

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**ANGUILLA**

**AXAHCVAP2020/0020**

**BETWEEN:**

**CARL WEBSTER**

Appellant/Counter-Respondent

and

**[1] HISTORIC BEACON POINT ANGUILLA LTD.  
[2] RONDA HODGE**

Respondents/Counter-Appellants

**Before:**

The Hon. Mr. Davidson Kelvin Baptiste  
The Hon. Mde. Louise Esther Blenman  
The Hon. Mr. Sydney A. Bennett

Justice of Appeal  
Justice of Appeal  
Justice of Appeal [Ag.]

**Appearances:**

Mr. Devin Hodge for the appellant/counter-respondent  
Ms. Paulette Harrigan for the respondents/counter-appellants

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2022: February 11;

2023: June 21;

**Re-Issued: September 19.**

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*Civil appeal – Assessment of damages – Personal injury – Loss of future earnings - Private nuisance - Appeal against trial judge’s award of damages – Whether learned judge erred in his award of damages for personal injury and private nuisance - Duty to set out case – Rule 8.7(1) of the Civil Procedure Rules 2000 – Failure to properly plead heads of general damages*

Mr. Carl Webster (“Mr. Webster”) is the registered proprietor of a parcel of land situated at Island Harbour, Anguilla and more particularly described as Registration East Central Block 89218B Parcel 210 (“Parcel 210”). Mr. Webster maintains his family home on Parcel 210.

Historic Beacon Point Anguilla Ltd. ("Historic Beacon") is the registered proprietor of a parcel of land more particularly described as Registration Section East Central Block 89218B Parcel 38 ("Parcel 38"). Mrs. Ronda Hodge ("Mrs. Hodge") is a food vendor and is one of two directors and shareholders of Historic Beacon. Parcel 38, which is in close proximity to Parcel 210, is used for the operation of a farm on which livestock are reared and various vegetable and fruit crops are grown. Mr. Webster complained that the activities, including the burning of waste material, involved in rearing the livestock on Parcel 38 caused disturbance, annoyance and discomfort to him and his family at their home on Parcel 210 and despite his complaints to Historic Beacon and Mrs. Hodge along with the environmental authorities, he was unable to obtain any relief.

On or about 10<sup>th</sup> April 2016, Mrs. Hodge saw Mr. Webster on Parcel 38 running from the direction of the farm located on the land. Mrs. Hodge enquired as to his purpose on the land and the two eventually got into a physical altercation.

In an ensuing action, Historic Beacon claimed damages against Mr. Webster for trespass to Parcel 38 and sought a mandatory injunction restraining Mr. Webster or his agents from entering Parcel 38. Mrs. Hodge claimed damages for personal injuries as a result of being unlawfully assaulted by Mr. Webster and sought a mandatory injunction restraining Mr. Webster from assaulting or otherwise interfering with her or coming within 100 feet of her. Mr. Webster denied assaulting Mrs. Hodge and claimed that he was the one assaulted by Mrs. Hodge, the result of which he sustained injuries to his head. He accordingly claimed damages against Mrs. Hodge and against Historic Beacon for nuisance. He additionally sought a mandatory injunction restraining Mrs. Hodge and Historic Beacon from burning waste material, rearing livestock within 200 feet of Parcel 210, and in any other way creating a nuisance as a result of the farming practices engaged in by them on Parcel 38.

The court found that it was likely that Mrs. Hodge had sustained multiple injuries to her head, inflicted by Mr. Webster. She was awarded damages totaling EC\$600,000.00 and US\$52,275.00 including the sum of EC\$225,000.00 in respect of lost earnings from the farm, and US\$20,250.00 for loss of earnings from the food vending business. The court also awarded Mrs. Hodge EC\$300,000.00 in respect of loss of future earnings from the farm and the sum of US\$27,000.00 for loss of future earnings from her vending business.

The court also found that on the totality of the evidence, Mr. Webster had made out a case for nuisance. The court ordered Mrs. Hodge and Historic Beacon to pay to Mr. Webster the sum of EC\$40,000.00 in respect of his claim for nuisance.

In relation to the claim for trespass, the court found that Mr. Webster indeed trespassed on Parcel 38, but such trespass was transient and caused no damage to the parcel. In the circumstances, the court made an award for the nominal sum of EC\$500.00.

Dissatisfied with the awards of damages made by the learned judge, Mr. Webster appealed. The main issue is whether the learned judge erred in his award of damages.

**Held:** allowing the appeal in part and making the orders at paragraph 64 of the judgment, that:

1. A claimant is required to include in the claim form or in the statement of claim, a short statement of all the facts on which he or she relies. This means that the claimant must state all the facts necessary for the purpose of formulating a complete cause of action. A detailed witness statement or a list of documents is not a substitute for this requirement. Further, a claimant must plead and particularise any item of damage which represents out-of-pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact quantification. Specifically, a claimant is required to include or attach to the claim form or statement of claim a schedule of any special damages claimed. A failure to include a particular out-of-pocket expense or pre-trial loss of earnings in the schedule of special damages attached to the claim form or statement of case or to amend the statement of case to include particulars of a claim for such expense or loss in the schedule of special damages will disentitle a defaulting claimant from recovering the claimed sum. In this case, Mrs. Hodge's claim was not amended to include a claim for loss of earnings from the farm or Mrs. Hodge's food vending business nor was it in any schedule of special damages attached thereto. In the circumstances, the learned judge's award of special damages of EC\$225,000.00 made to Mrs. Hodge for loss of earnings from the farm and the award of US\$20,250.00 made to her for loss of earnings from her food vending business is disallowed.

Rules 8.7(1) and (2) of the **Civil Procedure Rules 2000** applied; Rule 8.9(5) of the **Civil Procedure Rules 2000** applied; **Ilkiw v Samuels and others** [1963] 1 W.L.R. 991 applied; **Perestrello E Companhia Limitada v United Paint Co Ltd.** [1969] 3 All ER 479 applied; **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 applied; **Steadroy Matthews v Garna O'neal** BVIHCVAP2015/0019 (delivered 16<sup>th</sup> January 2018, unreported) applied.

2. If a claimant has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing payment into court. Thus, where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. The claimant may not otherwise rely on any allegation or factual argument which is not set out in the claim but which could have been set out there, unless the court gives permission, or the parties agree. In this case, the statement of claim and attached schedule contained no reference to any actual loss of earnings or any projected future loss. The amounts described in the schedule of special damages attached to the statement of claim as 'loss of earnings' were explained to be pre-trial expenses. The allegations of continuing loss of earnings or future loss of earnings were not "sufficiently made" in

the statement of case. Accordingly, the sum of EC\$300,000.00 awarded to Mrs. Hodge for loss of future earnings from the farm and the sum of US\$27,000.00 awarded to her in respect of loss of future earnings from her food vending business is disallowed.

Rule 8.7(1) of the **Civil Procedure Rules 2000** applied; **Daly v General Steam Navigation Co Ltd.** [1980] 3 All ER 696 considered; **Keithley George and Francis Trading Agency Limited v Gerald Khoury** Antigua and Barbuda Civil Appeal No.19 of 2004 (delivered 25th April 2005, unreported) applied; **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15 applied.

3. What amounts to strict proof of special damages is to be determined by the court by reference to the particular circumstances of the case. An appellate court is slow to interfere with findings of fact and credibility by the first instance judge and should not interfere with the trial judge's conclusion of primary facts unless satisfied that he was plainly wrong. Similarly, an appellate court is slow to interfere with assessments of general damages save in cases where the trial judge has applied the wrong principle or is otherwise clearly wrong. The judge's decision to award Mrs. Hodge special damages was based on his assessment of the credibility of Mrs. Hodge on the issue and it is not possible for this court to say that the judge's conclusion that he should accept her evidence is plainly wrong. Similarly, there is no basis to interfere with the learned judge's award for general damages which is within the range of awards made for pain and suffering and loss of amenities in comparable cases within the jurisdiction.

**Attorney General v Peter Bando** [2020] JMCA Civ 10 considered; **Sidney Binda v Juan Caliste et al** GDAHCV2014/0097 (delivered 10<sup>th</sup> February 2016, unreported) considered; **Ratcliffe v Evans** (1892) 2 QB 524 considered; **Ilkiw v Samuels and others** [1963] 1 W.L.R. 991 applied; **Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others** [2013] UKPC 13 applied; **Biogen Inc v Medeva plc** [1997] RPC 1 applied; **Fage UK Ltd. v Chobani UK Ltd.** [2014] EWCA Civ 5 applied; **Martin Alphonso et al v Deodat Ramnath** BVI Civil Appeal No. 1 of 1996 (delivered 21st July 1997, unreported) applied.

4. Having regard to the awards made in comparable cases in Anguilla and in the wider Eastern Caribbean jurisdiction, the fact that the nuisance had ceased since the date of the assault, and the fact that the courts generally award modest sums in nuisance in categories of cases involving loss of amenity to land for a transitory period, an award of \$20,000.00 to \$25,000.00 was fair in the circumstances. The counter-appeal is accordingly allowed.

**Elton Scatliffe et al v Dwite Flax** BVIHCV2010/0053 (delivered 26<sup>th</sup> October 2017, unreported) considered; **West Indies Concrete Co. Ltd. v Cutelyn Carty- Rey et**

al AXAHCV2014/0049 (delivered 12<sup>th</sup> August 2019, unreported) considered; **Bone and another v Seale** [1975] 1 W.L.R 797 applied; **Moeliker v A Reyrolle and Co Ltd.** [1977] 1 All ER 9 applied.

## JUDGMENT

- [1] **BENNETT JA [AG.]** : This appeal concerns the quantum of damages awarded by the trial judge after a trial.

### Background

- [2] The appellant/counter-respondent Mr. Carl Webster ("Mr. Webster") is the registered proprietor of certain lands situate at Island Harbour, Anguilla, one of which parcel is more particularly described as Registration Section East Central Block 89218B Parcel 210 ("Parcel 210"). Mr. Webster has maintained his family home on Parcel 210 with his wife and son, Mr. Carl Webster Jr., for more than 20 years prior to the occurrence of the matters now the subject of this litigation. Mr. Webster also claims to be the caretaker of certain "family land" situated on nearby land more particularly described as Registration Section East Central Block 89218B Parcel 39 ("Parcel 39"). Title to Parcel 39 is in the name of his aunts. The first respondent/first counter-appellant Historic Beacon Point Anguilla Ltd. ("Historic Beacon") is the registered proprietor of a parcel of land more particularly described as Registration Section East Central Block 89218B Parcel 38 ("Parcel 38"). Parcel 38 is in close proximity to Parcel 210 on which Mr. Webster maintains his family home. The land is used for the operation of a farm on which livestock comprising pigs, goats, ducks, rabbits and chickens are reared and various vegetable and fruit crops are grown. The second- respondent/second counter-appellant, Mrs. Ronda Hodge ("Mrs. Hodge") is a food vendor and farmer and is one of two directors and shareholders of Historic Beacon.
- [3] Mr. Webster claims that in the course of their rearing livestock on Parcel 38 the respondents/counter-appellants carried out frequent and prolonged burning of waste material in the preparation of animal feed. He alleged that the pungent and

malodorous smoke generated by the burning of waste material blew in a westerly direction towards his residence and that the smell generated from the animal feces and the noises made by the animals which noises were at their highest in the early mornings, late afternoons and, occasionally in the night- time caused disturbance, annoyance and discomfort to him and his family at their home on Parcel 210. He alleged that notwithstanding his complaints to the respondents/counter-appellants, the Environmental Health authorities and the police, he was unable to obtain any relief.

- [4] Mrs. Hodge alleged that on or about 10<sup>th</sup> April 2016 she saw Mr. Webster on Parcel 38 running from the direction of the farm which is located on Parcel 38. According to Mrs. Hodge, Mr. Webster had unlawfully, and without the permission or consent of Historic Beacon, or any person authorised to give consent on behalf of Historic Beacon, entered Parcel 38. Mrs. Hodge claims to have inquired from Mr. Webster his purpose for being on Parcel 38, whereupon, she claims, that Mr. Webster followed her as she walked towards the farm and began uttering obscenities and abusive and threatening language to her. He followed her along the opposite side of the fence that separated them, and eventually climbed over the fence and proceeded to assault her and beat her about the head with a pair of pliers.

#### **The action**

- [5] Historic Beacon claimed damages against Mr. Webster for trespass to Parcel 38 and a mandatory injunction restraining Mr. Webster, whether by himself, his servants or agents, from entering upon Parcel 38. Mrs. Hodge claimed damages against Mr. Webster for personal injuries, loss and damage sustained by her as a result of being unlawfully assaulted by Mr. Webster, and a mandatory injunction restraining Mr. Webster from assaulting, molesting, annoying or otherwise interfering with her or coming within 100 feet of her. Mr. Webster denied having trespassed on Parcel 38 and, that he assaulted and beat Mrs. Hodge. He instead claimed that it was Mrs. Hodge who assaulted him and that during this assault on him he sustained injuries to his head. He in turn claimed damages against Mrs.

Hodge and Historic Beacon for nuisance and additionally sought against Historic Beacon and Mrs. Hodge a mandatory injunction restraining them, or either of them, whether by their servants and/or agents, from burning waste material, rearing livestock within 200 feet of Parcel 210, permitting livestock from entering or traversing the adjoining property being Parcel 39, and in any other way creating a nuisance as a result of the farming practices engaged in by them on Parcel 38.

### **Personal injury claims**

- [6] The court found that it was likely that Mrs. Hodge had sustained multiple injuries to her head and that those injuries had in fact been inflicted by Mr. Webster. She had suffered a concussion and lacerations to her head as a result of the assault by Mr. Webster. In consequence of this, she suffered from migraines, dizziness and daytime sleepiness, all associated with the post-concussion syndrome induced by the head injuries that she suffered. She was therefore entitled to an award of damages on the basis of this assessment. Conversely, the court found that while Mr. Webster may have sustained injuries during the course of the assault, he was the aggressor on that day, and any such injuries had not been the result of self-defense. In any event the injuries allegedly suffered by Mr. Webster had not been substantiated by any medical evidence. In the circumstances the court made no findings as to causation and no award of damages.

- [7] On the basis of that conclusion, the learned judge awarded Mrs. Hodge damages totaling EC\$ 600,000.00 and US\$ 52,575.00 broken down as follows:

### **Damages for personal injury**

#### **A. Special damages**

- (1) US\$3,850.00 as special damages in respect of expenses incurred in employing labour on the farm for the period 11<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 with interest thereon at the rate of 3% per annum from 11<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment;

- (2) the sum of US\$1,475.00 as special damages in respect of expenses incurred in employing labour in her food vending business with interest thereon at the rate of 3% from 7<sup>th</sup> July 2016 to 2<sup>nd</sup> August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment;
- (3) US\$2,440.28 as special damages for medical and related expenses with interest thereon at the rate of 3% per annum from 2<sup>nd</sup> August 2016 to the date of the judgment and thereafter at the rate of 5% per annum from the date of the judgment to the date of payment;
- (4) the sum of EC\$225,000.00 in respect of loss of earnings from the farm with interest thereon at the rate of 5% per annum from the date of judgment until the date of payment;
- (5) the sum of US\$20,250.00 in respect of loss of earnings from her food vending business with interest thereon at the rate of 3% per annum from 10<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment.

**B. General damages**

- (1) the sum of EC\$50,000.00 for pain and suffering;
- (2) the sum of EC\$25,000.00 for loss of amenities’;
- (3) the sum of EC\$300,000.00 in respect of loss of future earnings from the farm with interest thereon at the rate of 5% per annum from the date of judgment until the date of payment;
- (4) the sum of US\$27,000.00 in respect of loss of future earnings from her vending business with interest thereon at the rate of 5% per annum from the date of judgment until the date of payment.

- [8] Mrs. Hodge had also claimed that the carpal tunnel syndrome, arthritis, osteoarthritis, slip disc, cervical strain and pinched nerve from which she suffered at the time of trial were caused by the injuries that she had sustained in the assault. The court found that Mrs. Hodge had been unable to establish on a balance of probabilities that those conditions had been caused by the assault.

#### **Counterclaim for nuisance**

- [9] The court found that on the totality of the evidence, it was more probable than not that the rearing of a variety of animals on the scale carried out by Historic Beacon on Parcel 38 had indeed created foul and malodorous air capable of causing a nuisance to the occupier of Parcel 210 and that Mr. Webster had made out his case for nuisance. The court ordered Mrs. Hodge and Historic Beacon to pay to Mr. Webster the sum of EC\$40,000.00 in respect of his claim for nuisance with interest thereon at the rate of 5% per annum from the date of judgment until the date of payment.

#### **Claim for trespass**

- [10] The court found that Mr. Webster had indeed trespassed on Parcel 38 but that such trespass was transient and caused no damage to the parcel. In the circumstance, an award for damages to Historic Beacon would be for a nominal sum of EC\$500.00 only.

#### **The Appeal**

- [11] Mr. Webster now appeals against aspects of the award for damages for personal injury to Mrs. Hodge. The respondents/counter-appellants have crossed appealed against the award for damages in nuisance awarded in respect of Mr. Webster's counterclaim. The sole issue for the Court's determination is whether the learned judge erred in his awards of damages.

### **Special damages for pre-trial loss of earnings**

- [12] A primary ground of the appeal is against the award of EC\$225,000.00 made to Mrs. Hodge as special damages in compensation for her loss of earnings from the farm and of the further sum of US\$20,250.00 as compensation for her loss of earnings from her food vending business. In the instant case, Mrs. Hodge had claimed in a schedule of special damages attached to her statement of claim, the sum of US\$3,850.00 as special damages for loss of earnings from the farm for the period 10<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 and the further sum of US\$1,475.00 categorized as loss of earnings from her food vending business for the period 11<sup>th</sup> April 2016 to 7<sup>th</sup> July 2016. There was no indication in the pleadings that Mrs. Hodge had suffered any diminution in her income other than the sums so claimed and no claim was made for any other pre-trial loss of earnings.
- [13] In her witness statement dated 1<sup>st</sup> August 2017 at paragraph [56], Mrs. Hodge clarified that the sum of US\$3,850.00 claimed as lost earnings during the period 10<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 was her estimate of the total paid by her to her son Mr. Vanklyn Hodge Jr. whom she had employed as a temporary substitute worker at the rate of US\$50.00 per day during that period. She further explained that the sum of US\$1,475.00 claimed by her as lost earnings from her food vending business during the period 11<sup>th</sup> April 2016 to 7<sup>th</sup> July 2016 was the sum paid by her to him for carrying on that business during that period. There was no documentation of the employment of Mr. Hodge or of the payments made to him.
- [14] In her witness statement, Mrs. Hodge further claimed that as a result of recurring headaches, dizziness, nausea and other symptoms of post-concussion syndrome experienced by her in consequence of the assault by Mr. Webster, she had been unable to work as before. Since the assault her earnings from the vending business had fallen from approximately US\$30,000.00 to US\$17,000.00 per year. Moreover, because of those symptoms she no longer had the ability to cultivate and maintain crops on the farm and as a result she had lost the income of approximately EC\$ 287,000.00 per year that she had previously earned from that activity. No

amendment had been made to the claim form or to the statement of claim to reflect these additional claims.

- [15] There is little dispute as to the principles applicable in the circumstances. In **Ilkiw v Samuels and others**<sup>1</sup> the plaintiff pleaded a claim for special damage amounting to £77 based on his loss of wages for four months absence from work. At the trial, which took place some 8 years after the date of the pleading, evidence was admitted which showed that the plaintiff's actual pre-trial loss of earnings amounted to the much larger sum of approximately £2000. It was held that the larger sum could not be recovered as it had not been claimed in the pleadings and there had been no application to amend the statement of claim. In the Court of Appeal, Diplock LJ observed at p. 1006 that:

“In my view, it is plain law — so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years — that you can recover in an action only special damage which has been pleaded, and, of course, proved.”

- [16] **Rules 8.7(1) and (2)** of the Civil Procedure Rules 2000 (“**CPR**”) requires that a claimant include in the claim form or in the statement of claim a short statement of *all* the facts on which he or she relies. (emphasis mine)

- [17] What is required is no more than a concise statement of the material facts sufficient to make clear the general nature of the case of the pleader. In **Steadroy Matthews v Garna O’neal**<sup>2</sup> per Michel JA at paragraph [30]:

“Now that the parties are required to file witness statements containing their evidence and that of any other witness that they propose to call, the pleadings (or statements of case as they are titled under the [CPR]) are no longer required to contain significant detail about the party's case. Rule 8.7 (1) of the CPR states that –‘The claimant must include in the claim form or statement of claim a statement of all the facts on which the claimant relies’, which means that he must state all the facts necessary for the purpose of formulating a complete cause of action. It is to the witness statements that litigants now turn to sift the details of the other party's case.”

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<sup>1</sup> [1963] 1 W.L.R. 991.

<sup>2</sup> BVIHCVAP2015/0019 (delivered 16<sup>th</sup> January 2018, unreported).

- [18] A claimant must plead and particularise any item of damage which represents out of pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. This was held in **Perestrello E Companhia Limitada v United Paint Co Ltd**<sup>3</sup> per Lord Donovan, and quoted with approval in the Privy Council case of **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack**.<sup>4</sup> Specifically, **CPR 8.9(5)** requires that the claimant include in or attach to the claim form or statement of claim a schedule of any special damages claimed.
- [19] This requirement is not satisfied by production of documentary evidence in a list of documents or by service of a witness statement setting out evidence proposed to be adduced in support of claims or matters for which no pleading has been made. The Privy Council case of **Charmaine Bernard v Ramesh Seebalack** is instructive. The claimant in that case was the legal personal representative of the deceased, who had been killed as the result of having been struck by a truck at Barrackpore in Trinidad. In that capacity she had commenced an action claiming damages against the driver and owner of the truck and against the insurer for a declaration that the insurer was liable to indemnify them. The claim form and statement of case gave particulars of the driver's negligence and alleged that the deceased's death had been caused by that negligence but gave no particulars of the claim for damages. Three case management conferences were held but no application was made to amend the statement of case to set out the special damages claimed. This notwithstanding, the claimant's list of documents was served and included a receipt for funeral expenses from a funeral home for services in connection with his passing. Listed also were pay sheets relating to the deceased's wages. Subsequently the claimant filed a witness statement giving details of the amount of the deceased's funeral expenses, details of his employment and of his monthly income in the months prior to his death. Later the claimant filed a bundle of documents which

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<sup>3</sup> [1969] 3 All ER 479.

<sup>4</sup> [2010] UKPC 15.

included the receipt for the funeral expenses and pay sheets for a period of over two years immediately preceding his death.

[20] The pre-trial review was held on 11<sup>th</sup> November 2008. Shortly thereafter, on 27<sup>th</sup> November 2008, the claimant applied for permission to amend the statement of claim to include particulars of special and general damages. The owner of the truck objected, relying on [Trinidad and Tobago] CPR Part 20.1(3) which provided that “the court may not give permission to change a statement of case after the first case management conference unless the party wishing to change a statement of case can satisfy the court that the change is necessary because of some change in circumstances which became known after that case management conference”. It was common ground that there had been no “change of circumstance” within the meaning of the rule after the first case management conference. The High Court judge acceded to the application and gave permission to amend, but his decision was reversed by the Court of Appeal of Trinidad and Tobago.

[21] In the Privy Council it was argued, inter alia that an amendment of the statement of case was not required in that the details of the claim for special damages could have, and had in part, been provided by the claimant in a witness statement. The Board rejected this argument pointing to the requirement in [Trinidad and Tobago] CPR 8.6 (identically worded to **Eastern Caribbean CPR 8.7**) which is headed “Claimant’s duty to set out his case”. The Board acknowledged that the need for extensive pleadings including particulars is reduced by the requirement that witness statements are now exchanged. However, Sir John Dyson SCJ, giving the judgment of the Board stated at paragraph [16]:

“16. But a detailed witness statement or a list of documents cannot be used as a substitute for a *short* statement of *all* the facts relied on by the claimant. The statement must be as short as the nature of the claim reasonably allows. Where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. Under the pre-CPR regime in England and Wales, RSC Ord 18 r 7 required that every pleading contained a summary of the material facts and by r 12(1) that “every pleading must contain the necessary particulars of any claim”. In *Perestrello v United Paint Co Ltd* [1969] 3 All ER 479, Lord Donovan, giving the

judgment of the Court of Appeal, said at p 485l: 'Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet...

The same principle gives rise to a plaintiff's undoubted obligation to plead and particularise any item of damage which represents out of pocket expenses or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is 'special' in the sense that fairness to the defendant requires that it be pleaded..."

- [22] From the foregoing it is clear that the principle, spelt out in **Ilkiw v Samuels and others** that a statement of case must be amended to bring the pleaded case in line with the evidence sought to be presented at trial continues to be applicable under the CPR. This is so even if that evidence had been set out in a witness statement. A witness statement is not a substitute for a statement of case; rather it serves to amplify or provide particulars or further particulars of the allegations set out in the statement of case. Failure to include a particular out of pocket expense or pre-trial loss of earnings in the schedule of special damages attached to the claim form or statement of case or to amend the statement of case to include particulars of a claim for such expense or loss in the schedule of special damages will disentitle a defaulting claimant from recovering the claimed sum. This was the position in **Steadroy Matthews v Garna O'Neal** where Michel JA in setting aside an award for special damages stated at paragraph [36]:

"[36] In light of the failure of the respondent (as the claimant in the court below) to comply with the requirements of rule 8.9(5) of the CPR by including in or attaching to the claim form or statement of claim a schedule of the special damages claimed for loss of earnings, and in the absence of both specific pleading and strict proof of the damages awarded, it was not open to the master to make the award that she did for special damages of \$197,155.00 for loss of earnings."

- [23] In his judgment the learned judge focused on the absence of any documentary evidence produced in support of the claim for pre-trial loss of earnings. He noted at paragraph [243] of the judgment that "...Neither Historic Beacon nor Mrs. Hodge

have produced a scintilla of evidence to substantiate the alleged pecuniary loss suffered by their respective businesses.” He went on to make an assessment of lost earnings, noting that where it is clear that some substantial loss has occurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. This approach could not have been faulted had the schedule of special damages attached to the statement of case been amended to include a claim for loss of earnings from the farm and from Mrs. Hodge’s food vending business. It is conceded on behalf of Mrs. Hodge, however, that no such claims had been made in the pleadings or in any schedule of special damages attached thereto. In the circumstances the appeal on this ground must be allowed. I would set aside the award of special damages of EC\$225,000.00 made to Mrs. Hodge for loss of earnings from the farm and the award of US\$20,250.00 made to her for loss of earnings from her food vending business.

#### **Award of damages for future loss of earnings**

[24] Mr. Hodge, counsel for Mr. Webster, argues that the learned judge erred in law in awarding loss of future earnings to Mrs. Hodge in circumstances where there was a failure to specifically plead such loss in the statement of claim and/or claim form and where there was a failure to prove such loss at trial. Ms. Harrigan, counsel for the respondents/counter-appellants, on the other hand says that loss of earnings are general damages and need not be specifically pleaded and particularized and that sufficient notice of the claim was given in the witness statements.

[25] Mr. Hodge’s submissions may be summarized as follows-

- (a) **CPR 8.9(5)** imposes a procedural obligation on a litigant claiming special damages to include or attach to the claim form or statement of case a schedule of any special damages claimed.

- (b) **Halsbury's Laws of England**,<sup>5</sup> is authority for the proposition that, "In personal injury actions, claims for loss of earnings, whether past or future, constitute special damage".
- (c) In **Grenada Steel Works Limited. v Herman Forde**,<sup>6</sup> Gordon JA endorsed the principle laid down in **Perestrello v United Paint Co. Ltd.**<sup>7</sup> to the effect that where there is a claim for a particular kind of loss which is not a necessary consequence of the wrongful act the claim for that head of loss should be set out in the statement of case to give the defendants a fair warning. A mere statement that the plaintiffs claim 'damages' is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful acts alleged.
- (d) In the instant case there were no pleadings or particulars whatsoever of future loss of earnings to Mrs. Hodge or her businesses, which would have indicated to Mr. Webster that a claim would be made for compensation for such loss. In the claim form and in the statement of claim Historic Beacon and Mrs. Hodge referred only to 'Damages... [and] consequential loss or damage. Loss of future earnings was not a 'necessary and immediate consequence' of the alleged assault upon Mrs. Hodge or of the injuries allegedly sustained thereby. The effect of the failure to include such a claim in the statement of case was to treat the claim for loss of earnings as a claim for general damages, which it was not.
- (e) The only stage at which there was any reference by Historic Beacon and Hodge to loss of earnings from businesses was in the Witness Statement deposed by Mrs. Hodge at Paragraphs [57] and [58] of her witness statement.

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<sup>5</sup> 4th edition, Volume 12 (1) at page 269.

<sup>6</sup> Civil Appeal No.17 of 2004 (delivered 24<sup>th</sup> April 2006, unreported).

<sup>7</sup> [1969] 3 All ER 479.

- (f) Accordingly, the court should not have entertained the (unpleaded) claim by Mrs. Hodge for damages for loss of future earnings.

[26] Ms. Harrigan's submissions may be summarized thus-

- (a) Loss of future earnings are general damages and Mr. Webster is wrong in describing them as special damages. Ms. Harrigan relied on **Martin Alphonso et al v Deodat Ramnath**<sup>8</sup> per Singh JA and **Steadroy Matthews v Gama O'Neal** per Michel JA paragraph [75] (4) where the award of loss of future earnings was described as general damages.
- (b) Loss of future earnings are damages at large and are in the discretion of the court. **CPR 8.9(5)** applies only to special damages and is not relevant to claims for general damages as such the respondents/counter-appellants were not required to include in or attach to the claim form or statement of case a schedule of future loss of earnings. Additionally, it is not necessary to particularize loss of future earnings in the statement of claim or claim form in light of the fact that the details and evidence are now contained in the witness statements.
- (c) In this case Mr. Webster was not taken by surprise that a claim was being made for future loss of earnings because the witness statements of Mrs. Hodge and Mr. Vanklyn Hodge were filed on the 2<sup>nd</sup> day of August 2017 setting out the details of their earnings and loss of earnings as a result of the assault upon Mrs. Hodge. This was done two years prior to the trial and Mr. Webster had over two years to prepare a defence to the claim. At the trial, counsel for Mr. Webster extensively cross-examined Mrs. Hodge and the witness Mr. Vanklyn Hodge in

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<sup>8</sup> BVI Civil Appeal No. 1 of 1996 (delivered 21<sup>st</sup> July 1997, unreported).

relation to Mrs. Hodge's earnings from the food vending business and from the sale of farm produce.

### Discussion

[27] In **Daly v General Steam Navigation Co Ltd**<sup>9</sup> Ormrod LJ posited at 703c-e that "So far as the special damage is concerned, that, as I have always understood, represents actual loss, 'actual' as opposed to 'estimated' loss. So far as the general damage is concerned, that loss necessarily has to be estimated." That has always been my view. Special damage is an item of specific loss capable of being quantified in money by evidence, whereas general damage is loss, compensation for which is a matter of assessment by the Court.

[28] In my view however the matter does not turn on whether the claim is to be classified as being for general or for special damages. The starting point for this discussion must be the case of **Keithley George and Francis Trading Agency Limited v Gerald Khoury Antigua and Barbuda**.<sup>10</sup> That case concerned an appeal against an award of damages for loss of future earnings. Gordon JA stated at paragraph [18] that:

"...This case commenced under the regime of Rules of the Supreme Court 1970 and continued under the [CPR] 2000. Under both regimes the duty of the plaintiff/claimant is to plead such facts as he will rely on for the purpose of pursuing his claim. Under either regime there was, in my view, a duty on the part of the respondent to claim losses for loss of future earnings and to assert the basis on which such a claim was being made. This was not done."

It transpired in that instance that the award had been made on the basis of a claim for the cost of hiring a replacement worker for a period after the accident and for an indefinite future period. It was thus a claim for past and future expense rather than for loss of future earnings. The claim was allowed only to the extent that damages were awarded for the pre-trial expense pleaded in the schedule of special damages

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<sup>9</sup> [1980] 3 All ER 696.

<sup>10</sup> Civil Appeal No.19 of 2004 (delivered 25<sup>th</sup> April 2005, unreported).

attached to the statement of claim. The point is that the requirement under the **CPR** that a claim for loss of future earnings or for projected future expenses should be expressly set out in the claimant's statement of case was made clear by this court.

- [29] In **Charmaine Bernard v Ramesh Seebalack**, the Privy Council held that a claimant was required to plead a claim for damages for "the lost years," as a head of loss in order to be permitted to advance that claim: failing this it was necessary for the claimant to amend the statement of case to include such a claim. Sir John Dyson SCJ giving the opinion of the Board at paragraph [16] posited that where general damages are claimed, the statement of case should identify all the heads of loss that are being claimed. He quoted with approval the observations of Lord Donovan in **Perestrello v United Paint Co. Ltd** where he stated at pages 485-486, paragraphs A and B:

"...if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing payment into Court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case."

At paragraph [17] of **Charmaine Bernard v Ramesh Seebalack**, Sir John Dyson SCJ affirmed that the observations in **Perestrello** are applicable to Part 8.6 of the CPR of Trinidad and Tobago (and by extension Part 8.7 of the Eastern Caribbean CPR).

- [30] In **Grenada Steel Works Limited v Herman Forde**, an award for loss of future earnings due to disability was set aside by this Court on the basis, stated by Gordon JA at paragraph [13] that "...at no point was the Appellant warned by the pleadings that the issue of loss of future earnings would be in issue."

[31] The position is shortly stated in **Halsbury's Laws of England**<sup>11</sup> under the rubric 'General and special damages' as follows-

"...Here, special damage refers to those losses which must be pleaded and established by the claimant, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the claimant is required only to assert that such damage has been suffered. Thus, the practice in personal injury cases is that financial losses such as medical expenses and lost earnings must be pleaded and proved specifically, whereas damages for such matters as pain and suffering need only be referred to generically."

[32] It is with these principles in mind that the claimant's pleaded case is to be examined.

[33] The injuries sustained by Mrs. Hodge for which compensation was claimed are set out in paragraphs [10] and [12] of the statement of claim as follows:

#### **"PARTICULARS OF INJURIES**

- (i) The 2<sup>nd</sup> claimant was born on the 9<sup>th</sup> day of August 1967 is now 48 years of age and suffered four lacerated wounds to her head.
- (ii) Immediately after the attack the 2<sup>nd</sup> claimant had headaches, nausea dizziness, insomnia, and suffered weakness in her body to such extent that she could barely stand up or function.
- (iii) As a consequence of the attack the claimant now suffers from dizziness, headaches, flashes in her eyes and insomnia. The 2<sup>nd</sup> Claimant has decreased strength in her limbs and has pain in the back of her neck and shoulders and has shooting pains from her neck to her fingers. The 2<sup>nd</sup> claimant has numbness in her right hand and feels pains in her legs to such extent that the 2<sup>nd</sup> claimant feels off balance and has been diagnosed with post-concussion symptoms and has been referred to a neurologist for a full neurological evaluation.

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<sup>11</sup> Volume 29 (2019) at paragraph [317].

(iv) Post concussion syndrome with migraine

(v) Cervical Strain

(vi) Pinched Nerve

11. By reason of the foregoing the claimants have suffered pain and injury, consequential loss and damages.”

[34] There is no pleaded claim and nothing in the statement of case to indicate that the injuries complained of would necessarily result in a claim for compensation for loss of future earnings. In fact, the schedule of special damages attached to the statement of claim contained a claim for loss of earnings from the farm for the period 10<sup>th</sup> April 2016 to 2<sup>nd</sup> August 2016 and a claim for loss of earnings from Mrs. Hodge’s food vending business for the period 11<sup>th</sup> April 2016 to 11<sup>th</sup> July 2016. There was no indication of any claim for any other loss of earnings present or future.

[35] Ms. Harrigan for the respondents/counter-appellants submits that the details and evidence notifying Mr. Webster that a claim was being made for future loss of earnings were contained in witness statements given by Mrs. Hodge and her husband, the witness, Mr. Vanklyn Hodge over two years before the date of the trial. By this submission she is, in effect, advancing the position that information contained in a witness statement may be used in place of, rather than to supply or supplement details of a claim set out in the statement of claim for loss of future earnings. My first observation is that this position is inconsistent with the principle, stated by Dyson SCJ in the Privy Council case of **Charmaine Bernard v Ramesh Seebalack** that a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the claimant.

[36] The requirement in **CPR 8.7(1)** for the claimant to include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies is intended to " ...put the defendants on their guard and tell them what they have to

meet when the case comes on for trial" as held in **Philipps v. Philipps**.<sup>12</sup> The continuing post-trial or permanent loss of earnings by Mrs. Hodge was not the inevitable and immediate consequence of the assault upon her. To advance a claim for loss of future earnings Mrs. Hodge had to show that because of the injuries that she had sustained in the assault she was unable to earn the income that she would otherwise have earned and that in consequence she had sustained a continuing loss of income. For this purpose, she would have had to prove the (net) income that she had, and would, but for the injury have continued to earn, the income that she was actually able to earn given her current condition, the claimed annual loss of earnings and the projected duration of that loss. These were facts upon which she relied for the purpose of that head of loss.

[37] **CPR 8.7 (1)** requires that the statement of all the facts on which the claimant relies be set out "...in the claim form or in the statement of claim." **CPR 8.7A** sets out the consequence of a claimant's failure to comply with this requirement: "The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission, or the parties agree."

[38] In **Charmaine Bernard v Ramesh Seebalack** at paragraph 27 the Board explained:

"If a statement of case contains allegations which are "sufficiently made" (so that it satisfies the requirements of Part 8), there is no need to amend it in order to provide particulars. These can be provided by way of further information or in the form of a witness statement. But for the reasons stated earlier, in the present case the statement of case should have included a short statement of the heads of loss that were being claimed. This could have been amplified by further information and/or in the witness statement(s).

[39] Had Mrs. Hodge's statement of case contained information that sufficiently identified future loss of earnings as a head of damage that was being claimed, some of the

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<sup>12</sup> (1878) 4 Q.B.D.

details necessary to support such a claim could have been supplied by the witness statements. The problem is that the statement of claim and attached schedule in truth contained no reference to any actual loss of earnings or any projected future loss. Even the amounts described in the schedule of special damages attached to the statement of claim as 'loss of earnings' were subsequently explained to be pre-trial expenses- i.e. wages paid by Mrs. Hodge to her son to work on the farm and in her food vending business during her absence for periods between 10<sup>th</sup> April 2016 and 2<sup>nd</sup> August 2016. There was no attempt to amend the statement of claim to assert that Mrs. Hodge had sustained any continuing loss of earnings or to include a claim for damages for the future loss of earnings for which evidence was given at the trial. Such allegations were not "sufficiently made" in the statements of case.

- [40] I conclude that the sum of EC\$300,000.00 awarded to Mrs. Hodge for loss of future earnings from the farm and the sum of US\$27,000.00 awarded to her in respect of loss of future earnings from her food vending should be disallowed.

#### **Other special damages**

- [41] Mr. Hodge for Mr. Webster argues that the above claims rested on the witness testimony of Mrs. Hodge and Mr. Vanklyn Hodge and that their evidence was not supported by any financial or other relevant records of either business. He argues that there was no objective proof that Mrs. Hodge's son had been a paid employee of Historic Beacon or of Mrs. Hodge or that he had been paid those sums out of the resources of the farm or the food vending business. He points out that Mr. Vanklyn Hodge Jr. admitted that he had worked gratuitously on the farm on occasion prior to and even after the date of the assault. His position is that had Mrs. Hodge's son been employed by Historic Beacon to work on the farm, or by herself to work in the food vending business it could be expected that such activity would generate records relating to employment, pay slips, deductions for social security and so forth. Moreover, both Historic Beacon and Mrs. Hodge might be expected to maintain accounting and other records in relation to their business activities. He cites the

case of **Attorney General v Peter Bandoo**<sup>13</sup> where the Court of Appeal of Jamaica set aside an award of special damages for loss of income on the basis that, in the circumstances it ought to have been supported by documentary evidence which existed but which the respondent had failed to tender. In coming to its decision the court stated:

“[64] ... The respondent (it is important to remember) was employed in the capacity of property and security manager for an established hotel. His claim is for a substantial sum. His position could not reasonably be considered akin to, say, that of a taxi driver or domestic helper, who would not usually be expected to give receipts when paid for services rendered. In the absence of the documentary evidence (that existed) being properly adduced, the respondent’s presenting his written and oral testimony by itself, would be akin to throwing figures at the court. In the circumstances, therefore, the evidence before the court was insufficient to prove his claim for loss of income.”

[42] Ms. Harrigan argues that the evidence showed that Mrs. Hodge is a farmer who conducted business with little formality and in some instances by barter. She pointed to the case of **Sidney Binda v Juan Caliste et al**<sup>14</sup> where the undocumented evidence of the claimant, a landscaper, fisherman and farmer as to his income was accepted in part by the learned master for the purpose of assessing loss of earnings. There the Master cited the case of case of **Desmond Walters v Carlene Mitchell**<sup>15</sup> a decision of the Court of Appeal of Jamaica. In that case a pushcart vendor recovered damages for loss of income notwithstanding that his claim for loss of income had been unsupported by documented evidence. In dismissing an appeal against the award, Wolfe JA, observed at page 176 that:

“There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages<sup>12th</sup> Edition the learned Author states: ‘However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen ,L.J., laid this down in the leading case on pleading and proof of damage ,Radcliffe v. Evans [1892]2Q.B.524(C.A.)’....Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well-

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<sup>13</sup> [2020] JMCA Civ 10.

<sup>14</sup> GDAHCV2014/0097 (delivered 10<sup>th</sup> February 2016, unreported).

<sup>15</sup> (1999) 29 JLR 173.

organized corporation may well be what Bowen, L.J., referred to as 'the vainest pedantry.'"

Ms. Harrigan urges that the evidence showed that Mrs. Hodge conducted her businesses in an informal and unsophisticated manner and with regard to the documentation of her business and earnings was really in a position analogous to that of a pushcart vendor or taxi operator.

[43] In **Ratcliffe v Evans**,<sup>16</sup> Bowen, L. J. who delivered the judgment of the English Court of Appeal said:

"As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

[44] Special damages must be specifically pleaded and strictly proved.<sup>17</sup> What amounts to strict proof is to be determined by the court by reference to the, the particular circumstances of the case. It had been urged upon the Court that Mrs. Hodge conducted her business without regard to many formalities; that Historic Beacon was for all practical purposes a personal business operated by Mrs. Hodge and another shareholder; that the company was in reality merely the proprietor of land on which the business was carried out and that its incorporation and allocation of shares was a mere formality not intended to have any practical effect. The court having heard the evidence must have drawn its own conclusion as to the validity of that perspective. The award in question relates to sums allegedly paid as wages to Mrs. Hodge's son prior to the trial. It was not contended that the sums claimed were unreasonable. The payment had been expressly pleaded although misdescribed as 'loss of earnings'. The fact is that it was open to the judge to accept Mrs. Hodge's evidence despite the absence of documentary support. The law simply requires that the special damage claimed be 'proved' in such

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<sup>16</sup> (1892) 2 QB 524.

<sup>17</sup> [1963] 1 W.L.R. 991.

way as is reasonable, having regard to the circumstances found by the court, not 'proved' only by documentary or expert evidence.

[45] An appellate court is reluctant to interfere with findings of fact and credibility by the first instance judge and is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness.<sup>18</sup> Specific findings of facts are inherently an incomplete statement of the impression which was made upon the judge by the primary evidence. The judge's expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance, which all play an important part in the judge's overall evaluation.<sup>19</sup> **Fage UK Ltd. V Chobani UK Ltd.** states that an appellate court should not interfere with the judge's conclusion on primary facts unless satisfied that he was plainly wrong<sup>20</sup>.

[46] The judge's decision was based on his assessment of the credibility of Mrs. Hodge on this issue and it is not possible for this court to say that the judge's conclusion that he should accept her evidence was plainly wrong.

#### **Pain, suffering and loss of amenities.**

[47] Mr. Hodge, counsel for Mr. Webster, urges that:

- (a) the injuries for which damages were being awarded were four (4) lacerations to the head and post-concussion syndrome;
- (b) there was no evidence presented at trial as to how long the resultant physical disability (post-concussion syndrome) was likely to continue;
- (c) Mrs. Hodge suffered from multiple adverse physical conditions some of which the judge had determined had not been caused by the assault;

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<sup>18</sup> Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 at para. 28.

<sup>19</sup> Biogen Inc v Medeva plc [1997] RPC 1 at 45.

<sup>20</sup> [2014] EWCA Civ 5.

- (d) There was no proper basis for the judge to differentiate between the gravity of pain and suffering caused by the assault and thus purely attributable to Webster on the one hand and the other ailments from which Mrs. Hodge suffered on the other hand;
- (e) the judge had found the evidence of Dr. Nelson to be unreliable to a great extent and ought to have rejected it in its entirety;
- (g) that the court had not been provided with evidence as to how the pattern of Mrs. Hodge's daily life has been affected and such evidence was essential for the court to make an award for loss of amenity; and
- (g) in the premises the court ought to have made an award of nominal damages; alternatively this court was invited to find that the awards of EC\$50,000.00 for pain and suffering and EC\$25,000.00 for loss of amenity were inordinately high.

[48] Mrs. Harrigan, counsel for Mrs. Hodge, pointed out that the learned judge had identified the physical ailments which on the balance of probabilities he attributed to the assault on Mrs. Hodge by Mr. Webster, that having heard the evidence he had been satisfied that those injuries would have interfered with Mrs. Hodge's enjoyment of life and her ability to work at the same capacity that she had prior to the assault; that the learned judge had exercised his discretion in accordance with correct and accepted principles as laid down in the case of **Martin Alphonso et al v Deodat Ramnath** and, accordingly the appellate court should not interfere with the award and should dismiss the appeal on this ground.

[49] I agree. The Court considered the evidence carefully and, in my view, perceptively. Despite his expressed reservations as to the reliability of much of the medical evidence, he found that in consequence of the assault Mrs. Hodge suffered from persistent headaches, dizziness, photosensitivity on exposure to sunlight, nausea and excessive daytime sleepiness and accepted the medical opinion of Dr. Nelson

that these afflictions were symptomatic of her post-concussion syndrome. Nonetheless he classified her physical disability arising from the injury as moderate in that her injuries had not resulted in any serious neurological damage, abnormal brain function or compromise to her cognitive abilities. He rejected the notion that some of the ailments affecting her, such as pinched nerve and carpal tunnel syndrome should be attributed to the assault. He accepted the evidence that she continued to be affected by post-concussion syndrome and accepted that her resulting disability would negatively affect the pattern of her daily life to which she had been accustomed prior to her injury. He found that her condition would interfere with her ability to engage in the farming activities which she had enjoyed and practiced avidly for most of her life. These were findings which were entirely open for the judge to make based on the totality of the evidence before him. Based on his consideration of awards in comparative cases the judge arrived at an award in the sum of EC\$50,000.00 for pain and suffering and EC\$25,000.00 for loss of amenities.

[50] It is axiomatic that a court of appeal is reluctant to interfere with assessments of general damages save in cases where the trial judge has applied the wrong principle or is otherwise clearly wrong. In **Martin Alphonso et al v Deodat Ramnath Satrohan Singh** JA stated at p.191 d-h:

“In appeals, comparable in nature to the present one, it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one... If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award. But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This Court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered.”

[51] I am firmly of the view that contrary to the contentions of Mr. Hodge, counsel for Mr. Webster, the awards for general damages made in this case are well within the range of awards made for pain, suffering and loss of amenities in comparable cases within the jurisdiction particularly awards made in similar cases involving post-concussion syndrome. I would dismiss this ground of appeal.

### **The counter-appeal**

[52] Mrs. Hodge challenges the decision on the ground that the learned judge erred in the exercise of his discretion in failing and/or neglecting to award a modest sum for loss of amenity in relation to the claim for damages for nuisance.

[53] The court found that the farming activities carried out by Historic Beacon and Mrs. Hodge, including the rearing of pigs and a variety of other animals on a large scale on land adjacent to Mr. Webster's residence, the preparing of food for those animals often burning plastic material for the purpose, and the burning of rubbish on that land subjected Mr. Webster and his family to foul and malodorous air, animal noises and particles of dust and smoke for a period of three years. This constituted substantial interference with Mr. Webster's use and enjoyment of his land. The court made an award of EC\$40,000.00 in respect of Mr. Webster's claim in nuisance.

[54] Ms. Harrigan urged that in cases of private nuisance damages are awarded not to users of the affected land for discomfort or inconvenience suffered but to persons having an interest in the land for injury to the land. There are three (3) categories of private nuisance. (a) substantial interference with claimant's use and enjoyment of land; (b) physical injury to the claimant's property; and (c) interference with rights of access and easements. Where the only damage shown is a loss of amenity to land for a transitory period the damages awarded tend to be of limited value and are modest. Ms. Harrigan argues that awards made in instances comparable to the case at bar were much lower, and points to decisions in cases such as the following:

(a) In **Elton Scatliffe et al v Dwite Flax**,<sup>21</sup> the defendants carried on the operation of trucking, heavy equipment rental, garage and tire repairs, concrete production, storage of sand, aggregate, cement, other particulate matter and diesel on land next to claimants' residence. The claimants were subjected to loud and deafening sounds at all hours of the day and night, noxious fumes and exhaust and the emission of large quantities of dust and particulate matter for a period of 6 years prior to 2010 and which so severely polluted their environment and interfered with their enjoyment of their property that it caused them to abandon their home. The claimants were awarded US\$10,000.00 in damages in a decision rendered in October 2017.

(b) In **West Indies Concrete Co. Ltd. v Cutelyn Carty- Rey et al**,<sup>22</sup> a cement plant had been constructed approximately 400 feet from residence of claimants. Large quantities of dust and particulate matter intermittently contaminated the air quality in claimants' home, their cistern water and the general environment of their home, causing them distress, discomfort and inconvenience. This situation persisted from the construction of the plant in 1985 up to the trial in 2019, when the court gave the defendant a period of 6 months from the date of judgment to abate the nuisance failing which a permanent injunction would be granted. The claimants were awarded EC\$10,000.00 in damages in a decision rendered in August 2019.

[55] Ms. Harrigan argues that in the case at bar the interference with Mr. Webster's enjoyment of his land and thus the extent and duration of the consequent loss of amenity to the land was less than in those instances. In this case the nuisance occurred over a period of three years. She argues that the award of \$40,000.00 was excessive in the circumstances.

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<sup>21</sup> BVIHCV2010/0053 (delivered 26<sup>th</sup> October 2017, unreported).

<sup>22</sup> AXAHCV2014/0049 (delivered 12<sup>th</sup> August 2019, unreported).

[56] Mr. Webster urges in response that:

- (a) It was open to the learned judge to award compensation for diminution in the amenity value over the three-year period for substantial interference with [Mr. Webster's] use and enjoyment of his family home on Parcel 210;
- (b) The sum awarded by the learned judge was neither unwarrantably high nor did it exceed the generous ambit within which reasonable disagreement is permitted;
- (c) The assessment of damages was peculiarly in the province of the learned judge, having seen the witnesses give evidence and heard the experiences of Mr. Webster and his son as to the substantial interference with their use and enjoyment of the family home;
- (d) In applying the cases of **Bone and another v Seale**<sup>23</sup> and **Scatliffe**, the learned judge was not bound to award the same, a similar or lesser sum to Mr. Webster, and was empowered to exercise his discretion in making an award so long as the award was fair and reasonable in all the circumstances of the case and not blatantly wrong; and
- (e) The learned judge took guidance from the legal principles applied in **Bone** and **Scatliffe** to arrive at the position that Mr. Webster was entitled to an award for the diminution in amenity value and thereafter awarded what he deemed to be fair and reasonable in all the circumstances of the case.

[57] The approach of an appellate court in determining an appeal against the quantum of an award of damages was reiterated by Stephenson LJ in the case of **Bone v Seale** at page 803 D-F as follows:

“We accept the test long ago laid down by Greer L.J. in *Flint v. Lovell* [1935] 1 K.B. 354, 360, where he said:

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<sup>23</sup> [1975] 1 WLR 797.

‘I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.’”

[58] In his decision to reduce damages awarded from £6,000 to £1,000 Scarman LJ reasoned at 805 F-H:

“Was there here an entirely erroneous estimate of the damage sustained by the two plaintiffs? This must be a matter of impression-impression derived from experience and a general knowledge of the way in which the law handles analogous claims.

One must bear in mind also a further general principle, that when one is removed from the world of pecuniary loss and is attempting to measure damages for non-pecuniary loss, an element in reasonableness is the fairness of the compensation to be awarded. There must be moderation; some attention must be paid to the rights of the offending defendant as well as to the rights of the injured plaintiff. Approaching this question of impression with those principles at the back of my mind, I ask myself the question: in the circumstances of this case was this award of £6,000 odd to the plaintiffs an entirely erroneous estimate of the damage sustained? There was an intolerable nuisance but it was only a nuisance; it was endured admittedly for 12 years but it was intermittent. Clearly it varied in intensity and sometimes it was wholly absent; these variations depended upon the direction of the wind and the change of the seasons. At the end of the day, as at the beginning of the day, I find myself saying that the sum awarded is altogether too much. If an appeal court, when damages are at large, reaches that conclusion, then in my judgment it must interfere; it must set aside the award as being an entirely erroneous estimate, and substitute a figure which accords with the reasonable requirements of the facts of the case.”

[59] In arriving at his decision in the instant case the learned judge explained at paragraph [275] of his judgment that in assessing the likely award of damages to Mr. Webster he had adopted a similar approach as Ellis J. in **Scatliffe v Flax**. (at paras [96] - [114]). In that case Ellis J noted at paragraph [95] et seq. that:

“[95] ...Courts have repeatedly emphasized that the essence of a recovery in nuisance is damage to land rather than to the person. Within the context of nuisance claims, damages for distress and inconvenience typically compensate for the interference with a claimant’s enjoyment of his property rather than the personal loss of amenity. Consequently, such awards have usually been of limited value.

[96] By way of example, in *Bone v Seale*, the claimant had to endure persistent smells emanating from a pig farm. The Court of Appeal reduced the award for 12 years of discomfort from £6,000 to £1,000. The Court considered that the award made in the court below was too high given the value of damages for loss of smell in personal injury cases.”

[60] Ellis J went on to observe at paragraph [106] of her decision that:

“In the case at bar, the claimants have advanced no valuation evidence which would practically assist the court in regard to the diminution in value (market rental) figures. In the absence of even primary data, the Court is forced to adopt the tried and trusted method of assessing general damages where there is a claim for loss of amenity whilst not losing sight of the fact that these are claims concerning land which usually tend to be modest.”

[61] She went on to review a number of awards in cases in the United Kingdom and within the jurisdiction of the Eastern Caribbean Supreme Court. The awards made in the cases reviewed ranged from EC\$500.00 to US\$ 10,000.00. She concluded that:

“[112] While judicial precedents may provide some general guidance, clearly each case must be considered on its own facts. In arriving at an award of damages this Court has also taken into account the fact that permanent injunctive relief has been granted. The Court has also considered that it is quite usual for courts in assessing damages in nuisance cases to award modest sums in nuisance in such categories of case.”

Using this approach, Ellis J awarded US\$10,000.00 in damages for “the serious loss of amenity over the considerable number of years which this nuisance persisted.”

[62] In the case at bar the learned judge professed to have adopted a similar approach. Nonetheless my impression is that even taking into account the necessity for each

case to be determined on its own facts, the award of EC\$40,000.00 made in the instant case is noticeably higher than awards made in other cases involving comparable or even greater loss of amenities to land for more extended periods. I note that the sum awarded was significantly larger than the EC\$25,000.00 sought by Mr. Webster's counsel at trial. In the case of **Moeliker v A Reyrolle and Co. Ltd.**,<sup>24</sup> Stevenson LJ concurred in increasing an award of damages for loss of amenity from £2,250 to £3,000, explaining:

"I doubt whether I should have granted him much more under this head. But, bearing in mind the restrictions they impose on his sea fishing and its enjoyment, I am unable to dissent from the opinion of Browne and Shaw LJJ that £3,000 is a fair award and £2,250 is just far enough below it to need correction..."

- [63] In my view having regard to awards made in comparable cases in Anguilla and in the wider Eastern Caribbean jurisdiction, the fact that the nuisance had ceased since the date of the assault, and the fact that the courts generally award modest sums in nuisance in categories of cases involving loss of amenity to land for a transitory period an award of EC\$20,000.00 to EC\$25,000.00 was fair in the circumstances. It seems to me that the award of EC\$40,000.00 is out of proportion to the circumstances of the case. I would allow this counter appeal and order that the award of EC\$40,000.00 made for nuisance be set aside and that the sum of EC\$25,000.00 be awarded under that head of damages.

### **Disposition**

- [64] For the foregoing reasons, I would order that this appeal be allowed in part. The order of the learned judge is varied as follows:

- (1) The award of EC\$225,000.00 and US\$20,250.00 made by the learned judge for special damages for loss of earnings is set aside.
- (2) The award of EC\$300,000.00 and US\$27,000.00 made by the learned judge for damages for future loss of earnings is set aside.

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<sup>24</sup> [1977] 1 All ER 9.

- (3) Save as aforesaid, the appeal stands dismissed.
- (4) The counter-appeal is allowed. The award of EC\$40,000.00 made by the learned judge for nuisance is set aside, and the sum of EC\$25,000.00 is awarded under that head of damages.
- (4A) The second respondent/second counter-appellant, Ms. Rhonda Hodge, shall pay prescribed costs in the court below, calculated on the award of \$25,000 as varied on the counter-appeal, in the sum of \$3,750.00.<sup>25</sup>
- (5) The appellant/counter-respondent shall pay to the second respondent/second counter-appellant prescribed costs in the court below calculated on the award as varied on appeal.
- (6) The respondents/counter-appellants shall pay to the appellant/counter-respondent costs of this appeal in a sum equal to one-third of the costs in the court below calculated on the award as varied on appeal.

I concur.  
**Davidson Kelvin Baptiste**  
Justice of Appeal

I concur.  
**Louise Esther Blenman**  
Justice of Appeal

**By the Court**

**Chief Registrar**

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<sup>25</sup> As corrected by order of the court dated 19<sup>th</sup> September 2023.