

**IN THE SUPREME COURT OF BELIZE, A. D. 2013**

**CLAIM NO. 750 OF 2010**

**(ERNESTO FLORES JR. bnf** **CLAIMANTS**  
**BETWEEN (YANERA FLORES**  
**(AND**  
**(DURAN HARBAN** **DEFENDANT**

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**BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA**

**Ms. Darlene Vernon for the Claimant**

**Mr. Darrel Bradley for the Defendant**

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**J U D G M E N T**

1. This is a Claim for damages for bodily injuries, pain and suffering arising from a Road Traffic Accident which occurred on the 26<sup>th</sup> day of May, 2010 on Partridge Street; special damages being medical and nursing expenses, and interest on any damages found due, plus costs. As the Claimant is a

ten-year-old minor, this Claim is brought by next friend, Yanera Flores (the child's mother).

2. The Defendant denies liability for the accident.
3. This trial concluded before me on October 24<sup>th</sup>, 2012. Closing submissions were due on November 16<sup>th</sup>, 2012. The Court extended the deadline for submissions to March 2013. The Claimant filed submissions on March 15<sup>th</sup>, 2013. To date, no submissions have been filed on behalf of the Defendant.

### **The Facts**

4. The Claimant, Ernesto Flores, was born on 9<sup>th</sup> March, 2001. At the time of the accident he was an 8-year-old student attending St. Martin De Porres Primary School located on Partridge Street, Belize City. On May 26<sup>th</sup>, 2009 at approximately 11:45 a.m. Ernesto was hit by the vehicle of the Defendant, Duran Harban, in front of his primary school on Partridge Street. Ernesto Flores suffered significant injuries to his body and was hospitalized for a period of forty one days. He was diagnosed as suffering from permanent disability.

## **The Issues**

5. (i) Was the accident caused as a result of the negligent driving of the Defendant on Partridge Street in front of a primary school, or did the Claimant cause or contribute to the accident?

(ii) Was the Defendant speeding in the circumstances in a known school zone during a lunch break?

6. The Claimant called three witnesses at the trial. The First Witness was Dr. Joel Cervantes who testified that the Claimant suffered injuries including severe head trauma and permanent brain damage. His injuries were life threatening and he had to be hospitalized for 41 days.

7. The Claimant also called Nelson Batty who stated that he was present at the scene of the accident and he saw what occurred. Mr. Batty testified that he had gone to school to pick up his children for lunch around 11:30 a.m. and that he was in his vehicle which was parked on Partridge Street facing towards Mahogany Street. He said that in front of the primary

school there are two gates that allow children to exit, one nearer to Vernon Street and the other almost adjacent to Ebony Street. He also said that he had a clear view of children exiting the school gates as no other vehicle was parked in front of the school at that time. Mr. Batty stated that while waiting for his children, he saw four children exit the school gate and attempt to cross to the other side of the road. One child was a bit slower than the first three and Mr. Batty said he saw that child checking the road and upon stepping down from the sidewalk and moving towards the middle of the road he saw a black Ford Ranger coming with speed of 25 to 30 mile per hour from the direction of Vernon Street unto Partridge Street. At that time the fourth child was already in the middle of the road, the driver tried to brake but failed to bring the vehicle to an immediate stop and hit the child. Upon hitting the child the vehicle came to a stop. The driver then exited his vehicle and ran to the child to try to assist him.

8. Mr. Batty was cross examined extensively by Learned Counsel for the Defence Mr. Bradley. It was put to Mr. Batty that he was not able to see the accident because the accident occurred behind him. Mr. Batty replied that he was able to see the accident as he was sitting in his vehicle (with his

body turned sideways) looking directly behind him, waiting for his own children to exit the school gate. He said he was only ten feet away from the gate where the children exited and there were no vehicles parked on that side of the street. He was further cross examined as follows:

*Q. "I'm also suggesting to you that you could not know the speed at which the defendant was driving. I am suggesting that to you.*

*A. Any driver who drives would know more or less a speed.*

*Q. Yes but this man is coming from behind you.*

*A. I am looking behind me.*

*Q. You are looking behind you. You are looking at the gate. Which is it?*

*A. If I look at you right now, I see the judge and see everybody in here and I am looking at you and I'm seeing everything here. You have a wide view when you look at something."*

9. The Claimant also called the child's mother Yanera Flores who stated that due to the severity of her son's injuries he was admitted to hospital as a highly critical patient. The child was eight years old at the time of the accident. After the accident he could not walk nor do anything for himself

that he was previously able to do because he had now become a special needs child. She said that as she is a single parent she had to remain at home to care for the child for two months and thereafter hire a baby sitter until she could return home to care for him after work. She makes her living as a food vendor.

10. The Defence called two witnesses, Duran Harban, the Defendant, and Mikhail Harry. Mr. Harban stated that he is a videographer and that he lives at Tropical Park on the Western Highway. He said that on 26<sup>th</sup> May, 2009 he was driving a black 2003 single cab Ford Ranger pickup with License Plate No. C-29751. He was driving with Mikhail Harry who was in the front passenger seat. He was on his way to pick up Mikhail's son from St. Martin De Porres Preschool which is located on the same compound as St. Martin De Porres Primary School on Partridge Street. Mr. Duran said that he had just driven passed the first of two pedestrian crossings on Partridge Street when suddenly and without warning he saw a child run quickly into the street from behind a parked vehicle located on the left hand of Partridge Street. He says vehicles were parked on both sides of the street at that time. The witness says that he was driving 5 to 10 miles per hour and as the

child ran into the street, he knocked the child slightly and he immediately applied brakes and the vehicle then immediately stopped. He got out of his vehicle and went to assist the child and later he went to report the accident to the police.

11. Under rigorous cross examination by Learned Counsel for the Claimant, Ms. Vernon, Mr. Harban admitted that he was familiar with the fact that there was a primary school on Partridge Street. He also admitted that it's common knowledge that the primary school would release the children for lunch at 11:30. On the issue of speed he was cross examined as follows:

*Q. " Sure, Mr. Harban. Driving 5 to 10 miles per hour, would you agree with me that you would have been able to stop if someone immediately came in front of you at that speed?*

*A. Stop how?*

*Q. Yes, you would be able to immediately stop because you were only going 5 to 10 miles.*

*A. Yeah*

*Q. Good. But that day of the accident, your vehicle did not immediately stop, did it? In fact your brakes when you applied actually had to go for a period before you came to an immediate stop, isn't that so?"*

At this point Mr. Bradley objected that those were two questions and Ms. Vernon rephrased as follows:

*Q. "You did not immediately stop when you hit the child, did you?"*

*A. Well, the car is a moving vehicle so if I press the brakes, it must take at least one second, I guess, to stop. I don't know if that's what you call immediately stop or --*

*Q. Did the vehicle when you applied your brakes come to an immediate stop?*

*A. It came to a stop, yes, Ma'am.*

*Q. Immediate stop?*

*A. It came to a stop, immediate stop, yes, Ma'am."*

12. Mikhail Harry was the second witness called for the Defence. He testified that he was in the vehicle driven by the Defendant who was driving at 5 to 10 miles per hour at the time on Partridge Street when suddenly and without warning he saw a child run quickly into the street. Mr. Harry said



that the Defendant knocked the child slightly with the vehicle and immediately applied his brakes bringing the vehicle to a complete stop. He also says that vehicles were parked on both sides of the street at that time and that Defendant was driving slowly because he had to come to a complete stop at the first pedestrian crossing. His witness statement mirrors that of the Defendant to a large extent. He was also extensively cross examined by Ms. Vernon on behalf of the Claimant. On the issue of whether the Defendant came to a complete stop at the first pedestrian crossing, he said, no, the defendant just slowed down.

### **Findings of Fact**

13. I find as a fact that the Defendant was driving in excess of 5 to 10 miles per hour when he hit the Claimant. I base my findings on the evidence of Mr. Nelson Batty who I found to be a credible and impartial witness. Even under intense cross examination by Learned Counsel for the Defence, Mr. Batty came across to me as witness of truth. I believe his evidence that he saw that the child was already in the middle of the road when the Defendant hit him with his truck. I find that he was an alert father sitting in

his truck waiting for his own children to exit the school gate. I believe that he had a wide view of the scene and would have his eyes trained on that area encompassing the school gate and the street. I do not believe Mr. Harry's evidence as I find that he was only trying to help out the Defendant as his friend. It was because they were going to pick up Mr. Harry's child from school that Mr. Duran was driving near the school at the time this accident occurred. I do not believe Mr. Duran's evidence on the speed of his driving or on the location of the child when he was hit. From the extreme severity of injuries suffered by the child upon impact and on the evidence of Dr. Cervantes, I find that the speed was closer to that cited by Mr. Batty that is 20 to 25 mph. I therefore find on a balance of probabilities that this accident was caused solely by the negligence of the Defendant. His failure to exercise due care and attention to other road users when driving in this area, where he knew a primary school was located, in an area that by his own admission he was very familiar with, at lunchtime when he knew school children would be on the street, and he drove at a speed well in excess of 5 to 10 miles per hour. As a result of his breach of his duty of care, this tragic accident has turned a normal healthy child into a special needs child with permanent brain damage.

## **Quantum of Damages**

14. The Claimant has submitted a claim for general damages for bodily injuries, pain and suffering arising from a road traffic accident, and for special damages being medical and nursing expenses incurred by the Claimant in the sum of BZ \$188,757.66. Interest was also claimed on any damages found due to the Claimant pursuant to Section 166 of the Supreme Court of Judicature Act Chapter 91.

15. On the claim for special damages the Claimant has disclosed receipts for expenses in regard to babysitting expenses and medical expenses incurred. These receipts were not tendered into evidence by the Claimant and Counsel for the Defendant had indicated that he would at some point in the trial be raising an objection as to whether these could be considered by the Court as evidence. However he never articulated any objection as promised and in admitting this claim I bear in mind Rule 28.18(1) and (2) of the Civil Procedure Rules:

**28.18 (1)** *“A party shall be deemed to admit the authenticity of any document disclosed to him under this Part unless that party serves notice that the document must be proved at trial.*

**(2)** *A notice to prove a document must be served not less than 42 days before the trial.”*

16. The court will therefore award special damages based on these receipts which clearly substantiate the claim of \$188,757.88.

17. On the issue of general damages, the Claimant has submitted a number of authorities to assist the court in assessing the quantum of general damages to be awarded. The decision of Wooding CJ in **Cornilliac v. St. Louis** 1965 7 WIR 491 sets out the considerations that a judge must take into account when assessing the quantum of damages in personal injury cases:

- 1) special damages until trial;
- 2) pain and suffering and loss of amenities;
- 3) loss of pecuniary prospects;
- 4) cost of future medical care and;
- 5) interest.

In arriving at an award for general damages, I must state that I fully agree with and adopt the approach of Wooding CJ that one figure be given for all the heads of damage as *“the nature and extent of the injuries inflicted cannot be disassociated from the physical disabilities which are their permanent result, nor are they unrelated to the pain and suffering which have to be endured.”*

### **Nature and extent of injuries suffered**

18. Dr. Cervantes testified that the Claimant suffered from the following injuries

- i) Severe head trauma and large epidural and subdural hematomas in the left fronto-temporo parieto-occipital regions of the brain with severe brain edema and considerable brain herniation.
- ii) On arrival at hospital his blood pressure, heart rate and respiratory rate were barely perceptible and was diagnosed as having less than one percent(1%) chance of survival.
- iii) The Claimant had to undergo tracheotomy for better management of his airways and feeding was initiated by way of gastronomy.

- iv) The Claimant was hospitalized for 41 days and subsequent Brain CT imaging confirmed extensive areas of infraction of the left middle cerebral artery. It was confirmed that the Claimant suffered permanent brain damage.
- v) The Claimant is now described as a special needs child as he cannot express himself appropriately and speak clearly. He has difficulty walking due to increasing spasticity and deformity in his right lower extremity and cannot write due to spasticity and deformity of his right upper extremity.
- vi) He has constant neurobehavioural changes and is deemed a candidate for long term or lifelong physical rehabilitation, occupational speech therapy and neurobehavioural speech therapy.
- vii) The Claimant will be considered a client for long term treatment and has a permanent disability of fifty percent.

19) In considering the assessment of damages the Court looks at similar cases as a general guide, bearing in mind that each case turns on its own particular facts.

In **Racquel Rodriguez et al v. Rupert Ritchie** Action No. 118 of 1991, two school children ages 13 and 15 at the time of the accident were hit by a towhead truck on their way from school. One child had to be hospitalized for two months and suffered from scarring, dizziness, headaches and had to use crutches. She also had to see a Neurologist because of head trauma with consequent epileptic attacks. A doctor testified that she would need medication for a long time. Conteh CJ (as he then was) awarded that child \$150,000 as general damages while her sister who had a broken ankle was awarded \$12,000 as general damages.

In **Jacob Weibe et al v Wilward Jones** Claim No. 698 of 2008, Legall J awarded the First Claimant \$35,000 as general damages. The Claimant was 35 years of age at the time of the accident, suffered abrasions to both upper extremities and was hospitalized for three days and his injuries were diagnosed as fracture of LI-L2 compressive, without compromise of the spine medul. He required three months full recovery.

In **Bernard Briceno v Lester West et al** Action No. 107 of 1984, the Claimant was 27 years old at the time of the accident and suffered injuries to his spinal cord, causing deformity to the spine, near total paralysis of the

right lower limb and partial paralysis of the left lower limb, had to use a wheel chair to move around and could no longer engage in sexual activity. Moe CJ (as he then was) awarded him \$60,000 in general damages.

I believe that the case of **Racquel Rodriguez** cited above is most on par with the case before me. In light of the medical evidence of the severity of the injuries suffered by Ernesto Flores in that he now has 50% disability which will require him to receive lifelong treatment and highly specialized therapy including tests such as a functional brain MRI to determine what parts of the brain are functioning (which Dr. Cervantes testified are not available in Belize), I award the sum of \$250,000 as general damages.

I also award interest on the total judgment sum at the rate of 3% per annum from date of filing of claim until date of judgment.

Costs awarded to the Claimant in the sum of \$7, 000.

***Dated this 5<sup>th</sup> day of July, 2013***

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**Michelle Arana  
Supreme Court Judge**