

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

BRITISH VIRGIN ISLANDS

CLAIM NO: BVIHCV2020/0008

BETWEEN:

JAMES LOWRY

Claimant/Applicant

and

RADWAN KAID

Defendant/Respondent

Appearances: Mrs. Marie-Lou Creque of counsel for the claimant/applicant
Mr. Nelson Samuel of counsel for the defendant/respondent

2020: July 6th,
2020: September 29th,
2020: October 6th

JUDGMENT ON ASSESSMENT OF DAMAGES

Background Facts

[1] **SANDCROFT, M [Ag.]:** On January 15th, 2017 at about 11:35 a.m. the defendant was the driver of a motor vehicle described as a black Ford Motor Jeep PV 19193, and the claimant was the driver of a vehicle described as a Silver Mitsubishi Bus Taxi 984. The defendant was driving on the Sir Francis Drake's Highway heading in a westerly direction from Road Town when his vehicle collided with the claimant's vehicle which was driving in an easterly direction towards Road Town. The collision occurred in the area known as Slaney on the Island of Tortola, Territory of the Virgin Islands. The defendant was on the claimant's side of the road and collided with the claimant in a direct head-on collision.

- [2] It is contested that the claimant suffered injuries as a result of the accident. These injuries and the gravity are listed on the Peebles Hospital Report dated 15th January, 2017 which says that the claimant was not restrained at the time of the accident.
- [3] The defendant was served with the documents in this matter on 21st January 2020 as deposed in the Affidavit of Walford Farrington filed on 22nd January 2020. Judgment in Default of Acknowledgment of Service was awarded on February 7th, 2020. Damages now remain to be assessed.
- [4] As a result of the collision, the claimant suffered the following injuries:
- (i) open book pelvis fracture with wide distraction of the pubic symphysis with associated disruption of both sacroiliac joints
 - (ii) fracture through the right abdomen adjacent to the right sacroiliac joint
 - (iii) lateral angulation of the right iliac bone
 - (iv) fracture through the left iliac bone
 - (v) hematoma and edema surrounding the bladder and prostate into the pelvic floor
 - (vi) basicervical fracture of the neck of the left femur with displacement of the fracture fragments
 - (vii) comminuted fracture through the distal shaft of the left femur with posterior displacement of the distal fragment and anterior angulation
 - (viii) comminuted fractures of the medial and lateral condyles of the left femur extended to the articular surfaces
 - (ix) joint haemarthrosis
 - (x) nondisplaced fracture through the medial malleolus of the left tibia
 - (xi) comminuted fractures to head of right fibula
 - (xii) comminuted fracture to midshaft of right tibia with posterior and lateral displacement of the distal fragment
 - (xiii) transverse fracture through junction of middle and distal thirds of the right fibula with posterior displacement and angulation of the distal fragment

(xiv) nondisplaced fracture through the medial malleolus of the right fibula at the level of the syndesmosis

(xv) avulsion to tip of lateral malleolus of the right fibula

[5] The claimant at the date of the accident was self-employed as a taxi operator, being the owner and operator of a silver Mitsubishi, eleven-seater motor bus bearing registration plates TX 984. The motor bus was duly licensed with the Government of the Virgin Islands and comprehensively insured with Nagico Insurances.

[6] As a result of his injuries, the claimant was admitted to the Intensive Care Unit of Peebles Hospital (Peebles) and where he underwent advanced trauma surgery. Additionally, the claimant has been advised that he incurred air ambulance expenses but he has not been furnished with same.

[7] At the time of the incident, the claimant, who was born on the 29th day of September, 1949 was 67 years old. He was the holder of a valid Virgin Islands driver's licence and taxi licence, having held a driver's licence for 38 years and a taxi licence for 23 years at the time.

[8] The claimant filed a witness statement annexing his documentary evidence in support of the assessment on 1st May 2020. Counsel for the claimant filed submissions and authorities to assist the Court in relation to the assessment of general damages and these were filed by the claimant on 6th May, 2020. However, at the time of the filing of submissions, the defendant was still assessing the claim against them.

[9] The claimant was later transported to Columbia, on 19th January 2017, to the Fundacion Cardioinfantil where he underwent additional surgeries for the following:

- i) Intramedullary nail incorporating dynamic hip screw of left femur reinforced with distal shaft/condoye plate and screw
- ii) Bone cement after initial debridement of osteomyelitis
- iii) Plating of right sacroiliac fracture
- iv) intramedullary nailing of the right tibia fracture and wound toileting

- [10] The Claimant returned to the Territory and was re-admitted to Peebles on 27th May 2017 where his wounds were debrided, dressed daily and he commenced a course of antibiotics. The claimant also underwent physiotherapy, commencing on 23rd June 2017 and had nine sessions of in-patient therapy.

General Damages

- [11] In **Livingstone v Rawyards Coal Co** (1880) 5 App. Cas. 25, Lord Blackburn stated the general principle that should guide this Court when assessing damages in tort. He said:

“I do not think there is any difference of opinion as to its (sic) being a general rule that where any injury is to be compensated by damages, in settling the sum of money to be given for reparation or damages, you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong...”

- [12] In assessing general damages, the Court is guided by the well-known case of **Cornilliac v St. Louis**¹ which sets out the considerations which must be borne in mind by the court when assessing general damages. Those considerations are:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) the loss of amenities, if any, and;
- (d) the extent to which, consequentially, pecuniary prospects are affected.

The Nature and Extent of The Claimant’s Injuries

¹ (1965) 7 WIR 491.

- [13] The majority of Mr. Lowry's surgical intervention took place in Columbia. After he was transported there on 19th January 2017, to the Fundacion Cardioinfantil, he underwent additional surgeries for the following:
- I) Intramedullary nail incorporating dynamic hip screw of left femur reinforced with distal shaft/condoye plate and screw
 - II) Bone cement after initial debridement of osteomyelitis
 - III) Plating of right sacroiliac fracture
 - IV) intramedullary nailing of the right tibia fracture and wound toileting.
- [14] Mr. Lowry has been unable to afford the services of a medico-legal translator to translate the numerous reports emanating from Columbia and as such, he relies upon the summary as reported in the BVI Health Services Report of 3rd December 2019.
- [15] Mr. Lowry previously attended the Community Wound Clinic to have his wounds dressed but now does so at home, where, prior to the Covid-19 pandemic, he was treated by nurses twice per week; now they attend to leave the dressing materials for the claimant to attend to himself, it was anticipated that his wounds will continue to need such treatment and care, with monitoring by a medical professional, for the duration of his life.
- [16] Mr. Lowry upon his return to the Territory of the Virgin Islands was re-admitted to Peebles Hospital on 27th May 2017 where his wounds were debrided, dressed daily and he commenced a course of antibiotics. He was re-admitted to Peebles Hospital where he stayed for about another two and a half to three months. He also underwent physiotherapy, commencing on 23rd June 2017 and had nine sessions of in-patient therapy.
- [17] Mr. Lowry in his January 2019 evaluation was still using crutches and had severe decrease in range of motion in his hips, knees and ankles and reduction in muscle strength in the same areas.

- [18] Mr. Lowry was in extreme pain immediately following the accident, advising his rescuers that he was in pain; this was to the point where he even lost consciousness twice prior to arrival at the Peebles Hospital.
- [19] For several months following the surgery, Mr. Lowry had to bear a slow, painful recovery with physiotherapy and was in constant pain. He continues in pain to date.
- [20] Mr. Lowry, at this stage of his life, can only properly ambulate with the assistance of a pair of crutches and even then, with extreme difficulty.
- [21] Mr. Lowry, who was a taxi driver, is currently unable to work and as a result of the diminished ability of his legs. His sole source of income is that of his social security pension.
- [22] Mr. Lowry suffered from depression and was accordingly medicated in respect of same as a result of the accident, the extent and effect of his injuries and resulting physical incapacity.

The Nature and Gravity of the Resulting Physical Disability

- [23] Mr. Lowry's lifestyle has changed dramatically. A previously independent person, the claimant can no longer do what he wants when he pleases. Instead, the claimant has to rely on others.
- [24] Mr. Lowry has had to endure reduced mobility and be chauffeured everywhere back and forth.
- [25] Mr. Lowry has also had to endure significant post trauma surgery pain, having had to learn how to walk again and to this day, he is completely dependent upon crutches.
- [26] Mr. Lowry has limited mobility and activities of simple actions often taken for granted: bending to pick up a fallen item, lifting a grocery bag, or just lifting his legs, are no longer simple options for him.
- [27] Mr. Lowry no longer has the benefit of a vehicle he can even have someone else drive for him and thus earn an income from that. His financial resources are depleted.

- [28] The claimant has had to undergo extensive physiotherapy. According to Mr. Lowry physiotherapy “was an agonizing experience.” And when he could no longer afford it, he did the recommended exercises which he was taught by the physiotherapist to do on a daily basis, with a view to strengthening his muscles.
- [29] For several months following surgery and the slow, painful recovery with physiotherapy, Mr. Lowry was in constant pain. This he says meant that “he was in constant, daily intense pain for a period of just over one year.”
- [30] Mr. Lowry stated that when he was eventually discharged from Peebles Hospital, he had to hire an assistant who did everything for him. And he could not begin to tell this Court how embarrassing it was for a grown man like himself, then aged 67, to have to depend on someone to help him out of bed, bathe, assist him with bodily bathroom functions, and clean him thereafter. For Mr. Lowry, “it was very embarrassing.”
- [31] Mr. Lowry stated that home care went on for about three months until he could better use the crutches, something he had to teach himself how to do. Even this, walking with crutches, is a complicated and difficult experience which left him quite tired.
- [32] Mr. Lowry stated that he is now permanently unable to work and as a result of the diminished use of his legs. Mr. Lowry also stated that he was permanently unable to engage in any gainful employment. His only source of regular income was that of his social security pension of \$300.00 per month and sometimes he received the benefit of goodwill offerings from friends and family.
- [33] According to Michelle Leslie (DPT), who saw Mr. Lowry on February 13th, 2019, in her assessment the claimant had decreased mobility, decreased lower limb joint range of motion and decreased muscle strength which seemed to be a result of his injuries. And in her opinion, he could benefit from outpatient physiotherapy to help strengthening both lower limbs, improve his gait and decrease his reliance on walking aids.

Claimant's Submissions

[34] The claimant submitted the case of **Darel Christopher v Benedicta Samuels dba Samuels Richardson & Co** BVIHCV2008/0183 at para. 72, where the Court awarded \$60,000.00 as damages for pain and suffering and loss of amenities; it is of note that this sum was discounted by 75% due to the Court's determination of Mr. Christopher's contributory negligence. Mr. Christopher suffered a spinal cord injury² which left him significantly physically disabled, as detailed at para. 59:

“...Dr. Chase concluded that Mr. Christopher had suffered a severe injury to his spinal cord in the cervical area and his left lower extremity and a closed left tibia fracture (which has now healed); significant functional disability from his spinal cord injury; Brown-Sequard type syndrome with upper motor neuron involvement; significant functional disability in terms of gait due to loss of knee flexion on the left and ankle motor and proprioception deficits and significant upper extremity dysfunction due to his left hand intrinsic neuropathy and contractures; extreme stiffness in the fingers and on the left hand (and therefore, there is very little function in the left hand) and stiffness in the PIP joint.”

[35] The claimant posited that in the aforementioned case that further surgery could assist with long rehabilitation, with work limited “to just a light duty job” where he was previously an active plumber.

[36] The claimant submitted that the **Christopher** case outlined other cases on general damages for pain and suffering at paras. 66-70 and commended the cases of **Ulbona Morillo v Leanne Forbes** BVIHCV2003/005 as well as **Daphne Alves v Attorney General** BVIHCV 2006/0306. It is to be noted that this case was overturned by the Eastern Caribbean Supreme Court Court of Appeal, same was done on the sole issue of expiration of time within which to bring the action

[37] The claimant also submitted that the **Morillo** case made an award of \$40,000.00 where the Claimant was 50 years old and suffered spinal injuries resulting in her inability to raise her hand fully.

[38] The claimant posited that the **Alves** case gave an award of \$35,000.00 to the Claimant, in a work-related injury, to a 33 year old Claimant for a spinal injury with dis-congenic disease rendering her incapable of sitting or walking for long periods of time or carrying greater than 10 lbs.

² The details of the injuries were summarized at paras. 56-59

[39] It was also submitted by the claimant that his injuries were far more severe than those stated in either of the aforementioned cases.

[40] The claimant also posited the case of **Allison Canaii v Leonard Malzaire & John Baptiste Mathurin** SLUHCV2003/0821, it was submitted, is also useful to the Court. The Claimant in that case suffered severe injuries resulting from a car accident including trachea laceration and a comminuted type II fracture of the left foot. The latter resulted in limited movement and a limp which may eventually necessitate fusion of the ankle. The case outlined at length the method of computation of loss and damage, extensively quoting Lord Devlin in the case of **Shepherd v H. West and Anor** (1964) AC 326.

“Then there is or may be a temporary or permanent loss of a limb, organ or faculty. Whether it is the limb itself that is lost or the use of it is immaterial. What is to be compensated for is the loss of use and the deprivation thereby occasioned. This deprivation may bring with it three consequences. First, it may result in loss of earnings and they can be calculated. Secondly, it may put the victim to expense in that he has to pay others for doing what he formerly did for himself; and that also can be calculated. Thirdly, it produces loss of enjoyment, loss of amenities as it is sometimes called, a diminution in the full pleasure of living. This is incalculable and at large. This deprivation with its large consequences is something that is personal to the victim. You do not, for instance, put an arbitrary value on the loss of a limb, as is commonly done in an accident insurance policy. You must ascertain the use to which the limb would have been put, so as to ascertain what it is of which the victim has actually been deprived.”

What has to be considered in the present case is the method of compensation for the third of these consequences, loss of employment or pleasure. There is here an almost total loss of use of all the faculties or limbs, but compensation under this head must be assessed in the same way as it would be for a partial loss of a single limb or faculty. The degree is different, but not the principle.

There are two ways in which this loss of employment can be considered. It can be said that from beginning to end it is really all mental suffering. Loss of enjoyment is experienced in the mind and nowhere else. It may start with acute distress at the inability to use a limb in games or exercise as before or just in getting about, and may end with a nagging sense of frustration. If this is the true, then total unconsciousness as in *Wise v*

Kaye (31) relieves all mental suffering, and nothing can be recovered for a deprivation which is not being experienced.

The other way to look on the deprivation of a limb is as the loss of a personal asset, something in the nature of property. A limb can be put both to profitable use and to pleasurable use. In so far as it is put to profitable use, the loss is compensated for by calculating loss of earnings and not by assessing mental pain. On the same principle, it can be said, a sum must be assessed for loss of pleasurable use irrespective of whether there is mental suffering or not.”

- [41] The claimant also submitted that the principles enunciated in the **Canaii** case are useful but as the Claimant in that case satisfactorily recovered, the Court placed the case in the mid-lower category³ while the Lowry case, the claimant further submitted would fall into a higher category.
- [42] The claimant posited that he had effectively demonstrated that he was unable to work and thus is severely adversely affected by his disability. He also posited that his injuries fell into the very serious category as suggested by the Judicial Studies Board Guidelines⁴.
- [43] The Court was also invited to consider the case of **Garna O’Neal v Steadroy Matthews** BVIHCV2013/153. In that case, the Claimant was injured when she was struck by a safari while crossing on a pedestrian crossing. She was dragged on the ground as the vehicle continued driving over her. She suffered multiple serious injuries including a collapsed lung, broken ribs, laceration of her liver and removal of her spleen. She had to have permanent rods inserted in her arm.
- [44] The Court also took note of the claimant’s “obvious sadness, humiliation and embarrassment caused by her disfigurement for not being able to expose her arm because of the extensive scarring”⁵ as well as the several surgical procedures inter alia, and acceded to the Claimant’s request for an award of \$100,000.00 as general damages for pain and suffering. This was not disturbed on appeal.
- [45] The claimant in the **Binder** case was injured in a motor vessel accident off Jost Van Dyke. A motor vessel collided with the dinghy in which she was travelling,

³ Para 16 of the judgment of Mason, J

⁴ Please see attached extract

⁵ Para 21 of the judgment of Hariprashad Charles, J

such that she was thrown into the water, struck on her right ankle, left pubic area and the right side of her head which caused her to lose consciousness for approximately 20 minutes⁶. She was transferred from Peebles Hospital to a hospital in the USVI where she remained for 7 days. She was unable to work for 3 months as she was bedridden and confined to a wheelchair and thereafter was on crutches.

- [46] Ms. Binder suffered 31-50% disability of the injuries to various parts of her body⁷. She also cited issues of her reduced quality of life. The Court was invited to adopt the principles on loss of amenities as iterated by Hariprashad-Charles, J at para. 80 in the case:

“In terms of loss of amenities, it is authoritatively settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account.”

Defendant's Submissions

- [47] The defendant submitted that the foregoing cases cited by the Claimant are useful in guiding the Court to arrive at a reasonable and comparable award which is in line with awards made in this jurisdiction, these are **Darel Christopher v Benedicta Samuels dba Samuels Richardson & Co** BVIHCV 2008/0183 and **Heidi Binder v Patrick Mc Vey et al**, BVIHCV2005/006, and **Garna O'Neal v Steadroy Matthews** BVIHCV2013/153.
- [48] The defendant also submitted that it was a well-established principle that special damages must be pleaded, particularized and proven. The defendant therefore objects to an award of special damages for items listed on page 4 of the Schedule for which no receipts are provided.
- [49] The defendant further submitted that the degree of injuries, pain suffering and loss of amenities suffered by the Claimant are comparable to those of the three cases cited above. However in the cases cited the resulting disability was more severe

⁶ Details of the Claimant's injuries are at para 67 of the judgment

⁷ Para 75 of the judgment

than the claimant's, for example: **Darel Christopher** suffered physical and neurological damage, and became sexually impotent as a result of the accident; **Heidi Binder** suffered sexual and urinary dysfunction, spinal trauma which left her spine "curved" causing chronic back pain, she also suffers severe insomnia, cognitive dysfunction and chronic pelvic pain; **Garna O'Neal** suffered excruciating pain as the gravel entered her body while being dragged under the bus, permanent titanium plates embedded in her hand, sadness, humiliation and embarrassment caused by her disfigurement for not being able to expose her arm because of extensive scarring.

- [50] The defendant finally submitted that an award in the range of \$60,000.00 to \$90,000.00 would be fair and reasonable compensation in the circumstances and in keeping with the general principles as cited by Charles J. in the matter of **Darel Christopher Benedicta Samuels dba Samuels Richards & Co** BVIHCV2008/0183 at paragraph 71:

"The only general principles which can be applied are that damages must be fair and reasonable that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt out to made to reward a sum which accords "with the general run of the assessment made over the years in comparable cases. It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live. There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in *Fletcher v Autocar and Transporters Ltd*, "the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances."

Assessment guidelines

- [51] In assessing general damages, the court must have regard to recent comparable awards in its own, and other jurisdictions', with comparable social and economic circumstances, to assist in arriving at the quantum of damages which is to be

regarded as fair compensation to the claimant. As was stated by Lord Diplock in **Wright v British Railways Board**,⁸

“... Non-economic loss constitutes a major item in the damages. Such loss is not susceptible to *measurement* in money. Any figure at which the assessor of damages arrives at cannot be other than artificial and, if the aim is that justice meted out to all litigants should be even-handed instead of depending on the idiosyncrasies of the assessor, whether jury or judge, the figure must be ‘basically a conventional figure derived from experience and from awards in comparable cases.’ (my emphasis)

[52] In the case of **Wells v Wells**,⁹ Lord Hope of Craighead observed as follows:

“The amount of the award to be made for pain, suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court’s best estimate of the plaintiff’s general damages.” (my emphasis)

The approach is therefore to look at comparable cases in making an assessment of damages. In the United Kingdom, the Judicial Studies Board (“the Board”) has provided guidelines to assist in the assessment of damages and to achieving a measure of consistency in awards in personal injuries claims. The categorisation of facial injuries and range of awards suggested by the Board is particularly helpful as it assists in assessing the nature and extent of the claimant’s injuries. The Board considers that the assessment of facial injuries is an extremely difficult task, there being three elements which complicate the award. First, while in most cases the injuries described are skeletal, many of them will involve an element of disfigurement or at least some cosmetic effect. Second, in cases where there is a cosmetic element the courts have invariably drawn a distinction between awards for damages to males and awards for damages to females, the latter attracting the higher awards. Third, in cases of disfigurement there may also be severe psychological reactions which put the total award at the top of the bracket, or above it altogether.¹⁰

⁸ [1983] 2 All ER 698 at 699.

⁹ [1998] 3 All ER 481 at 507.

¹⁰ Guidelines for the Assessment of Damages in Personal Injury Cases, 10th edn., Oxford University Press.

[53] I am also guided by Gordon JA in the case of **Philmore Skepple v Joseph Weekes**¹¹ in which he quoted with approval the dicta of Singh JA in **Fenton Auguste v Francis Neptune**¹² as follows:

“It is my considered opinion, that the practice of non-itemization should be used where it is impracticable to itemise the awards under different heads. This can happen where there is vagueness of the evidence and lack of specific diagnosis of the injury... But where the evidence is such that it is practicable to itemise, such practice should be followed. This is the modern approach, and it is necessary especially when dealing with the issue of interest that is to be awarded under different heads.”

The claimant and defendant are entitled to know what the sum assessed is for each relevant head of damage and thus to be able, on appeal, to challenge any error in assessments.¹³

[54] It is well established that the assessment of damages has two components. There is the objective part and the subjective part (see **H. W. West & Sons v Shephord** [1964] A.C. 326). The objective component deals with the actual injury and the subjective part takes account of the non-physical injury on the claimant. Additionally, there is a distinction between pain and suffering on the one hand and loss of amenities on the other (see Lord Scarman in **Lim Poh Choo v Carnden and Islington Health Authority** [1980] A.C.174, 189G, reaffirming what was said in **H. West & Son Ltd. v. Shephord** [1964] A.C. 326). Lord Scarman made the very important point, often overlooked, that pain and suffering depend on the claimant's awareness of and capacity for suffering. Thus, it is entirely possible for there to be a low award in a personal injury case for fairly serious injuries if the evidence shows that the claimant is unable to appreciate the suffering or has no capacity for awareness of the pain. On the other hand, the lack of awareness of pain and the lack of capacity for suffering does not necessarily mean that the award for personal injury will be low. It can be quite high, if the injuries in and of themselves are so serious that the claimant has, on an objective view, suffered a

¹¹ Antigua and Barbuda High Court Civil Appeal No. 10 of 2009 (delivered 25th January 2010, unreported).

¹² Fn. 4 at p. 5.

¹³ See Sachs LJ in *George et al v Pinnock et al* [1973] 1 WLR 118.

significant loss. This was indeed the case in **Lim Poh Choo** where the claimant was unable to appreciate her suffering and pain but suffered a substantial loss.

[55] The combined effect of these principles is that where the claimant suffers a substantial loss and is acutely aware of his suffering and undoubtedly suffers greatly from the injuries, then the award is going to be a high one.

[56] It is settled law that in these courts, compensation for pain and suffering and loss of amenities is achieved by an award of a sum of money calculated on the basis of established principles and the use of comparable cases as a guide. This principle was approved in the case of **Beverly Dryden v Winston Layne** SCCA 44/87 delivered 12 June 1989 where Campbell JA stated as follow:

“Personal injury awards should be reasonable and assessed with moderation and that as far as possible comparable injuries should be compensated by comparable awards”

[57] The claimant submits a figure of Special damages of ECD\$60,688.87 and prescribed costs in accordance with CPR rule 65.5. The claimant and the defendant have helpfully submitted authorities for the court’s consideration which I will now consider. I will also examine other cases that will be able to give assistance in deciding the fair and reasonable amounts to be ordered.

[58] The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords “with the general run of assessments made over the years in comparable cases.”¹⁴ And extent of the claimant’s injuries in relation to his scarring and disfigurement, albeit to his legs.

Quantification of the Awards

General Damages Award

¹⁴ 4 See *Bird v Cocking & Sons Ltd* [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.

[59] The bedrock principle by which I am to be guided is restitutio in integrum. That is, so far as money can do it the claimant must be restored to the position he would have been in if the tort had not been committed. The compensation contemplated in the area of personal injury is best encapsulated in the judgment of Lord Reid in **H. West & Son Ltd. And Another v Shephard** [1964] A.C. 326,341:

“Unless I am prevented by authority I would think that the ordinary man is, after the first few months, far less concerned about his physical injury than about the dislocation of his normal life. So I would think that compensation should be based much less on the nature of the injuries than on the extent of the injured man’s consequential difficulties in his daily life.”

What the claimant is being compensated for is “the extent to which the injury will prevent [him] from living a full and normal life and for what [he] will suffer from being unable to do so,” per Lord Reid, *ibid*.

[60] The dictum of Lord Reid was applied by the Jamaican Court of Appeal in **Beverley Dryden v Winston Layne** SCCA 44/87 delivered 12th June, 1989. So, in arriving at a just award, I should take into consideration the fact of the physical injury and the consequential difficulties it poses, weighting the latter over the former. Furthermore, in seeking to discover the judicial consensus of awards, as far as possible, I am to compare like injuries and arrive at an award that is not inflated. As Campbell J.A. said in **Beverley Dryden v Winston Layne**, *supra*:

“personal injury awards should be reasonable and assessed with moderation and that so far as possible comparable injuries should be compensated by comparable awards.”

[61] In seeking to compare personal injury cases, the pitfall of attempting to standardise damages must be scrupulously avoided. The decided cases are a mere guide to avoid making “a wholly erroneous estimate of the damage suffered” or awarding either an inordinately low or inordinately high sum. In fine, the damages awarded should be moderate and just. Birkett L.J. summed up the position with admirable pellucidity in **Bird v Cocking & Sons, Ltd.** [1951] 2 T.L.R. 1263:

“The assessment of damages in cases of personal injuries is, perhaps, one of the most difficult tasks which a judge has to perform ... The task is so difficult because the elements which must be considered in forming the assessment in any given case vary so infinitely from other cases that there can be no fixed and unalterable standard for assessing the amounts for those particular elements. Although there is no fixed and unalterable standard, the courts have been making these assessments over many years, and I think they do form some guide to the kind of figure which is appropriate to the facts of any particular case, it being for the judge, ... to consider the special facts in each case; ... one case cannot really be compared with another. The only thing that can be done is to show how other cases may be a guide, and when, therefore, a particular matter comes for review one of the questions is, how does this accord with the general run of assessments made over the years in comparable cases?”

- [62] This comparative approach is in essence a gathering, or more precisely an unveiling, of the general consensus of opinion as to what the claimant in contemporary society should be awarded: **Rushton v National Coal Board** [1953] 1 All ER 314,317.
- [63] As will be posteriorly indicated, the defendant is 85% responsible for the accident giving rise to the claimant’s injuries. It is therefore the early finding of this tribunal of an apportionment of damages on the basis of an 85:15 assessment of liability. What then, should be the award to the claimant in the instant case? From a consideration of the cases submitted by both sides it appears that the range of awards is from a low of ECD\$40, 000.00 to a high of ECD\$120, 000.00.

The loss of amenities

- [64] An award for loss of amenities is to compensate the claimant for the loss of quality or reduced enjoyment of life. (See **Angeleta Brown v Petroleum Company of**

Jamaica Limited and Juici Beef Limited (unreported), Supreme Court, Jamaica, Claim No. 2004 HCV 1061, judgment delivered 27 April, 2007).

- [65] Mr. Lowry has had to endure reduced mobility and be chauffeured everywhere back and forth.
- [66] Mr. Lowry has also had to endure significant post trauma surgery pain, having had to learn how to walk again and to this day, he is completely dependent upon crutches.
- [67] Mr. Lowry has limited mobility and activities of simple actions often taken for granted: bending to pick up a fallen item, lifting a grocery bag, or just lifting his legs, are no longer simple options for him.
- [68] Mr. Lowry no longer has the benefit of a vehicle he can even have someone else drive for him and thus earn an income from that. Though it is noted that he would have been compensated for the loss of the vehicle.
- [69] In **Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited** (supra) McDonald-Bishop J (Ag.) (as she then was) declared that the claimant is entitled to an award for any prospective pecuniary losses that are reasonably likely to flow from the injuries sustained.
- [70] There appears to be an omnibus challenge to any item of special damages which is not properly receipted. The defendant's pithy submission is that if any award is to be made under this head, they place reliance on the receipts attached to the Statement of Claim in accordance with **Lawford Murphy v Luther Mills** (1976) 14 JLR 119 (**Murphy v Mills**). The well-known principle, encapsulated in the headnote was quoted:
- “In any action in which a plaintiff seeks to recover special damage the onus is on him to prove his loss strictly. It is not enough for a plaintiff “to write down particulars, and, so to speak throw them at the head of the court, saying: ‘This is what I have lost; I ask you to give me these damages’. They have to prove it.”
- [71] In **Donnelly v Joyce** [1973] 3 All ER 475, a decision of the English Court of Appeal. In that case the mother of a six-year-old child gave up her part-time job to care for him as a result of the injuries he sustained in the accident for which the

defendant was liable. The child claimant sought to recover the loss of wages incurred by the mother. The contention was that the loss was the mother's and not the claimant. It was also contended that the claimant was not under any contractual or moral obligation to pay his mother for the services provided.

[72] The court held:

"In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining his loss, was the proper and reasonable cost of supplying the plaintiff's needs."

[73] There appears to be euphoric harmonization between **Donnelly v Joyce**, supra and **Murphy v Mills**, supra. **Donnelly v Joyce** approached the question of the defendant's liability to pay from the perspective of causation. In other words, if the physical incapacitation rendering the claimant in need of the help from the third party is referable to the accident, then the defendant is liable to pay. However, the value of that service must be quantified. Their Lordships were of the view that the quantification should be hinged to the proper and reasonable cost of supplying that service. **Murphy v Mills** would then dictate that the proper and reasonable cost of supplying the service must be strictly proved.

[74] That having been said, as I observed in **Stone-Myrie v Gordon Williams** [2014] JMSC Civ. 133, the apparent strident effect of **Murphy v Mills** has been softened by **Omar Young & Michael Meade v June Black** SCCA #106/2001 delivered on December 19, 2003 (**Meade v Black**). The court in the **Meade v Black** recognized that the circumstances from which some items of special damages arise are not susceptible to the strict proof required by **Murphy v Mills**.

[75] It was very pellucid from Mr. Lowry's medical report that his injuries had affected his physical ability to carry out his job to a great degree and that they caused him excessive discomfort in the work environment. That Mr. Lowry's job as a Taxi driver required him to be driving for long hours, walking and doing work which

required him to engage in the use of his muscles and his legs is not lost on the Court.

[76] Dr. Harlan O. Vanterpool stated in a peremptory medical report that it was very likely that Mr. Lowry's condition would remain permanent and that if his condition continued to deteriorate that physiotherapy and definitive management were necessary.

[77] In the circumstances, and having considered all the authorities and the evidence, I also consider the sum of USD\$100,000.00 for pain and suffering and USD\$10,000.00 for loss of amenities to be an appropriate, fair and reasonable award and I so award.

Conclusion

[78] I am mindful that the approach of comparison and adjustment of similar awards in personal injuries cases is not flawless and that each case must be assessed on its own facts. As stated by Rattray J in the Jamaican case of **Duhaney** which I adopt:

“It is readily accepted that no two cases of persons sustaining personal injuries are exactly alike. And yet our system of justice requires that, as far as is possible, there be consistency in awards involving similar injuries. The award of a sum of money as compensation for severe and extensive injuries suffered in an accident, ... can never put a person back in the position he was prior to the accident, nor provide adequate solace for his misfortunes. The unenviable task of the Court is to arrive at a fair money value as redress for a claimant's afflictions, in effect doing what is described as “measuring the immeasurable.”

[79] It is at this juncture that I must register my staunch disagreement with Counsel for the defendant who was of the humble view that the injuries suffered by Darryle Christopher and in the other cases cited were more severe than the injuries suffered by the claimant at bar, especially in light of the evidence of the long-term impact and resulting disability suffered by Mr. Christopher.

[80] In the circumstances, I have taken into account the nature and extent of the claimant's injuries which were substantive in nature although confined to his shoulder and leg regions, and the fact that this is a 69 year old man who still has some vim, vigour and vitality left and has to contend with excruciating pain and to be dependent on physiotherapy and definitive management for relief and comfort from the severe pains.

Loss of Income

[81] In the case before me, because of the nature of his injuries and the difficulty in performing his job at this time with the situation remaining permanent, Mr. Lowry had also achieved minimum medical improvement and it had been three (3) years since the accident, although he is unemployed at this time, he was also concerned that he had lost his job as a taxi operator, his only source of income and may then, as a result of his injury, be further disadvantaged in getting another source of income.

[82] Therefore, I must address my mind to whether there is a risk of continued unemployment as a result of the claimant's injuries, the risk materialised within a few months after the accident. His pains and post traumatic osteoarthritis have made it particularly difficult to cope in the work environment. He also experienced discomfort and could not drive for lengthy periods or at all. Though the medical evidence does not overtly state that the claimant cannot work, his post traumatic osteoarthritis diagnosis and his witness statement evidence concerning the effect of his injuries on his ability to perform his work are in my view sufficient to justify making an award under this sub-heading.

[83] What, to my mind, ought to be done as a matter of practice is to claim for loss of earnings up to the date of trial/assessment, as an item of special damages and to particularize the same accordingly. At the commencement of the trial, the particulars of the claim can be amended, to specify what the specific sum of loss has been to the claimant, in terms of his earnings, from the time of the defendant's alleged wrong done to him, up until the date when the trial of that claim, had actually commenced. That is in fact, a claim for 'loss of earnings'. That is a claim

which is specifically calculable and ought, to my mind, to be specified in the special damages particulars, in terms of the precise calculation thereof, once the trial has commenced.

- [84] As such, the claim for loss of future earnings, refers to my mind, to a claim for anticipated loss of earnings, after the trial of the claim has been concluded. Considered in that context, the claim for loss of future earnings is, in reality, an item or aspect of the claimant's overall claim for general damages.
- [85] I am fortified in my view as expressed above, by dicta from the case earlier cited in these reasons, which for ease of reference, will now simply be referred to as, '**the Monex case.**' Rattray P, who delivered the Court of Appeal's judgment in that case, stated, as recorded at page 21, that, '**it is worthy of note that from the date in 1991 when the respondent commenced her working life until the date of trial, real quantifiable losses were sustained, which could have been claimed as loss of earnings, an item of special damages.**'
- [86] In further support of that position of mine, I refer to paragraph 35-061 of the text – **Mcgregor on Damages**, 18th ed., 2009, where the following is stated: '**The claimant is entitled to damages for the loss of his earning capacity resulting from the injury; catastrophic injuries, where cost of care predominates, apart, this generally forms the principal head of damage in a personal injury action. Both earnings already lost by the time of trial and prospective loss of earnings are included. While the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage, there would appear to be no substantive difference between the two (2), the dividing line depending purely on the accident of the time that the case comes on for hearing. Thus it has been accepted that the rule in British Transport Commission v Gourley in relation to the incidence of taxation applies equally to the loss of income till judgment and the loss of earning capacity in the future. Similarly, the courts must take account of relevant changes of circumstances occurring before and after judgment, the only difference being that the former are a reality and the latter a matter of**

estimate. However, interest is to be awarded on the past loss but not on the prospective loss of earnings.’ See: *Jefford v Gee* – [1970] 2 QB 130.

[87] ***British Transport Commission v Gourley* – [1956] AC 185**, is authority for the proposition, as stated by the author in his quotation above, that, ‘the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage’. (See per Ld. Goddard, at 206).

[88] As stated at paragraph 35-065 of the same text, **‘the courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimant’s present annual earnings less the amount which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now, instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation. There are, exceptionally, situations in which the court is entitled because there are too many imponderables in the case, to regard this conventional method of computation as inappropriate and to arrive simply at an overall figure after consideration of all the circumstances.’ See: *Blamire v South Cumbria Health Authority* – [1993] P.I.Q.R Q1.**

[89] The anticipated loss, which is that which, to my mind, can properly be categorized as, ‘loss of future earnings,’ would pertain to the anticipated income losses of the claimant between the time, post-trial and his expected date of retirement, based upon evidence as to his date of birth or, at the very least, his age at the time when trial was underway. That anticipated loss is typically to be calculated using the multiplier/multiplicand method and no interest is payable on any damages or sum

awarded in respect of such anticipated loss. On the other hand though, interest is to be awarded, in respect of the claimant's actual loss of income.

[90] In England, the 'Ogden tables' are used to determine the multiplier. Those are actuarial tables created by a team of experts in the United Kingdom and which pertain to persons who live there. I note that we are in the British Virgin Islands but it has been brought to my attention the Court of Appeal's decision in the case of **Auguste v Neptune** (supra) at pp. 3-4 of the judgement, which set out the principles for selecting a multiplier and cited previous multipliers fixed by earlier courts for persons of varying ages and indicating a multiplier of 12 for a 45 year old man and 10 for a 57 year old man. Mr. Nelson further contended that given the learning in the cases cited, submitted that an appropriate multiplier of 11 should be used; this is in line with the Court of Appeal case in **Ramnath v. Alphonso** cited in **Paul v. Blyden** at paragraph 20, and that this sum be reduced by one quarter to account for the vicissitudes of life leaving a multiplier of 8.25.

[91] **'When determining the multiplicand, that is, the annual loss of earnings, it is required that the court first settle on what is the likely pattern of employment and earnings that the claimant would have had if it were not for the tort. Then the likely pattern of employment and earnings in the circumstances of the case is decided, in order to determine the loss.'** See: **Ward v Allies** and **Morrison Architects** (op. cit.); and **Leesmith v Evans** – [2008] EWHC 134.

[92] Thus, to determine both actual loss of earnings and loss of future earnings, it is very clear that what must be provided to the court, first and foremost, is evidence as to the claimant's earnings up until the time when he either ceased altogether, to earn at all, any income, or alternatively, ceased to earn as much income as he or she used to earn, prior to the commission of the tort, in relation to him, by the defendant.

[93] This court recognizes that it is always open to a court to draw reasonable inferences from the facts found to have been proven to the requisite standard, which is proven as being more probable than not; or in other words, proven on a balance of probabilities. This court also recognizes and has applied the requisite standard of proof, that being proof on a balance of probabilities.

- [94] It must be recalled, what was stated by Browne LJ in **Moeliker v A. Reyrolle & Co. Ltd.** (op. cit.), which is that – ‘... If the claimant is earning as much as he was earning before the accident and injury, or more, he has no claim ...’ Also, it must be recalled what was stated in **Fairley v Thompson** (op. cit.), by Ld. Denning, that being that, ‘compensation for loss of future earnings is awarded for real assessable loss proved by evidence.’
- [95] The onus was on the claimant to prove, to the requisite standard, that he was earning an income as of December, 2017 and that, as a consequence of the commission of the relevant tort, by the defendants, he was negatively impacted to the extent that, amongst other losses suffered by him, he also suffered the loss of the income that he was earning prior to the commission of that tort. The claimant has proven same and accordingly, an award will be made by this court to him, either for loss of earnings up until trial, or for loss of future earnings, which in reality, should relate to loss of earnings, post-trial.
- [96] The claimant’s witness statement divulged his earnings before and after the accident. However, not much consistent documentary proof was submitted to the Court. In my view, this is not astounding because his job was informal in nature. In other words, the claimant was in the position of the pushcart vendor.¹⁵ An explanation was proffered as to why documents in proof of his earnings were not submitted. Due to the claimant’s failure to strictly prove his earnings, I will use the monthly wage as quoted by the minimum wage standards in the Territory of the Virgin Islands in addition I will add the monthly pension of USD\$300.00 to calculate the award. The figure of seven hundred and fifty United States dollars (USD \$750.00) will therefore be used.

¹⁵ In **Desmond Walters v Carlene Mitchell** (unreported), Court of Appeal, Jamaica, SCCA 64/91, judgment delivered 2 June 1992, Wolfe J.A (Ag) (as he then was), concluded that one could not expect a sidewalk or a push cart vendor to prove his or her loss of earnings with the mathematical precision of an organized company.

Harrison’s Assessment of Damages: Cases on Personal Injury and Fatal Accident Claims (2 edn, 6), page 36- “Where it is impossible to ascertain what the earning capacity of the victim is, or will be in the future, the Court, may assume that, at least, the claimant (victim) would be able to earn an amount equivalent to the national minimum wage. See **Douglas v KSAC and Ors** (Consolidated) 18 JLR 338” 7 52 weeks are in 1 year.

- [97] This figure would have to be multiplied by 52¹⁶ (12 in this case) to ascertain a yearly figure. The resulting figure, the multiplicand, is nine thousand United States dollars (USD\$9,000.00).
- [98] A suitable multiplier has to be applied to the multiplicand. To ascertain the multiplier one has to subtract the claimant's age at the date of the assessment from the age he is expected to retire. This is done to find out the remaining period of his working life¹⁷.
- [99] Having been born on September 29, 1949, the claimant was almost seventy (70) years old at the date of the judgment. The formal retirement age for men is sixty-five (65). However, some men work to the ages ranging from 70 to 75. The multiplier should be discounted to take account of the following factors: receipt of earnings lost as a lump sum, and the vicissitudes of life (the claimant might have lost his job at some point in the future through redundancy or illness).
- [100] I believe that an appropriate multiplier would be 2.95. Consequently, the mathematical calculation for the claimant's loss of income is as follows: \$USD9,000x2.95= US\$26, 555.95.

The issue of Contributory Negligence

- [101] The defendant and claimant are divergent on the issue of contributory negligence. The claimant's attorney-at-law is indulging the Court to find that there is no evidence to support any potential issue of contributory negligence on the part of the claimant. The Court is invited to determine that none exists and thus make no subrogation against his award.
- [102] Lord Denning explained the concept of contributory negligence in **Jones v Livox Quarries Ltd.**¹⁸ when he stated:

"A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself, and in his reckonings he must take into account the possibility of others being careless."

¹⁶ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

¹⁷ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

¹⁸ [1952] 2 QB 608 at page 615

[103] In **Froom v Butcher**,¹⁹ Lord Denning M.R. discussed a barrage of cases involving claimants for damages for personal injuries to illustrate the law relating to contributory negligence where the claimants were not wearing seat belts in motor vehicular accidents caused by the negligence of the defendant drivers. In that case, Mr. Froom suffered a broken rib, bruises to his chest and abrasions on his head as a result of a collision with a car, the driver of which was convicted of careless driving. Mr. Froom, as a personal preference, contrary to the law, was not wearing a seat belt when the accident occurred. He was awarded £450 in general damages by the judge at first instance. On appeal, Lord Denning reasoned the matter this way:

“Everyone knows, or ought to know, that when he goes in a car he should fasten the seat belt. It is so well known that it goes without saying, not only for the driver, but also the passenger. If either the driver or the passenger fails to wear it and an accident happens – and the injuries would have been prevented or lessened if he had worn it – then his damages should be reduced.”

The appeal was allowed and the damages reduced by £100.

[104] Lord Denning gave guidance on the approach to be taken in apportioning damages in such cases when he declared:

“Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was the prime cause of the whole of the damage. But insofar as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be... In most of these cases, the liability of the driver is admitted: the failure to wear a seat belt is admitted: the only question is: What damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.”

¹⁹ [1976] 1 QB 286

- [105] The defendant entreated the Court to take notice of the Peebles Hospital Report dated January 15th, 2017 which indicated that the claimant was, "... the unrestrained driver of his vehicle." This the defendant submitted meant that the claimant was not wearing a seat belt at the time of the accident contrary to the legal requirement that an operator of a motor vehicle is to wear a seatbelt. The defendant posited that as a result of this finding, the natural inference is that the claimant had contributed to his injuries as a result of not wearing the seat belt. The defendant further posited that any award made to the claimant should be discounted by 10 to 20 per cent as a result of his contributory negligence.
- [106] The point in issue was addressed in the St. Lucia case of **Bonny Alexander v Stanislaus Smith and James Enterprises Limited**.²⁰ Mr. Alexander, a front seat passenger who was not wearing a seat belt, was thrown from the vehicle in which he was travelling and became entrapped in a tree as a result of a collision with a vehicle driven by the first defendant and owned by the second defendant. The defendants admitted liability in the acknowledgement of service and did not file a defence. Mr. Alexander obtained judgment in default of defence. At the assessment of damages, Counsel for the defendants submitted that the failure of Mr. Alexander to wear a seat belt raised the issue of contributory negligence as being relevant to the quantum of damages to be awarded to the claimant. Counsel for the claimant contended that the admission of liability by the defendants and the entry of judgment in default against them amounted to an estoppel on the issue of liability.
- [107] The erudite Master (as she then was) at paragraph 27 of the judgment had this to say:
- "A default judgment is conclusive on the issue of liability of the defendants as pleaded in the statement of claim but not necessarily conclusive on the issue of damages. It is open to the defendant at the assessment of damages to advance a causation objection, failure to mitigate loss or contributory negligence."**

²⁰ SLUHCV2017/0208

The Court noted that it was uncontested that the claimant was not wearing a seat belt at the time of the accident and was of the view that his injuries would have been less severe had he been wearing a seat belt. The global sum awarded to him was reduced by 15%. (This decision had been reversed on appeal and is discussed at paragraphs 107 to 109 below.)

[108] In the said case of **Bonny Alexander (supra)** listed for hearing by the Eastern Caribbean Supreme Court of Appeal in March 2020.²¹ Mr. Alexander (“the appellant”) challenged the decision of the learned Master in finding that he was contributorily negligent. Learned Counsel for the appellant argued that it was not open to the erudite Master to have made a determination that not wearing a seat belt contributed to the loss suffered by the appellant in the absence of any evidence of the seat belt or the not wearing of a seat belt as exacerbated any damage or injury.

[109] The Court had to consider:

- (i) **Whether the learned Master erred in assessment of damages in finding that the appellant was contributorily negligent;**
- (ii) **Whether there was evidence before the learned Master indicating that failure to wear a seat belt contributed to injuries; and**
- (iii) **Whether or not the learned Master erred in considering oral submissions on contributory negligence in the absence of such pleadings and evidence.**

[110] In an oral judgment, the Court of Appeal ruled that there must be some evidence from an expert to say that some additional injury would have been sustained by the failure to wear a seat belt. Whereas the judgment of Lord Denning in **Froom v Butcher**²² made it clear that as much as one may take the view that if you do not wear a seat belt, then any injury may be exacerbated by that fact, but that is not a basis upon which a Court can make a finding of contributory negligence. Since there was no evidence from an expert or otherwise upon which the learned Master

²¹ SLUHC VAP2018/0016

²² Supra at note 4

could have made a finding of contributory negligence, the Court found that the order reducing the damages awarded to the appellant by 15% on the basis that he was contributorily negligent by not wearing a seat belt could not stand. The awards made by the learned Master were reinstated without the reduction of 15% for contributory negligence.

[111] Contributory negligence does not mean breach of a duty to take care, but simply means careless conduct on the part of the person, usually the plaintiff, in failing to prevent or avoid the carelessness of the other person's breach of duty to take care (**Charlesworth and Percy on Negligence**, 9th Ed. Para 1-10). Negligence depends on a breach of duty, whereas contributory negligence does not. Negligence is a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man, he might hurt himself (see **Jones vs. Livox Quarries Ltd.** (1952) 2 Q.B. 68).

[112] I also appreciate that in consolidated **Bakeries and Victor Williams vs. Pauline Williams** 1968 JLR page 49 it was held that: A motorist was required to exercise reasonable care. He was not required to be a perfectionist. However, as propounded in **Lang v London Transport Executive** 1959 WLR PS 1168 at page 1176 by Havers J.

“If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions (**Fardon v Har Court Rivington** 1932 146 LT 391, 392)”

[113] I find, however that in the absence of any definitive expert evidence on the issue of contributory negligence on the part of the claimant, that the claimant was not contributorily negligent in the present circumstances.

[114] Finally, I wish to thank learned Counsel for their submissions in this matter.

Orders

[115] the order on the assessment of damages is as follows:

General damages:

- i. pain and suffering US\$100,000.00 at 6% interest from the date of the service of the claim form to the date of payment and USD\$10,000.00 for loss of amenities;
- ii. Loss of income of US\$26, 555.95 at no interest is awarded;
- iii. No order as to future medical expenses;
- iv. 'Special damages' is awarded to the claimant, in the sum of US\$60,688.87, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment.
- v. Prescribed costs pursuant to Appendices B and C of Rule 65 **Civil Procedure Rules 2000** as amended).

Ricardo Sandcroft
Master [Ag.]

By the Court

Registrar