

**IN THE SUPREME COURT OF BELIZE A.D. 2007
(CIVIL)**

CLAIM NO. 189 of 2007 (Consolidated)

BETWEEN

**MARLENI MAGANA (Intended
Administratrix of the Estate of
Raul Magana**

Claimant

AND

**ENRIQUE MONTEJO
ROQUE RIVEROL**

Defendants

CLAIM NO. 190 of 2007

BETWEEN

**MARLENI MAGANA
SELENI MAGANA, JULIAN MAGANA &
CHRISTIAN MAGANA Infants, by their
Next Friend Maleni Magana
MARIA MAGDALENA FORBES
MYRA PENA**

Claimants

AND

**ENRIQUE MONTEJO
ROQUE RIVEROL**

Defendants

Before: The Honourable Madame Justice Griffith

Date of Hearing: 24th and 25th November, 2015

Appearances: Mrs. Tricia Pitts-Anderson, Pitts & Elrington, for the Claimants; Mr. Herbert Panton, Dean Lindo & Co, for the Defendants.

DECISION

Assessment of Damages – Personal Injuries – Multiple Claims – General Damages – Future Medical Care – Future Medical Expenses.

Introduction

1. This is an assessment of damages in respect of two claims which were consolidated, both having arisen out of the same event. In April, 2006, Raul Magana perished in a fatal car accident on the Philip Goldson Highway, in Corozal, Belize. The deceased was the driver of his vehicle, whilst his wife Marleni Magana, mother-in-law Maria Magdalena Pena, sister-in-law Myra Pena and his three minor children Seleni, Julian and Christian Magana

were passengers. The passengers all survived but sustained varying degrees of injury to their respective persons. The Defendant Enrique Montejo was the driver of the other vehicle which was involved in the accident. The second named Defendant was said to be the owner of that vehicle. The second Defendant at no time took any part in the claim. On 17th July, 2014, the date of trial of the claims, the Defendant Enrique Montejo appeared and admitted liability for the accident and a consent judgment was entered to this effect. Thereafter the matter was adjourned for further hearing on the assessment of damages in relation to both claims. This is the assessment of damages.

Issues

2. The issues to be determined on the assessment of damages are as follows:-
 - (i) The quantum of damages payable under claim 189 of 2007 ('the dependency claim');
 - (ii) The quantum of damages payable under claim 190 of 2007 ('the personal injury claim').

Analysis of Issues

The Dependency Claim

3. The Dependency Claim was filed by Marleni Magana on behalf of the Estate of Raul Magana deceased. The claim was for damages for the benefit of the deceased's dependents and for special damages on behalf of those dependents in the sum of \$7,500. The claim was supported by the requisite documents which established the entitlement of the claimant and the deceased's dependents – namely – the marriage certificate of Marleni and Raul Magana; the death certificate of Raul Magana and the birth certificates of their three children – Seleni, Julian and Christian. Liability having been admitted, the only issues are whether the special damages claimed were proven at trial and what damages were established by evidence for the benefit of the deceased's dependents.
4. The total amount claimed of \$7,500 comprised \$3,500 for funeral expenses and \$4,000 for the loss of the deceased's motor vehicle in the accident.

Unfortunately, despite being properly pleaded from the inception, there was no evidence submitted in support of either of these claims for special damage. Quite clearly, funeral expenses would have been incurred for the deceased's burial, but what the amount was and whether that amount was borne by the claimant or the deceased's estate was not established by any evidence at the hearing for assessment of damages. In the circumstances, no award is made in relation to this claim.

5. Additionally, with respect to the claim for the loss of the deceased's vehicle, it is clear from the photographs provided in support of the claim, that the vehicle was destroyed beyond repair. There was a statement provided from one Mr. Davis Yama that the vehicle belonging to the deceased was damaged beyond repair as a result of the accident. This person did not give evidence at the hearing for assessment and in any event, that statement contained no information as to the value of the vehicle – pre or post-accident. The value of \$4000 cannot be accepted by means only of the assertion of the claimant. It is considered that there are several variables which may have affected the value of the vehicle in respect of which there was no evidence. For example, whether there was any salvage value obtained from the vehicle and given the age of the vehicle, a realistic market value should come from one with knowledge of vehicles and the market, such as a mechanic. In the absence of any proof of the value of the vehicle lost, no award is made for this claim.
6. Aside from the claim for special damages, the other aspect of a dependent's claim is the value of the dependency lost by the death of the deceased. There was no evidence adduced of the financial benefit lost by the Claimant and the deceased's dependents. Such a loss was certainly pleaded in Claim 189 of 2007, but no evidence of the deceased's salary nor the benefits received by the dependents was provided to the Court. There were no submissions at all made in this regard, thus it can only be imagined that this aspect of the claim was no longer pursued by the Claimant in Claim No. 189 of 2007. In the circumstances, the special damages not having been proved and there being no evidence led to quantify the value of dependency lost, there is no award made in respect of Claim 189 of 2007.

The Personal Injury Claims

7. The six passengers travelling in the deceased's vehicle all sustained personal injuries. Before embarking on the assessment of the respective injuries, the Court acknowledges the broad statement of principle that damages are meant to be compensatory - to restore a claimant to as close a position as can be done, had the wrong (in this case, the accident caused by the defendant), not been committed. Damages are to be assessed in terms of general damages, which compensates non-financial loss and special damages, which compensates financial loss which can be proved up to and at the date of trial. In order to be awarded, special damages must be specifically pleaded and proved whilst general damages are assessed according to the three heads of (i) pain and suffering, (ii) loss of amenities and where applicable (iii) loss of future earnings or earning capacity. There are also other recognized heads of damage such as loss arising in the form of future medical expenses and care, both of which fall to be considered in this case.
8. In this assessment, each Claimant will be dealt with individually, detailing the injuries received and submissions of counsel on quantum, followed by the Court's consideration and quantification of that claim. For ease of reference, the Claimants are referred to by name and the assessment shall be in the following order:- (i) Marleni Magana, (ii) Myra Pena, (iii) Maria Magdalena Pena, (iv) Christian Magana, (v) Julian Magana and (vi) Seleni Magana. In terms of the evidence, because all the children were minors at the time, evidence in support of their claims was initially provided by their mother Marleni along with their respective medical reports. By the time of the trial however, Marleni had suffered a stroke and was unable to testify thus evidence pertaining to the children was provided by their grandmother Maria Magdalena Pena, who also gave evidence, as far as she was able, in respect of Marleni. Most supporting documents were originally made in Spanish but had been translated to English.
9. Except in the case of Seleni, the medical evidence was restricted to medical reports only (as opposed to oral testimony of doctors) and in some instances, the claim was put at a disadvantage because the medical jargon used was not translated for the Court.

Where appropriate, the Court relied on acceptable common knowledge or dictionary definition of some terms – for example the reference to bones or other body parts - but in other instances, it was not within the Court’s purview to attempt to ascertain the specialized medical meaning of terms used in the reports and the full extent of the injury or condition may not have been appreciated. It is considered that any such result is to be borne by the Claimants as a reflection of adequacy of the information put before the Court.

(i) Marleni Magana

10. Marleni is the widow of the deceased driver, the mother of the three children and daughter and sister respectively of Maria and Myra, who were all passengers in the vehicle. At the time of the accident she was seated in the rear seat of the vehicle behind the driver, holding son Julian (then 8 years old) on her lap. Marleni was rendered unconscious by the impact and taken to the Northern Regional Hospital where her condition on admission to that hospital was later reported as *‘politrauma and bifocal fracture of the right tibia’*. By further medical report of one Dr. Roberto Gutierrez of Hospital General Chetumal, it is seen that Marleni was transferred from Northern Regional in Belize to the hospital in Chetumal 12 days after admission. Dr. Gutierrez observed that she had sustained multiple trauma and multiple fractures to the tibia of her right leg.
11. A rod had been placed in her fractured leg which was removed and an open injury of 3-4 cm was observed in the middle portion of the leg. She underwent surgery that same day and about 7 days after that, the leg was affixed with intramedullary nails and an external fixture attached. Marleni was released 16 days after that and on further consultations, the stitches were removed. The report stated that Marleni would have required radiography every 6 weeks to determine the progress of healing of the fracture which was described as complex, requiring about 8-10 months for full consolidation. The implant would have required removal between one to one and a half years after consolidation of the fractures.

12. There was no follow up medical report that was provided which detailed the progress or final prognosis for Marleni's fractured leg. She was not present at the trial to speak for herself but evidence is accepted from her mother Maria who was able to say that after Marleni was released from the hospital in Chetumal she was taken home to Belize to continue her recovery. Upon her release however, Marleni was unable to walk and appeared in severe pain. She required the assistance of family members to care for herself, her home and her children as she was unable to do so. Marleni was able to walk again with the assistance of physiotherapy about 7 months after the accident. Maria says that Marleni was in pain for several weeks after the accident and continues to be affected by pain in her legs, although not very badly, during rainy or cold weather. She is unable to stand for any prolonged period or do strenuous activities. In terms of amenities Marleni was in good physical condition before the accident and was very active as the primary caregiver for her children. The sum of \$2,157 is claimed as special damages for medical expenses including cost of treatment, medication, travel to Chetumal and out of pocket expenses in Chetumal whilst receiving medical treatment.

Assessment

13. The report from the Northern Regional Hospital in Belize detailed nothing except that Marleni was admitted with multiple trauma and bifocal fracture of right tibia. This assessment was confirmed by the report of Dr. Gutierrez from Hospital General Chetumal, which similarly stated that Marleni suffered multiple trauma and multiple fractures to the right tibia. There was no specification by any medical professional of the precise nature of the multiple injuries sustained by Marleni. In her statement, Ms. Pena says that after the accident she later learned that Marleni had suffered a broken left rib, fractures to her leg, injury to the neck and other internal injuries. Save for the fractured leg which was detailed by medical report, this evidence of what the other injuries were cannot be accepted from Ms. Pena. That specificity was not within her competence or personal knowledge - this is hearsay information which she received from others. To be clear, it is not the fact that Marleni suffered additional injuries that is in question, as this fact is evidenced by the medical reports.

However, it is the evidence of the nature and extent of these other injuries which is lacking. There will be recognition of the fact that multiple injuries were sustained, but in the absence of proper medical evidence of what and how serious those other injuries were, the award will be less than it could have been.

14. In terms of the multiple fractures to her right tibia – (the bone between the shin and knee), Marleni is said to have presented to Hospital General Chetumal with a rod in her tibia which was removed. In light of the fact that the leg would have had to have been cut open to enable insertion of the rod, it is reasonably inferred that the rod was inserted by surgical means. Thereafter Marleni underwent another surgery to remove that rod and to repair the bad condition her leg was in. This is deduced from lines 6-13 of the report of Dr. Gutierrez. It was said therein (Spanish to English translation) – *“When she is received she is honestly in a bad state, general hypertrophy of all the right inferior extremity, which was immobilized at the top by a rod, it was then removed and an open injury of approximately 3-4 cm was observed, between the third middle upper area of the leg, and exuding hematic fluid. On that same day the surgical intervention was requested and she underwent surgical intervention.”*

15. It was then said that 6-7 days after, that intramedullary nails were affixed and an external fixture was attached. It was not stated whether this action was done via surgical intervention, however, towards the end of the report it is pointed out that the implant must be removed but not earlier than a year to a year and a half after consolidation (this is understood to mean healing) of the fractured bones. It is inferred that the implant referred to the intramedullary nails which were affixed and it is again inferred that as the insertion must have been done via surgery the removal must require likewise. With respect to the reference to the general hypertrophy of the right inferior extremity, clearly the reference is to the same injured lower right leg but general hypertrophy is not explained and this is not a term appropriate for the Court to try to ascertain meaning outside of medical clarification. At the most therefore, what is garnered from Dr. Gutierrez’ report is that Marleni underwent at least 3 surgical procedures to her fractured lower right leg and it was a very serious injury.

16. With respect to the requirement for radiography (x-ray) every six weeks, whilst this is accepted, it has not been said for how long Marleni actually underwent an x-ray every six weeks and what if any additional pain and suffering it caused her. Dr. Gutierrez' report indicated she would require the x-ray every six weeks during the time she would have to undergo physiotherapy, which was to have been for 3-4 months. The fracture was said to require between 8-10 months for full healing. It was not said that the x-ray frequency would remain throughout that period. At the most therefore the Court accepts that the requirement for an x-ray every six weeks lasted for about 4 months. Thereafter, it is accepted that regular x-rays would still be required during the remainder of the period of the ten months forecast for full healing of the fracture. Ms. Pena confirmed that Marleni did undergo physiotherapy which enabled her to walk again approximately seven months after the accident.
17. Ms. Pena states that Marleni was in severe pain for several weeks after the accident. With 3 surgeries behind her, a rod in her leg, unable to walk, having to travel back and forth to Chetumal for medical attention it is accepted that Marleni was in severe pain as Ms. Pena stated. It is accepted that Marleni continues to date to suffer pain in both her legs during rainy or cold weather, however the extent of that pain and what is used to manage it has not been given. Whether or not that is a direct consequence of the fracture to her right leg or other injuries received did not form part of the medical evidence and as such the recurrent pain alleged will not significantly affect quantification. As of July, 2015 Ms. Pena stated that Marleni had recently suffered a stroke and was unable to help herself and family but it was not suggested nor was any evidence given, of whether 8 years down the road, this stroke was as a result of the accident.
18. That information thus plays no part in the assessment in favour of Marleni. In respect of loss of amenities, it is accepted that Marleni was unable to care for herself and her family for at least 7 months after the accident. The evidence of her being in severe pain for several weeks after the accident and without mobility for seven months after the accident supports this claim entirely. The ability to care for her children seems to have been the main loss of amenity suffered. As previously a housewife, no loss of income was claimed.

19. The case of **Alberto Idelfonso v Ercelia Wagner & Gabriel Villafranco**¹ was submitted as a comparable award. The Claimant therein suffered a closed fracture of the upper arm bone and open fracture of his right thigh bone, underwent two surgeries, and was treated with nail fixation of both fractures and given six months to recuperate. The Claimant suffered complications from a bone infection of the fractured thigh and was further hospitalized. The Claimant remained with a disability in the form of a limb length discrepancy of 2 inches which resulted in a limp, severe restriction on flexion of his knee and a noticeable pelvic tilt. That Claimant required corrective surgery to restore the length of his thigh bone affected by the bone infection and was unable to walk long distances and some 9 months after the accident had not been able to return to work or carry out previous activities. Learned counsel in the case at bar submitted that the sum of \$50,000 which was awarded in *Idelfonso* is appropriately awarded for Marleni.
20. The Court also refers to its earlier decision of **Kelvin Aguilar v David Wang**², in which an award of \$82,500 was made for general damages for pain and suffering and loss of amenities. The Claimant Aguilar suffered a severe fracture to his thighbone which required surgical intervention, implant of rod and the Claimant was left with a noticeable limp. This award however also catered for a severe open forearm fracture with resulting disability. Because the additional multiple injuries suffered by Marleni were not detailed by medical evidence, the award must be lower than that in Aguilar, but the severity of the fracture, multiple surgeries and the existence of other albeit not detailed injuries places the award higher than Idelfonso. A fair award for pain and suffering and loss of amenities, is considered to be **\$65,000**.
21. With respect to the special damages, in relation to this and all other Claimants, the amount claimed was based upon an exchange rate of BZ\$5 to 1 Peso. It was verified that the exchange rate to be applied from 2006 throughout the relevant periods of the claims, is in fact BZ\$6 to 1 Peso. An adjustment to the calculation for special damages for this and all remaining claims thus has to be made.

¹ Belize Supreme Court Claim No. 131 of 2014

² Belize Supreme Court Claim No. 550 of 2014

After re-calculation upon adjustment of the exchange rate and disallowance of four minor items, (two being claims for groceries and the other two being indeterminable), the amount awarded for Marleni's special damages is **\$1,783.37**.

(ii) Myra Pena

22. Myra is Marleni's sister and was seated in the front passenger seat of the vehicle when the accident occurred. She was rendered unconscious and awoke the next morning in the hospital in Orange Walk, Belize. She was told that she had an operation to drain blood from her abdomen, had a broken rib, punctured lung and scratches and bruises to her face and left leg. Myra spent 9 days in the hospital but thereafter went for further evaluation in Chetumal. The summary of her injuries from the Hospital confirms the injuries which were told to Myra, namely that she had pneumothorax (condition causing collapse of the lung); post laparoscopy (post abdominal surgery) and politrauma (multiple injuries). The further medical attention in Chetumal indicated that Myra suffered injury to her brachial plexus and she was treated with a neck brace and physiotherapy was recommended. She also started to complain of pain to her hip about three weeks after the accident and her thigh started to turn black. She was diagnosed in Chetumal with an abscess in the soft tissue of her thigh and was treated for same. Contrary to the submission of Counsel, the medical evidence was not that Myra suffered a broken hip.
23. Myra was employed as a housekeeper at Paradise Villas in Belize. She claimed to have been unable to work as a result of the accident from the date of the accident in April, 2006 until December 25th, 2006. Her employer by letter confirmed her position, her absence for the period of 8 months alleged and salary for that period in the sum of \$28,436.50. Medical expenses in the sum of \$675 were claimed as a result of injuries suffered.

Assessment

24. Learned counsel for the Claimants submitted that Myra's hip injuries were similar to those suffered in *Idelfonso* (save for the residual disability of which there was no indication) and an award of \$40,000 was suggested.

The Court disagrees with this suggestion even though the award suggested is less than *Idelfonso*. The injuries were in no way similar. *Idelfonso* sustained a fracture to the upper right arm and open fracture to his right thigh bone. Both fractures were surgically repaired and three months after, the Claimant was found to be suffering from an infection to the fractured thigh bone. This infection had to be repaired surgically and even thereafter, the claimant underwent at least 2 more surgeries to repair the fracture to his thigh bone which had not healed properly and to once again treat for bone infection. In the instant case Myra underwent one laparoscopic surgery for internal injuries and the infection which surfaced weeks after the accident was identified as an abscess to soft tissue in her hip, resulting in damage to surrounding soft tissue in her thigh.

25. Maria was treated for this abscess, but there is no indication that this treatment was surgical. In the circumstances, the comparison to the injuries suffered in *Idelfonso* cannot be maintained. Using *Idelfonso* as an upper ceiling guide however, an award for damages for pain and suffering is granted in the sum of \$20,000. There was no particular evidence of amenities lost but it is accepted that there would have been disturbance to Myra's enjoyment of life for the period of her recovery from her injuries thus the award takes this into account. The medical expenses claimed by Myra as a result of the accident are accepted, however the amount awarded with the adjustment to the exchange rate is six hundred and sixty-four dollars and sixty-three cents (**\$664.63**). On the other hand, the amount claimed for loss of earnings is considered as insufficiently made out. The injuries sustained by Myra on a whole consist of internal injuries treated by one surgery, damage to the nerves at the base of her neck and soft tissue injury to her hip resulting in an abscess which required treatment several weeks after the accident.
26. There was no medical report which indicated Myra's prognosis and required time for healing. It is not apparent on the injuries established by the medical evidence that eight months away from work was justified. There was no challenge to this evidence by the Defendant but at the end of the day, the Court must be satisfied of the proof of the claim.

In the absence of medical evidence supporting her lay off from work for eight months after the accident I am prepared to award only a sum for absence from work for four months as the totality of injuries suffered do not lead to an obvious inference that such a lengthy period was required to return to work. The amount of **\$14,218.25** is awarded for four months loss of earnings. The total award for special damages is thus **eighteen thousand eight hundred and eighty-two dollars and eighty-eight cents (\$14,882.88)**.

(iii) Maria Magdalena Pena

27. Maria Magdalena, the mother of Marleni and Myra was seated behind the passenger seat in the vehicle when the accident occurred. She was holding her grandchild Christian. Maria was said by the report provided from the Northern Regional Hospital to have suffered 'luxation and fracture of the left femur'. There was no follow up report on Maria's progress or outcome. In terms of special damages Maria claims lost wages for 10 months in the sum of \$4000 derived from a rate of \$2000 pesos every two weeks. Medical expenses were claimed in the sum of \$918.85.

Assessment

28. The Belize Hospital's report of Maria's injury is unclear based on Maria's evidence and there was no other medical report which spoke to her condition. The report speaks of a luxation (dislocation) and fracture to the left femur (thigh bone). Maria spoke of having pain in her hip, but the report made no reference to a hip injury. This issue is resolved by the x-ray that was instructed for Maria from the hospital in Chetumal. The x-ray request was marked for the pelvic bone and not for the femur. Along with Maria's evidence of having pain in her hip, the injury is thus accepted as to her hip and not femur. However, there was no indication of the course of treatment prescribed or the length of time taken for the injury to heal. There was no specific evidence given of loss of amenities but it was indicated that Maria was unable to work for 10 months after the accident. Learned counsel for the Claimants cited **Adolph Vancolbier v Romel Bergess & Manuel Perez**³ as a comparable award based on the similarity of the injury suffered.

³ Belize Supreme Court No. 103 of 2003 (decided on 27th November, 2009).

The case will be used as an upper ceiling as the extent of injuries of the claimant therein were greater than what Maria suffered. The Claimant in *Vancolbier* suffered a hip fracture along with a head injury and was awarded 25,000. Absent the head injury, Maria's award for general damages including an element for inflation given that the award was made 6 years ago, is fifteen thousand dollars (**\$15,000**). In terms of the special damages, once again there was no medical evidence of the period for recovery however with the injury accepted as a broken hip, it is not unreasonable to accept that Maria was unable to work for 10 months. The amount of 10 months wages lost is awarded at four thousand dollars (\$4000). The Claim for nine hundred and eighteen (\$918.85) for medical expenses has been supplemented by receipts and is accepted but with the re-calculation upon adjustment of the exchange rate, the amount awarded for special damages is eight hundred and eighteen dollars and ninety-eight cents (**\$818.98**). The total award for special damages is **four thousand eight hundred and eighteen dollars and ninety-eight cents (\$4,818.98)**.

(iv) Christian Magana

29. Christian was seated in his grandmother's Maria Pena's arms in the rear passenger seat of the vehicle at the time of the accident. He received only scratches and bruises and learned counsel submits he must have been traumatized by the accident. The amount of \$5000 is claimed as general damages for pain and suffering.

Assessment

30. There is no indication of the extent of these scratches and bruises but clearly they were so minor that no medical inventory was taken of them. With respect to the claim for \$5,000 it is presumed that the greater part of that amount claimed is for mental distress. Munkman on Damages⁴ acknowledges that mental distress is a necessary element of the head of pain and suffering and it is recognized that Christian must have been traumatized by the accident.

⁴ Munkman on Damages for Personal Injuries and Death, 11th Ed. Para 6.25

There was no evidence from Marleni or Myrna however, as to the degree of distress that Christian suffered or any loss of amenities in terms of his enjoyment of life as a normal boy after the accident. In these circumstances, only a nominal award is granted in the sum of **two thousand five hundred dollars (2,500)** for the minor scrapes and bruises suffered by Christian, including an element of mental distress as a result of being involved in the accident which killed his father and seriously injured his mother and siblings. There are no special damages to be considered in respect of Christian.

(v) Julian Magana

31. Julian was held in his mother Marleni's arms who sat in the rear seat behind the driver at the time of the accident. The first account of his injuries from the Northern Regional Hospital indicated that he suffered politrauma and bilateral fractures of femurs. Thereafter there was a report provided by a Dr. William Cicler Garcia from Chetumal, Mexico who spoke to having operated on Julian's bilateral fractures where external fixators were placed. The recovery period forecast was 3-6 months with x-rays to be taken to assess the reattachment of the fractures. No follow up report was provided in respect of Julian's progress in healing nor his prognosis at final recovery. It was said but not supported by medical evidence, that Julian's tongue had been severed as a result of the accident and had to be sewn back on. He thereafter had to undergo speech therapy to assist him to speak again.
32. In evidence given by his grandmother Ms. Maria Pena, Julian is said to have been in bed for about one year and a half and to have experienced severe pain. In terms of loss of amenities, whilst Julian's legs have healed, Ms. Pena says he appears to have to make a conscious effort to do physical activities, suffers from severe constant headaches forcing him to lock himself away in darkness. Ms. Pena further expanded in oral testimony that Julian does not play any sports, sometimes says that his legs hurt and is not able to jump very well. He also tires easily. With respect to the injury to his tongue, Julian is now able to speak clearly.

Assessment

33. Learned counsel relied on ***Idelfonso*** as a guide and submitted that Julian's injuries were on par with the claimant in ***Idelfonso*** thus an award of \$40,000 was suggested. The injuries in ***Idelfonso*** have already been stated. This is not considered an ideal case for comparison purposes as we are here dealing with a fracture to both (not one) femurs, occurring in an 8 year old child as opposed to male adult. The decision of ***Ernesto Flores Jr (bnf) Yanera Flores v Duran Harban***⁵ which was submitted by learned counsel but in relation to the claim for Seleni herein, is considered a more appropriate guide. It is recognized that the injuries suffered by the claimant in ***Flores*** were far more extensive than Julian's given the occurrence of a head injury therein, but the award therein will provide a ceiling. The Claimant in ***Flores*** was 8 years old at the time and suffered from severe life threatening head trauma resulting in permanent brain damage and a life after recovery of special needs. The award in that case was \$250,000.
34. In ***Flores***, the Court referred to ***Racquel Rodriguez et al v Rupert Ritchie et anor***⁶ which concerned an assessment of damages arising from an accident affecting two teenagers, 13 and 15 years. One child suffered head trauma and was left with epileptic attacks who was awarded \$150,000, the other suffered a broken ankle and was awarded \$12,000. The award for \$12,000 is the more relevant of the two to the instant case and it is considered that in today's (2016) terms that award would be equivalent to at least \$20,000. Julian's injuries are more severe than the broken ankle in ***Rodriguez***, but far less severe than the head trauma. It is accepted that Julian must have been in tremendous pain with both legs broken and held in place by external pins, and from being confined to bed for about a year and a half. With respect to the injury to his tongue, this was not detailed in any of the medical evidence, but such an injury however would have been plainly evident and painful. Additionally, in one of the receipts provided for his medical expenses, it is seen that Julian was admitted to the hospital in Chetumal in mid-April, 2016, for reconstructive

⁵ Belize Supreme Court Claim No. 750 of 2010

⁶ Belize Supreme Court Claim No. 118 of 1999

plastic surgery which it is considered, supports the evidence of his grandmother that his tongue was severed and had to be re-sewn. The evidence of the consequential impairment of speech requiring the speech therapy from his grandmother is also accepted as having occurred.

35. As a consequence of his confinement to bed whilst his legs healed, it is accepted, that Julian would have been unable to attend to his own needs - to the extent to be expected of any 8 year old child; that he would have been unable to run around, play or enjoy life in the manner expected of an 8 year old boy and that he would not have been able to attend school. It is reasonably assumed that he may have had some tutelage whilst incapacitated, but certainly, he was unable to physically attend school with his peers for that year and a half. It is considered that quite apart from the severe pain from the physical injury of two broken legs and severance of his tongue, the loss of amenities occasioned by Julian's injuries were significant for an 8 year old child.
36. Unfortunately, there was no follow up medical evidence which spoke to Julian's recovery – that is, how well did the fractures heal; presumably the external pins holding the fractured bones in place must have been removed at some point through medical intervention; there must have been a period of intense physiotherapy during and after his recovery to assist him to walk again. It is not stated how long the period of speech therapy was for; it was not stated whether and if so to what extent Julian's schooling was affected by his injuries and recovery – he may have fallen behind by an entire year. All this information could have increased the award in favour of Julian in a not unsubstantial way. Be that as it may, with the information available, assessing the claim to be in the lower to mid-range between the ceiling of \$250,000 in Flores and lower end of \$20,000 in Rodriguez, a fair assessment of general damages for pain and suffering and loss of amenities for Julian's injuries is considered to be **\$60,000**.
37. The special damages claimed on behalf of Julian are accepted having been supported by receipts and the amount claimed is granted but with the re-calculation after adjustment of the exchange rate. The special damages awarded are in the sum of **one thousand, three hundred and fifty-three dollars and sixty-seven cents (\$1,353.67)**.

(vi) Seleni Magana

38. Seleni was seated in the rear seat of the car in the middle between her mother and grandmother. She received by far the gravest injuries of the passengers in the vehicle. Seleni was 10 years old at the time of the accident. The inventory of her injuries given by Dr. Pedro Arriaga on her admittance to the Karl Heusner Memorial Hospital as an intensive care patient were head trauma, intra-cranial hypertension, neurological deficit secondary to one and hip fracture. Seleni was placed on a mechanical ventilator to keep her alive. On 13th April, 2007 (eight days after the accident) Seleni was transferred to Belize Medical Associates for a 'left fronto-temporo-parietal craniectomy performed by neuro and spinal surgeon Dr. Cervantes. That surgery which entailed opening up her skull, was to gain access to the brain, remove of a blood clot and allow the brain to swell without being crushed by the skull in order to heal. This operation was said to be a life-saving operation as without it Seleni could have died or been left in a permanent vegetative state.

39. After that surgery Seleni was returned to the KMHM for further management and care. Seleni remained on the ventilator for two months in an induced coma, which Dr. Cervantes stated was necessary in order for her brain to rest and heal. Dr. Cervantes provided a medical report dated October 19, 2015 which contained a summary of Seleni's injuries as a result of the accident, her progress and prognosis. His report also contained estimated costs for Seleni's future medical expenses. Dr. Cervantes gave oral evidence at the hearing where he explained the findings in his Report. It is proposed to outline his evidence somewhat extensively so that the assessment for Seleni is fully illustrated. It is to be noted that Seleni underwent more than one CT scan for her brain and pelvis, for which there were reports submitted by other practitioners.

In particular the CT scan conducted on 10/04/06 detailed the following findings:-

Head CT

- Depressed (3mm) fracture of the left fronto-parietal bones.
- Non-depressed fracture through the right mastoid and occipital bones.
- Extensive left fronto-parietal hypodensity consistent with edema/infarct.

- Significant left hemispheric cerebral edema with compression and collapse of the ipsilateral lateral ventricle and subfalcine herniation.
- Left posterior occipital lobe infarct.

Abdomino-pelvic CT

- Moderate ascites (haemoperitoneum) with no tomographic evidence for solid viscera, including liver, GB, spleen, pancreas or kidney injury. R/O hollow viscera injury.
- Comminuted left hip fracture with joint luxation and displaced fragments.

40. In his Report, Dr. Cervantes listed updated diagnoses of the injuries sustained by Seleni as a result of the accident, along with his explanations (according to my understanding and expressed in my simplified words) which are as follows:-

(i) *Sequelae of Diffuse Axonal Injury*

Dr. Cervantes explained firstly that brain injury occurs by the brain moving back and forth within the skull upon an impact to the skull, thereby sustaining damage from where the surface of the brain connects to the interior the skull. The damage sustained to the brain tissue causes disruption of axons – ie, a process of nerve cells by which messages are relayed within the brain. A diffuse axonal injury is one in which there is widespread damage to the nerve endings contained in brain tissue as opposed to such damage concentrated in one place.

(ii) *Post Traumatic Organic Brain Dysfunction*

The axonal injury as explained in paragraph (i) has not healed or there has been healing with scars, which means that the relay of information within the brain as would normally be the case without axonal damage, is disrupted. As compared to her original brain injury, Seleni has showed a very minor degree of improvement and she is not a functional person. Dr. Cervantes stated that Seleni came out of the coma in more or less the same condition as she was when she was induced, albeit the diagnosis is not one which could have been given at the date of trauma. The diagnosis required a period of assessment of her condition and progress as the brain went about its recovery.

The minor improvement of her condition referred to is that Seleni is able to answer questions and communicate with her mother and family members.

(iii) *Post Traumatic Depression*

Seleni's frontal and side brain were damaged, which has resulted in her depression. Dr. Cervantes explained that this means that she is literally always sad.

(iv) *Post Traumatic Psychosis*

Seleni hears voices and sees things that are not there. In answer to the Court as to how he could be sure what was actually going on with Seleni given her limited verbal responses, Dr. Cervantes explained that having had Seleni under his care for 9 years, he was familiar with her manner and capacity for communication and as such was assured of his diagnosis.

(v) *Post Traumatic Epilepsy*

An electroencephalogram (EEG) (an electrical test measuring electricity in the brain), was conducted on Seleni which showed abnormal electrical behavior in her brain. That abnormal electrical abnormality means that Seleni suffers from seizures as a result of the brain injury.

(vi) *Post-Traumatic Stress Disorder*

Usual symptoms of PTSD that we are aware of such as nightmares and flash backs.

(vii) *Post-Operative Status Craniectomy*

Craniectomy means the surgical removal of a portion of the skull to allow access to the brain. The term 'post-operative status craniectomy' thus means the visible evidence remaining that shows that a cut was made into the skull.

(viii) *Post-Operative Status Cranioplasty*

Cranioplasty is the replacement of the portion of the skull after craniectomy. Likewise, the term 'post-operative status cranioplasty' means the physical evidence remaining after that replacement.

(ix–xii) *Post-traumatic Osteonecrosis (Avascular Necrosis) of Head of Left Femur; left limb length discrepancy of 7 inches; pelvic imbalance; function scoliosis; and chronic post traumatic pain syndrome.*

These five diagnoses spoke to the effects of the fractured left hip and femur for which Seleni underwent several surgeries. Avascular necrosis means that blood supply was cut off, resulting in dead bone tissue which had to be removed. The removal of the bone tissue then lead to the shortening of the limb which then created both the pelvic imbalance and scoliosis (abnormal spine curvature). This condition results in pain and an imbalance in walking and Seleni has to wear specifically built up shoes to assist her in walking.

(xiii) *Chronic Post-Traumatic Pain Syndrome*

Seleni has pain in several areas of her body and can do little physical activity without fatigue. By way of example Dr. Cervantes stated that perhaps she may be able to spread the bed, but then have to rest thereafter; or perhaps sweep 2-3 rooms and rest thereafter. She requires pain medication but is now no longer on a regimen but is administered according to need.

41. In addition to requiring pain medication to cope with her constant pain, Dr. Cervantes summarized her prognosis by stating that:-

- (i) Seleni has to take anti-psychotic medication to address her psychosis;
- (ii) She has to take anti-epileptic medication in order to prevent seizures
- (iii) She will never be a functional citizen;
- (iv) She will never have a consensual relationship;
- (v) She has remained in the mind of a 10 year old child but has the body of a woman;
- (vi) She can never work;
- (vii) She cannot make informed decisions in respect of financial or medical concerns;
- (viii) She is unable to look after herself and will remain dependent on help for her daily care;
- (ix) She will always need neurological care and medication; and
- (x) Apart from continued neurological care, in order for Seleni to obtain the optimum quality of life possible, her condition justifies follow up care for the rest of her life from specialists in psychiatry, psychology, pain specialists, orthopedics, occupational therapy and physical and rehabilitative therapy.

42. In terms of her medical expenses, Seleni's current expenses are about \$5,000 per month and that does not include the cost of consultations she requires. She will require at least that amount for the rest of her life. She is an invalid with an invalidity rating of 80%. Seleni requires further surgery to address remaining issues with her hip and femur. She may require surgery for scoliosis in the near future. Her neurological status *may* be improved by further brain surgery. Dr. Cervantes estimated the accumulated costs for her additional spine, brain, hip and femur surgeries to be in the region of BZ\$1.5 million. In answer to a question by learned counsel for the Defendants as to the benefits of the additional surgeries, Dr. Cervantes clarified that the additional brain surgery is not a present option but the orthopedic surgery to her hip would improve her function and comfort. With respect to the brain surgery, (which is to be considered in the future only), the most viable option for surgery, is a highly specialized procedure of using Seleni's own healthy tissues to cover and hopefully repair the damaged areas in her brain. That type of surgery carries a 50/50% chance of success, and if successful would improve her brain function, but it is not possible to say whether she would be fully functional.

Assessment

43. The evidence of Dr. Cervantes as to Seleni's neurological injuries and condition, and her orthopedic issues, the underlying injuries of which are supported by reports of other specialists is accepted. It is found that the severity of Seleni's injuries speak for themselves and they are classified in the round as severe traumatic brain injury and serious hip and thigh fracture, both with a multitude of residual conditions.

She is entitled to a sizeable award in general damages for her pain and suffering and loss of amenities. She will be entitled to a sizeable award for her future medical expenses as well as for her medical care. It is noted although no issue was made of it, that because of the nature of her injuries, Seleni will require attention by specialists who will more often than not in Belize be within the private medical as opposed to public medical facilities and thus more expensive.

44. Of the cases cited by learned Counsel the most applicable is **Ernesto Flores JR (bnf) Yanera Flores v Duran Harban**⁷. This case concerned a 10 year old child who suffered severe head trauma as a result of a road traffic accident. He was hospitalized for 41 days, suffered permanent brain damage and was thereafter classified as a special needs child with 50% overall disability, required lifelong treatment and therapy for his special needs. An award was granted for general damages in the amount of \$250,000. Reference was made in this case to **Racquel Rodriguez et al v Rupert Ritchie et anor**⁸ where an award of \$150,000 was granted in favour of a 15 year girl who suffered multiple injuries including head trauma which manifested months after the accident. The award in **Flores** was comparatively based on the award in Rodriguez and agreeably higher. There was no however, no illustration of the basis of the award made in **Rodriguez** and the Court is mindful of the award made in **Pamela Watson, Joyce Frankson et al v Ricardo Palma**⁹ in the sum of \$200,000. This latter award was made in relation to multiple injuries of varying degrees of severity with an overall disability of person of 80%. The basis of the award in this case was clearly illustrated thus it is considered of greater assistance for comparative purposes than **Rodriguez** and **Flores**. The claimant **Frankson** was an adult as opposed to the instant case where we are dealing with a child with severe head injuries and resulting physical and mental disability. The award for Seleni should be higher than **Frankson** and is considered fairly assessed in the sum of **\$250,000**.

45. With respect to Seleni's future medical care, there was no indication from the medical evidence of whether Seleni's life expectancy has been shortened as a result of her traumatic brain injury. An average life span of 65 years is considered reasonable and thus used to estimate the award for her future care. Twenty (20) years is deducted on account of contingencies, (especially where it is not unreasonable to expect Seleni's life span to be affected by her severe injuries) and on the basis of receiving payment in a lump sum¹⁰, leaving us with 45 years from which to deduct Seleni's current age.

⁷ Supra (this case was decided in July, 2013).

⁸ Supra

⁹ Belize Supreme Court Claim No. 74 of 2014

¹⁰ Munkman on Damages para 9.8 et seq – on receipt of a lump sum it is presumed that the monies received can be invested at a profit.

The amount of \$5,000 per month (60,000 per year) is accepted as the multiplicand, particularly because Dr. Cervantes has been treating Seleni from the time of the accident to present and is very familiar with her care. This multiplicand of \$60,000 is applied to the multiplier of 25 years which remains after the discount of 20 years. The award for future medical care is therefore **one million five hundred thousand dollars (\$1,500,000)**.

46. In respect of future medical expenses, the court is not satisfied with the global figure of one million five hundred thousand estimated for surgeries for brain, spine, hip and femur. These are all different medical disciplines and whilst the Court very much recognizes and acknowledges the tremendous experience and expertise of Dr. Cervantes, this undefined estimate is not an appropriate basis upon which to make an award. For example, the brain surgery is said not to be an option at this time and it is not certain that Seleni's condition would in any way improve as a result of it. Additionally, it was said that she *may* require surgery for scoliosis in the near future but what that was dependent on was not stated. It is also thought reasonable that a definite allocation as to an estimate for this surgery should have been possible instead broad estimate stated in respect of all future surgeries. On the other hand, there was a definite indication that Seleni does require further surgery for her hip and femur, which would certainly improve her quality of life. Accepting Dr. Cervantes' evidence of the skilled procedures required for all of Seleni's treatment, I award 1/3 of the amount estimated for the additional surgeries, in the amount of **\$500,000**. The absence of specificity restricts any greater award.

47. Seleni's claim for special damages was for medical expenses incurred both in Belize and Mexico. The amount claimed was \$10,337.14. This amount appears to be an error. Two claims were dis-allowed having not been substantiated by receipts. Even with these amounts omitted however, the Court's tally of the medical expenses for Seleni amounted to **\$11,534** (with the re-adjusted exchange rate) and that sum is awarded.

(vii) Miscellaneous Special Damages

48. The claim comprised miscellaneous special damages for transportation (gas) and the associated costs of fumigation (requirement upon overland border entry to Mexico) and transportation (in the form of bus tickets) to Merida, Mexico. These are expenses were incurred as a result of having to travel to seek medical attention. The miscellaneous expenses are awarded as claimed but with adjustment to the exchange rate, as follows:-

(i)	Fumigation	\$358.33
(ii)	Gasoline	\$243.83
(iii)	Transportation	\$396.50

Conclusion

49. The total claim is quantified as follows:-

Marleni Magana

General Damages		\$	65,000.00	
Special Damages		\$	1,793.75	
Sub-total		\$		66,793.75

Myra Pena

General Damages		\$	20,000.00	
Special Damages				
Loss of Earnings	\$14,218.25			
Medical Expenses	\$ 664.63	\$	14,882.88	
Sub-total		\$		34,882.88

Maria Magdalena Pena

General Damages		\$	15,000.00	
Special Damages				
Loss of Earnings	\$ 4,000.00			
Medical Expenses	\$ 818.98	\$	4,818.98	
Sub-total		\$		19,818.98

Christian Magana

General Damages		\$	2,500.00	
Sub-total		\$		2,500.00

Julian Magana

General Damages	\$ 60,000.00	
Special Damages	\$ 1,353.67	
Sub-total		\$ 61,353.67

Seleni Magana

General Damages	\$ 250,000.00	
Future Medical Care	\$1,500,000.00	
Future Medical Expenses	\$ 500,000.00	
Special Damages	\$ 11,534.02	
Sub-total		\$2,261,534.02

Miscellaneous Expenses

Fumigation	\$ 358.33	
Gasoline	\$ 243.85	
Transportation	\$ 396.50	
Sub-total		<u>\$ 998.68</u>

Total Award**\$2,447,881.90**

50. In addition to the total award, interest and costs are granted as follows:-

- (i) With the exception of Seleni Magana, pre-judgment interest is awarded on the total sum awarded for each Claimant at the rate of **3%** from the date of filing of the claim until the date of judgment;
- (ii) With respect to Seleni Magana, pre-judgment interest is awarded on the sum of \$261,534.02 (being the total of general and special damages) at the rate of **3%** from the date of filing of the claim until the date of judgment;
- (iii) Post judgment interest is granted on the total award for each claimant at the statutory rate of **6%** from the date of judgment until payment;
- (iv) For purposes of costs, the total award in the Claim is two million four hundred and forty-seven thousand eight hundred and eighty-one dollars and ninety cents (**\$2,447,881.90**).

- (v) Prescribed costs are awarded to the Claimants on this total sum in the amount of one hundred and twenty-seven thousand two hundred and thirty nine dollars and forty cents (**\$127,239.40**).

Dated the day of March, 2016.

Shona O. Griffith
Supreme Court Judge