at which the bus was travelling and also remember that from the bus left Mile 30 I was signaling the bus driver to slow down.

I am not sure how fast the bus was going but as a regular passenger on buses I knew that the bus was going faster than usual.”

25. The No. 2 defendant gave evidence that he was travelling at 40 to 45 miles per hour. He also said in evidence that when the truck reached about 10 to 15 feet near him he sensed danger; and at that point, he did not go off the shoulder of the road. He said he made an error.
  
26. I believe the evidence of Duncan Smith that the No. 2 defendant was driving real fast at a speed, and was going faster than usual. I also believe the No. 2 defendant, when he said he made an error in not going off the shoulder of the road when the truck was 12 to 15 feet near him and he sensed danger. I also believe him when he said that when he saw the truck cross the centre of the highway, he was about 50 to 55 yards away. In those circumstances this defendant should have, it seems to me, pulled off to the shoulder of the road at that distance away, or should have kept a constant look at the truck and swerved to the shoulder of the road before he sensed danger 12 to 15 feet away. Even at 12 to 15 feet away, he should have pulled off to the grass verge of the road. Moreover, this defendant admitted he made an error in not going to the shoulder of the road when he sensed danger.

27. The No. 4 defendant's action in swerving to his left and veering directly towards the bus, and omitting to blow his horn or apply brakes contributed to the cause of the accident. The No. 2 defendant action by driving real fast and at a speed, and by not turning off on the shoulder of the road when he saw the truck cross the center line of the road, and later when he sensed danger, contributed to the cause of the accident. The question now is whether these actions and omissions amount to negligence.

### **Question of Negligence**

28. Considering the evidence in this case were the Nos. 2 and No. 4 defendants negligent? Was there a duty on the part of the said defendants to exercise reasonable care to prevent injury to other persons using the highway? The evidence above clearly shows that the said defendants had a duty to exercise reasonable care when driving on the highway. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons: see *Glasgow Corporation v. Muir 1943 A.C. 448, at p 457; Donoghue v. Stevenson 1932 A.C. 562, at p580; and Fatdon v. Harcourt Livingston 1932 A.E.R. 81.*
29. But before deciding the question of negligence, the court must bear in mind, the well known and often articulated views of Lord Pearson with respect to the burden of proof in the celebrated *Henderson v. Harry E. Jenkins 1969 3 A.E.R. 756 at p766.*

“In the action for negligence, the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants and if he is not satisfied the plaintiff action fails.”

30. I am satisfied, on a balance of probabilities, that the No. 2 defendant failed to discharge his duty to exercise reasonable care when driving on the highway to prevent injury to the claimant because the said defendant drove at a speed and failed to turn off on the shoulder of the highway when he saw the truck cross the center line of the highway on his side of the highway about 50 to 60 yards away and also when he failed to do so although he sensed danger when the truck was 15 to 20 feet away. I am also satisfied, on a balance of probabilities, that the No. 4 defendant failed to discharge his duty to exercise reasonable care when driving on the highway to prevent injury to the claimant, because the said defendant swerved the truck he was driving to his left and it veered directly towards the bus, and also because he failed to blow his horn and apply his brakes. I am therefore satisfied that both the No. 2 and No. 4 defendants were negligent and caused the injuries to the claimant. Moreover, I find that the Nos. 1 and 3 defendants were vicariously liable for the negligence of their employees, the Nos. 2 and 4 defendants respectively, who, at the time

of the accident, were acting in the course of their duties and as servants or employees of the said Nos. 1 and 3 defendants. On the evidence examined above, I decide for purpose of this civil action that the No. 4 defendant was 70% the cause of the accident and the No. 2 defendant was 30% the cause of the accident.

### **Damages**

31. I must now consider the question of damages. I must consider general damages which need not be specially pleaded. Then I have to consider special damages which must be specially pleaded. Under the heading general damages, much guidance has been given by Wooding CJ in the hallmark decision of *Cornilliac v. St. Louis* 1965 7 W.I.R. p. 491. The learned judge enumerated several considerations which a judge should bear in mind when making an assessment of general damages involving personal injuries as follows:-

- “(i) The nature and extent of the injuries sustained;
- (ii) the nature and gravity of the resulting disability;
- (iii) the pain and suffering which had to be endured;
- (iv) the loss of amenities suffered; and
- (v) the extent to which consequentially, the appellants pecuniary prospects have been materially affected.”.

32. These are the items or heads which I have to consider in assessing general damages. I consider (v) above as meaning loss of earning capacity, because this loss is assessed under general damages. I must also consider, for convenience, the relevant facts under each item or head. I must, however, bear in mind that though it is convenient to itemize the different heads, in the end judgment is given for a single lump sum as damages for pain and suffering and loss of amenities.
33. But I observe in *Johnson v. Sterlings Products Ltd. 1981 30 W.I.R. 155*, George CJ itemized the heads above and gave an amount under each head. Wooding CJ in *Cornilliac* however, adopted a different approach and did not disclose an amount under each head above, but gave a total figure under all the heads as damages for pain and suffering and loss of amenities. The reason Wooding CJ gave one figure for all the heads was because, according to him, **“the nature and extent of the injuries inflicted cannot be disassociated from the physical disabilities which are their permanent result, not are they unrelated to the pain and suffering which have had to be endured.”**
34. This approach of Wooding CJ. is supported by Lord Denning CJ in *Fletcher v. Auto Car and Transportation Ltd. 1968 2 A.E.R. 726*. Lord Denning expressed disagreement with arriving at a figure under each item and adding them up, because of the risk of overlapping, a point which Wooding CJ clearly had in mind when he made the pronouncements above. For these reasons, I adopt the position of Wooding CJ and would give one total figure under all the heads as

damages for pain and suffering and loss of amenities. But I must consider for convenience the relevant facts under each head. The facts under head are as follows:

(1) **Nature and extent of injuries sustained**

- (a) The doctors who examined the claimant were not called to give evidence of the nature and extent of the injuries the claimant suffered. But they issued medical reports of her injuries, which were exhibited by the claimant in her witness statement and which were tendered by consent in evidence. According to the report dated 16<sup>th</sup> November, 2007 by Dr. Lizarraga of Universal Health Services, Belize City, the claimant suffered “facial injury including loss of bone of the mandible in the chin and inclusive of teeth, and teeth bearing bone, and overlying skin of the chin. Additionally the left mandible ramus is also fractured with marked displacement.” The report states that the claimant underwent medical treatment at Karl Heusner Memorial Hospital, Belize City, where she remained for 11 days after the accident. She was then transferred to Universal Health Services, Belize City, where she underwent medical tests, CT Scans, X-rays and had a gastric by pass tube inserted in her stomach for purpose of enabling her to consume food. She also underwent surgery on her lower left arm.

- (b) The claimant remained at Universal Health Services until

around the end of October, 2007, when arrangements were made for her to get further medical treatment in Guatemala as such treatment were not available in Belize. In Guatemala she was examined by Dr. Edwardo Olmstead at a hospital called Centro Medico where she spent one month and twelve days.

- (c) Dr. Olmstead issued a medical surgical report dated 27th March, 2008 of the claimant's injuries as follows:

“Findings: Severe mandible chin injury with:  
Multi fragmentary fracture on left branch of mandible.  
Total central loss of bone tissue and bland tissues.  
Severe scar retraction of mandibular fragments.  
More than 70% destruction of lower lip.  
Multi fragmentary fracture of right wrist.

(2) **Nature and gravity of the resulting physical disability**

The claimant suffered severe facial deformity accompanied, for some time, of total inability to masticate food. She could now eat liquefied food without using a tube, but with some discomfort. The claimant tendered in evidence as exhibit Y.R.H. 8 a photograph of her facial injuries which shows teeth

missing, her lower jaw mashed in, most of her lower lip missing and disfigurement of her chin and right side of her face up to her cheek bone. She also suffered injuries to her hands.

(3) **Pain and suffering**

The claimant must have felt severe pain because of the injuries. She also suffered due to the fact that for some period of time she could not speak and could consume food only by the use of a tube in her stomach. Two years after the accident, she still cannot chew food, but continues to take liquefied food on her own, rather than by the tube. She suffers much discomfort and embarrassment because of her facial appearance, and walks around covering her lower face with a towel. She needs plastic reconstructive surgery not available in Belize. If she does not get the constructive surgery, which her family cannot afford, she will not be able to chew food again. The claimant is unable to work and care for her new born baby who was born on the 21<sup>st</sup> April, 2008. At the time of the accident she was in the early stages of pregnancy; but there is no evidence that the accident had any physical or other effects on the baby.

(4) **Loss of amenities**

The term loss of amenities has been defined as a “loss of

pleasure of life or a diminution of the injured person's capacity to enjoy his accustomed lifestyle on account of the injuries which he has sustained": see George CJ in *Johnson v. Sterling Products Ltd.* above at page 163. There is no evidence of what kind of sporting or recreational activities the claimant participated in prior to the accident. There is no evidence of what kind of recreational or sporting activity, if any, she could participate in the future. But there is no doubt that her facial appearance would result in a diminution of her accustomed lifestyle.

(5) **Loss of earning capacity**

- (a) Loss of earning capacity is an award or compensation made by the court because of the injured person disadvantage in the labour market. It is compensation for the diminution, due to the injury, of the earning capacity of the injured person. There is a difference between a loss of earning capacity and loss of future earnings. In *Fairley v. John Thompson Ltd. 1973 2 Lloyd's Report 40*, Lord Denning explains the difference –

“It is important to realize the difference between an award for loss of future earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earning is awarded for real assessable loss proved by evidence. Compensation for

diminution of earning capacity is awarded as part of general damages.”

- (b) The claimant was born on 29<sup>th</sup> September, 1981. She is 28 years old. The accident occurred on 20<sup>th</sup> September, 2007 when she was about 26 years old. In order to award a figure under this heading for loss of earning capacity, the court has to consider in what capacity the claimant was employed at the time of the accident and what was her salary. But no such evidence was presented to the court. There is evidence that she is unemployed but was she employed at the time of, or prior to the accident, and if so in what capacity or on what salary. Sadly, there is no evidence of these matters. The burden is on the claimant to prove the case, not on the defendant. There is also sadly, no evidence concerning the nature of her skills, if any, and the kind of employment she could undertake in the future. The warning of Carey JA in *Gravesandy v. Moore 1986 40 W.I.R. 222* quoting Canberry JA in *United Dairy Farmers Ltd. v. Goldbourne 1984* must not be forgotten:

“Awards must be based on evidence. A plaintiff seeking to secure an award for any of the recognized heads of damage, must offer some evidence, directed to that head, however tenuous it may be.”

(c) There is evidence of her injury which, it seems to me, would result in some diminution of her earning capacity, though the full extent, due to the lack of evidence, is not known. I therefore award nominal damages in the amount of \$8000 for loss of earning capacity.

35. I must now assess and consider the other items or heads above and arrive at a final award as general damages for pain and suffering on loss of amenities. In order to arrive at the final award for general damages, I should also consider comparable awards made by other courts.

**Comparable awards**

36. In order to arrive at an amount as general damages, I should also consider the amount of general damages awarded by the courts for similar injuries in order to understand the range of awards in this type of case. But I must bear in mind the reservations expressed by the Privy Council with respect to comparing awards. Lord Carswell in *Seepersad v. Persad and Another 2004 64 W.I.R. 378 at page 385* said:

“The Board entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to

ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.”

37. I now turn to comparable awards made in other jurisdictions and in Belize.

- (1) Richard Ramnarase v. Boohoosingh H.C.A. No. S 503 of 1999 (T.T.). Injuries to right side of face with compound fractures of the right mandible, loss of several teeth and scarring of the right face. General Damages \$150,000 (T.T.).
- (2) Judith Duncan v. Rama Gopaul H.C.A. No. S 690 of 1984 (T.T.) unreported. Injuries to left femur and to right side of her face which affected the function of her eyelid. The facial scars were permanent but could be improved by further surgery. Claimant 25 year old was pregnant at the time of the accident. Suffered other injuries. General Damages \$85,000 (T.T.).
- (3) Gopaul v. Walker H.C.A. No. S 218 of 1986 and 372 of 1988 (T.T.) unreported. Fractures to the skull and injury to the right eye and dislocation of left elbow. Fractures of upper jaw and dental injuries resulting in loss of teeth. There

was facial maxillary deformity. Suffered other injuries. General Damages \$80,000 (T.T.).

- (4) *Aurora Awe v. Authur How* No. 441 of 2002 Supreme Court Belize (unreported). Plaintiff suffered several fractures of her hands, foot and hip. Se also suffered a broken jaw. She was in severe pain and reserved treatment in Guatemala. General Damages \$150,000 Belize.

### **Amount of General Damages**

38. There is an element of speculation in awarding general damages in these kinds of cases. Canberry JA in *United Dairy Farmers Ltd. v. Goldbourne* recognized the difficulty in making these awards. “In making awards,” he said “the courts do their part to measure the incomprehensible or the immeasurable (e.g. pain and suffering, or loss of amenities, but there is a stage at which this ends and sheer speculation begins”: see *Gravesandy v. Moore above at p 228*.
39. I bear in mind that some of the above awards were made in different currencies and more than twenty years ago. I also consider the facts and circumstances of this case and that I must award general damages that are fair and reasonable. Doing the best I can, on the evidence available, and on the facts of this case including the injuries the claimant suffered, I arrive at a figure for general damages for pain and suffering and loss of amenities in the amount of \$75000. This amount

includes the \$8000 awarded as nominal damages for loss of earning capacity.

**Special damages**

40. Special damages must be specially pleaded and proved before the court could make an award under this head. If the intention is to claim for loss of future earnings, the loss has to be specially pleaded and proved: see *Gravesandy v. Moore* above. The claim form in this matter fails surprisingly to make a claim for special damages. The statement of claim does not have within it, a specific claim for special damages, once again surprisingly. But at the last page of the statement of claim the following words, as mentioned above, appear: “Please see attached schedule of special damage.”
41. There is a schedule attached to the statement of claim and it is headed: “Schedule of Past and Future loss and Expense.” And also attached to the schedule are several receipts. The relevant information in the schedule ought to have been specifically pleaded in the statement of claim. This kind of work should be correctly described as inappropriate and far below the standard of legal pleadings expected in the Supreme Court.
42. To compound the problem, the claimant was not asked any questions in the witness box about special damages or about the matters mentioned in the said schedule or the receipts. However, the claimant in her witness statement which was tendered by consent in evidence said the following at paragraph 21:

“21 Full particulars of the expenses incurred to date as well as the cost of my much needed surgery are set out in the statement of claim.”

43. The claimant seems to be incorporating as part of her witness statement the “schedule of special damages” referred to in the statement claim. It seems that the schedule and the statement of claim, and the witness statement were served on the defendants so that the information in the schedule would not have caught the defendants by surprise. I will therefore consider the schedule, but only matters therein which fall within paragraph 21 above, that is to say, expenses incurred to date and cost of much needed surgery, as the evidence of the claimant in relation to special damages. I do not include as evidence under special damages items of the schedule such as loss of past earnings, future earnings, disadvantage in the labour market, loss of future care and assistance because there is no evidence proving these matters, and they are not included in the wording of paragraph 21 above.

44. I award as special damages, as stated in the said schedule, the following:

1. Past care and assistance	\$ 11,928.01
2. For care and assistance of young son	\$ 3,428.58
3. Past medical expense	\$ 750.33
4. Past travel expense	\$ 554.30
5. Facial reconstruction	<u>\$120,000.00</u>
	<u>\$136,661.22</u>

45. Among the list of documents disclosed by the third and fourth defendants is a document headed Medical Surgical Report dated 27<sup>th</sup> March, 2008 by Dr. Eduardo Olmstead. It was estimated by the doctor in the report that facial reconstruction would cost not less than US \$60,000. This accounts for the \$120,000 Belize mentioned above for facial reconstruction.
46. Before concluding, I must mention that although the attorneys for the claimant made on 22<sup>nd</sup> February, 2010, with the permission of the court, closing submissions in writing to the court, and exchanged written submissions with the attorney for the Nos. 3 and 4 defendants, and the court having fixed 24<sup>th</sup> March, 2010 for decision in the case, the said claimant's attorneys, on 5<sup>th</sup> March, 2010, filed further disclosure documents and further written submissions without the consent of the court, and in breach of Rules 28.13 and 39.3 of the Supreme Court Civil Procedure Rules 2005. The filing of these documents is not only unfair to the other parties in the case, but amounts to behaviour not expected in the Supreme Court; and learned counsel for the Nos. 3 and 4 defendants was correct in registering her written protest to such behaviour. These documents are not properly before the court, and they do not have any effect on my decision in this case.

### **Conclusion**

47. I award to the claimant as follows:

- (1) General damages for pain and suffering and loss of amenities the amount of \$75,000.00
- (2) Special damages in the sum of \$136,661.22
- Total \$211,661.22

48. The total damages awarded to the claimant is \$211,661.22 BZ. Since I have found that the No. 2 defendant was 30% the cause of the injury to the claimant and the No. 1 defendant was vicariously liable; and the 4<sup>th</sup> defendant was 70% the cause of the injury to the claimant and the No. 3 defendant was vicariously liable, I order that the Nos. 1 and 2 defendants pay to the claimant the amount of \$63,498.36, and the Nos. 3 and 4 defendants pay to the claimant the amount of \$148,162.85, being 30% and 70% of the total damages respectively.

I therefore make the following orders:

1. The Nos. 2 and 4 defendants drove their motor vehicles negligently and caused injury to the claimant.
2. The Nos. 2 and 4 defendants negligently caused the injuries to the claimant in the course of their duties and as servants and employees of the Nos. 1 and 3 defendants respectively who are vicariously liable for the injuries to the claimant.
3. The Nos. 1 and 2 defendants are 30% liable for the injuries

to the claimant; and the Nos. 3 and 4 defendants are 70% liable for the injuries to the claimant.

4. The Nos. 1 and 2 defendants shall pay to the claimant damages in the sum of \$63,498.36
  
5. The Nos. 3 and 4 defendants shall pay damages to the claimant in the sum of \$148,162.85.

The defendants shall pay interest to the claimant as follows:

- (a) Nos. 1 and 2 defendants shall pay the claimant 6% interest on the amount of \$63,498.36 from 20<sup>th</sup> September, 2007 until the amount is fully paid.
  
- (b) Nos. 3 and 4 defendants shall pay to the claimant 6% interest on the amount of \$148,162.85 from 20<sup>th</sup> September, 2007 until the amount is fully paid.
  
- (c) The defendants shall pay to the claimant costs, to be agreed or taxed.

Oswell Legall  
JUDGE OF THE SUPREME COURT  
22<sup>nd</sup> March, 2010

