

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 131 of 2014

ALBERT IDELFONSO

CLAIMANT

AND

ERCELIA WAGNER

1st DEFENDANT

GABRIEL VILLAFRANCO

2nd DEFENDANT

Hearings

2014

24th November

3rd December

Mr. Phillip Palacio for the Claimant.

JUDGMENT

1. This matter comes before the Court for the exparte assessment of damages following entry of a default judgment on the 27th day of July, 2014. The original claim was filed on the 25th March 2014 and was later amended on the 24th April 2014. It claimed:
 - (1) Damages for personal injury and loss caused by a vehicular accident.
 - (2) Special damages in the sum of \$7,145.00 and
 - (3) Interest on damages claimed at such rate and for such period as the Honourable Court deems just.

By notice of application filed on the 9th July, 2014 the Claimant prayed for his damages to be assessed.

Irregularities: The default judgment

2. From the default judgment filed the Court noted that the sum of \$7,145 had been allowed as special damages. However, the rules are clear. A claim for a specified sum of money under Rule 2.4 means –
 - (a) *A claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract; and*
 - (b) *For the purposes of Parts 12 (default judgment) and 14 (judgment on admissions), a claim for –*
 - (i) *The cost of repairs executed to a vehicle;*
 - (ii) *The cost of repairs executed to any property in, on or abutting, a road; or*
 - (iii) *Any other actual financial loss other than loss of wages or other income.**claimed as a result of damage, which it is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim;*
3. It translates that where a court office is asked to enter a default Judgment on such a claim, it must ensure that each item is specified and the corresponding copies of receipted bills are attached to the claim form or the statement of claim. This is in keeping with the need to specifically prove special damages. Needless to say, although the particulars of special damages were specified in this matter, there were no bills attached to either the amended claim form or the amended statement of claim. Default

judgment in those circumstances ought not to have been entered for the specified sum of \$7,145.

4. More importantly however, default judgment on a claim partly for a specified sum and partly for an unspecified sum cannot be entered for the specified sum only unless the Claimant abandons his claim for the unspecified sum – see Rule 12.8 (3). In my view if the Claimant wished to have both sums the application for, and the consequential default judgment entered, should properly have been for “payment of an amount to be decided by the court” under rule 12.10 (1)(C) which reads:

Default judgment –

(c) On a claim form for an unspecified sum of money shall be judgment for the payment of an amount to be decided by the court.

This rule then footnotes the following:

“34. Rule 16.2 deals with the procedure for assessment of damages where judgment is entered under this paragraph.”

5. In accordance with Rule 16.2 the application for the default judgment should correctly have stated whether or not the Claimant was in a position to prove the amount of damages, the estimated time required to deal with that assessment or in the alternative how much time he required to put himself in order. If the Claimant declares his readiness to prove, then the court office **must** fix a date for the assessment (giving the Claimant at least 14 days notice of same), (emphasis mine). This circumvents the need to make, and the cost of, any further application. We need not mention the delay and resources occasioned by managing a new application. If however, the Claimant is not in a state of readiness the court office **must** still fix a period within which the assessment of damages will take place and set a date for

sending a listing of questionnaire to the Claimant (again emphasis mine). This obviously simplifies the process and allows the court to maintain control by giving and enforcing timelines.

Consequences:

6. When Counsel came to the assessment his submissions indicated that he was not aware that special damages had already been awarded in the sum of \$7,145 as stated on his request for entry of judgment in default. In fact, at the assessment he was only able to prove \$4,980.00 of the \$7,145 claimed. This highlights the type of issues which are created perhaps through an ignorance or misunderstanding of, or simply a determination to flout the rules.

7. Since this is an application for the assessment of damages arising from an administratively entered default judgment, this court is of the view that the matter could be cured. I do not think the error would be sufficient to have the original order set aside. Nor do I think it will prejudice either party at this stage. The alternative is less attractive for I shall knowingly have allowed an error in a judgment to perpetuate. The court has the general power under Rule 26.9 to rectify matters where there has been a procedural error or failure to comply with the rules. The Court office has clearly failed to comply with the rules. Bearing the overriding objective in mind, the default judgment will be corrected to the extent necessary to allow the court to properly and fairly assess the damages. The default judgment is therefore varied to read “default judgment is entered for payment of an amount to be decided by the court.”

The Evidence:

8. The Claimant is a 19 year old full time construction worker who sustained injuries during a road traffic accident on the 21st June, 2013. He was at the time riding a motor cycle with his brother on the pillion. He was thrown over the bonnet of the defendant's car on impact and lost consciousness. He regained consciousness amidst leaking motor cycle oil and "a lot of pain" and was taken to the Southern Regional Hospital for treatment. The next day he was transferred to the Karl Heusner Hospital where he spent two weeks. He sustained a closed right humeral fracture and an open fracture to his right femur. He was surgically treated with nail fixation of both fractures and given six months to recuperate. He was readmitted about three months later where he was found to be suffering from osteomyelitis, (a bone infection), complicating the right femur. He remained in the hospital for one month and was treated on this occasion with surgical management and intensive antibiotics.

9. When he was assessed by Dr. Francis Smith an Orthopedic Consultant in July 2014 a limb length discrepancy of 2 inches resulting in a limp was noted, so too was a restriction of the range of motion of the right knee – it lacked 90% full flexion. There was also a noticeable pelvic tilt. The doctor reviewed X-rays done since June, November and December, 2013 and confirmed the placement of the rods. He indicated that there was evidence of union of the bones as well as evidence suggestive of osteomyelitis of the right femur. His prognosis was that although the fractures had united the right femoral fracture may be complicated by osteomyelitis.

10. Following a number of surgeries (the Claimant says three, only two are supported by the medical evidence provided) he has recovered but maintains a limp as the right leg is shorter than the left.
11. Dr. Francis explained that the rods could be removed through surgery in about two years after which the patient could undergo limb lengthening surgery to restore the length of the right femur. This surgery was not without its complications and could only be done abroad (USA). He indicated a permanent residual disability of 20% of the total person but did not say whether this was with or without the leg lengthening surgery.
12. A later report by Dr. Andre Sosa (2.19.14) said it was customary to leave the rods in place for at least 18 months before removal. He also spoke of the Claimant's leg discrepancy of 2.4 inches, back pain and pain in the right hip region from the protrusion of IM rod. What was most beneficial was the quotation he gave of the cost associated with removal of the rods, (which had not been before the Court previously). He gave the Claimant's prognosis as favourable with intermittent pain in the right thigh.
13. The Claimant himself explained how presently, on walking, he continues to have pain in his left leg. He cannot walk long distances because of the leg length discrepancy. That pain is clearly not debilitating as he was present in court and I was able to see and appreciate his gait and movement first hand. He wants to have the leg lengthening surgery and return to work eventually.

Special damages:

14. A claim for special damages was made in the sum of \$7,145. \$4,500 for his completely destroyed motor bike. This was evidenced by a bill from a retailer. He also presented receipts totalling \$480 for medical expenses. Through his submissions the Claimant sought an additional \$17,280 for loss of earnings during the period the Claimant was unable to work, that is from the date of the accident to the date of the filing of the claim. However, neither the amended claim form nor statement of claim showed that amount under special damages where it ought properly to have been pleaded. It was particularized under general damages. Nevertheless, it had been pleaded and the Defendant would have been well aware of the claim, so the sum will be awarded. The Claimant earned \$1,080 per month proven by a letter from his employer. He has not returned to work since the accident. At the date of the filing of the claim he had not been earning for 9 months. He is therefore entitled to the sum of \$9,700. The Claimant has proven the total sum of \$14,680 as special damages and the court awards same.

15. By his submission the Claimant sought general damages under the following heads:

Pain and suffering

Loss of amenities

Future loss of earnings

Future medical expenses

Pain, Suffering and loss of Amenities:

16. It must be remembered that damages for physical injury are compensation not a reward. “... damages are designed to compensate for such results as have actually been caused...” **H. West and Son Ltd. v Shephard [1964] AC 326.** And although difficult to quantify and inadequate to fully restore a person as you may restore or replace a thing, as Lord Morris said in **Parry v Cleaver [1970] AC 1 at 22** “no other process can be devised than that of making a monetary assessment.”

17. The facts on which the award will be made have already been outlined. I shall therefore proceed to consider Counsel’s submissions. He presented the case of **Sanchez et al v Gianchandani BZ 2000 SC 49 Action No. 385 of 1999.** Conteh CJ awarded an overall sum of \$275,000 as general damages. The Claimant in that case was a father of four with comminuted fractures of the right and left femurs, right and left tibias, both wrists, right hip and pelvis as well as bilateral joint subluxation. While the court was happy for the guidance as to the application of the law this case provided, it found that its award could not be followed. Not only were the injuries so vastly different but the learned Chief Justice himself recognized the practical difficulties in his assessment where all the authorities provided to him were from the UK.

18. At page 2 of the judgment Conteh CJ referred to the case of **Cornilliac v St. Louis [1965] 7 WIR 491.** He summarized and was guided by the considerations for assessing general damages outlined therein:
 - “(a) the nature and extent of the injuries sustained;
 - (b) the nature and gravity of the resulting physical disability;

- (c) *the pain and suffering which had to be endured;*
- (d) *the loss of amenities suffered, and*
- (e) *the extent to which consequentially the plaintiffs pecuniary prospects have been materially affected.”*

19. This court shall be guided likewise. I am certain that the Claimant must have experienced severe pain. He has also had to undergo the unpleasantness of multiple surgeries and the stabilization of his fractures by rods and bone infection (which may recur). There is no evidence before the court of the severity of the pain then or now although the Claimant says it remains continuous. He spoke of pain originally to his face, hands and legs. He now complains of pain to his leg, hip and back. His final medical report says the pain should now be intermittent and there is no evidence of the Claimant needing medication to control the pain. He is able to walk unaided and climb stairs since the court room in which I saw him is at the top of quite a high and treacherous staircase. What worries me somewhat is that his leg length discrepancy appears to have increased by four inches between July and October 2014. I bear in mind that the measurements were taken by two different Doctors and this could possibly account for the difference. Still it is a tad disconcerting.
20. The Court must of necessity take into consideration the future leg lengthening procedure which is expected to improve the Claimant's current circumstance. He cannot be compensated for both the deformity and the cost of surgically correcting it. Although he is at present temporarily disabled, neither the full duration of this disability nor the percentage of

permanent impairment expected, if any, have been spoken to in the evidence. However, his prognosis is favourable.

21. The Claimant has said that he can no longer engage in his hobbies of playing football or his second income job of diving. He cannot ride a motor bike which was his mode of transportation at the time of the accident. He has lost some of the joys of life and the court must consider all of this in arriving at a single broad estimate.
22. Conteh CJ in *Sanchez* (ibid) urged the courts to strive for uniformity in their awards. This approach also known as the comparable case approach, has received the approval of the House of Lords and the Privy Council where it has been said that fairness between one Claimant and another requires some degree of uniformity – *H West & Son Ltd. v Shephard* (ibid).
23. To aid the court in this vein Counsel also presented *Ryan Richards v Michael Francois Claim No. GDA HCV 2010/0156*. Here a 24 year old Claimant was awarded the sum of \$80,000 for pain and suffering and \$60,000 for loss of amenities. The Claimant had suffered injuries to his left leg, left arm and shoulders. He experienced excruciating pain and was hospitalized for three months and would have a permanent limp and deformity of the lower limb. He was advised against surgery to straighten. Due to the permanent limp there was a strong possibility that the Claimant might develop future back pain. He could not walk without an ambulatory aid.

24. Finally he proffered *Casey Pigott and Sherrian Pigott v Veleloma Potter and Vernon Potter Claim No. ANUHCV 2010/0423 and Ronald Fraser v Joseph Dalrimple et al Claim No. ANUHCV 2004/0513. Pigott (ibid)* was found to be most helpful. The Claimant in this case suffered similar injuries to the case before this court and walked with a visible limp. Rods had been surgically implanted in his upper thigh and hip. He continued to experience intermittent pain and discomfort and could no longer indulge his hobbies of bicycle stunt riding, beach cricket or sports with friends. He could balance his walk with a built up shoe but preferred to have leg lengthening surgery. He was awarded \$50,000 for his pain, suffering and loss of amenities.
25. I choose to offer a comparable sum in this case. The Claimant is therefore awarded \$50,000 for his pain suffering and loss of amenities.

Future loss of earnings:

26. ***Munkman on damages, 11th Edition at 10.19*** tells us that the judge must estimate the period during which the incapacity will continue. Based on the medical evidence provided by Dr. Andre B Sosa the Claimant's rods should be removed in the next two months or so. Dr. Francis places it at an additional six months. I chose to accept the time frame given by Dr. Francis as he was speaking specifically of the Claimant and not in a general way as Dr. Sosa was. They both agree that the bone lengthening surgery could be done thereafter. The Claimant has included the cost of this surgery and clearly stated that it is his desire. The surgery ought to considerably shorten his period of incapacitation and inability to work. Recovery from that surgery is said to be six months. The patient's prognosis is favourable.

27. Presently, the Claimant cannot do the work he is accustomed doing as he cannot stand for long periods or lift heavy objects. Certainly it would be difficult to conduct such strenuous manual labour with a pronounced limp and consequent back pain. No evidence has been provided, although requested by the court, as to what level of recovery the Claimant may achieve after a successful leg lengthening surgery. One can only assume that since his prognosis is favourable he would be as good as, if not whole again and capable of starting work. The Claimant has also indicated that his employer has not fired him and is willing to wait until he has fully recovered and able to resume his job. This speaks volumes of both the employer and the employee. At the time of the accident the Claimant was earning a salary of \$1,080 per month or \$12,960 per year. He also claimed to supplement his income by diving but no evidence of the amount earned thereby was presented.
28. No evidence has been provided that his disability is permanent after leg lengthening surgery nor that he will not be able to work as a construction worker in the future. The Claimant is very young and although he has only a primary school education he is still capable of equipping himself in order to choose another field of work if he finds himself unable to resume as a construction worker. I find that the multiplier ought not to be very high.
29. Counsel offered eight years as a multiplier and submitted the Antigua High Court case of *Ronald Fraser v Joe Dalrimple et al Claim No. ANUHCV 2004/0513* for guidance. In that case the 46 year old Claimant's injury despite rods, fibre glass casts and immobility was not healing. He could not bear full weight on his left lower limb and remained on crutches after more

than three years. Two years later, on assessment, the broken ankle still showed no sign of healing and the Claimant was unable to walk or move one of his legs. Like chalk and cheese to the matter before this court. In that case a multiplier of four was used. In this case I find a multiplier of two to be appropriate. That ought to include his period of further surgeries, eventual recovery and resumption of earning. A sum of \$25,920 is awarded.

Future medical expenses:

30. Under this head Counsel asked for the cost of removing the rods as well as the leg lengthening surgery. His expert set that figure at \$16,449.00 and \$170,000 respectively. The court considered the *Pigott* case (ibid), where, although the Claimant could effectively function, without the leg lengthening surgery, by wearing a built up shoe the court did not see this as negating the need for the surgery. Michel J spoke frankly at page 7 - *“the fact is he is (as of now) a 25 year old young man who is entitled to decide that he does not want to live the remainder of his life with a deformity (even though a manageable one) occasioned by negligence of another and that he requires that other to finance the cost of his corrective surgery. I will peg the award at the lowest end of Doctor Singh’s scale because it is still open to the first Claimant not to do the surgery at all or to do it at a better priced location.”* In the present case Doctor Francis quoted two options for the leg lengthening surgery and consequential physical therapy. US\$85,000 for bilateral femoral lengthening and US\$95,000 for the bilateral tibial lengthening. I accept the lower figure and find no difficulty doing so. The good doctor indicated that this was his recommended option and it was also the one submitted by Counsel.

31. I will therefore allow the future medical expenses and award the even sum of \$186,500.

The Order of the Court is as follows:

32.
 1. The default judgment entered on the 2nd July, 2014 is corrected to read “Judgment is entered for payment of an amount to be decided by the court.”
 2. Special damages is awarded in the sum of \$14,680 with interest at the rate of 3% per annum from the 21st June 2013 to 3rd December 2014.
 3. General damages is awarded for pain and suffering and loss of amenities in the sum of \$50,000, \$25,920 for future loss of earnings, and \$186,500 for future medical expenses with interest at the rate of 3% from the 21st June, 2013 to the 3rd December 2014.
 4. Costs shall be prescribed. I rely on the Claimant to calculate.

SONYA YOUNG
JUDGE OF THE SUPREME COURT