

breathing. At the Hospital she was treated by the General Surgery, Orthopaedic Surgery and Neurosurgery teams.

- [3] She filed this claim to recover damages for her injuries. She is now 21 years old and is recognizably dependent and socially sheltered as a direct result of her injuries. Unfortunately, as a result of a breakdown of relations, a complete medical assessment of the full effects of her injuries was not forthcoming, despite significant effort. However, the claimant gave evidence of the effect of her injuries on her life and lifestyle.

THE INJURIES

- [4] Three medical experts provided evidence regarding the claimant's condition: – Dr. Nyi Nyi Than, a Resident Orthopaedic Surgeon and Dr. Colin Abel, Consultant Surgeon, both of the Bustamante Hospital for Children gave reports in 2007 and Dr. Richard Reynolds a Senior Orthopaedic Resident with Dr. Kenneth Vaughan, Consultant Orthopaedic Surgeon at the University Hospital of the West Indies gave a report in 2017. Dr. Reynolds treated the claimant for a fracture to the left femur near the site of her previous injuries.

- [5] As a result of the accident the claimant suffered severe head injuries and was unconscious with a Glasgow Coma Score of 6/15. She suffered generalized brain oedema and right and left temporal and left parietal lobe hypodensity. A CT-Scan revealed a contusion of the right frontal lobe of the brain. As a result of the trauma to the head she had seizures and had to be medicated for some time for this condition. There was also memory impairment.

- [6] A follow up CT scan revealed temporal and right parietal lobe infracts secondary to the severe head injury. Dr. Abel in his report remarked:

“This child received severe injuries which were life threatening.....

She will have significant disability especially as a result of the head injury.”

Her left lower limb was semi-flexed and abducted on presentation. X-ray investigations showed a fracture of the neck of the femur and a fracture of the right Superior Ramus of the left pubic bone. Initially she was unable to control excretory functions and for a very long period was unable to walk. She now suffers from arthritis of the hip and suffers pain when it is cold in the left leg.

- [7] Surgically, Percutaneous Pinning of the neck of the left femur was conducted the day after hospitalization. On March 12, 2007 follow-up x-ray revealed non-union of the hip and she underwent another surgery for open reduction and Internal Fixation of the fracture site.
- [8] A chest x-ray showed Bilateral Haemopneumothrax. Incisions were made in the chest walls so that bilateral basal chest tubes could be inserted to treat the Bilateral Haemopneumothrax. There was damage to her lungs which were swollen and her windpipe due to the Tracheotomy. These also damaged her larynx rendering her unable to speak loudly.
- [9] She was admitted to the Intensive Care Unit until February 5, 2017, where the ventilator was attached to her to assist her breathing. Subsequently a Tracheotomy was performed because she required prolonged ventilation. She remained on the ventilator until January 31, 2007.
- [10] The report of Dr. Reynolds is instructive as it provides an assessment of some of the long term effects of the claimant's injuries twelve (12) years after the accident.
- [11] The claimant presented to Dr. Reynolds with occasional pain to the left thigh when it is cold, a 30cm healed scar to the left proximal lateral femur, a 7cm healed scar to the left distal lateral femur, a mild left short leg gait (limb length – Right 83.5cm, left 82cm); range of motion in the hip- Flexion Right 120 degrees, left 75 degrees, abduction right 40 degrees left 15 degrees; internal rotation right 25 degrees, left 5 degrees. The knees and ankle were normal. These are permanent conditions.

These findings were ascertained from radiographs generated at the request of the doctor.

- [12] The radiographs showed the plate and screws inserted at Bustamante Hospital for Children traversing the femoral neck, as well as the shortened femoral neck on the left when compared to the right.
- [13] The injury Dr. Reynolds was treating was a complete fracture of the femur immediately distal to the plate in place. He had to do a bone graft to secure the healing of the femoral fracture. Importantly he opined that,

*“The femoral shaft fracture has healed and Miss Golding has regained function similar to her pre-injury function. **The limitations which she currently experiences are likely as a result of her previous injury which was managed at another institution.**”*

Dr. Reynolds ascribed a permanent partial disability rating as a result of the injury to the left leg of 14% which amounts to a 6% of the whole person.

- [14] The claimant gave evidence that prior to the accident she used to participate in Sports Day activities at school and loved to dance. However, because of her injuries she cannot stand for long as it causes pain and cramping in her legs. Also because of the plate at the neck of the femur she is unable to run and falls very easily. She was forced to remain indoors, only venturing outside with someone she trusts to assist if she falls. In fact, when she returned to school after the accident her mother, a teacher, acquired a wheelchair for her so she could go outside and play.
- [15] Consequently, the natural social interactions of the childhood and teenage years have been lost to her. She remains, from my observations of her in the witness box and what she said, a sheltered, isolated person. She has never dated or gone to parties or other social events outside of those that her limitation permits and she

had to be accompanied by her mother. She has unsightly scars on her leg, walks with a limp and has developed an acceptance of her circumstance which is sad to see.

- [16] Academically she struggled initially. Thankfully her mother, being a teacher, was able to assist her significantly and she has performed commendably and is now enrolled in a Community College perusing studies in Social Work. She recalls in her evidence that after the accident she was like a baby again and had to learn who is mommy and who is daddy and basic things. Her academic success is a manifestation of her determination to excel.

THE CLAIMANT'S SUBMISSIONS

- [17] The claimant submitted that she is entitled to general damages for pain and suffering and loss of amenities. She focussed on three cases to support her entitlement to \$8,000,000.00 for general damages.

- [18] The first is **O'Brien Vassell v Lennox Jackson and Delroy Lindsay** reported in Khans Volume 3 on page 19 where a mechanic suffered loss of consciousness, lacerations above and below the right eye and right cheek and a posterior fracture of the right hip resulting in a whole person impairment assessment rating of 20%. In December 1988 he was awarded \$100,000.00 which updates to \$6,311,764.71.

- [19] The second case is that of **Martel Halstead v Devon Maragh** reported in Khans volume 6 at page 49. Here a construction worker with a 10% disability rating resulting from an 8cm X 3cm laceration below the left mandible, fractured left mandible, loss of consciousness, head injuries and fracture of the middle of the left femur was awarded in February 2006 \$2,000,000.00, which updates to \$5,911,845.73.

- [20] In **Ruddard Myers v Electoral Office of Jamaica and Canute Miller**, reported on page 21 of Khans volume 6, a taxi driver who was a back seat passenger suffered transient loss of consciousness, upper gastro-intestinal haemorrhage, closed anterior dislocation of the right shoulder and closed femoral fracture and was

assessed with an 8% whole person disability. He was awarded \$3,250,000.00 in May 2007 for general damages.

ANALYSIS AND CONCLUSION

- [21] In **Pogas Distributors et al v McKitty** SCCA 13&16/ 94 the Court of Appeal emphasized that the focus of the court in the assessment of damages should be on the nature and severity of the claimant's injuries and the amount of time she would be affected by pain and the impact on her life as a result of the damage caused by the defendant's tortious actions. Impact on litigants is assessed by the findings of the medical experts but regard is to be given to what the litigant says about the effect on her. Careful scrutiny of such evidence is necessary as efforts can be made to embellish and exaggerate impact to attract increased damages.
- [22] In the case at Bar the only evidence available that speaks to the full effects of the injury is from Dr. Reynolds and the claimant herself. The medical evidence of Dr. Nyi Nyi and Dr. Able are more descriptive of the presenting condition of the claimant than a prognosis of the permanent effects of the injuries on her. In these circumstances I scrupulously observed the claimant as she gave evidence noting her demeanour and her description of the effects of the injuries on her.
- [23] The cases cited by counsel for the claimant emphasise the injury to her leg and the disability rating and a ball park figure of \$8,000,000.00 was suggested as adequate compensation. None of the cases was concerned with a limp caused by a shortened femoral neck, inability to run, dance and play outside without assistance and propensity to falling. Neither did they feature the damage to the voice box, rendering the claimant unable to speak loudly. These represent permanent loss of amenities for which compensation should be made. Dr. Reynolds speaks to some of these deficits and guardedly suggests that they may have contributed to the fall and the fracture he treated.
- [24] The cases submitted also did not address the neurological impact on Sherona. She says she has caught up academically with great effort. However, her level of social

interaction and the isolated lifestyle she has been forced to maintain is not accounted for.

[25] I am aware that there will not always be a similar case to that of the claimant but the decision of Bingham J in **Carl Richard Archie (bnf Carl William Archie) v International Rentals and Leroy Kennedy**, reported at page 202 of Khans volume 3, a decision made in June 1984 offers some assistance for both the approach and the injuries sustained by this claimant.

[26] In that case there was a dearth of medical evidence regarding the permanent effects of the injuries after maximum medical improvement had been attained. The court relied on the plaintiff's evidence about the impact on him and juxtaposed it against the medical evidence garnered while he was still recovering, to arrive at an assessment of what was recoverable for general damages.

[27] The medical evidence in this claim describes serious head injuries, with Dr. Abel specifically giving a prognosis of 'significant disability' as a result of the head injuries. This did not materialize for Sherona who is currently perusing pre-university studies.

[28] However, the social isolation and inability to dance, run and participate in sporting events described in the medical report in the **Archie** case were examined against the evidence of that claimant. The matter concerned an eight-year-old child who was rendered unconscious for a few hours, suffered shock, a fracture of the shaft of the right femur, lacerations to the head with brain injury resulting in excruciating headaches and abrasions to the elbow and both hands, after being hit by a car whilst crossing the road. The prognosis of the psychiatrist was that he would suffer depression and would be unable to resume normal sporting activities. However, at the time of trial he was enrolled in school, although his grades had dropped and he was participating in sports and social activities, although he could not dance

because of his injuries. The award, negatively influenced by this, was \$180,000.00 which upgrades to \$658,900.67.

[29] However, in the case at Bar, Sherona cannot speak loudly to save her life, she cannot dance, has unsightly scars on her leg, has a limp and is prone to falling and injuring herself, as happened with the injury treated by Dr. Reynolds. She is socially isolated as she has been forced to stay inside from the time of the accident and she is heavily dependent on her mother. This evidence cannot be ignored in assessing the impact of the accident on her.

[30] The case of **Kella Smith (BNF Nicole Smith) v The Attorney General of Jamaica and Javed Smith** [2020] *JMSC Civ. 154*, 6-year-old Kella Smith, was a pedestrian crossing the South Camp Main Road in Kingston when a police service vehicle collided with her causing her to sustain injuries. The injuries were said to impact on the Claimant's daily activities in the following ways

- i. Flare ups of pains in the right foot;
- ii. Walks with a noticeable limp;
- iii. Frequent fainting spells;
- iv. Difficulty concentrating at school;
- v. Significant fall in academic performance;
- vi. Regular wetting of the bed;
- vii. Displays stubborn and rebellious behavior;
- viii. Aggressive towards her siblings resulting in frequent fights;
- ix. Behavior consistent with that of a baby;
- x. Gets very emotional.”

[31] The learned judge, in determining the figure to be awarded considered, inter alia, the intellectual abnormality the Claimant suffered and awarded a sum of \$15,000,000.00.

[32] While not identical to the instant case, this case is instructive as it places great weight on the impact on the daily life of the young claimant, including learning challenges and social development, which were significantly impacted by the accident. Further, in **Phillip Granston v Attorney General of Jamaica** (unreported) Supreme Court, Jamaica, Claim No. 1680 of 2003, delivered on the 10th day of August 2009 Sykes J, as he then was, stated at paragraph 74:

“...The goal of looking at past awards is to make sure that awards are consistent but the desire for consistency cannot be used to suppress awards that are properly due to the injured party even if that award is outside of the past cases.”

[33] Therefore, in the instant case to arrive at a just award regard must be had to the decision in the **Kella Smith** case and the tenets adumbrated by Sykes

[34] Consequently, having regard to the cases cited and the evidence presented, an award of \$10,000,000.00 is, to my mind, adequate compensation for general damages.

SPECIAL DAMAGES

[35] The evidence of expenses incurred is supported in large measure by receipts and where none is available, it is unchallenged. The award of Special Damages is therefore \$2,371,308.51

ORDER

Special Damages - \$2,371,308.51 with interest at 3% per annum from January 17, 2007 to May 12, 2021.

General Damages - \$10,000,000.00 with interest at 3% per annum from February 19, 2013 to May 12, 2021.