

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CIVIL)
A.D. 2020**

CLAIM NO. AXAHCV 2016/0054

BETWEEN:

**HISTORIC BEACON POINT ANGUILLA LTD
RONDA HODGE**

Claimants

and

CARL WEBSTER

Defendant

Appearances:

Ms. Paulette Harrigan, Paulette Harrigan's Chambers of counsel for the Claimants
Mr. Devin Hodge, Astaphan's Chambers of counsel for the Defendant

2019: September 24; 26; 27;
October 2; 3;
2020: November 3.
Reissue

Claim for personal injuries – Assault and battery – Nuisance – Smoke escaping from adjoining and nearby lands – Trespass to land – Quantum of damages – Assessment and measure of damages – Counterclaim – Claim for personal injuries – Damages for personal injuries – Claim for Nuisance – Assessment of Damages for nuisance – Injunctive relief – Mandatory injunction – Expert Medical Evidence – Medical practitioner – Medical Report – Section 13 Evidence Act – Admissibility of expert report – Practice and procedure – Civil Procedure Rules Parts 8.9 (3), 10.6, 32.6

JUDGMENT

[1] **INNOCENT, J.:** The first-named claimant, Historic Beacon Point Anguilla Ltd. ('Historic Beacon') is a limited liability company incorporated under the Companies Act, and is the registered proprietor of certain lands situated at Island Harbour, Anguilla, and more particularly described as Registration Section East Central Block 89218B Parcel 38 ('Parcel 38'). At the material time Historic Beacon owned and operated a farm on Parcel 38.

- [2] The second-named claimant, Mrs. Ronda Hodge ('Mrs. Hodge') is a food vendor and farmer and is one of the directors and shareholders of Historic Beacon. The other director and shareholder of Historic Beacon is Mr. Maxwell Carty ('Mr. Carty').
- [3] The defendant Mr. Carl Webster ('Mr. Webster') is the registered proprietor of certain lands situate at Island Harbour, Anguilla, and more particularly described as Registration Section East Central Block 89218B Parcel 41 ('Parcel 41') and Block 89218B Parcel 210 ('Parcel 210'). Mr. Webster's home is located on Parcel 210.
- [4] Mr. Webster also claims to be the caretaker of certain "family land" situated in close proximity to Parcel 38 and more particularly described as Registration Section East Central Block 89218B Parcel 39 ('Parcel 39'). Title to Parcel 39 is registered in the names of Hermina Webster and Edris Noreen Webster as trustees and who are alleged to be Mr. Webster's aunts.
- [5] Historic Beacon claims 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.
- [6] Mrs. Hodge claims 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.
- [7] In support of the claim for assault and trespass, Mrs. Hodge alleged that on or about 10th 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 upon Parcel 38.

- [8] Mrs. Hodge claimed that while she was proceeding along the road ('Parcel 455') which serves as an access to Parcel 38, she met Mr. Webster standing by a fence which separates Parcel 455 from Parcel 39. It appeared, according to Mrs. Hodge that Mr. Webster was on Parcel 39. 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. Mrs. Hodge claims that Mr. Webster became belligerent and began uttering obscenities and abusive and threatening language to her.
- [9] Mrs. Hodge further alleged that while she was returning along the road Mr. Webster followed her along the opposite side of the fence that separated them, and continued his display of belligerent conduct, eventually threatening to kill her and feed her to the pigs. Mrs. Hodge alleged that Mr. Webster climbed over the fence and proceeded to assault her and beat her about the head with a pair of pliers.
- [10] Mr. Webster denied having trespassed on Parcel 38 and, that he assaulted and beat Mrs. Hodge. Mr. Webster admitted to standing near the fence on the adjoining property (Parcel 39) and that at no time did he enter upon Parcel 38. In fact, Mr. Webster claims that it was Mrs. Hodge who assaulted him and, it was during this assault on him that he sustained injuries to his head.
- [11] Mr. Webster, whose residence is located on Parcel 210, also claimed to have suffered loss and damage as a result of the nuisance caused by the farming practices engaged in by Historic Beacon on Parcel 38. Mr. Webster claimed that Historic Beacon is engaged in animal husbandry on Parcel 38 which included the rearing of livestock such as goats, pigs, chickens, ducks and rabbits. Mr. Webster alleged that Historic Beacon, in the course of carrying out its farming practices on Parcel 38, have engaged in the practice of frequent and prolonged burning of waste material in the preparation of animal feed. Mr. Webster claimed that the

pungent and malodorous smoke generated by the burning of waste material blew in a westerly direction towards his residence.

- [12] In addition, Mr. Webster alleged that the smell generated from the animal faeces on Parcel 38 escaped therefrom and blew onto Parcel 210, causing discomfort to him and his family. Mr. Webster also complained that the animal noises that were at their highest in the early mornings, late afternoons and, occasionally in the night- time, caused disturbance and annoyance to him and his family.
- [13] Therefore, Mr. Webster alleged that he has been disturbed in the quiet use and enjoyment of his property by the nuisance created by Historic Beacon on Parcel 38. He therefore claimed damages against Historic Beacon for the alleged nuisance.
- [14] In addition, Mr. Webster claimed 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.
- [15] Historic Beacon and Mrs. Hodge admitted that they cooked animal feed on Parcel 38 but denied that they engaged in prolonged and frequent burning of waste material, and that any smoke was generated thereby. Historic Beacon and Mrs. Hodge also denied that they engaged in imprudent farming practices, and had at all material times maintained the farm in good condition, and employed the best practices in crop and livestock farming. Therefore, they denied Mr. Webster's complaint of the malodorous scent emanating from the farm. In addition, they denied that the animals escaped onto Parcel 39 because the farm was fenced and the livestock were kept within an enclosed area.

- [16] The claimants admitted that Mr. Webster had indeed made several complaints to the Environmental Health Department and the Royal Anguilla Police Force ('RAPF') concerning the alleged nuisance. However, the claimants contended that the relevant authorities found that the claimants were not in breach of any laws or regulations while conducting their farming operations on Parcel 38.
- [17] It appears that the claimants also contended that Mr. Webster is not entitled to claim any relief in relation to Parcel 39 as he did not have title to the same and was not authorized to act on behalf of the registered proprietors thereof.

Trespass

- [18] One of the issues arising for determination in the present case is whether Mr. Webster trespassed on Parcel 38 on 10th April 2016. The court, having heard the evidence of the parties in relation to the question of the alleged trespass by Mr. Webster on Parcel 38, and the court having observed the demeanor of the respective witnesses, has arrived at the following conclusions.
- [19] It appears, having regard to the evidence given in respect of the relative locations of Parcel 38 and Parcel 39, and the evidence in relation to the fencing that separates Parcel 38 from Parcel 39, it would be fair to conclude that Mr. Webster had the ability to enter upon Parcel 38. Indeed, Mr. Webster, by his own admission, testified as to his belief that he was entitled to enter upon Parcel 39.
- [20] It was also made to appear to the court that Mr. Webster, notwithstanding his insistence that he was entitled to enter upon Parcel 39 in his capacity as what he described as the caretaker thereof, provided no evidence to substantiate that fact. Mr. Webster proffered the explanation that he had gone onto Parcel 39 to repair the fence. That explanation seemed unlikely in the absence of any explanation as to why Mr. Webster would enter upon Parcel 39 to repair a fence of his own volition without any express authority to do so. Therefore, Mr. Webster's claim to

be the caretaker of Parcel 39 provided no justification or plausible excuse for being on Parcel 39.

[21] The court is also mindful of the fact, that in light of Mr. Webster's evidence regarding the alleged nuisance on Parcel 38, it seems plausible that he may very well have had a reason for entering upon Parcel 38.

[22] In any event, it is the court's view that much depended on the relative credibility of Mrs. Hodge and Mr. Webster. The court is inclined to accept the evidence of Mrs. Hodge that she saw Mr. Webster on Parcel 38.

[23] Mr. Webster challenged Mrs. Hodge's evidence on the basis of her ability to have seen him on Parcel 38 owing to the foliage located at the entrance of the access road which obscured a portion of the farm located on Parcel 38, including the area around the chicken coop. Mrs. Hodge described seeing Mr. Webster coming from the area of the chicken coop.

[24] The court also took into account the evidence coming from both Mrs. Hodge and Mr. Webster regarding the dilapidated condition of the fence, which would have permitted Mr. Webster ready access to Parcel 38. It will be recalled that that Mrs. Hodge met Mr. Webster standing close to the fence on the boundary that separated Parcel 38 from Parcel 39, a fact which Mr. Webster did not deny but rather confirmed.

Assault

[25] As previously stated, the resolution of many of the issues that arise in the present case depends wholly or substantially on the view which the court takes of Mrs. Hodge's and Mr. Webster's credibility.

[26] It appears from the evidence lead at the trial that tensions between Mr. Webster and Mrs. Hodge had been brewing for some length of time. The perennial discord between the parties appears to have been fueled by Mr. Webster being

disgruntled by Historic Beacon's use of Parcel 38 and the alleged nuisance created thereby, and also what appears to be the dissatisfaction of both parties concerning the disposition of certain "family lands". It is not surprising that the deep-seated yet dormant discord erupted on the day of the incident giving rise to the present proceedings.

[27] The evidence presented at the trial points clearly to the fact that both Mr. Webster and Mrs. Hodge vented their mutual vitriolic feelings for each other on that day; that was amplified by the verbal and physical confrontation that ensued. It is not readily discernible from the evidence presented which of the two parties ignited the physical confrontation. However, what is clear is that both parties agreed that they were verbally abusive to the other. However, given the frailty of human emotions it is apparent that both parties contributed towards what erupted into a physical confrontation resulting in injury to both parties.

[28] It is not in dispute that the parties were engaged in a physical fight. Therefore, it is not improbable or unlikely that Mrs. Hodge sustained the injuries that she suffered and that those injuries were in fact inflicted by Mr. Webster.

[29] Both parties appeared to give conflicting versions as to how Mrs. Hodge sustained the injuries that she did. The injuries suffered by Mrs. Hodge were not inconsistent with blows inflicted with a blunt object. It is not disputed that at the material time, Mr. Webster had a pair of pliers in his possession, allegedly for the purpose of repairing the boundary fence. Mr. Webster maintained throughout the proceedings that Mrs. Hodge suffered her injuries when they both toppled over to the ground and that Mrs. Hodge struck her head on the rocks located on the dirt road on Parcel 455 that served as an access to Parcel 38. Mrs. Hodge insisted that the road was a dirt road and that there were no rocks in the vicinity of where the fight occurred.

[30] Therefore, on a balance of probabilities, it appears more likely than not that the injuries sustained by Mrs. Hodge were caused or inflicted by Mr. Webster. The

court is of the view that it is unlikely that Mrs. Hodge would have sustained the multiple head injuries that she did by merely falling down and striking her head on a blunt surface or object; there was more than just a single blow to her head.

Nuisance

- [31] Based on the evidence presented at the trial, the court has arrived at the conclusion that Mr. Webster has made out his case for nuisance on a balance of probabilities. This finding is supported by the separate admissions by Mrs. Hodge and Mr. Carty that they engaged in the practice of igniting and burning waste material for the purpose of cooking feed for their livestock.
- [32] The resolution of this dispute between the parties lies in the determination of the question of whether this practice created a nuisance which affected Mr. Webster's use and enjoyment of his residential property located on Parcel 210; and whether the practice amounted to an unreasonable use of Parcel 38.
- [33] In order to succeed in his claim for nuisance, Mr. Webster would have needed to establish that on a balance of probabilities, substantial interference with the use and enjoyment of his property and the use of Parcel 38 was unreasonable.
- [34] Mr. Webster's claim for nuisance is based on the allegation that he and his family were made to endure, for a period of three years, noxious odours, noise and dust coming from Parcel 38. Therefore, Mr. Webster alleged that there was a substantial interference with his use and enjoyment of Parcel 210.
- [35] Mr. Hodge, counsel appearing for Mr. Webster, submitted that the claimants had knowledge of the substantial interference to the use and enjoyment of his property but nevertheless persisted in their conduct. According to Mr. Hodge, given the duration and frequency of their conduct, the interference must be viewed as excessive and malicious, particularly in light of the repeated complaints made by Mr. Webster to the environmental health authorities and the police.

- [36] In his closing submissions, Mr. Hodge contended that it was not in dispute that Mr. Webster's house located on Parcel 210 was constructed more than twenty years prior to Historic Beacon's engagement in large scale animal husbandry on Parcel 38.
- [37] Mr. Hodge submitted that Historic Beacon did not establish that Parcel 38 is located in an area zoned for farming and animal husbandry. In addition, Mr. Hodge submitted that there was a neighbor occupying residential property in close proximity to that of Mr. Webster. This, submitted Mr. Hodge, lends itself to the conclusion that the general area consisted of both agricultural and residential use. In any event, Mr. Hodge argued, that even if the area had been zoned for farming and the rearing of livestock, such zoning did not permit Historic Beacon to cause a nuisance to occupants of adjoining land.
- [38] Mr. Hodge relied on the decision in **Dr. Graham Edward Wheeler v J.J. Saunders Ltd**¹ to amplify his argument. In **Wheeler v JJ. Saunders Ltd**, the appellant had applied for planning permission to construct a building containing a row of 20 pens each capable of taking 20 pigs under a mono-pitch roof and with an opening for ventilation and access to the front only. Part of the building has a slatted floor and a channel to contain the pigs' excrement underneath it. Permission was granted by the District Council, and the first pigs went into occupation. An application for planning permission for a second Trowbridge house was subsequently made and granted by the same planning authority. The two Trowbridge houses were filled with pigs. The second Trowbridge house was only 11 metres from the nearest point to the respondent's property. The court below awarded the respondent damages and an injunction. The appellants appealed against the judge's decision. The appellant's main contention on the appeal was that the judge should not have awarded damages and an injunction in respect of nuisance in the form of smell from pigs in the Trowbridge houses. The argument for the appellants is that since they obtained planning permission for the two

¹ [1994] EWCA Civ 32

Trowbridge houses, any smell emanating from the pigs kept in them cannot amount to a nuisance.

[39] The court of appeal held that there can be little doubt and it is now accepted that, apart from any effect of planning permission, there was nuisance by smell. The reasoning of the court of appeal was that planning permission although authorizing the use of the land, did not confer any immunity from an action in nuisance if the use to which the land is put results in a change of use from that originally granted unless such change of use was permitted by the planning authority. In any event, there was no evidence in the present case that planning approval was granted to Historic Beacon to significantly change the use of the Parcel 38 after 2012.

[40] Therefore, the court agrees with Mr. Hodge's argument, that even if the area where Parcel 38 had been located was zoned for agricultural use, such zoning did not permit Historic Beacon to carrying on of their farming activities in such a way to effectively change the permitted land usage, to the extent that it changed the ordinary usage of the land beyond what was contemplated thereby resulting in nuisance.²

[41] Mr. Hodge also submitted, that it appears from the evidence elicited from Mr. Webster that on or about the year 2013 there was a significant change in land use with respect to Parcel 38, which was marked by an increase in the scale of animal husbandry, which was unprecedented for that locality. Mr. Hodge submitted that in the circumstances, Mr. Webster could not have foreseen exposure to noxious and foul smelling odours, smoke and fumes, generated by the burning of rubbish, animal odours and noises of the kind that occurred years after he built and occupied his residential property on Parcel 210. In addition, Mr. Hodge submitted that the farming practices in which Historic Beacon engaged ought to have caused them to foresee the likelihood of nuisance to adjoining lands.

² See also: the discussion in *Coventry and Others v Lawrence and Another* supra

[42] Mr. Hodge also submitted that Historic Beacon's reliance on the fact that Mrs. Hodge's forebears had utilized Parcel 38 in a similar manner prior to Historic Beacon's use and occupation, in support of the argument that Mr. Webster came to the nuisance, was doomed to fail.

[43] Mr. Hodge sought to distinguish the decision in **Coventry and Others v Lawrence and Another**³ from the present case in order to dispel the notion advanced by Historic Beacon that Mr. Webster had come to the nuisance, as it were. Mr. Hodge's contention was that Mr. Webster had purchased the land and constructed his residence on Parcel 210 prior to the obvious change in usage of Parcel 38 that occurred on or about the year 2012.

[44] In **Coventry v Lawrence**, the issue was whether the claimants were aware of the motor sports carried on when they purchased Fenland. This was obviously relevant to the claim for an injunction. The claimants asserted that they had no such knowledge. The defendants maintained and put in cross-examination that this assertion was simply incredible. The court held:

“The outcome of this litigation will be a disaster for the Claimants, a fact which I regret. On the other hand the Claimants' predicament is a consequence of their decision to purchase a house in an area where motor sports were an established activity. This fact was or should have been apparent to the purchasers and the purchasers' professional advisors. (Contrary to the protestations of counsel, this is not a finding of dishonesty. We are not deciding whether (a) the existence of motor sports nearby was known to the Claimants when they purchased or (b) the existence of motor sports nearby was not known to the Claimants but ought to have been known.)”⁴

[45] It appears that apart from setting out the general legal principles to be applied in determining a claim for nuisance, Ms. Harrigan, counsel appearing for the claimants, presented very little assistance to the court in her closing submissions by failing to adequately relate the facts to the law.

³ [2012] EWCA Civ. 26

⁴ At para [86]

- [46] The law of nuisance is aimed at protecting the occupier of land from substantial interference with his enjoyment thereof. In considering a claim for nuisance, a court is required to strike a balance between the right of a defendant to use his land as he wishes and the right of a claimant to be protected from interference with his use and enjoyment of his land.
- [47] In order for an action for nuisance to arise, in the case of interference with use and enjoyment of land, it must be substantial. Therefore, where the claim involves interference with the enjoyment of land, alleging inconvenience, annoyance or discomfort caused by the actions of the defendant, this must be shown to be substantial. Therefore, where a defendant is able to prove that his conduct was reasonable in all the circumstances, he would not be held liable.
- [48] The court must consider the particular circumstances of each case, having regard to the following factors:
- (1) The nature of the locality;
 - (2) The utility of the defendant's conduct;
 - (3) The claimant's abnormal sensitivity;
 - (4) The duration of the harm;
 - (5) Whether the defendant carried on the activity with the main purpose of causing harm and annoyance to the claimant.
- [49] In **Greenidge v Barbados Light and Power Co. Ltd.**⁵ the court laid out the test to be applied in order to succeed on a claim for nuisance. In the cited case, the plaintiff sought an injunction and damages against the defendant company which owned an electricity undertaking at Spring Garden, St Michael. The plaintiff and his family lived in a couple of his apartments at Spring Garden and he let out the remainder to visitors. His claim was that from about the year 1971 noxious and offensive fumes, vapours and smoke had been discharged over his property from the defendant's premises and that the operation of the undertaking over the same

⁵ (1975) 27 WIR 22

period had caused excessive noise in and about his apartments. He alleged that the installation of additional equipment and machinery at the plant since 1971 had increased the volume of noise coming on to his premises. He claimed that annoyance and discomfort had been and were still being caused to him, his family and his tenants and that he had suffered loss in the business of letting his apartments.

[50] The court held:

“That in determining whether or not a nuisance exists all relevant circumstances must be taken into account. The character of the neighbourhood is an important one of these considerations and the test to be applied is an objective one to accord with the standard of the ordinary reasonable and responsible person living in the locality.

[51] The court reasoned that:

“The law does not allow as a defence that the place is a convenient or suitable one for committing the nuisance or that the business or operation causing the nuisance is useful to persons generally in spite of its annoyance to the plaintiff. It is likewise no defence to say that the best known means have been taken to reduce or prevent the nuisance complained of or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. On the other hand, the plaintiff cannot put up his apartments next to an industrial area and expect to apply standards of noise, smoke and smell which are alien to that locality.”

[52] The court also held:

“It is now clear, that the law of nuisance does not allow as a defence that the place is a convenient or suitable one for committing the nuisance. A defendant cannot claim immunity from suit merely by pointing to the fact that its operations are in a farming or agricultural area.”

[53] The court was able to distill from Mrs. Hodge’s evidence, that notwithstanding the ownership and occupation of other parcels of land in close proximity to Parcel 38, by herself and Historic Beacon, Parcel 38 was more conducive to animal husbandry because the other parcels of land were utilized for other purposes.

- [54] Mr. Hodge also alluded to what he described as the unreasonableness of Historic Beacon's farming activities on Parcel 38. Mr. Hodge complained that it was not only the conduct engaged in, but also the extent to which the offending conduct was carried on. In support of his argument he relied on the decision in **De Keyser's Royal Hotel v Spicer Bros. Ltd and Minter**.⁶
- [55] In **De Keyser v Spicer and Minter**, the defendants were constructing a building nearby to the claimant's hotel. This involved the excavation of the foundations and pile-driving operations to be carried out as a result. The excavation work was carried on between 7:30 p.m. and 6:40 a.m., with pile-driving operations being carried on mostly during the daytime. However, on one occasion the pile-driving continued throughout the night. The claimant's brought a claim in private nuisance alleging that the ongoing activity prevented guests from sleeping and from guests being able to hear the speaker after dinner. The claimants sought an injunction to prevent the work being carried out at these times.
- [56] In considering the issues of whether the defendant's temporary building works could constitute a nuisance and whether or not the temporary work was of a consistent enough nature to constitute a continuous interference with the claimant's amenities and the enjoyment of their land. It was held that the defendants had not operated their excavation and building in a reasonable manner, and the interference with the claimant's land was capable of constituting a continuous interference with their enjoyment of their land. This was the case even though the building works were temporary in nature and would eventually cease, because the works had continued throughout the evening for a matter of months and because they had been carried out at unreasonable times in the evening and through the night. This had resulted in the guests being unable to sleep. Private nuisance did not require that the nuisance be completely permanent in nature, but it was required that it was continuous.

⁶ (1914) 30 TLR 257

- [57] Having regard to the evidence presented at the trial, the court is of the considered view that the activities carried on by Historic Beacon on Parcel 38 were carried on in an unreasonable manner having regard to the location, time and frequency of those activities.
- [58] The extent of Mrs. Hodge's evidence was that the farming activities engaged in by Historic Beacon on Parcel 38 could not have affected Mr. Webster's use and enjoyment of Parcel 210; and that in any event, the cooking of animal feed had been employed by Historic Beacon's predecessors in title prior to Mr. Webster's complaints.
- [59] Mrs. Hodge testified that Parcel 38 is the location that she used to plant crops and that this area is just across the road from Mr. Webster's house. She later testified that thereafter she only reared livestock on Parcel 38. She also testified that Mr. Webster had, from on or about the year 2004, complained about the effects of the farming practices engaged in by Historic Beacon on Parcel 38. She indicated that Mr. Webster's house was located on Parcel 210 prior to the year 2004.
- [60] According to Mrs. Hodge, Mrs. Kathleen Rogers ('Mrs. Rogers') was speaking the truth when she testified that Historic Beacon was engaged in the practice of burning plastic material on Parcel 38. Mrs. Hodge also testified that the dry wood that was ignited to cook feed for the livestock would burn to ashes. She agreed that ash is the last stage of the process of burning wooden material. She also agreed that the fire would have had to be burning for some time in order for the wooden material to break down into ashes.
- [61] According to Mrs. Hodge, the coal generated from burning of the wooden material could be reused to ignite other fires. She said that the wooden material would take from a half hour to two hours to cook the animal feed. She further testified that the process of igniting and burning wooden material until it became charcoal would inevitably produce smoke, and that she would engage in this practice at least

thrice per week. She also agreed that the smoke thereby generated would produce an odour.

[62] Mrs. Hodge denied having told Mrs. Rogers that she engaged in the practice of burning material on Parcel 38 infrequently. According to Mrs. Hodge, when Mrs. Rogers visited the farm she was engaged in the practice of burning material at least thrice weekly. When pressed further, Mrs. Hodge agreed that she had not spoken the truth to Mrs. Rogers when she told Mrs. Rogers that she only engaged in this practice infrequently whereas in fact she did engage in this practice frequently.

[63] It cannot be disputed that the farming practices engaged in by Historic Beacon on Parcel 38 generated a foul odour. The evidence coming from Mrs. Hodge and Mr. Carty revealed that expired food obtained from local supermarkets was cooked as food for the livestock. These expired items consisted of unsold food items that were deemed unfit for human consumption. Mrs. Hodge admitted that the expired food items would sometimes give off a bad odour. Mrs. Hodge testified that she personally did not do anything wrong, and if there was any wrongdoing in relation to the manner in which the animal feed was prepared, the blame laid with the employees on the farm.

[64] It was rather surprising that Mrs. Hodge would have testified that she stopped the employees from engaging in the practice of burning rubbish on the farm. Mrs. Hodge also denied that the practice of burning plastic material, more particularly Tetra Pak, continued after Mrs. Roger's visit to the farm. However, she testified that they continued burning wood to ignite the fires.

[65] It is not in dispute that Mr. Webster complained to the police authorities frequently about the fires being ignited on Parcel 38. Mrs. Hodge also confirmed that prior to April 2016, Mr. Webster had made more frequent complaints to the police about the practices engaged in by Historic Beacon on Parcel 38. She agreed that Mr. Webster's complaints commenced from as far back as the early 2000s.

Mrs. Hodge also testified that when Mrs. Rogers informed her that it was an offence to burn garbage, the practice ceased.

[66] Mrs. Hodge said in her testimony that the time of day when the feed for the livestock would be prepared was dependent on the day and the condition of the weather. Sometimes she would prepare animal feed until dusk; but she would not engage in this practice before nine o'clock in the morning. She agreed that animal feed was cooked at midday as well.

[67] Mrs. Rogers, an Environmental Officer (Health Inspector) attached to the Department of Health testified at the trial with respect to the observations that she made when she visited the farm on Parcel 38 and Mr. Webster's residence. Mrs. Rogers said that when she visited the farm she observed what appeared to be burnt charcoal on the ground along with some ashes in an area that measured approximately 8 feet in diameter. That was on 12th January 2016.

[68] The burning of Tetra Pak material by Historic Beacon was also confirmed by Mrs. Rogers' testimony. She said, that when she visited Parcel 38 she saw the area littered with Tetra Pak. She described the farm as being unkempt.

[69] It was made to appear to the court, based on Mrs. Rogers' testimony that the pungent odour created by the burning of Tetra Pak material on Parcel 38 would certainly have affected neighbouring properties. Mrs. Rogers indicated this was the reason that she asked them to put out the fire and to desist from burning Tetra Pak material.

[70] According to Mrs. Rogers, when she visited Parcel 38 on 12th January 2013 she also visited Mr. Webster's residence but smelt no odour. She indicated that it was because of this that she concluded that the burning had stopped. However, she carried out no physical inspection of Parcel 38 on that occasion.

- [71] It appears from Mrs. Rogers' testimony that Mrs. Hodge had admitted burning rubbish on Parcel 38 occasionally. That was sometime prior to the date that she observed Tetra Pak strewn on Parcel 38.
- [72] Mrs. Rogers testified that she had visited Mr. Webster's home on more than one occasion and that many complaints would have preceded these visits. She said that she visited Mr. Webster's house on a particular occasion when he had complained about the burning of fire on Parcel 38. She testified that on that occasion she visited Parcel 38 and then left after Mr. Webster had extinguished the fire. She testified that on that occasion when she visited Mr. Webster's home she did not smell smoke because the fire had already been extinguished.
- [73] According to Mrs. Rogers, she recommended to Historic Beacon that they utilize fuel to prepare the animal feed. Mrs. Rogers also testified that she made this recommendation because she was aware of the nuisance that burning Tetra Pak would create with respect to neighbouring properties.
- [74] Mrs. Rogers testified that, between 14th January 2016 and 14th March 2016 she observed a pile of sticks that seemed to be in preparation for igniting a fire. She said that Historic Beacon was not using fuel as recommended.
- [75] It appears that Mrs. Rogers was unable to say definitively whether Mr. Webster's property was affected by the smoke emanating from Parcel 38. This is attributable to the fact that she did not actually visit Mr. Webster's property while the fire was burning on Parcel 38. However, this does not imply that Mr. Webster's property was not affected by the smoke. Mrs. Rogers herself seems to have qualified her position regarding the likely effects of the smoke on Mr. Webster's property in her testimony. According to Mrs. Rogers, she would have had to have been in and around Carl Webster's home in order to observe the effect of the smoke generated by the burning on Parcel 38. On the evidence presented, it appears that Mrs. Rogers only visited Mr. Webster's residence after the fire on Parcel 38 had been extinguished.

- [76] Mrs. Rogers also testified that between the months of January and March 2016 her department received anonymous calls concerning activities on Parcel 38. However, these events were not investigated because the callers never identified themselves. These calls were received prior to her first site visit to Parcel 38 in January 2016. Mrs. Rogers also testified that she indicated to Mr. Webster that the only way that she could have determined whether the burning on Parcel 38 was creating a nuisance was if she was present while the fire was ablaze. It is not clear from the evidence whether Mrs. Rogers in fact visited Mr. Webster's residence while the fire was burning.
- [77] Essentially, Mrs. Rogers' evidence confirmed Historic Beacon's practice of burning various materials on Parcel 38. She testified that on one site visit she saw a fire that had been lit by Mrs. Hodge's son. However, she did not serve an abatement notice at that time.
- [78] Mrs. Rogers also testified that Mr. Webster's residence was located to the west of Parcel 38 and that the wind blew from east to west. She said it was precisely for that reason that she instructed Historic Beacon to extinguish the fire.
- [79] The court also heard the testimony of Mr. Carty. Mr. Carty described the location of Parcel 38 relative to Mr. Webster's residence. He said that the western boundary of Parcel 38 is closest to Mr. Webster's residence. According to this witness, Mr. Webster's home is not opposite or across from the area where Historic Beacon prepared the animal feed. He said that Mr. Webster's home is not located immediately west of Parcel 38, it is more or less southwest of Parcel 38.
- [80] When describing the process that was utilized to cook the animal feed, Mr. Carty indicated that he would cook chicken by means of burning a wood fire. Mr. Carty testified that he knew Mrs. Rogers, and agreed that she came to the farm on 14th January 2016. He agreed that on this occasion there was a fire ablaze on Parcel 38.

- [81] According to Mr. Carty, he would cook the animal feed between 2:30 p.m. and 3:00 p.m.; and that it would take a couple of hours for the feed to cook. This he said, was dependent on the type and quality of the food being cooked. He denied burning Tetra Pak and other plastic material and claimed to be an environmentalist. Mr. Carty said that when Mrs. Rogers spoke to him about the burning of plastic material he undertook to ensure that this practice would cease.
- [82] It appears from Mr. Carty's testimony that frozen expired food items was used in the preparation of animal feed. However, Mr. Carty denied that the preparation of the animal feed from these items would emit a foul odour while being prepared.
- [83] Mr. Carty testified that the livestock were all enclosed in their pens and that the animal waste generated was disposed of in accordance with good farming practices.
- [84] He agreed that Parcel 38 was the closest parcel of land occupied by Historic Beacon to Mr. Webster's residential property. He also said that Historic Beacon commenced animal husbandry on Parcel 38 on or about the year 2013.
- [85] It would appear that after Mrs. Rogers' visits, the practice of burning material on Parcel 38 for the purpose of preparing animal feed had either declined or ceased altogether. This is evident from the testimony of Mr. Webster. Mr. Webster testified that presently the practice of burning material on Parcel 38 has diminished to a great extent. According to Mr. Webster, there is no longer any burning taking place on Parcel 38. However, he testified that the stench generated by the livestock still emanated from Parcel 38.
- [86] The question of the reasonableness of the use of Parcel 38 arose from the testimony of both Mr. Webster and Mrs. Hodge. It appears that the evidence in support of her defence to Mr. Webster's complaint concerning the nuisance created by the rearing of livestock on Parcel 38 was premised on the customary

usage of Parcel 38. This aspect of Mrs. Hodge's case was explored by Mr. Hodge in his submissions and in his cross-examination of Mrs. Hodge.

[87] It appears from the testimony of Mrs. Hodge at the trial that this was clearly not the case. The court found that the variety and quantity of livestock reared on Parcel 38 increased in the period after the year 2012 and involved a significant change from small farming to a larger scale farming enterprise.

[88] In cross-examination, Mrs. Hodge testified that she only reared livestock on Parcel 38. The other areas of land either owned or occupied by Historic Beacon, and with less proximity to Parcel 210 were put to other uses. She denied that her predecessors ceased rearing livestock on Parcel 38 because of the nuisance caused to Mr. Webster's enjoyment of Parcel 210.

[89] Essentially, Mrs. Hodge disagreed that the use of Parcel 38 involved a change in the customary use of Parcel 38 after she returned from University in St. Thomas, that is, when she became more involved in the farming activities carried out on Parcel 38. She then recanted somewhat and testified that she agreed that some of the changes in the land use occurred after her return to Anguilla. She denied that there were chickens and pigs on Parcel 38 during the period 2004 to 2012.

[90] She also testified that her mother and her aunt did not rear pigs prior to her involvement on the farm, but that they raised other animals. She stated that during the period 2004 to 2012 there were no ducks or rabbits on Parcel 38; her mother and her aunt did not rear these animals. According to Mrs. Hodge, she made those changes to the variety of the livestock reared on Parcel 38 because she wanted to produce sufficient to satisfy the Anguillian market.

[91] In the circumstances, the court found, on a balance of probabilities, that Mr. Webster's allegation that his use and enjoyment of his residential property located on Parcel 210 was disturbed by the increased volume of animal husbandry carried on by Historic Beacon since the year 2012. The court makes this finding

notwithstanding Mr. Carty's assertions regarding the manner of disposing of and containing the animal faeces generated on Parcel 38. It is inconceivable and unlikely that the rearing of a variety of animals on such a scale would not have created foul and malodorous air capable of causing a nuisance to the occupier of Parcel 210.

Personal Injuries

- [92] Mrs. Hodge testified concerning her injuries and her general physical condition after the incident. Another witness gave evidence regarding Mrs. Hodge's condition post injury. Mrs. Hodge was driven to the hospital by Mr. Carty. She was given a medical referral form, portions of which had been filled in by a police officer. This referral form was later handed over to the attending physician who also filled in relevant portions of the form.
- [93] In her statement of claim, Mrs. Hodge pleaded that at the material time she was 48 years old. She claimed to have suffered four lacerations to her head. She also pleaded that immediately after, what she described as 'the attack', she experienced headaches, nausea, dizziness, insomnia and weakness in her body to the extent that she could barely stand up or function.
- [94] At the time of filing the claim on 2nd August 2016, she claimed to be suffering from dizziness, headaches, flashes in her eyes and insomnia. She claimed that she experienced decreased strength in her limbs, pain in the back of her neck and shoulders along with what she described as "shooting" pains, from her neck to her fingers. She also claimed to be suffering from numbness in her right hand and an unsteady gait. According to Mrs. Hodge, as a result of her symptoms she was referred to a neurologist.
- [95] According to the statement of claim, Mrs. Hodge alleged that she had been diagnosed with post-concussion syndrome, cervical strain and a pinched nerve.

- [96] Mrs. Hodge claimed to have undergone an x-ray and CT scan. She claimed that after she had those tests performed, she attended at the hospital where she obtained a medical report and the results of the x-ray and CT scan. She also claimed to have travelled to St. Thomas and St. Maarten for specialised medical care.
- [97] According to Mrs. Hodge, on or about December 2017 she was seen by Dr. James Nelson in St. Thomas. She testified that on or about July 2016, after she had seen Dr. Nelson, her condition did not improve. She revisited Dr. Nelson because, according to her, she felt very weak in her arms and legs. She claimed to be suffering from dizziness, back pains and migraine headaches.
- [98] She claimed that when she went to see Dr. Nelson in December 2017, she had a sleep test and an MRI performed. She was prescribed medication for her symptoms. After Dr. Nelson had completed his examination he recorded his findings in the form of a report.
- [99] No objection was raised with respect to the admissibility of the medical reports at the trial and they were admitted into evidence.
- [100] The court heard the testimony of Dr. James Lambert Nelson Jr. ('Dr. Nelson') who testified that he specialised in the field of neurology and general medicine. He was deemed an expert in neurology and internal medicine. Dr. Nelson testified at the trial via videolink. No objection was taken with respect to him testifying as a witness at the trial.
- [101] Dr. Nelson testified that Mrs. Hodge was referred to him by Dr. Hughes who is a registered medical practitioner in Anguilla. He said that he received a written referral dated 21st July 2016 addressed to him from Hughes Medical Centre in Anguilla, which was signed by Dr. L.A. Hughes which he identified and which was tendered and admitted as an exhibit.

- [102] In his testimony, Dr. Nelson said that Mrs. Hodge attended at his office in St. Thomas on 27th July 2017. His nursing assistant obtained her medical history. He examined her and one of his technicians conducted an ECG and an MRI of her brain. He prescribed medication for the treatment of her headaches and wrote a report detailing his findings.⁷
- [103] He testified that his examination revealed that Mrs. Hodge suffered from migraine and excessive daytime drowsiness. He also found that she had a cervical strain, a slipped disc and a pinched nerve in her right arm. She also appeared to be suffering from tenderness and muscle spasms, discomfort of the neck on rotation, weakness in the right arm and right triceps and restricted pronation on flexing of the wrist.
- [104] Dr. Nelson also found that Mrs. Hodge's ECG results were normal. The CT scan and MRI were also normal and unremarkable. She was advised to have a sleep study done, to be followed up by multiple MSLT tests.
- [105] The MRI which was performed in St. Maarten exhibited changes that were consistent with arthritis of the C5 and C4 vertebrae of the cervical spine which contributed to the pinched nerve. Dr. Nelson said he prepared a report highlighting his findings in relation to these tests.⁸
- [106] Dr. Nelson further testified to having conducted further tests on Mrs. Hodge that included an EMG, NCV and AMS examination. These tests were conducted in March 2018. According to him, the results of these tests are contained in a report dated 27th July 2018. The purpose of these tests was to determine the cause of the right shoulder and arm pain that Mrs. Hodge complained of. On this occasion she was prescribed medication and advised to undergo physiotherapy for the neck

⁷ Trial Bundle 3 p. 59

⁸ Trial Bundle 3 pp. 59 and 78-79; Report 14th January 2018

and arm pain. She also received cervical traction and was advised to obtain a cervical traction kit. He prepared a report based on the tests conducted.⁹

[107] Dr. Nelson opined, that the headaches suffered by Mrs. Hodge would be exacerbated by prolonged exposure to sunlight, and that this would interfere with her work as a farmer.

[108] Essentially, Dr. Nelson testified, that the weakness in her right hand lessened her ability to engage in the cultivation of crops, her daytime sleepiness would prevent her from working for long hours, and that her disabilities would affect other aspects of her life as well. According to Dr. Nelson, his prognosis was guarded.

[109] Dr. Nelson was cross-examined. He described the C4 and C5 slip disc and arthritis as degenerative conditions (diseases) that could affect muscles and sensation in the limbs and movement in the arms and wrist. This condition, he said, can also impair movement of the lower extremities. He also testified that osteoarthritis is also a degenerative condition (disease).

[110] It appears that separate and apart from the symptoms that Dr. Nelson was able to discern, much of his diagnosis was derived from the history given by Mrs. Hodge. Dr. Nelson testified that there was a historical basis for his diagnosis of Mrs. Hodge. He said, that the history given by Mrs. Hodge would have formed a significant basis for his diagnosis. He concluded, that if the patient is lying about the historical nature of her injury that would certainly affect his diagnosis. Dr. Nelson testified that, in his opinion, based on the history presented by Mrs. Hodge, there is a connection between the injury and the condition with which Mrs. Hodge suffers. According to Dr. Nelson, he could only work with the referral that he was given.

[111] Based on Dr. Nelson's evidence, the issue which immediately comes to the fore is that of, whether the condition with which Mrs. Hodge suffers was caused by the

⁹ Trial Bundle 3 pp. 89 – 95

injury inflicted by Mr. Webster. The resolution of this issue is complicated by the fact that there is no conflicting medical opinion. Mr. Webster did not present any expert medical opinion to counter that of Dr. Nelson. In the circumstances, Mr. Hodge was given great latitude in his cross-examination of Dr. Nelson.

[112] In cross-examination, Dr. Nelson testified that in July 2017 he found that Mrs. Hodge had a normal gait. He also determined that she had normal orientation. He assessed her memory and he found it to be normal. She was able to speak fluently and her coordination was normal. According to Dr. Nelson, he diagnosed her as having neuro-sclerosis in the C4, C5 and C6 portions of the spine. This, he said, was caused by the narrowing of the spine.

[113] He said that it could take years for a person to suffer from a pinched nerve. He agreed that he was aware that Mrs. Hodge had been farming for a long time. According to Dr. Nelson, a person can develop a pinched nerve after prolonged use of a tool such as a hoe. He testified that the likelihood of Mrs. Hodge having the injury to her cervical spine prior to April 2016 could not be excluded. Dr. Nelson also stated that he did not see all of Mrs. Hodge's medical records.

A Procedural Point

[114] All of the medical reports were admitted into evidence at the trial without objection. As stated previously, there was no conflicting expert medical evidence led by Mr. Webster.

[115] In the Statement of Claim, under the heading "Particulars of Injuries" it was pleaded that:

"The 2nd Claimant shall produce the medical reports of Dr. Kim Cabatana dated 10th April, 2016, Dr. Cheryl Dangleben dated 13th April 2016, Dr. Lowell Hughes dated the 21st day of July 2016, Dr. James Nelson dated 27th July 2016 and all subsequent doctors' certificates."

[116] Mr. Webster, in his defence filed 4th October 2016, merely made a blanket statement denying the injuries claimed to have been suffered by Mrs. Hodge.

- [117] The matter went to case management on 6th June 2017. The case management order provided for both parties to apply for directions and orders on or before 14th August 2017.
- [118] Mrs. Hodge filed Standard Disclosure on 30th June 2017 and included in the list of documents the medical reports from several medical practitioners including the medical report of Dr. Nelson dated 27th July 2016.
- [119] On 2nd August 2017, Mrs. Hodge filed an application seeking the court's permission to file additional witness statements including that of Dr. Nelson. The application was heard before the Master who granted Mrs. Hodge an extension of time to file and serve the additional witness statements.
- [120] On 28th February 2018, Mrs. Hodge filed what purported to be a witness summary in respect of Dr. James Nelson. This witness summary appeared to be a far cry from what was required by the CPR. It gave no indication of the evidence that the witness intended to give at the trial.¹⁰
- [121] Mrs. Hodge filed an application on 19th April 2018 seeking the court's permission to take the evidence of Dr. Nelson by videolink. On even date the claimants filed a supplemental list of documents that included a NCV & EMG Report, neurological evaluation report and an email from Dr. Nelson.
- [122] On 31st May 2018, Mr. Webster filed an application seeking a stay of Mrs. Hodge's application for an order that a medical practitioner independent of Mrs. Hodge's medical doctor be permitted a period of 74 days to review all of Mrs. Hodge's medical records related to her alleged injuries; to conduct a medical examination of Mrs. Hodge; and to file a witness statement within 14 days thereafter.¹¹ Not surprisingly, the application was opposed by Mrs. Hodge.

¹⁰ CPR 29.6

¹¹ Paras. 1 – 19 of the notice of application

- [123] On 26th June 2018, Mathurin J. dismissed Mr. Webster's application on the grounds that Mr. Webster had failed to apply for relief from sanctions and had failed to comply with the provisions of CPR 10.6 in that he had not disputed the medical evidence relied on by Mrs. Hodge. Mr. Webster did not appeal the decision of Mathurin J.
- [124] It appears from the record of the proceedings that Mrs. Hodge did not comply with CPR 9(3) and CPR 32.6. No objection was taken by counsel appearing for Mr. Webster at the trial with respect to the deployment and admissibility of the various medical reports and the medical reports and witness summary of Dr. James Nelson.
- [125] At the completion of the trial, the court became aware of the decision of the Privy Council in the case of **Bergen v Evans**¹² which was not referred to by either counsel in their written closing submissions. The case of **Bergen v Evans** dealt with the procedure for the deployment of medical expert evidence in personal injuries claims.
- [126] Specifically, the issue arising in **Bergen v Evans** was whether the special provisions about the attaching of medical reports to a statement of claim for personal injuries in the CPR and the special provision for admissibility of evidence contained in medical reports in section 163 of the Evidence Act, displaced what, read on its own, appears to be a general rule, applicable to all expert evidence that it may not be deployed without the court's permission, in CPR 32.6.
- [127] In **Bergen and Evans**, their Lordships held, on the issue of whether the judge erred in finding that the respondent had been entitled to rely on the expert report because the appellant had failed to plead properly in his defence contrary to CPR 10.6 by means of a non-admission, that the rigorous interpretation of CPR 10.6 by the courts below, prohibiting the mere non-admission of the matters alleged in the

¹² [2019] UKPC 33

respondent's attached medical report, had been correct. CPR 10.6(2) was clear and prescriptive, in relation to the particular category of civil claims consisting of a personal injuries claim where the claim form or statement of claim had a medical report attached. The defendant 'must state in the defence' whether all or part of the medical report had been agreed and, if part had been disputed, the nature of the dispute. It followed that the judge's conclusion, that the appellant's defence had been defective when served and, because no application to amend it had been made thereafter, that it had remained defective until the date fixed for the trial, had been correct.¹³

[128] On the question of whether the defect in the appellant's defence had enabled the respondent to establish her case as to the extent of her personal injuries, their Lordships held, that the general rule was that a claimant faced with a defective or even non-existent defence still had to prove its case, even though that might typically have been achieved in a relatively summary way.

[129] Further, their Lordships held, that a failure by a defendant to plead, in conformity with CPR 10.6, to the claimant's attached medical report did not mean that the claimant could then deploy that medical report in evidence without the need to seek permission under CPR 32.6. The ability to deploy the attached medical report in evidence was not the automatic consequence of a defective defence. However, a defendant's failure to plead, as required by CPR 10.6, to a claimant's attached medical report would frequently constitute a strong reason for the court to give permission, under CPR 32.6, to the claimant to deploy the attached report in evidence for the purposes of proving its case. Accordingly, permission to deploy the medical evidence had still been required under CPR 32.6.¹⁴

[130] In relation to the question whether section 163 of the 2011 Act had rendered the written report of a medical practitioner admissible, it was held that the provision for admissibility of documentary medical evidence in section 163 had not overridden

¹³ At paras [25], [26] and [30]

¹⁴ At paras [32] – [34] and para [37]

the requirement of permission for its deployment under CPR 32.6 because the two provisions were not in any way inconsistent with each other. Therefore, the respondent had not obtained the right to deploy the medical reports by way of expert medical evidence.¹⁵

Admissibility of Medical Reports

- [131] The purpose of the above exposition was not intended in any way to be a critique of Mathurin J.'s ruling on Mr. Webster's application. However, it was necessary for the purpose of determining whether the medical reports were properly received as evidence at the trial notwithstanding the non-objection of Mr. Webster's counsel.
- [132] Transposed to the case of Anguilla, there is no similar provision in the Anguilla Evidence Act akin to section 163 of the St. Kitts Evidence Act.¹⁶ Therefore, the basis of the admissibility of the medical reports would be the common law position as obtained in England by virtue of section 13 of the Evidence Act¹⁷ and the provisions of the Common Law (Declaration of Application) Act.¹⁸
- [133] The court is satisfied that in the present case no application had been made by Mrs. Hodge pursuant to CPR 32.6 for the deployment of the medical reports relied on in the course of the trial.
- [134] A number of documents that purported to be medical reports obtained from several medical practitioners were disclosed by Mrs. Hodge. The situation regarding the deployment of those medical reports was made more egregious by the fact that neither was leave sought to tender those medical reports, nor were any of the medical practitioners who prepared them called as witnesses at the trial.

¹⁵ At paras [39] and [44]

¹⁶ R.S.A. c. E65

¹⁷ **13.** Every document which by any law in force on or after 25th April, 1876 is admissible in evidence in any Court of Justice in England, shall be admissible in evidence in the like manner, to the same extent, and for the same purpose, in any Court in Anguilla, or before any person having by law, or by consent of parties, authority to hear, receive and examine evidence.

¹⁸ R.S.A. c. C60

- [135] Mr. Hodge, counsel appearing for Mr. Webster, challenged the weight, if any, which the court could attach to the medical reports relied on by Mrs. Webster in his written closing submissions. In addition, Mr. Hodge submitted that none of the medical practitioners who examined Mrs. Hodge were called to testify at the trial. Mr. Hodge submitted that, as a result, Mr. Webster was prevented from cross-examining any of the medical practitioners and thereby test the reliability and credibility of their evidence.
- [136] It appears that Mr. Hodge contended that the court ought to attach little, if any, weight to the medical reports admitted into evidence at the trial. Mr. Hodge also adopted the position that the weight to be attached to these medical reports, upon which Dr. Nelson relied, would also infect the weight to be attached to Dr. Nelson's findings.
- [137] Mrs. Hodge provided no witness statements from the medical practitioners who prepared the medical reports; and none of the medical practitioners were called as witnesses at the trial and cross-examined. The contents of these medical reports, untested by cross-examination, can only be accorded minimal weight, if any at all.
- [138] The court saw no difficulty with Mrs. Hodge identifying those medical reports that she received. However, the medical reports could not have been adduced in evidence through Mrs. Hodge as she was not the maker of those reports. In addition, she could neither verify, confirm, nor deny the merits of the opinions expressed therein.
- [139] Even if the court were to consider these medical reports, no significant evidential weight could be attached to them as they were uncontested. It is impermissible to admit into evidence the medical reports of medical practitioners who did not provide witness statements and did not testify at the trial. There appears to be no statutory enactment permitting the admission of medical reports into evidence in civil proceedings as an exception to the hearsay rule in Anguilla.

[140] In any event, the court finds that these medical reports were equivocal insofar as they appeared to be incongruous with Dr. Nelson's evidence. It is the court's view that none of the reports from the other medical practitioners are admissible in evidence and therefore could not be relied on by Mrs. Hodge.

Causation

[141] The predominant issue to be decided in the present case is, whether all the personal injuries suffered by Mrs. Hodge were caused by the assault occasioned at the hands of Mr. Webster on 10th April 2016. The resolution of this issue is critical not only to the question of liability, but also the quantum of damages sought by Mr. Webster, and the heads of damages under which she seeks to recover.

[142] Ms. Harrigan, counsel appearing for Mrs. Hodge, in her closing submissions, argued that Mrs. Hodge's injuries were "directly" and "positively" related to the injuries that she suffered on 10th April 2016. This argument is drawn entirely from the testimony of Dr. Nelson. Dr. Nelson's conclusions in this regard were based substantially on the medical history presented by Mrs. Hodge and contained in the medical reports from other medical practitioners, his examination of Mrs. Hodge and the tests conducted by him.

[143] On the contrary, Mr. Hodge submitted that to a large extent the medical condition suffered by Mrs. Hodge, and highlighted in the testimony and medical report of Dr. Nelson, bore no causal connection to the injuries suffered by Mrs. Hodge occasioned by the alleged assault by Mr. Webster on 10th April 2016, the nature and extent of which injuries, he submitted, remained unsubstantiated given the inadmissibility of the other medical reports.

[144] Mr. Hodge sought to cast doubt on the weight, if any, to be attached to Dr. Nelson's testimony in the following respects. According to Mr. Hodge, the premise upon which Mrs. Hodge had occasion to visit Dr. Nelson on 27th July 2016 was that she had seen no improvement in her recovery. Mr. Hodge argued that

when Dr. Nelson saw Mrs. Hodge on 27th July 2016 he opined that she presented with normal gait, normal speech and that she was well oriented. This, Mr. Hodge contended, ran contrary to the complaints made by Mrs. Hodge about her physical condition.

[145] Mr. Hodge also argued that notwithstanding Mrs. Hodge's complaints about her physical health, she testified to having returned to conducting her business as a vendor up until September 2017.

[146] Therefore, it appears that Mr. Hodge not only sought to challenge the weight to be attached to Dr. Nelson's testimony, but also Mrs. Hodge's credibility, on the basis that despite what she described as weakness in her limbs and pain in her legs, this did not comport with the employment in which she engaged during the period of her illness.

[147] Mr. Hodge also sought to challenge the reliability and weight to be attached to Dr. Nelson's diagnosis on the ground that it was deficient, in that it was not based on a full examination of her medical history prior to 10th April 2016. Therefore, Mr. Hodge appeared to be contending that Dr. Nelson's conclusions, having been drawn from medical reports compiled after the incident giving rise to the present proceedings, gave way to speculation.

[148] This situation, Mr. Hodge submitted, fell woefully short of the duty which an expert witness owes to the court. In addition, Mr. Hodge argued that the deficiency of Dr. Nelson's evidence is highlighted by the fact that Dr. Nelson testified that Mrs. Hodge suffered from a degenerative condition, that is, one that would have progressed over time. According to Mr. Hodge, had Dr. Nelson made reference to Mrs. Hodge's medical history prior to 10th April 2016, this would have been probative of whether the degenerative condition suffered by Mrs. Hodge was caused by the injury suffered on 10th April 2016.

- [149] In her written closing submissions, Ms. Harrigan argued that Dr. Nelson did not accept the suggestion that the medical condition diagnosed by him existed prior to 10th April 2016. Ms. Harrigan submitted that Dr. Nelson's testimony confirms that Mrs. Hodge's medical condition was derived from the physical trauma that she suffered on 10th April 2016.
- [150] To counter Mr. Hodge's argument that Dr. Nelson's diagnosis was rendered unreliable due to the time that elapsed between the injuries suffered on 10th April 2016 and his diagnosis, Ms. Harrigan submitted that Dr. Nelson's evidence ought not to be deprived of any weight due to this effluxion of time. In support of this argument, Ms. Harrigan relied on the decision in **Sidney Binda v Juan Caliste and another**¹⁹, where one of the defendants had raised a complaint similar to that raised by Mr. Hodge.
- [151] It does not appear that the learned Master in that case made any definitive ruling on the point, although it appears that the learned Master must have accepted the evidence of the doctor notwithstanding the lapse of time between the injury and the doctor's diagnosis and medical opinion. Therefore, this case is of no moment given the issue under consideration. It may very well be, that the learned Master's decision to accept the evidence might have been influenced by a myriad of factors peculiar to that case. This authority laid down no legal principle of general applicability that can be transposed to the present case. Ultimately, the weight to be attached to the evidence in the present case is a matter for the trial judge as the arbiter of fact.
- [152] Mrs. Hodge has the evidential burden of proving causation. It is not for Mr. Webster to disprove it. There is no evidential burden on Mr. Webster. Therefore, can it be said, on a balance of probabilities, that Mrs. Hodge's medical condition, as diagnosed by Dr. Nelson, was caused by the injury inflicted by Mr. Webster?

¹⁹ GDAHCV 2014/0097 10th February 2016

- [153] The court has reviewed the admissible evidence adduced at the trial, namely, the medical report and the oral testimony of Dr. Nelson. In the court's view, Mrs. Hodge has failed to establish, on a balance of probabilities, that the injuries inflicted by Mr. Webster substantially contributed to or caused all of the physical ailments from which she presently suffers. The court is fortified in this view after careful examination and assessment of Dr. Nelson's testimony.
- [154] Dr. Nelson testified that he is a medical doctor who specialises in neurology, internal medicine and sleep medicine. He diagnosed Mrs. Webster as suffering from post-concussion syndrome with migraine (post traumatic) and excess daytime sleepiness. He also diagnosed her as suffering from cervical strain (suspect cervical disc), meaning he suspected that she had a slipped disc. He also found radiculopathy of her right arm, and which he defined as a pinched nerve.
- [155] He said that his clinical examination of Mrs. Hodge's condition revealed tenderness and muscle spasm that he felt on examination of her neck; there was discomfort on range of motion of the neck; there were weakness in the right arm affecting the triceps muscle, the wrist flexors, which are the muscles that bring your hand down, and the wrist pronators. The wrist, the wrist flexors, the flexors of the wrist that bring the hand down are called pronators and they turn your hand from the up position to the down position; that's called pronation, and that muscle was weak.
- [156] Dr. Nelson testified that he recommended a series of testing. An EEG was performed at his office and was normal. A CT scan of the brain was performed in Anguilla and was normal. An MRI of the brain and cervical spine was ordered. EMG and NCV which stands for "nerve conduction velocity" of the arms was a test that was ordered. She was also advised to have a sleep study which is termed a "polysomnogram", and this was to be followed by a "multiple sleep latency test" which is MSLT.

- [157] Dr. Nelson said that the result of the polysomnogram showed that Mrs. Hodge had a mild positional and REM related sleep apnea. It also showed that she had something called alpha intrusion which is something that occurs during sleep and is a response to pain that occurs while the patient is sleeping; it is physiological.
- [158] Dr. Nelson also testified that the MSLT is the study or a nap study which is performed at least four and sometimes five naps. He described this study. He stated that the patient would fall asleep after being observed. The patient is expected to at least have a decent amount of sleep the night before. In the report of the study which he prepared, it said that she slept on two of the naps but, however, she actually slept on one nap. It was thought that her daytime sleepiness was the result of poor sleep and her migraine headaches. She had fragmentation of sleep with multiple arousals; many of those arousals were felt to be due to pain. He prepared a report called a "polysomnogram and MSLT Report", dated January the 13th and 14th January 2018,²⁰ which is the medical report from the witness dated January 14th, 2018.
- [159] According to Dr. Nelson, the MRI of the cervical spine was performed some months later in St. Martin at a place called, Centre d'Imagerie Medicale des iles du Nord. The MRI revealed changes consistent with osteoarthritis of the tsec joints, that's between C4 and C5 and also between C5 and C6, and these changes resulted in narrowing of the passageway so the nerve can come out of the spine. That passageway is called the neural foramen; colloquially that would be termed a pinched nerve.
- [160] Dr. Nelson testified that he made a request for an MRI of the brain and was never presented with any results.
- [161] Dr. Nelson confirmed ordering an EMG and NCV. He testified that both the EMG and NCV were conducted on 13th March 2018. He said the report which was entitled "Treatment or Disposition" showed the "EEG and CT of the brain normal",

²⁰ Exhibit JN4

then the "MRI Brain and Cervical Spine ordered"; and then also the "EMG & NCV" and the KVMS (sic). All of those tests were conducted on 13th March 2018. He said that he created a report dated 13th March 2018 concerning the tests conducted on Mrs. Hodge. The purpose of those tests was for further evaluation of the weakness in her right arm, and the pain that she was having in her right shoulder and right arm.²¹

[162] Dr. Nelson said that he gave a prescription for medication for her headaches, and he referred her to his physical therapist for an evaluation of her neck and arm pain. The physical therapist's name is Dr. David Tuflacht; he was his employee for 20 years. He saw Mrs. Hodge, evaluated her and gave her some exercises to perform to help her neck and arm pain. He also performed something called cervical traction to stretch her neck and help with the pain. She was advised to get a cervical traction kit so that she can continue doing that at home.

[163] Dr. Nelson testified that he created a report. The report is a neurological evaluation concerning the history, positional findings, the results of the testing, his diagnoses and his analysis of her situation following the injury of 10th April 2016.²²

[164] Dr. Nelson affirmed his position contained in his report, that in his opinion Mrs. Hodge's current complaints were "directly" and "positively" related to the trauma she suffered on or about 10th April 2016.

[165] His prognosis was guarded because she continued to have symptoms. He testified that by this he meant that if she was continuing to have headaches, neck pain, arm pain, that this would continue for the foreseeable future since she had already been symptomatic for two years.

[166] Dr. Nelson was asked about the effect that her condition would have on her farming activities. He testified that, given that the history presented was that her

²¹ Trial Bundle 3 at p. 85

²² See: Trial Bundle No. 3 page 89 to 95 [Exhibit "JN5"]

headaches were worse when she was in the sun; as a farmer she would be working in the sun every day. When she is in the sun she had daily headaches (sic), this would interfere with her ability to work as a farmer. There was weakness in the right arm; objects would be dropping from her right hand with weakness in her right arm. The weakness in the right hand would interfere with her ability to plant, weed, carry the crops; all aspects of her ability to farm would be affected by this weakness in the hand and by the increase in the headaches in the sun. She also has daytime sleepiness. The daytime sleepiness would interfere with her ability to farm the maximum number of hours.

[167] He testified that he managed Mrs. Hodge's condition with a prescription for Maxalt, "M-A-X-A-L-T", which is a pill to treat migraine headache to make the pain go away. According to Dr. Nelson, future medical care would include taking these prescriptions. The second prescription, the Inderal, was to prevent headaches.

[168] Dr. Nelson was cross-examined by Mr. Hodge. He agreed that narrowing of the cervical spine, which was shown on the MRI and what he described as narrowing of the neural foramen, is a degenerative condition. He also testified that that narrowing of the cervical spine can cause issues with nerves that control the motor function of the limbs and the muscles as well as sensation. He agreed that that degenerative condition would affect movement in the arms and wrists, and that it can also impact the legs.

[169] Dr. Nelson agreed that osteoarthritis is also a degenerative condition. He testified that carpal tunnel syndrome is a condition that comes about as a result of extensive use of the hands and wrists. He stated that in his report the carpal tunnel syndrome was unrelated to the injury.

[170] Mr. Hodge cross-examined Dr. Nelson in respect of his diagnosis of post-concussion syndrome. He testified that although there were no physical findings that led to that conclusion, it was based on a historical diagnosis. He said, however there was a finding, a very objective finding of alpha intrusion which

documented that Mrs. Hodge was having pain; that is, the pain from her headaches and her neck and arm injury. In his assessment of the post-concussion syndrome, he would have taken account of the discomfort Mrs. Hodge expressed that she was experiencing. This, he said, would have formed a significant part of his diagnosis. Dr. Nelson agreed that the account given to him by Mrs. Hodge with respect to the discomfort she claimed to be experiencing would have formed a significant part of the basis for his diagnosis.

[171] Mr. Hodge asked Dr. Nelson whether he would still be in a position to give such a diagnosis based on the discomfort described, if the patient was not telling the truth or was malingering. Dr. Nelson agreed that his diagnosis would be affected by the patient's malingering or not speaking the truth about the pain experienced.

[172] Dr. Nelson testified that, it is correct that narrowing of the cervical spine can also cause pain. According to Dr. Nelson if one is suffering from a narrowing of the cervical spine and they get hit on the head that will aggravate the situation.

[173] Mr. Hodge challenged Dr. Nelson's diagnosis of daytime sleepiness. Dr. Nelson in response said, that the MSLT indicated that she did fall asleep in one of her naps. Mr. Hodge posed the question to Dr. Nelson, whether Mrs. Hodge having stood in court to be examined from morning until afternoon, during which time she did not fall asleep, be inconsistent with his finding of daytime sleepiness. Dr. Nelson's response was that if someone had daytime sleepiness and tiredness they don't always fall asleep. Again, someone who has daytime sleepiness and tiredness does not always fall asleep.

[174] Mr. Hodge cross-examined Dr. Nelson on the question of whether it is capable of being established, as part of his medical expertise, that Mrs. Hodge is suffering from daytime sleepiness as a result of an incident that occurred in April 2016. Dr. Nelson replied that he could say that during her sleep session in the sleep study she had 99 arousals which was a hundred times during one night which he saw a fragmentation of sleep.

- [175] When pressed further, Dr. Nelson testified that “I can say that she got struck on the head ... I can say that it is consistent with the history. In my opinion it was, based on the history. Based on what the patient explained to me and based on the documents that I had reviewed from her initial medical evaluation, from the lacerations on her head, from the fragmentation of sleep that occurred while she was sleeping, it's all consistent with that history.”
- [176] Dr. Nelson agreed that the sleep test was conducted on 13th March 2018, approximately 22 months after the incident. He also agreed that the injuries that he saw on her records were of a superficial nature in terms of the outer extremity of the skin. He also agreed that 22 months post the alleged incident, that those superficial scars would have healed; and that, when he examined her in March of 2018 there were no such wounds affecting her. He said that only the scars were present; there were no wounds present that would be affecting her in March of 2018 when he examined her. According to Dr. Nelson, the scars documented that the wounds occurred although the wounds themselves had healed up. Dr. Nelson agreed that when he examined her in March of 2018 during a sleep test, the wounds from April of 2016 were not present.
- [177] Dr. Nelson agreed that it was possible that during a period of 22 months there could have been many other factors that could have contributed to somebody suffering from daytime sleepiness. However, he did not see any in Mrs. Hodge's historical record, and having reviewed the records, did not see any other reason for her to have this problem. He also agreed that he did not know what her activities were between July 2016 and March 2018, however, he could only work with the documents that he had been given. He also agreed that it was possible she was exposed to some other trauma between the period of July 2016 to March of 2018 when he performed the sleep test.
- [178] Not surprisingly, Mr. Hodge in his cross-examination of Dr. Nelson sought to impugn Mrs. Hodge's credibility in respect of the symptoms she complained of

post injury. Dr. Nelson testified that he found Mrs. Hodge's gait to be normal; and that she was able to speak fluently which would have been just three months after the alleged incident.

[179] Dr. Nelson testified in cross-examination that when he conducted a cerebella test on Mrs. Hodge, a test designed to evaluate balance and coordination, he found that her balance and coordination to be normal. He said that he also conducted a rapid alternating movements test as well. He testified that when she did the rapid alternating movements he found her to be moving normally. Dr. Nelson said that he conducted a nerve conduction velocity test on Mrs. Hodge's upper extremities, and that he found all her distal latencies to be normal.

[180] Dr. Nelson testified that radiculopathy is a pinched nerve especially when the nerve is protruding or coming out of the spine. It could be in either the neck or in the back. In Mrs. Hodge's situation it was in her neck. He said that a person can have a pinched nerve affecting their health for years. He said that he has had it for 40 years.

[181] Dr. Nelson agreed that he was aware that Mrs. Hodge was involved in farming for a long time but he did not know that it was from her childhood. He said that he was not aware that as recent as February 2013 that Mrs. Hodge would cultivate her farmland by herself. He said he didn't know if she had help or not but he knew that she was a farmer. He said that he was not aware exactly how she farmed or if she used a hoe or not, but he was aware of what a hoe was. He agreed that in his medical opinion a person can sustain a pinched nerve from ploughing land using a tool like a hoe. He also testified that in his medical opinion there existed the possibility that she could have sustained the pinched nerve at some time prior to April of 2016. However, he did not see any historical documentation of that.

[182] Dr. Nelson agreed to having seen Mrs. Hodge's medical history, but that medical history didn't cover the period from when she was a small child. He also agreed that he had not seen all of her medical records; so that it was possible that he

wouldn't know whether, prior to the medical records that he saw, whether she had sustained a pinched nerve.

[183] He was asked by Mr. Hodge whether it would be fair to say, that the cause of the pinched nerve, in his medical opinion, was inconclusive? Dr. Nelson testified that:

“In medicine you take a history and then we do an examination. The history and physical is the basis of all medicine. The history and her examination were very consistent with her getting hit in the head ... and aggravation of the neck. There's no documentation of Ronda Hodge having ever seen a doctor for her neck or arm pain.”

[184] Dr. Nelson also testified, that in his experience, every patient who suffers a pinched nerve does not consult a doctor immediately. He said that it is possible that Mrs. Hodge could have sustained a pinched nerve well before April of 2016 and simply did not go to a medical doctor.

[185] Dr. Nelson agreed that osteoarthritis can affect a person's ability to grip things. Therefore, there was a possibility that if Mrs. Hodge described having difficulty gripping things, it could be attributed to her osteoarthritis.

[186] In response to a question posed by the court for clarification, Dr. Nelson testified that when he diagnosed Mrs. Hodge, and formed his prognosis and the opinion that her medical condition was directly connected to the injury sustained on the alleged assault, it was based on the medical report that he obtained from Hughes Medical Centre including the history she gave him, plus his examination of her, and the tests that were performed. According to Dr. Nelson, all of which were consistent with her head injury that caused her headache, neck pain and arm pain.

[187] When asked whether he had asked for any medical history prior to the incident, Dr. Nelson testified that: “If one looked on page number 2 of his report, there's a section that says ‘Review of Medical Records;. And it says: ;I will appreciate it if you would forward all medical and hospital records so that I might review and comment upon them to you in a supplemental report.’ So yes, I did ask.” He said he received some reports in this package here but it was not a complete report of

her entire medical history from childhood. He also testified that there was the possibility that there could have been some prior histology that he was not aware of that could have led to the onset of the various symptoms, particularly the osteoarthritis and the pinched nerve that he spoke about, prior to the incident that occurred in April 2016.

- [188] It appears that Mr. Hodge did not seek to discredit or contradict Dr. Nelson's evidence by presenting any other contradictory expert evidence. However, the court is not bound to accept the evidence of an expert on the basis that no other expert witness has contradicted it.
- [189] Mrs. Hodge was cross-examined by Mr. Hodge. It appears that the substance of Mr. Hodge's cross-examination was intended to cast doubt on Mrs. Hodge's credibility with respect to her various complaints respecting her physical condition. It was also intended to highlight that Dr. Nelson's findings may not have necessarily been consonant with all of the complaints made by Mrs. Hodge.
- [190] In cross-examination, Mrs. Hodge testified that she is comfortable wearing platform shoes and that she is able to do so unassisted. She agreed that in December 2017 she travelled to St. Thomas, and that this would have been closer to the time that she sustained the alleged injury. She also agreed that the trip to St. Thomas necessitated travelling from Anguilla via ferry to Saint Maarten and from Saint Maarten to Tortola, then onward to St. Thomas. She testified that during this trip she did not require the aid of a wheelchair. She agreed that travelling through airports involved a significant amount of walking. Mrs. Hodge accepted that, as a passenger, if she had any difficulty walking she would have required the use of a wheelchair.
- [191] Mrs. Hodge denied that she felt better in 2017 than she does presently. Mrs. Hodge testified that she is presently self-employed as a food vendor at a school. She testified that since September 2017 the number of days and the number of hours that she engaged in this employment has been reduced. She

testified that she engaged in this activity at intervals of just over one hour three times daily. According to her, she has to prepare early in the morning from about 3 a.m.; this was the case for the past nine years, since the year 2000. She claims that this was her routine until 2016. She testified that she was assisted in this venture by both Mr. Carty and her son after April 2016.

[192] Mr. Hodge, in his closing submissions, urged the court to exercise caution in making any determination regarding the issue of causation as it relates to Mrs. Hodge's medical condition. Mr. Hodge submitted that the court did not have the benefit of information regarding any medical assessment of Mrs. Hodge prior to her being seen by Dr. Nelson. Essentially, Mr. Hodge argued that the court was placed in a difficult position as far as determining the issue of causation by not having placed before it the evidence tested in cross-examination of the medical practitioners who examined Mrs. Hodge prior to her visit to Dr. Nelson.

[193] According to Mr. Hodge, the weight, if any, that the court could attach to Dr. Nelson's testimony was diminished substantially by the fact that the history given to him by Mrs. Hodge was invariably subjective and the fact that, by his own admission, that the lacerations which Mrs. Hodge claimed to have suffered had already healed by the time that he had examined her.

[194] Mr. Hodge argued, that in large measure, Mrs. Hodge's alleged physical condition bears no causal connection to the allegation of assault and battery that occurred on 10th April 2016, save and except the lacerations which she claimed to have suffered, which he said, are unsubstantiated by independent or other medical evidence.

[195] Furthermore, Mr. Hodge submitted, that the complaints that prompted Mrs. Hodge's visits to Dr. Nelson in December 2017 and January 2018 did not coincide with her daily lifestyle activities and routine.

- [196] In addition, Mr. Hodge challenged Mrs. Hodge's credibility on the premise that, based on Dr. Nelson's assessment of Mrs. Hodge, and his findings at the trial in respect of osteoarthritis and narrowing of the cervical spine, both degenerative conditions, one could come to the likely conclusion that they were preexisting conditions that did not arise from the injuries Mrs. Hodge suffered on 10th April 2016.
- [197] Mr. Hodge submitted, that despite her complaint of weakness in her arm and lower extremities, her choice of footwear, and the fact that she was able to travel unassisted within a relatively short period post injury, eroded her reliability, and by extension, the credibility of both her evidence and the history that she recounted to Dr. Nelson.
- [198] It appears that Mr. Hodge's submission was that, the court must treat Mrs. Hodge's credibility as suspect, on the grounds that she had advanced her case on the basis that carpal tunnel syndrome, with which she was diagnosed and of which she complained impeded her ability to grip objects, was somehow associated with the injury that she suffered in April 2016. This attempt at correlation, Mr. Hodge submitted, was contradicted by Dr. Nelson's testimony at the trial.
- [199] Mr. Hodge also sought to challenge Mrs. Hodge's credibility with respect to her complaint of daytime sleepiness. According to Mr. Hodge, notwithstanding this complaint, she was able to work in the daytime as a school vendor on a daily basis.
- [200] With respect to the weight to be attached to Dr. Nelson's testimony, Mr. Hodge submitted that Dr. Nelson's testimony in relation to the question of causation was grossly deficient as it related to the underlying basis of his diagnosis. This evidence, argued Mr. Hodge, fell short of establishing a causal link between the totality of Mrs. Hodge's medical condition and her injuries sustained on 10th April 2016. This deficiency, he argued, stemmed from Dr. Nelson not having had

disclosed to him Mrs. Hodge's full medical history prior to 10th April 2016. This fact, argued Mr. Hodge, did not permit Dr. Nelson to rule out the possibility of any preexisting medical conditions which Mrs. Hodge may have falsely or erroneously attributed to the injuries that she suffered on 10th April 2016. Therefore, Mr. Hodge submitted, that ultimately, very little weight, if any, should be attached to Dr. Nelson's evidence as establishing causation between the injuries suffered by Mrs. Hodge and her underlying physical condition at the time of filing the claim.

- [201] Ms. Harrigan sought to counter Mr. Hodge's arguments in this way. Ms. Harrigan contended, that although the suggestion by Mr. Hodge in cross-examination of Mrs. Hodge, that the symptoms could have preceded the incident on 10th April 2016, Dr. Nelson testified that the results of the tests which he testified about confirmed his findings that the cause of Mrs. Nelson's symptoms was derived from the trauma that she suffered on 10th April 2016.
- [202] Ms. Harrigan also submitted that notwithstanding Mr. Hodge's suggestion that the credibility, hence the reliability of Dr. Nelson's evidence was affected by the effluxion of time between the injury and the eventual diagnosis, and was based on Mrs. Hodge's subjective account of her medical history, Dr. Nelson's diagnosis was also based on his examination of Mrs. Hodge and the tests which he conducted and evaluated.
- [203] Ms. Harrigan submitted, that inasmuch as the medical report from Dr. Hughes was relied on by Dr. Nelson as part of Mrs. Hodge's medical history, which indicated that Mrs. Hodge was suffering from post-concussion syndrome, failed to give any conclusive diagnosis of Mrs. Hodge's condition, Dr. Nelson's diagnosis was based on tests that he administered.
- [204] Whether Mrs. Hodge's medical condition, as described by Dr. Nelson, was caused by the injuries that she sustained on 10th April 2016, was ultimately a question of

fact for the court on the basis of all the evidence that it heard. In **Watt v Tucker**,²³ Waller LJ delivering the judgment of the court, cited the dicta of Clarke LJ in **Coopers Payen Limited v Southampton Container Terminal Ltd**²⁴:

“All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.”

[205] The question of causation in the present case must be considered by reference to the evidence as a whole, including the eyewitness evidence, Mrs. Hodge's evidence and the expert evidence, all of which must be considered against the probabilities. In the present case, the court has proceeded on the premise that Dr. Nelson's reports and his oral testimony is the expert evidence presented by Mrs. Hodge in the case. There was no other expert evidence presented to contradict Dr. Nelson.

[206] Therefore, the expert evidence must be weighed in the balance with the other evidence in the case, particularly that which comes from Mrs. Hodge herself, and the court must come to a conclusion based upon all the evidence. The court is not obliged to accept all of the evidence of Dr. Nelson. The court must take its view of Dr. Nelson's evidence in light of all the other evidence. The approach adopted by the court is clearly set out by Lightman J. in **Cooper Payens Limited**:

“Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the

²³ [2005] EWCA 1420

²⁴ [2003] EWCA Civ 1223 at para 42

need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the judge depart from it and then for a good reason which he must fully explain. But if his evidence is on an issue of fact on which direct evidence is given, for example the speed at which a vehicle was travelling at a particular time, the situations is somewhat different. If the evidence of a witness of fact on the issue is credible, the judge may be faced with what, if they stood alone, may be the compelling evidence of two witnesses in favour of two opposing and conflicting conclusions. There is no rule of law or practice in such a situation requiring the judge to favour or accept the evidence of the expert or the evidence of a witness of fact. The judge must consider whether he can reconcile the evidence of the expert witness with that of the witness of fact. If he cannot do so, he must consider whether there may be an explanation for the conflict of evidence or for a possible error by either witness, and in the light of all the circumstances make a considered choice which evidence to accept. The circumstances may be such as to require the judge to reach only one conclusion.”²⁵

[207] The question of the admissibility of the expert testimony of Dr. Nelson looms large in the present proceedings. Counsel for the parties, in their written closing submissions, did not deal specifically with this point. However, it appears that the point was raised tangentially by Mr. Hodge and rebutted by Ms. Harrigan. The court laments the failure of counsel to address this issue, particularly in light of the procedural and evidential implications of adducing such evidence. In the circumstances, in assessing Dr. Nelson’s evidence, the court is constrained to examine the question of not only the weight to be attached to Dr. Nelson’s evidence, but also its admissibility.

[208] The court’s first observation is that Mrs. Hodge sought to deploy the expert evidence of Dr. Nelson without there being compliance with CPR 32. CPR 32 provides a comprehensive set of rules regarding court appointed experts, their duty to the court, and the form and substance of expert reports submitted to the court.

²⁵ At para. 67

[209] CPR 32.6 gives the court power to restrict expert evidence. A party may not call expert witnesses or put in the report of an expert witness without the court's permission.²⁶ CPR 32.7 mandates that expert evidence is to be given in a written report unless the court directs otherwise. CPR 32.13 mandates that an expert witness must address his or her report to the court and not to any person from whom the expert witness has received instructions. CPR 32.14 makes provision as to the contents of an expert report and provides:

- “(1) An expert witness' report must –
 - (a) give details of the expert witness' qualifications;
 - (b) give details of any literature or other material which the expert witness has used in making the report;
 - (c) say who carried out any test or experiment which the expert witness has used for the report;
 - (d) give details of the qualifications of the person who carried out any such test or experiment;
 - (e) If there is a range of opinion on the matters dealt with in the report –
 - (i) summarise the range of opinion; and
 - (ii) give reasons for his or her opinion; and
 - (f) contain a summary of the conclusions reached.
- (2) At the end of an expert witness' report there must be a statement that the expert witness –
 - (a) understands his or her duty to the court as set out in rules 32.3 and 32.4;
 - (b) has complied with that duty;
 - (c) has included in the report all matters within the expert witness' knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
 - (d) has given details in the report of any matter which to his or her knowledge might affect the validity of the report.
- (3) There must also be attached to an expert witness' report copies of –

²⁶ (1) A party may not call an expert witness or put in the report of an expert witness without the court's permission.

(2) The general rule is that the court's permission is to be given at a case management conference.

(3) When a party applies for permission under this rule –

(a) that party must name the expert witness and identify the nature of his or her expertise; and

(b) any permission granted shall be in relation to that expert witness only.

(4) The oral or written expert witness' evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.

(5) The court must direct by what date the report must be served.

- (a) all written instructions given to the expert witness;
 - (b) any supplemental instructions given to the expert witness since the original instructions were given; and
 - (c) a note of any oral instruction given to the expert witness;
- and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party."

Unfortunately, none of Dr. Nelson's reports complied with the provisions of CPR 32 recited above.

[210] Ellis J. in the case of **Elton Scatliffe and Another v Dwite Flax**²⁷ was confronted with a similar issue concerning the admission of expert evidence as in the present case. Justice Ellis, in delivering the judgment of the court, said at para [71]:

"In cases where an expert fails to comply with the Court's requirements both as to formality and timescale, the Court has the power to penalize instructing parties in costs. Where such breaches are particularly egregious a court may also order that the evidence may not be used. Such actions are justified because when a court appoints a certified expert, it is anticipated that such expert will provide advice to the court that conforms to the best standards and practice of the expert's profession. This position was usefully summarized in **Oldham MBC v GW and Others**:

"Once instructed, experts in their advice to the court should conform to the best practice of their clinical training and, in particular, should describe their own professional risk assessment process and/or the process of differential diagnosis that has been undertaken, highlighting factual assumptions, deductions there from and unusual features of the case. They should set out contradictory or inconsistent features. They should identify the range of opinion on the question to be answered, giving reasons for the opinion they hold. They should highlight whether a proposition is a hypothesis (in particular a controversial hypothesis) or an opinion deduced in accordance with peer reviewed and tested technique, research and experience accepted as a consensus in the scientific community. They should highlight and analyse within the range of opinion an 'unknown cause', whether that be on the facts of the case (e.g. there is too little information to form a scientific opinion) or whether by reason of limited experience, lack of research, peer review or support in the field of skill and expertise that they profess. The use of a

²⁷ BVIHCV 2010/0053

balance sheet approach to the factors that support or undermine an opinion can be of great assistance.”²⁸

[211] In **Elton Scatliffe**, Ellis J. relied on the dicta in **National Justice Cia Naviera SA v Prudential Assurance Co. Ltd., The Ikarian Reefer** held that it would be useful for experts to be guided by the principles stated therein, where Creswell J. said at para [89]:

“The duties and responsibilities of expert witnesses in civil cases include the following:

- i. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
- ii. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.
- iii. An expert witness should state the facts or assumption on which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
- iv. An expert witness should make it clear when a particular question or issue falls outside his expertise.
- v. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
- vi. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the Court.
- vii. Where expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.”

[212] In the circumstances, the court resists the hesitation to find that the expert report and expert oral evidence of Dr. Nelson are plagued with inherent weaknesses stemming from the noncompliance with CPR 32. In particular, neither Dr. Nelson's

²⁸ At para. [71]

written reports nor his oral testimony rendered any meaningful assistance to the court in resolving the range of issues concerning the issue of causation in the present case.

[213] Having assessed Dr. Nelson's oral testimony at the trial, the court is of the opinion that Dr. Nelson failed to state that he considered material facts which could have detracted from his concluded opinion. It is clear from Dr. Nelson's testimony in cross-examination, that his opinion regarding the cause of some of Mrs. Hodge's medical complaints were not properly researched and was based on an insufficiency or unavailability of information. It was not until he was cross-examined by Mr. Hodge that he hesitantly conceded that the lack of information may have had the tendency to affect the conclusiveness of his findings in relation to the cause of some of the psychical disabilities suffered by Mrs. Hodge. However, nowhere in his oral testimony did Dr. Nelson indicate that as a result of the lack of historical information, his expert opinion was a provisional one.

[214] Having highlighted the difficulties inherent in Dr. Nelson's oral testimony, particularly distilled in the process of cross-examination, it appears that Dr. Nelson failed to describe the process of professional risk assessment and/or differential diagnosis employed or undertaken by him. This is significant since Dr. Nelson, by his own admission, testified that his diagnosis was based substantially on the medical history recounted to him by Mrs. Hodge and test results conducted by him and other medical professionals. Nowhere in his medical reports or oral testimony did Dr. Nelson allude to the process or methodology by which any contradictory diagnosis could be discounted and/or how any of the factors that were capable of contradicting his diagnosis could have rendered his diagnosis inconclusive. In addition, Dr. Nelson's diagnosis contained in both his medical reports and oral testimony failed to highlight any factual assumptions made and the deductions made therefrom. They also failed to set out any contradictory or inconsistent features inherent in the medical history that he obtained and the diagnosis that he arrived at.

- [215] Even more astonishing was Dr. Nelson's failure to describe how he arrived at his diagnosis in accordance with recognised medical practice within a particular field of expertise, medical research and experience accepted within the medical community.
- [216] This is not an exhaustive list of the challenges presented by the form and substance of Dr. Nelson's testimony. In any event, the court finds, for the reasons already stated, that Dr. Nelson's expert evidence was, to a very great extent, inconclusive. The situation is compounded further by the fact that there was no indication of the nature of the instructions that Dr. Nelson received and the nature of the opinion that he was asked to provide by the person who provided these instructions.
- [217] Ultimately, the court, in making any factual finding in relation to causation and the actual nature of Mrs. Hodge's present physical condition, will need to avoid the danger of falling into speculation. In the circumstances, Dr. Nelson's oral testimony, taken at its highest, must also be assessed in conjunction with Mrs. Hodge's testimony.
- [218] In the premises, the court declines to admit the expert reports of Dr. Nelson. Given the fact that the admissibility and weight to be attached to Dr. Nelson's evidence was critical to the issue of both liability and damages, it would have been prudent for Mrs. Hodge to have ensured that such evidence was deployed in compliance with CPR 32 and that it met the requirements set out therein.

Damages – Assault

- [219] Notwithstanding the court's ruling on the admissibility of Dr. Nelson's evidence and that of the medical reports of the other medical practitioners relied on by Mrs. Hodge, this does not mean that the court can discount Mrs. Hodge's testimony regarding the injuries that she suffered on 10th April 2016 in their entirety, if the court finds her testimony in relation thereto credible. It appears that

the court's refusal to rely on Dr. Nelson's evidence wholeheartedly would only serve to whittle down the quantum of damages that Mrs. Hodge can recover in her claim for damages for personal injuries.

[220] In the circumstances, the court finds, on a balance of probabilities, that Mrs. Hodge did suffer the lacerations to her head as a result of the assault by Mr. Webster. The court is also prepared to find, on a balance of probabilities that Mrs. Webster would likely have suffered from migraines, dizziness and daytime sleepiness, all associated with the post-concussion syndrome induced by the head injuries that she suffered. Therefore, an award of damages would be assessed on this basis.

[221] However, the court, having analysed and assessed the testimony of Dr. Nelson at the trial, is not prepared to find that the carpal tunnel syndrome, arthritis, osteoarthritis, slip disc, cervical strain and pinched nerve were caused by the injuries Mrs. Hodge sustained on 10th April 2016. The court is of the view that the evidence given by Dr. Nelson relative to those injuries were inconclusive and unreliable for the reasons already stated.

General Damages

Pain, Suffering & Loss of Amenities

[222] Mrs. Hodge was an avid and prolific farmer. She was obviously an asset to Historic Beacon in its farming enterprise; bearing in mind that she possessed the skill and knowledge necessary to successfully engage in the farming business. It is only fair to assume, that arguably, her ability to engage in fulltime farming and her food vending business has been diminished.

[223] It is unclear from the evidence whether Mrs. Hodge has been prevented altogether from engaging in the business of farming and her food vending business on the scale that hitherto existed.

- [224] Unfortunately, the court must lament the lack of assistance given to the court by counsel evidenced by their failure to provide any or any useful authorities in respect of the assessment of damages for pain, suffering and loss of amenities (PSLA). Ms. Harrigan simply cited the decision in **Ronald Fraser v Joe Dalrimple and others**²⁹ and referenced the authorities cited therein. This is hardly an acceptable approach to an assessment of damages.
- [225] In any event, Ms. Harrigan relied on the authority of **Wadadli Cats Limited v Frances Chapman and others**, where the respondent suffered injuries to her person whilst on a boat trip organized and conducted by the Appellant. In her Statement of Claim the Respondent, who was the Plaintiff, particularised her injuries as shock, severe bruising to the head, severe pain in the neck and arm, bruising of the inner ear and post-concussion syndrome, paraesthesia (pins and needles in her right arm), numbness over the right thumb and forefinger, cervical spondylosis and a mild degree of carpal tunnel syndrome.
- [226] In **Wadadli** the learned trial judge awarded the following sums as general damages: \$500,000.00 for pain, suffering and loss of amenities; \$40,000.00 for the depression and other psychological problems she had suffered in the aftermath of the accident; \$30,000.00 for loss of a congenial form of employment, making a total award of \$570,000.00 for general damages. The Court of Appeal found that an award of \$40,000.00 for pain and suffering and \$80,000.00 for loss of amenities was fair and accurate in the circumstances.
- [227] In **Roger Samuel and another v Tevorn Francis**,³⁰ the claimant, who was 41 years at the time of the accident, suffered significant injury including persistent headaches and pains to the right side of the neck and post-concussion syndrome along with inflammation of the scalp. He was awarded EC\$38,000.00 for PSLA.

²⁹ Supra

³⁰ [2008] ECSCJ No. 260

[228] In **Mitchell and Smith v Batson**,³¹ the claimant suffered a wound to the scalp, concussion, fracture of the skull, fracture of the lower jaw and a wound to the left ankle. She was hospitalized for 23 days, for one week of which she was unconscious. The medical evidence disclosed that the resulting discomforts were headaches, disturbed sleep, and a possible impairment of personality. In the High Court action she was awarded EC\$5,500.00 for pain and suffering and EC\$4,000.00 for impairment of personality. On appeal it was contended that the award of general damages was too high. It was argued on behalf of the appellant that the award for general damages resulting from physical disability had not been made on the basis of positive medical evidence insofar as the medical evidence relating to the resulting effect of the injuries suffered was indefinite so that it could hardly be regarded as being of the quality necessary for justifying the award.

[229] The Court of Appeal held, that the medical evidence in this case was sparse and did not assist the court in forming a conclusion as to how long the resultant physical disability and discomfort to the respondent was likely to continue, and the somewhat scanty and cursory nature of this evidence placed the trial judge in a very awkward position and rendered his task more difficult than it need have been; and, the trial judge did not derive much assistance from the medical evidence, such as there was, as to the residual effects of the accident on the general health of the respondent. He, however, elected to accept the evidence of the respondent and that of her husband as to the continuation of her discomfort, which she said dated from the accident. This evidence disclosed that at the time she gave her evidence, some two years after the accident, she was no longer the hale and hearty woman she originally was, and was in effect only a shadow of her former self. Bearing these circumstances in mind, particularly the pain and suffering to which the respondent must have been subjected coupled with the impairment of her personality, the award of EC\$9,500 for general damages was justified as it had

³¹ (1970) 14 WIR 438

not been shown to be so inordinately high as to amount to a wholly erroneous estimate of the damage the respondent had suffered.

[230] In assessing the amount of damages that Mrs. Hodge is entitled to for PSLA, the court will take into account the nature and gravity of the resulting physical disability, the pain and suffering endured, the loss of amenities suffered and the extent to which her pecuniary prospects have been diminished or materially affected.³²

[231] Mrs. Hodge complains of persistent headaches, dizziness, photosensitivity on exposure to sunlight, nausea and excessive daytime sleepiness which, according to the medical evidence, appear to be all symptomatic of her post-concussion syndrome. However, what is evident from the evidence led at the trial is that the injury suffered by Mrs. Hodge did not result in any serious neurological damage. The results of the CT scans showed no abnormal brain function. There was no resultant behavioural changes arising from the injury. It appears that her cognitive abilities were in no way compromised. In the circumstances, the court would classify Mrs. Hodge's physical disability arising from the injury as moderate.

[232] She claimed to have experienced these symptoms from the date of the injury up to the time of the present claim. It appears from Dr. Nelson's evidence that she was experiencing some of those symptoms when he diagnosed her with post-concussion syndrome in 2018. It may be recalled that Dr. Nelson's prognosis was guarded. The court derived from Dr. Nelson's use of the word "guarded" and the explanation which he gave for the same that it was uncertain how long Mrs. Hodge's symptoms would last. At the time of the trial Mrs. Hodge claimed to still be suffering from those symptoms. This evidence was challenged.

[233] However, in assessing the quantum of general damages for PSLA, the court is challenged by the fact that there is insufficient medical evidence or other evidence

³² *Corneliac v St. Louis* (1965) 7 WIR 491

from which a proper assessment can be made of the resulting physical disability suffered by Mrs. Hodge. The circumstances of the present case are similar to that in **Mitchell and Smith v Batson**, in that the court was without assistance from the medical witness as to the residual effect of the injury on Mrs. Hodge's general health. Therefore, the court accepts the evidence of Mrs. Hodge as to the continuation of her discomfort, which she stated began from the date of the incident.

[234] The court accepts that given Mrs. Hodge's physical condition, particularly her sensitivity to sunlight, there would certainly be interference with her farming activities that she enjoyed and practiced avidly. Unfortunately, the court did not benefit from further evidence related to Mrs. Hodge's resulting personal disability and how the pattern of her daily life has been affected by her resulting disability from the injury. It would be safe to assume that the day time sleepiness and headaches from which she suffers would have a negative effect on the customary pattern of her daily life prior to her injury.

[235] Nevertheless, the resulting physical disability suffered by Mrs. Hodge is significantly less than in the case of the claimant in **Wadadli**. In the circumstances, the court will make an award of EC\$50,000.00 for pain and suffering and EC\$25,000.00 for loss of amenities.

Special Damages

Medical & Related Expenses

[236] In her Statement of Claim, Mrs. Hodge claimed the sum of US\$2,440.28 for medical and related expenses. The court is inclined to award this amount as special damages for medical and related expenses. Therefore, Mrs. Hodge is entitled to recover US\$2,440.28 as special damages in respect of medical and related expenses from the date of claim being 2nd August 2016 to the date of judgment at the rate of 3%, and from the date of judgment to the date of payment at the rate of 5% per annum.

Other Expenses

[237] Historic Beacon, in the Statement of Claim, seeks to recover the sum of US\$3,850.00 for loss of earnings from the farm for the period 10th April 2016 to 2nd August 2016. According to Mrs. Hodge's testimony, she paid her son US\$50.00 per day for the period 11th April 2016 to 2nd August 2016 to carry on her work on the farm.

[238] In respect of her food vending business, Mrs. Hodge claims the sum of US\$1,475.00 for the period 11th April 2016 to 7th July 2016. Again, she testified that this sum represents payments to her son for carrying on her food vending business for which she paid him the sum of US\$4.00 per hour for the said period.

[239] Therefore, the court finds that Mrs. Hodge is entitled to recover the sum of US\$3,850.00 as special damages and not as loss of earnings. In the circumstances, the court awards Mrs. Hodge the sum of US\$3,850.00 with interest thereon at the rate of 3% from 2nd August 2016 to the date of judgment and at 5% from the date of judgment to the date of payment.

[240] Mrs. Hodge is also awarded the sum of US\$1,475.00 as special damages with interest thereon at the rate of 3% from 2nd August 2016 to the date of judgment and at 5% from the date of judgment to the date of payment.

Loss of Earnings

[241] Mrs. Hodge claimed that production on the farm diminished significantly and this has resulted in a substantial loss of income to both herself and Historic Beacon. On this basis she claims an award of damages for loss of earnings totaling EC\$287,000.00 annually.

[242] Mrs. Hodge also claims loss of earnings in relation to her food vending business and a fish farm that was in the process of development or in the conceptual phase.

- [243] Neither Historic Beacon nor Mrs. Hodge have produced a scintilla of evidence to substantiate the alleged pecuniary loss suffered by their respective businesses. Also, no evidence was led by either Historic Beacon or Mrs. Hodge with respect to any attempts at mitigating such loss.
- [244] Mr. Hodge submitted, that neither Historic Beacon nor Mrs. Hodge were entitled to recover as special damages loss of earnings or loss of future earnings. According to Mr. Hodge, they failed to substantiate their claims by producing any or any documentary evidence of such loss.
- [245] In response to Mr. Hodge's submission, Ms. Harrigan submitted, that the fact that the claimants did not document their loss did not operate to disallow them an award of damages for loss of earnings and loss of future earnings. According to Ms. Harrigan, the question that the court had to consider was, whether it is probable that the claimants had suffered loss and continued to suffer loss as a result of the injuries inflicted by Mr. Webster which resulted in the reduction of Mrs. Hodge's reduced capacity, in the absence of documentary proof.
- [246] Ms. Harrigan argued that even if the loss of earnings claimed by Mrs. Hodge and Historic Beacon was not readily quantifiable, the court ought to make an assessment on the primary facts as presented. In support of this argument she relied on the decision in **Asquith Mc Lean v Sheldon Bynoe**.³³
- [247] It is well settled that a claimant seeking damages must prove his loss and must satisfy the court as to both the fact of damage and the amount. If the claimant satisfies the court of neither, his action will fail, or at the most, he will be awarded nominal damages. However, if the fact of damage is shown but no evidence is given as to its amount so that it becomes impossible to assess damages, this will generally permit only an award of nominal damages. However, where it is clear that some substantial loss has occurred, the fact that an assessment is difficult

³³ [2009] ECSCJ No. 97 per Lanns J. at para 16

because of the nature of the damage is no reason for awarding no damages or merely nominal damages.

[248] The assessment of damages in the present case is compounded by the fact of the uncertainty of how much of the pecuniary loss is attributable to Mr. Webster. This is principally the case in light of the court's observations regarding the nature of the injuries suffered by Mrs. Hodge and the resulting personal disability arising therefrom. In the circumstances, it would be unacceptable for Mr. Webster to be held liable for the totality of this loss.

[249] Therefore, the court will make the best estimate that it can, in light of the evidence, while making the fullest allowances in favour of the claimant for the uncertainties known to be involved in any such apportionment. In the premises, the court will only award a portion of the sum claimed by Historic Beacon for loss of earnings from the farm. In arriving at this apportionment, the court is also mindful of the fact that Historic Beacon took no steps to mitigate this loss.

[250] According to Mrs. Hodge, she was accustomed of working 6 hours with ease on the farm but because of her injuries, after 2 hours she is forced to stop working. She claims to no longer be able to cultivate and maintain the crops as she used to. In her witness statement Mrs. Hodge claims to have earned EC\$287,000.00 annually from crops. Mrs. Hodge claims that the farm now earns nothing because she was the main driving force behind the project with the knowledge and skill to carry on the work.³⁴

[251] The court accepts that Mrs. Hodge may very well have been the driving force behind Historic Beacon's farming business. However, it does not seem fair that Mr. Webster should be made liable for the full amount of Historic Beacon's loss of earnings particularly in light of the fact that Historic Beacon did absolutely nothing to mitigate such loss by employing other persons to cultivate the farm. In the

³⁴ Witness Statement at para 58

circumstances, the court makes an award of EC\$50,000.00 annually for loss of earnings.

[252] It appears that the loss of earnings are being claimed by Historic Beacon based on the absence of Mrs. Hodge and diminution in the contribution which she made to the company which was privately owned of which she was a director and holding half of the shareholdings, which caused a substantial, if not total reduction in Historic Beacon's turnover and profits. In the court's view, Mrs. Hodge would only be entitled to recover in respect of the diminution of the profits distributed to her.

[253] The court has taken into account the undoubted effect of Mrs. Hodge's absence on the profits of Historic Beacon. Therefore, the true loss fell to be measured by the reduction in the net profit of the company, the turnover, gross profit and overheads which would have been diminished during the time that Mrs. Hodge was injured. The court has adopted this approach bearing in mind that the loss of business profits may not be due entirely to Mrs. Hodge's absence. It may very well be relative to prevailing general business and trade dynamics.

[254] Mrs. Hodge stated in her witness statement that she earned US\$200.00 daily from her food vending business which amounted to US\$30,000.00 annually. According to Mrs. Hodge, because of her physical condition she can no longer work in the business as she used to. She described having difficulty preparing food and standing for long periods of time. In the circumstances, she now prepares less food and now earns approximately US\$120.00 per day equivalent to approximately US\$17,000.00 annually. Therefore, it appears that Mrs. Hodge is claiming loss of earnings equivalent to a reduction in earnings of US\$80.00 per day equivalent to US\$13,000.00 annually.

[255] The court is minded to make an award under this head which will be apportioned to take account of the uncertainty of Mr. Webster's contribution to the actual loss. Therefore, the court makes an award of US\$4,500.00 annually for loss of earnings from the food vending business.

Loss of Future Earnings

- [256] In respect of loss of future earnings, the court is placed in the unenviable position of not having placed before it any medical evidence in relation to the number of years it is anticipated that Mrs. Hodge's disability would last. It will be recalled that Dr. Nelson's prognosis was guarded. Therefore, the multiplier adopted by the court will be reflective of the expectation of Mrs. Hodge's working life.
- [257] Mrs. Hodge was 53 years old at the time of trial. Assuming that Mrs. Hodge would be expected to work up to the age of retirement which is 65 years, then this would place the multiplier at 12 years. In arriving at a suitable multiplier, the court has taken into account the fact that Mrs. Hodge's working life may very well be shortened by the other physical conditions that she suffers, which would inevitably impede the number of years that she would have engaged in the business of farming. Accordingly, the multiplier adopted will be adjusted to take account of this fact. The multiplier will also be adjusted to take account of the fact that the award is a lump sum payment. The multiplier will be further discounted to take account of the contingencies of life. Therefore, the court will adopt a multiplier of 6 years from the date of trial. In the circumstances, Mrs. Hodge is awarded the sum of EC\$300,000.00 for loss of future earnings from the farm. In respect of loss of future earnings from the vending business, Mrs. Hodge is awarded the sum of US\$27,000.00.
- [258] Historic Beacon and Mrs. Hodge also sought to recover loss of earnings in respect of loss of revenue from a prospective fish farming business at Island Harbour in respect of which it seeks to recover as consequential loss or damage flowing from the injuries suffered by Mrs. Hodge. This claim for consequential loss was not specifically pleaded in the claimants' statement of case. However, it appears in

Mrs. Hodge's witness statement.³⁵ This evidence was not amplified at the trial. However, Mrs. Hodge was cross-examined extensively in relation thereto.

[259] In cross-examination, Mrs. Hodge admitted that she had failed to produce any documentary evidence of the land purchase by Historic Beacon. Mrs. Hodge also testified that Historic Beacon had not obtained planning approval for the commencement of the fish farming business but had gone on to dig the pond to house the fish. She also testified that the agreement with the Government had not been finalised and that she never sold any fish from the fish farm.

[260] It is inconceivable that the claimants can recover damages in respect of what can be regarded as a prospective loss. It appears from the evidence presented that apart from purchasing land and fish tanks for the fish farming business, the proof of which was purely unsubstantiated, the claimants expended no other sums in furtherance of a business enterprise for which there was no guarantee would ever come to fruition. Therefore, an award damages for the loss of income from this 'intended' enterprise would involve an excursion into the realm of speculation. In addition, this claim was not particularised as special damages in the statement of case and no documentary proof of the sums claimed to have been expended had been provided. Therefore, no award will be made for special damages in respect of this item of pecuniary loss claimed by the claimants.

[261] In support of her closing submissions, Ms. Harrigan urged the court to adopt the approach of Michel J. in the decision in **Ronald Fraser v Joe Dalrimple and others**³⁶ where the only evidence of the claimant's earning capacity came from the claimant himself. The court accepted his evidence and applied the figure claimed by him as the multiplicand in arriving at the award of loss of future earnings.³⁷

³⁵ At paras 59-60

³⁶ [2010] ECSCJ No. 0513

³⁷ Per Michel J. at para 37

[262] Ms. Harrigan also relied on the decision in **Wadadli Cats Limited v Frances Chapman**³⁸ to support the view that Mrs. Hodge was entitled to recover sums expended on retaining persons to carry on employment on her behalf at the farm and in her vending business were recoverable as loss of earnings and loss of future earnings. The court does not agree with this submission. In **Wadadli v Chapman** the judge in the court below determined that the Respondent would have had to employ a fork-lift driver to drive a fork-lift vehicle which was integral to the running of his business - a function that the Respondent used to do. The learned judge awarded damages to the Respondent under the head of "loss of future earnings". The Court of Appeal held that such an award could not be for loss of future earnings and held that such an award ought to have been classified as damages for future expenses.³⁹ In the present case, there is no evidence of neither Mrs. Hodge nor Historic Beacon employing other persons to continue working on the farm.

[263] With respect to Mr. Webster's counterclaim for personal injuries, the court finds, as conceded by counsel appearing for Mr. Webster, that this aspect of the case had not been proven or substantiated by any medical evidence. However, the court accepts that Mr. Webster suffered the injuries pleaded; this is also confirmed by the testimony of Mrs. Hodge. Mrs. Hodge accepted that she knew that Mr. Webster suffered injuries, but she denied that she caused the injuries suffered by Mr. Webster.

[264] However, it did not arise clearly and distinctly from the pleadings whether Mrs. Hodge relied on self-defence. The issues that arise from the testimony at the trial were, whether Mrs. Hodge inflicted those injuries on Mr. Webster or whether, as alleged by Mrs. Hodge, Mr. Webster sustained those injuries when he was climbing over the fence and became entangled thereon.

³⁸ [2005] ECSCJ No. 29

³⁹ At para 19

- [265] This Court having formed the view that Mr. Webster was the aggressor on that day, can only conclude that the injuries that he suffered were inflicted during the fight with Mrs. Webster. In addition, the court having determined the question of liability as it did, obviously discounted any assertions made by Mr. Webster with respect to self-defence.
- [266] Mr. Hodge, admitted that the injuries suffered by Mr. Webster were not substantiated by any medical evidence. In the circumstances, the court makes no award of damages to Mr. Webster for his personal injuries; and makes no finding in relation to the question of causation.

Damages – Trespass

- [267] In their claim for trespass to land, Historic Beacon did not allege any damage to Parcel 38. The allegation of trespass committed by Mr. Webster was transient. Therefore, an award for damages in the present case would only be for a nominal sum. In the circumstances, the court will make an award of EC\$500.00 in respect of the claim for trespass to Parcel 38.

Damages – Nuisance

- [268] In his claim for nuisance, Mr. Webster did not allege any damage to property. In addition, the said claim, apart from alleging interference with his use and enjoyment of his property and discomfort and annoyance to his family, Mr. Webster did not adduce any evidence of injury to the health of his family or himself, or any damage to his property. Therefore, these matters raised the issue of the basis upon which Mr. Webster is entitled to recover damages for nuisance and the assessment of any damages awarded.
- [269] The court also observed that apart from evidence coming directly from Mr. Webster himself and his son, no other witness was called to substantiate the effects of the alleged nuisance. In addition, Mr. Webster presented no evidence to

substantiate the damage that he suffered as a result of the nuisance of which he complained.

[270] Mr. Hodge submitted, that Mr. Webster is entitled to recover damages in respect of the diminution in the amenity value of his property. This he said, was the case, notwithstanding that Mr. Webster had presented no expert evidence in that regard. Therefore, according to Mr. Hodge, Mr. Webster should not be precluded from recovering under this head of damage.

[271] Mr. Hodge submitted, that given the nature, duration and impact on the well-being and inconvenience caused by the substantial interference with the use and enjoyment of Mr. Webster's property, he is entitled to recover damages for the diminution in amenity value. Essentially, Mr. Webster claims that he is entitled to recover loss of amenity value to his property while the nuisance persisted and for the personal discomfort and inconvenience suffered by himself and his family.

[272] On the contrary, Ms. Harrigan in her written closing submissions argued that Mr. Webster failed to prove that the claimants caused material damage to his property or substantial interference with his use and enjoyment thereof.

[273] The issue of material damage to Mr. Webster's property clearly does not arise in the present case. However, given the court's finding that there was substantial interference with Mr. Webster's use and enjoyment of his property, it will be necessary to determine the basis and quantum of the likely award of damages that Mr. Webster can recover.

[274] The court is of the view that Mr. Webster has made out his claim for substantial interference with the use and enjoyment of his property. Therefore, he is entitled to be compensated for the same. Mr. Webster complained of noxious fumes, particles of dust that polluted his household and animal noises emanating from Parcel 38. He made repeated complaints to the police and the environmental

health authorities to secure the abatement of the nuisance. In any event, any award would be for a nominal sum.⁴⁰

- [275] In assessing the likely award of damages to Mr. Webster the court has adopted a similar approach as Ellis J. in **Scatliffe v Flax**.⁴¹ Accordingly, the court will make an award of EC\$40,000.00 in respect of Mr. Webster's claim in nuisance.

Injunction

- [276] It appears from the evidence presented at the trial that the nuisance complained of has abated either entirely or substantially. However, Mr. Webster has testified that the odours emanating from the animals on the farm still interfere with his enjoyment of his residential property.
- [277] Mr. Hodge, in his closing submissions, stated that: "Based on the evidence of the defendant and considering that the practices of the claimants on Parcel 38 has improved significantly since April 2016, the injunctive relief contemplated by the counterclaim would not be advanced."
- [278] With respect to the injunctive relief claimed by Historic Beacon, in respect of trespass to Parcel 38 by Mr. Webster, the court is of the view that there is no need to make an order for an injunction in light of the transient nature of the complaint made by the claimant. There has been no evidence presented to the court that suggest that Mr. Webster has trespassed on Parcel 38 subsequent to April 2016 or has threatened to do so. Therefore, the court makes no order with respect to this aspect of the claim. In the circumstances, the claimants' claim for a permanent injunction is dismissed.

Order

- [279] In the circumstances, the court's order is as follows: -

⁴⁰ Bone v Seal [1975] 1 WLR 797

⁴¹ At paras [96] – [114]

1. The defendant shall pay to the claimant the sum of EC\$50,000.00 for pain and suffering and the sum of EC\$25,000.00 for loss of amenities
2. The defendant shall pay to the second-named claimant the sum of US\$2,440.28 as special damages for medical and related expenses with interest thereon at the rate of 3% per annum from 2nd August 2016 to the date of judgment and thereafter at the rate of 5% per annum from the date of judgment to the date of payment.
3. The defendant shall pay the claimants the sum of US\$3,850.00 as special damages in respect of expenses incurred in employing labour on the farm for the period 11th April 2016 to 2nd August 2016 with interest thereon at the rate of 3% per annum from the 11th day of April 2016 to 2nd August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment.
4. The defendant shall pay to the second-named claimant 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 7th July 2016 to 2nd August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment.
5. The defendant shall pay to the claimants 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.
6. The defendant shall pay to the second-named claimant 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 10th April 2016 to 2nd August 2016 and thereafter at the rate of 5% per annum from the date of judgment until the date of payment.

7. The defendant shall pay to the claimants 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.
8. The defendant shall pay to the second-named claimant 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.
9. The defendant shall pay to the first-named claimant the sum of EC\$500.00 on the claim for trespass with interest thereon at the rate of 5% per annum from the date of judgment until the date of payment.
10. The claimants shall pay to the defendant 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.
11. The defendant shall pay the claimants prescribed costs in accordance with CPR 65.5 on the global award of damages.
12. The claimants shall pay to the defendant prescribed costs in accordance with CPR 65.5 in the sum of EC\$6,000.00.
13. The defendant shall pay to the claimants the balance due on the amount awarded to the claimants as damages and costs after deducting the lesser award of damages and costs to the defendant in accordance with CPR 42.11(2).

Shawn Innocent
High Court Judge

By the Court

Registrar

