

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

SAINT LUCIA

CLAIM NO: SLUHCV2017/0547

BETWEEN:

**KAREEM EDWIN
of Caye Mange in the Quarter of Gros Islet
in the State of Saint Lucia**

Claimant/Applicant

and

**JOHN D'AUVERGNE
of Bois D'Orange in the Quarter of Castries
In the State of Saint Lucia**

Defendant/Respondent

Appearances: Mrs. Maureen John-Xavier of counsel for the claimant/applicant
Ms. Kristian Henry of counsel for the defendant/respondent

2020: June 10th,
2020: September 28th

JUDGMENT ON ASSESSMENT OF DAMAGES

Background Facts

- [1] **SANDCROFT, M [Ag.]**: On 24th September, 2015, the claimant who was riding his Yamaha motorcycle 2012 model Registration No. PD1907 along the Castries/Gros-Islet, sustained injuries when the defendant who was driving a Mazda Motor car Registration Number PD4447 and travelling in the opposite direction, suddenly and unpredictably crossed his path to turn into a minor road, thereby causing an accident.
- [2] A claim was issued in the instant proceedings by the claimant on 8th September, 2017 and a Defence was filed by the defendant on 6th October, 2017.

- [3] On 23rd January, 2020 at a case management conference the claimant and the defendant by consent agreed that the claimant was contributory negligent and liability would be apportioned at the rate of 70% to the defendant and 30% to the claimant.
- [4] The parties also agreed to the following special damages:
Loss to Motorcycle - \$34,126.00
Physiotherapy Consultations and Related Expenses - \$1,676.10
Medical Report - \$1,000.00
Domestic Assistance - \$4,500.00
Loss of Income - \$24,960.00
- [5] The parties however were unable to agree on the quantum for general damages and accordingly, have sought the Court's assistance on deciding the award for damages under this heading.
- [6] As a result of the collision, the claimant suffered the following injuries:
- a. Pain and suffering;
 - b. Abrasion and laceration to the right knee;
 - c. Comminuted fracture of the left patella;
 - d. Minimally displaced fracture of the left distal radius;
 - e. Displaced fracture of the right distal radius;
 - f. Blunt head trauma with no loss of consciousness.
- [7] The claimant at the date of the accident was employed as an air condition technician. He was immediately taken to the Emergency Department of Tapion Hospital where he received his initial treatment which included splinting of fractures with plaster of Paris.
- [8] The claimant was born on 15th May, 1982 and would have been 33 years old at the date of the accident.
- [9] The claimant filed a witness statement annexing his documentary evidence in support of the assessment on 30th May 2019, pursuant to an Order of the Master dated 29th April, 2019. Counsel for the parties were to file submissions and authorities to assist the Court in relation to the assessment of general damages

and these were filed by the claimant on the 27th of February, 2020. However, at the time of filing submissions, the defendant and the claimant were still conducting negotiations with a view to settling the matter in relation to quantum.

- [10] The claimant was subsequently managed at St. Jude Hospital on 9th October, 2015 with open reduction and cerclage wiring of the patella, and open reduction with plate and screw fixation of the right distal radius. He was discharged from the hospital on 10th October, 2015 for follow up care in the orthopaedic out-patients clinic which he still attends.

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;

¹ (1965) 7 WIR 491.

- (d) the extent to which, consequentially, pecuniary prospects are affected.

The nature and extent of the claimant's injuries

- [13] The claimant, Mr. Edwin, visited Dr. N. Dagbue, Consultant Orthopaedic Surgeon, for an assessment of any permanent impairment since he had achieved maximum medical improvement. In his most recent medical report dated February 8, 2020, Dr. Dagbue reported that the clinical and radiological assessment on presentation at the time confirmed that the claimant sustained the following injuries:
- a. Pain and suffering;
 - b. Abrasion and laceration to the right knee;
 - c. Comminuted fracture of the left patella;
 - d. Minimally displaced fracture of the left distal radius;
 - e. Displaced fracture of the right distal radius;
 - f. Blunt head trauma with no loss of consciousness.
- [14] Dr. Dagbue reiterated that the claimant was managed surgically at St. Jude Hospital on 9th October, 2015 with open reduction and cerclage wiring of the patella, and open reduction with plate and screw fixation of the right distal radius.
- [15] The claimant was last seen on February 3rd, 2020. Clinical and radiological assessment on presentation confirmed:
- i. Healed fracture of the left radius and ulna with plate and screws in situ.
 - ii. Healed fracture of the right radius with plate and screw in situ and early post traumatic osteoarthritis of the wrist.
 - iii. Healed fracture left patella with post traumatic patellofemoral and tibiofemoral osteoarthritis.
- [16] In respect of the foregoing indications of the claimant's current stable condition, the February Report further provided that the claimant had reached maximum medical improvement. Dr. Dagbue confirmed that under the guidelines of the American Medical Association for the evaluation of permanent impairment, the

claimant had a whole person impairment (herein WPI) of 13%. The report differentiates between impairment, which is specifically related to loss of body function and disability, which is related to the limitation or restriction of an activity, particularly occupation, due to the impairment.

- [17] The claimant continues to be managed with physiotherapy to correct his limp.
- [18] The claimant had also provided the following reports dated 18th November, 2015, 22nd June, 2017 and 8th February, 2020, prepared by Dr. N. Dagbue (herein Dr. Dagbue) upon his examination of the Claimant. The reports disclose that at the time of the collision the Claimant sustained the following injuries:
- 1) Abrasion and laceration to the right knee
 - 2) Comminuted fracture of the left patella
 - 3) Minimally displaced fracture of the left distal radius
 - 4) Displaced fracture of the right distal radius
 - 5) Blunt head trauma without any loss of consciousness
- [19] The injuries sustained by the claimant have however, generally healed well aside from the indications of scarring to his right knee, expected pain to the left wrist from strenuous activity, deformity, stiffness and early post-traumatic osteoarthritis of the right wrist and the early post traumatic osteoarthritis of the left knee, all of which is taken into consideration to provide a WPI of 13%.
- [20] Dr. Dagbue also provided that outside of the more definitively assessed WPI of 13%, there is the possibility that the Claimant may develop post traumatic osteoarthritis in his left wrist, that he may require arthroplasty of the right wrist and that the post traumatic osteoarthritis of the patellofemoral joint may necessitate total knee replacement surgery.

The nature and gravity of the resulting physical disability

- [21] The claimant last visited Dr. Dagbue on 8th February, 2020 where he was reassessed. The claimant complained of difficulty in running, a limp whilst walking, left wrist pains off and on and pain in his left knee. Dr. Dagbue's final assessment (herein the February Report) of the claimant's injuries to date confirmed the following:

- 1) Healed fracture of the left radius and ulna plate with screws in situ
- 2) Healed fracture of the right radius with plate and screw in situ and early post traumatic osteoarthritis of the wrist
- 3) Healed fracture of the left patella with post traumatic patellofemoral and tibiofemoral osteoarthritis

The February, 2020 Report also provided that the claimant was presently being managed with physiotherapy to correct his limp.

- [22] The February 18th, 2020 Report stated that the abrasions and lacerations that Mr. Edwin sustained to the right knee had healed well, but he would have permanent scars on the anterior knee.
- [23] The February 18, 2020 Report also stated that Mr. Edwin's blunt head trauma that he had sustained had healed well as he did not have residual symptoms at the time. He may however still have headaches on and off in the future.
- [24] The February 18th, 2020 Report also stated that the minimally displaced fracture of the left distal radius that Mr. Edwin sustained had also healed well. Though he would continue to have pain in the left wrist whenever he used it for strenuous activities. He may also develop post traumatic osteoarthritis of the wrist in the future.

Claimant's Submissions

- [25] The claimant refers to the 2013 decision in the Saint Lucian proceedings **Francis Maurice v Clarence Mangal et al** ² (herein **Mangal**) where the claimant in that instance was involved in a collision and sustained a commuted fracture of the left patella and late osteoarthritis. The claimant was unable to participate in playing cricket and act as umpire, the latter being one of three revenue streams, as it was extremely painful to stand for long periods of time. The claimant had a temporary partial disability of 60% which progressed into a 20% permanent disability. The claimant was able to return to umpiring cricket. The claimant had a similar type knee injury, was unable to participate in his routine sporting activity and was found

² *Francis Maurice v Clarence Mangal et al* SLUHCV2005/0176

to have a disability of 20%, as compared with the current claimant's WPI of 13%, and was awarded **\$87,300.00** for pain suffering and loss of amenities.

- [26] The claimant also submitted the St. Vincent and Grenadines decision of **Cleos Billingly v Kevon Jessie-Don Anderson**³ (herein **Cleos Billingly**) where the Claimant was awarded **\$110,000.00** (\$80,000.00 for pain and suffering and \$30,000.00 for loss of amenities). The Claimant sustained a head injury and multiple injuries to his limbs such as his leg, elbow, humerus (arm) and thumb. These injuries were treated with external fixation of the fracture of the distal humerus and closed reduction casting of the fracture of the tibia/fibula.
- [27] In the aforesaid case, Master Pearletta Lanns opined at paragraph 33 of her judgment that there was "no doubt that the claimant experienced severe pain immediately after the accident and each surgical procedure and during physiotherapy... that even now he continues to be in pain"
- [28] The claimant also relied on the St. Lucian case of **Howell Fontenelle v Jn Baptiste Marville**⁴ (herein **Howell**), where the Claimant in that instance suffered multiple injuries to his hands, including the extensors of his fingers and thumb being severed. The Claimant was left with 20% permanent disability. However, no evidence was provided in relation to the pain and suffering endured other than the Claimant stating that he still suffers pain. Additionally, no evidence was given in relation to how his day-to-day living was affected. In 2016 an award of **\$40,000.00** was delivered by Justice Cenac-Phulgence.

Defendant's Submissions

- [29] The defendant submitted that with the 2002 local jurisdiction decision of **Marcel Fevrier et al v Bruno Canchan et al**⁵ (herein **Marcel Fevrier**), the Defendant collided with the first-named Claimant's vehicle along the Castries/Gros Islet Highway. The first-named Claimant sustained a fractured leg, fractured toes, fractured hip and a fractured left knee. The first-named Claimant had operative

³ *Cleos Billingly v Kevon Jessie-Don Anderson*, SVGHCV2013/0096

⁴ *Howell Fontenelle v Jn Baptiste Marville*, SLUHCV2011/0837

⁵ *Marcel Fevrier et al v Bruno Canchan et al*, Saint Lucia Civil Suit No. 313 of 1989

and reduction and K-wire fixation of the fractures and dislocation in his feet and the fractured tibia and fibula were immobilized in a cast, leaving the Claimant incapacitated for six months. The first-named Claimant was stated to have 2% permanent disability. The first-named claimant was awarded damages in the sum of **\$50,000.00** for pain, suffering and loss of amenities.

[30] The defendant further submitted that in the case of **Laura Marrocco v the Attorney General of Antigua and Barbuda**⁶, (herein **Laura Marrocco**) the Claimant, a 67 year old female sustained similar wrist and knee injuries, being a fractured right distal radius and distal ulna and traverse fracture and bicondylar non-displaced tibia plateau fracture of the right knee. The Claimant had to use a walker for 6 months. The Court in 2006 awarded **\$60,000.00** for pain, suffering and loss of amenities.

[31] The defendant posited that the claimant's cast in **Cleos Billingly** was removed some 5 months after the accident. Additionally, both claimants in **Marcel Fevrier** and **Laura Marrocco** were immobilized for a period of 6 months. In comparison the claimant in these proceedings made a claim for domestic assistance for a period of 90 days (with which the defendant has agreed). The claimant has not stated the amount of time for which he was immobile nor has he provided any further evidence to suggest his period of immobility was as extensive as the claimants in the aforementioned cases. It was submitted that an award for loss of amenities should also take into account and, should reflect no more than the 90-day period of alleged immobility.

[32] The defendant further posited that in the 2006 Dominican decision of **Ronald Rossi v Stephanie Peters**⁷, the claimant was 46 years old at the time he sustained a knee injury occurring from a similar type vehicular accident as a motorcycle rider. The claimant complained of other injuries however was unable to prove the same due to lack of medical evidence. His counsel submitted that an award should be between the ranges of \$120,000.00 to \$160,000.00. Master Fidela Corbin Lincoln however found that an award of **\$80,000.00** was more

⁶ *Laura Marrocco v the Attorney General of Antigua and Barbuda*, ANUHCv1997/0240

⁷ *Ronald Rossi v Stephanie Peters*, DOMHCv2013/0308

appropriate for his injuries, age and circumstance having similarly reviewed the case of **Mangal** and other similar type cases.

[33] The defendant submitted that the cases of **Howell**, as well as, **Aschelle Hippolyte v Joanne Page**⁸ (herein **Aschelle**) and **Arjoon v Williams**⁹ (herein **Arjoon**) relied upon by the claimant are unreliable in the current circumstances. The injuries in these cases concerned mainly the hand and arm areas. **Arjoon** is a case in another jurisdiction where the claimant sustained a fracture to the hand and forearm and as such provides little guidance or relevance to these proceedings. The **Aschelle** case is of little assistance as well; though a local case it concerns a crush hand injury which required 5 surgeries due to continuous complications arising from the injury and as such is reflective in the award of **\$90,000.00** for pain, suffering and loss of amenities, whereas the facts are starkly different in these proceedings.

[34] The defendant further submitted that it was unreliable to use the amounts awarded for individual injuries in a cumulative effect, as pain and suffering is an overall assessment of the whole body, inclusive of physical and mental well-being. The court has taken the approach that the pain and suffering from multiple injuries overlaps and that an overall view must be taken when calculating the quantum.

[35] That the case of **Sadler v Filipiak et al**¹⁰ summarizes the approach developed through judicial precedent in assessing the quantum for multiple injuries. Lord Justice Pitchford at paragraph 15 of his judgment quotes the judge at first instance and affirms the principle declared for assessing multiple injuries;

“...60. Mr Lazarus reminded me, I think rightly, that the award of damages is not strictly for the injuries sustained per se, but for the pain and the suffering and the loss of amenities which result from them. That supported his contention that I must allow for a measure of overlap.”¹¹ (our emphasis)

[36] The defendant also posited that the issue of discounting and the degree of discounting in respect to amalgamating the awards considered for separate

⁸ *Aschelle Hippolyte v Joanne Page*, SLUHCv2008/0805

⁹ *Arjoon v Williams*, Judgment dated 3rd May, 1973 – DD pg. 64

¹⁰ *Sadler v Filipiak And Another* [2011] EWCA Civ 1728 per Lord Justice Pitchford at para 15

¹¹ *Ibid*, *Sadler* per Lord Justice Pitchford at para 15

injuries due to an overlap in the pain and suffering is discussed at paragraph 32 as reproduced below:

“In *Smith v Jenkins* [2003] EWHC 1356 (QB) Gibbs J was faced with the question whether it was appropriate to make a significant discount in respect of the phenomenon of overlap between categories of injury... At paragraph 81 of his judgment Gibbs J explained:

"81. In assessing the appropriate award under this head, I bear in mind that in most cases in which a claimant suffers from two or more distinct categories of injury, it may not be appropriate simply to aggregate the figures which might be awarded for each injury considered separately. A discount may be appropriate in arriving at a suitable total figure. Here, I think that a discount would be inappropriate. In the case of each of the categories of injury suffered, the effect of the one has in my view made it if anything more difficult for the claimant to cope with the other, even after making allowance for the exaggeration already discussed. ... "¹²

[37] And that the case of **Santos v Eaton Square** is compared at paragraph,

“On the other hand in *Santos v Eaton Square Garage Limited* [2007] EWCA Civ 225 there was a distinct overlap between the painful consequences of physical injury called chronic pain syndrome and a diagnosis of PTSD. In that case Maurice Kay LJ said at paragraph 22:

"22 ... However, in this as in any other similar case, the correct approach is not one of simple aggregation. Compensation for pain, suffering and loss of amenity has to take into account that where there is a plurality or duality of conditions simple aggregation would produce over-compensation for pain, suffering and loss of amenity..."¹³

[38] And that Lord Justice Pitchford affirms the correct approach in assessing multiple injuries sustained by a Claimant at para 34:

“It is in my judgment always necessary to stand back from the compilation of individual figures, whether assistance has been derived from comparable cases or from the JSB guideline advice, to consider whether the award for pain, suffering and loss of amenity should be greater than the sum of the parts in order properly to reflect the combined effect of all the injuries upon the injured

¹² Ibid, Sadler per Lord Justice Pitchford at para 32

¹³ Ibid, Sadler per Lord Justice Pitchford at para 33

person's recovering quality of life or, on the contrary, should be smaller than the sum of the parts in order to remove an element of double counting. In some cases, no doubt a minority, no adjustment will be necessary because the total will properly reflect the overall pain, suffering and loss of amenity endured. In others, and probably the majority, an adjustment and occasionally a significant adjustment may be necessary.”¹⁴ (emphasis added)

- [39] The defendant further posited that the claimant would suffer an overall emanation of pain as the injuries were sustained at the same time and no one injury exacerbated the other or caused the other to occur. Additionally, it is submitted that there would be a huge degree of overlap if the Claimant's injuries were aggregated based off the awards submitted in the knee injury case of Rossi and the hand related injury cases of **Howell, Arjoon** and **Aschelle**. Accordingly, the Claimant would be overcompensated and inevitably the award would require significant discounting.
- [40] The defendant also submitted that the case of **Clemmie Boyd v Ellon Lewis et al**¹⁵ did not assist the Court as there were several soft tissue injuries, along with disfiguring facial injuries, acute blood loss and only one similar injury being a wrist fracture. Additionally, the age of the claimant at 76 years old and the jurisdiction were too dissimilar from these proceedings. Accordingly, little weight should be given to the amount awarded in this case.
- [41] The defendant in conclusion submitted that an appropriate award for general damages for the claimant should be in the sum of \$90,000.00 for pain suffering and loss of amenities, the claimant's case did not have any aggravating factors which should increase his award above the more relevant cases of **Marcel Fevrier, Laura Morrocco, Mangal** and **Cleos Billingsy** cited by both the claimant and the defendant in these proceedings.

Assessment guidelines

¹⁴ Ibid, Sadler per Lord Justice Pitchford at para 34

¹⁵ GDAHCV2015/0466

[42] 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**,¹⁶

"... 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)

[43] In the case of **Wells v Wells**,¹⁷ 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.

¹⁶ [1983] 2 All ER 698 at 699.

¹⁷ [1998] 3 All ER 481 at 507.

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.¹⁸

- [44] I am also guided by Gordon JA in the case of **Philmore Skepple v Joseph Weekes**¹⁹ in which he quoted with approval the dicta of Singh JA in **Fenton Auguste v Francis Neptune**²⁰ 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 is the sum assessed for each relevant head of damage and thus to be able, on appeal, to challenge any error in assessments.²¹

- [45] It is well established that an 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

¹⁸ Guidelines for the Assessment of Damages in Personal Injury Cases, 10th edn., Oxford University Press.

¹⁹ Antigua and Barbuda High Court Civil Appeal No. 10 of 2009 (delivered 25th January 2010, unreported).

²⁰ Fn. 4 at p. 5.

²¹ See Sachs LJ in *George et al v Pinnock et al* [1973] 1 WLR 118.

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 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.

[46] 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.

[47] 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”

[48] The claimant submits a figure of ECD\$150,000.00 for pain and suffering and ECD\$50,000.00 for loss of amenities as the appropriate award to be made under this head. The claimant also submits a figure of ECD\$748,800.00 as General Damages for future loss of earnings, agreed Special damages of ECD\$66,846.91 and prescribed costs in accordance with the CPR rule 65.5. The claimant suggested that the amount be deducted for uncertainty in employment and for an amount which he would necessarily spend on himself. The claimant and 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.

[49] 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.”²²

Quantification of the Awards

General Damages Award

- [50] 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*.

- [51] The dictum of Lord Reid was applied by the Jamaican Court of Appeal in **Beverley Dryden v Winston Layne** *supra* 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.”

- [52] In seeking to compare personal injury cases, the pitfall of attempting to standardise damages must be scrupulously avoided. The decided cases are a

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

mere guide to avoid making “a wholly erroneous estimate of the damage suffered” or the awarding of 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?”

- [53] 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.
- [54] As was previously indicated, the defendant was 30% responsible for the accident giving rise to the claimant’s injuries. It is therefore the agreed joint-submission of an apportionment of damages on the basis of a 70:30 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

- [55] 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).
- [56] Mr. Edwin, in his witness statement stated that as of 22nd June 2017, I could have performed most of the basic activities of daily living like bathing, cooking washing etc., but with difficulty as I would have pain in the knee when I stand for long periods of time.
- [57] Mr. Edwin stated that he could no longer effectively perform his job as an Air Conditioner Technician as it involved standing and using his hands for the most part and for prolonged periods.
- [58] 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.
- [59] Mr. Edwin also stated that since the accident his performance on the whole has seriously diminished. He was employed as an Air Conditioner Technician at the Wally's Refrigeration and Air Conditioning Company. He was paid a monthly wage of about ECD\$5000.00.
- [60] Mr. Edwin further stated that because of the aforesaid accident that he was out of work on sick leave as a result of the injuries for a period of six months. He also continued to suffer from temporary partial impairment until this time.
- [61] Mr. Edwin also stated that at his last visit on 3rd February 2020, Dr Dagbue stated that clinical and radiological assessment on presentation confirmed that he was healing but would still suffer a long-term impairment.
- [62] Mr. Edwin continued to be managed with physiotherapy to correct his limp. However, since he had achieved maximum medical improvement, Mr. Edwin was afraid that his limp would be permanent.

Dr. Dagbue assessed that Mr. Edwin's current medical condition and resulting injuries and disability since achieving maximum medical improvement were:

- (a) The abrasions and lacerations that Mr. Edwin sustained to the right knee have healed well, but I will have permanent scars on the anterior knee.
- (b) The blunt head trauma that he sustained has healed well. Mr. Edwin does not have residual symptoms at this time. However, he could suffer from headaches off and on in the future.
- (c) The minimally displaced fracture of the left distal radius he sustained had healed well. He would continue to have pain in the left wrist whenever he uses it for strenuous activities. He may develop post traumatic osteoarthritis of the wrist in the future.
- (d) The fracture of the right distal radius had healed well with mild residual deformity, and stiffness of the wrist as a result of the severity of the injury. Mr. Edwin had also developed post traumatic osteoarthritis of the wrist which may require arthroplasty of the wrist in the future.
- (e) The fracture of the left patella had healed well. Mr. Edwin had developed early post traumatic osteoarthritis of the patellofemoral joint, which may necessitate total knee replacement surgery in the future.
- (f) Dr Dagbue assessed him and concluded that as a result of his injuries, he would have difficulty climbing up and down ladders and steps as a result of the continued pain in the knee. That was a correct assessment because he could no longer climb ladders and heights.
- (g) He would experience wrist pain whilst driving and difficulty in running, jumping whilst playing sports.
- (h) He would continue to suffer from a limp when walking, left wrist pains off and on and pain in the left knee from time to time.
- (i) He would continue to have difficulty in performing some of his activities of daily living like washing, cleaning, landscaping his yard, using a weed eater to cut the grass, etc.

- [63] Mr. Edwin further stated that he experienced difficulty performing his job as an Air Conditioner Technician because he could not lift up heavy items and would find it difficult to climb stairs and ladders.
- [64] Mr. Edwin averred that as a result of his injuries that he was no longer able to participate in motorcycle competitions and races. This was a sport that he said he enjoyed prior to the accident.
- [65] Mr. Edwin further averred that he was no longer able to go out socialising at any event where he was required to stand for prolonged periods of time. He also required assistance with most of his household chores and duties.
- [66] Mr. Edwin further stated that he was no longer able to maintain his physical fitness. Prior to the accident he was an avid sports player and attended the gym regularly. As a result of his injuries and resulting disabilities, he had become unfit, had put on unnecessary weight and had in the process lost his self-confidence, and was unable to participate in strenuous physical activities or lift heavy items.
- [67] It was very pellucid from Mr. Edwin's medical report that his injuries had affected his physical ability to carry out his job to some extent and that they caused him some discomfort in the work environment. That Mr. Edwin's job as an Air Condition Technician at Wally's Refrigeration and Air Conditioning required him to be standing, climbing ladders and doing work which required him to engage in the use of his muscles and his phalanges is not lost on the Court.
- [68] Dr. Dagbue stated in a subsequent medical report that it was very likely that Mr. Edwin's condition would remain permanent and that if his condition continued to deteriorate that surgical intervention would become necessary.
- [69] In the circumstances, and having considered all the authorities and the evidence, I also consider the sum of ECD\$105, 000.00 for pain and suffering and ECD\$15, 000.00 for loss of amenities to be an appropriate, fair and reasonable award and I so award.

Conclusion

- [70] 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 approach 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.”

- [71] It is at this juncture that I must register my staunch disagreement with Counsel for the defendant who was of the humble view that there would be a huge degree of overlap if the claimant’s injuries were aggregated based on the awards submitted in the knee injury case of **Rossi** (supra) and the hand related injury cases of **Howell**, **Arjoon** and **Aschelle** (supra); and that the claimant would be overcompensated and inevitably the award would require significant discounting.
- [72] 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 wrist and knee regions, and the fact that this is a 38 year old man who still is in the prime of his life and has to contend with excruciating pain and to be dependent on physiotherapy and pain-killers for relief and comfort from the severe pains.

Handicap on the Labour Market

- [73] As was helpfully elucidated by Harrison, J.A in: **Monex Ltd. v Mitchell and Grimes** – SCCA 83/96 (judgment delivered December 15, 1998), ‘**loss of future earnings represents a distinctive different set of circumstances where the victim who, earning a settled wage has suffered a diminution in his earnings on resuming his employment or assuming new employment due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable in such circumstances.**’

Thus, as was stated in **Fairley v Thompson** – [1973] 3 All ER 677, by Lord Denning, ‘**compensation for loss of future earnings is awarded for real assessable loss proved by evidence.**’

It is very important to note that, as was stated by Browne J in **Moeliker v A. Reyrolle and Co. Ltd.** – [1977] 1 All ER 9, ‘**As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he (the claimant) is earning as much as he was earning before the accident and injury, or more, he has no claim for loss of future earnings. If he is earning less than he was before the accident, he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But in either case he may also have a claim, or an additional claim, for loss of earning capacity, if he should ever lose his present job.**’

- [74] In some of the case law vis-a-vis claims for loss of future earnings, such claims are set out as a sub-head of the overall special damages, items/sums being claimed for. In other cases though, such claims are treated as an item of general damages and therefore, are not specifically particularized.
- [75] By now it should be accepted, based on case law, that there is a distinction between handicap on the labour market and loss of future earnings. The Court of Appeal of Jamaica in **Monex Limited v Mitchell and Gmines** S.C.C.A. 83/96 (delivered December 15, 1998) held at pages 12 and 13 that there was a difference between handicap on the labour market and loss of future earnings. Harrison J.A. who delivered the leading judgment, accepted as correct Lord Denning's distinction between the two. This Lord Denning did in **Farley v John Thompson** 119731 2 Lloyd's Rep. 40. Harrison J.A. also held that loss of earning capacity arose where the claimant had resumed work without any loss of earning or resumed work at a higher rate of earning although there was a risk of losing the current job and that the claimant will be at a disadvantage in the labour market which will make it less easy to secure employment (see pages 12 and 13). His Lordship cites **Moeliker v Reyrolle** [1977] 1 W.L.R. 132. Harrison J.A. repeated

this view in **Dawnette Walker v Hensley** Pink S.C.C.A No. 158/01 (June 12, 2003).

- [76] In **Atlas v Briers** 144 C.L.R. 202 Barwick C.J. of the High Court of Australia, notwithstanding the vacillatory reception of the other members of the court, stated the true position of what handicap on the labour market is being compensated. His Honour stated at page 209:

The plaintiff in **Gourley's Case** had been deprived of some part of his earning capacity. It was for this deprivation that compensation was to be awarded. Undoubtedly that capacity is a capital asset, though like other capital assets capable by its use or employment of producing income. Logical adherence to this concept would, in my opinion, avoid much of the confusion which to my mind has crept into the assessment of damages for loss of earning capacity tortiously caused. Although statements can be found in decided cases to the effect that it is for loss of earning capacity that compensation by way of damages is to be assessed, in other cases the method of determining, or the factors employed in determining, the value of such an asset as earning capacity have been confused with the identity of the asset itself. It can be seen in the reasons in **Gourley's Case** itself, where loss of earnings or non-receipt of remuneration is treated as synonymous with loss of earning capacity: compensation for the non-receipt of earnings is what is sought rather than compensation for the deprivation of a capital asset, albeit one capable of producing earnings. The confusion is exacerbated, in my opinion, by the practice of determining the compensation for non-receipt of earnings by estimating the value of an annuity to produce the actual earnings which the earning capacity might have been expected to produce during the remaining working life, some endeavour being made by arbitrary discounting to take account of the vicissitudes of life. A multiplier is applied to the estimated periodic earnings.

But the plaintiff has not in a relevant sense lost the earnings either to the period before verdict or the future thereafter: he has lost the capacity to earn perhaps the equivalent of his current earnings or perhaps more or less according to the reasonable expectations of the employment of his earning capacity. If the award of damages for such an injury destroying or diminishing his earning capacity were merely a matter of replacing those earnings, the amount of the award would be taxable: but it is not, for the reason that the award is for a capital loss, however much the amount of the award is quantified by a consideration of what the use or employment of that capacity might be expected to produce. In other words, the assessment of damages for loss of earning capacity is in truth an exercise in valuation.

[77] Here, his Honour is making a pellucid distinction between the capacity to earn and the assessment of the loss. The learned Chief Justice makes the telling point that confusion has arisen because of the methodology of computing the damages. The usual mode of computation is by reference to what the claimant has earned but that should not obscure the fact that the capacity to earn is more in the nature of a capital asset than it is simply loss of income. This is brought out by the fact that a person may not be earning but there can be no doubt that his capacity to work has been impaired. In this circumstance, the only difficulty, if it could properly be characterised as a difficulty is, what would be the correct amount for compensation of the injury to this asset?

[78] This was brought out with greater clarity by the High Court of Australia in the case of **Medin v Stote Government Insurance Commission** 182 C.L.R. 1, In that case, the claimant was injured in a motor vehicular accident. He resumed work but was forced to take early retirement because of the effect of the injuries. At the trial, the claimant indicated that his injuries did not make him able to perform at the level that he wanted. It appeared that his employer did not have any difficulty with his work. The issue was whether he could claim for handicap on the labour

market. The court held that he was entitled to recover under that head. McHugh J. at page 15 summed up the distinction in this way:

In Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings. In practice, there is usual little difference in result irrespective of whether the damages are assessed by reference to loss of earning capacity or by reference to loss of earnings. That is because the injured plaintiff recovers not merely because his earning capacity has been diminished but because the diminution of his earning capacity is or may be productive of financial loss". Nevertheless, there is a difference between the two approaches, and the loss of earning capacity principle more accurately compensates a plaintiff for the effect of an accident on the plaintiff's ability to earn income. Earning capacity is an intangible asset. Its value depends on what it is capable of producing. Earnings are evidence of the value of earning capacity but they are not synonymous with its value. When loss of earnings rather than loss of capacity to earn is the criterion, the natural tendency is to compare the plaintiff's pre-accident and post-accident earnings. This sometimes means that no attention is paid to that part of the plaintiff's capacity to earn that was not exploited before the accident. Further, there is a tendency to assume that if pre-accident and post - accident incomes are comparable, no loss has occurred. (My emphasis)

- [79] The last sentence is important. It points out the fallacy of equating loss of income or the absence of loss of income with impaired working capacity. In the Anglophone-Caribbean, we have followed the English approach in this regard. In **Forley v John Thompson** [1973] 2 Lloyd's Rep. 40 Lord Denning held at page 42:

It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence, Compensation for diminution in earning capacity is awarded as part of general damages. If I may give an instance, a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before, He will have diminished earning capacity, but he has not lost any future earnings.

- [80] This line of reasoning is consistent with the Australian position. It is the damage to the loss of the capital asset that is being compensated. In this analytical framework, it is obvious that it matters not whether or not the claimant is working at the time of the trial.
- [81] This reasoning of Browne L.J. in **Cooke** is consistent with the decision in **Glady's Smith (feme sole) v Lord Mayor, Aldermen and Citizens of Manchester** (1974) 17 K.I.R. 1. In that case the claimant did not suffer any loss of future earnings because her employers agreed to keep her on. She did suffer a loss of earning capacity because, as her lawyer submitted, she was not able to leave the job she was in and go out into the open labour market and compete on equal footing with her competitors. However, if it were not for the generosity of her employers, she would have been out in the cold. This decision demonstrates the point made by the court in **Medin** - one is not to confuse loss of earnings with loss of earning capacity.
- [82] Once it is accepted that the true and main object of compensation is the claimant's intangible asset of his earning capacity and not his actual earnings, what can it matter if it is the case that the claimant never worked at all? The fact that a claimant did not use his working capacity, his intangible asset, does not make it any less an asset which, if damaged, is a proper object of compensation. If this is

the case, it is not quite clear what is the relevance of the risk of losing the current job.

- [83] A step in the right and progressive direction was made by **Monex**. The claimant in that case was 10 years old at the time of the accident and twenty-four years at the time of trial. She had never worked. An award of loss of earning capacity was upheld by the Court of Appeal. This could only have been on the basis that the claimant had an intangible asset that was now impaired. As Harrison J.A. said at page 14:

The award of damages for loss of earning capacity in respect of an infant victim not yet earning a wage and disabled by the act of the defendant, although speculative, represents to the said victim a real loss which a court has a duty to examine and quantify, if material is provided by the evidence.

- [84] The real loss referred to in this passage could not possibly be loss of income since if the claimant has never worked, was not working at the time of the trial and unlikely to work in the future, Harrison J.A. could not possibly have been referring to loss of future earnings. The only possible loss that the court could have had in view is the capacity to earn as distinct from the earnings themselves. Thus, at least in this case, the Court of Appeal of Jamaica and the High Court of Australia are at one, never mind the contradictions inherent in the **Moeliker** formulation.
- [85] Ms. Mederick had suffered hypoaesthesia (decreased sensation to the C4-C5 dermatome); deep tendon reflexes decreased on the left side of her body, left toe dorsiflexion 4+/5 and decreased range of motion of the neck to the right, which have all been documented. It is true that the medical reports have not explicitly addressed the issue of handicap on the labour market and the Court of Appeal of Jamaica has said that before an award under this head can be made there must be medical evidence supporting the claim (**Dawnette Walker v Hensley Pink** S.C.C.A No. 158/01 (June 12, 2003)). The Court of Appeal also held that the claimant must be working at the time of trial to become eligible for an award under the head of handicap on the labour market. It would seem to me that the decision of the court has to be seen in the context of the case that was before it. There was

no evidence that the claimant in that case had such extensive injuries as Ms. Mederick. In other words, the severity of the injuries of the claimant in the Walker case did not make it immediately obvious that the claimant must necessarily have suffered an impaired capacity on the labour market. I do not understand the Court of Appeal to be saying that if the injuries are so extensive that it does not require medical evidence to confirm that the claimant would suffer a handicap on the labour market, the Trial Court could not make such an award. This would be like saying that a mason who has lost both hands and legs cannot get an award under this head if the doctor does not indicate that he has suffered a handicap on the labour market.

- [86] By parity of reasoning, from the injuries suffered by Mr. Edwin there can be no doubt that he has suffered damage to his capacity to work, or if one prefers more familiar language, he may not be able to compete with other able bodied persons on the open market.
- [87] The prospect of work for a severely injured, adequately educated thirty-eight-year-old man is not as grim as it appears. If Mrs. Smith in **Gladys Smith** could secure an award under this head, however, Mr. Edwin is not necessarily in that position to benefit under this head of damages.
- [88] In deciding whether the multiplicand or the lump sum method, in awarding under this section, if any to accept, it is clear from the English approach, which has been adopted in several countries in the Anglo-phone Caribbean, that the lump sum payment is not meant to be derisory because it is real loss that is compensated. I would not award any sum to the claimant under this head of damages.

Loss of Future Earnings/Loss of Earning Capacity

- [89] 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. Edwin had also achieved maximum medical improvement and it has been four (4) years since the accident, although he is employed at this time, he was concerned that he may lose or may be at risk of losing his employment at some time in the future and

may then, as a result of his injury, be disadvantaged in getting another job equally well paid.

[90] Therefore, I must address my mind to whether there is a risk of unemployment as a result of the claimant's injuries, and whether the risk would materialise within a few years after the accident. His pains and post traumatic osteoarthritis have made it particularly difficult to cope in the present work environment. He also experiences discomfort when he has to stand for lengthy periods. Though the medical evidence does not 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.

[91] 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.

[92] 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.

[93] 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.'

- [94] 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.
- [95] **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).
- [96] 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.

- [97] 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.
- [98] 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 St. Lucia but Ms. Xavier has pointed me to the Court of Appeal 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. Ms. Xavier further contended that given the learning in the cases cited, she 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.

- [99] **'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.
- [100] 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.
- [101] 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.
- [102] 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.'
- [103] The onus was on the claimant to prove, to the requisite standard, that he was earning an income as of May, 2015 and that, as a consequence of the commission of the relevant tort, by the defendant, he was negatively impacted to the extent that, amongst other losses suffered by her, 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.

- [104] The claimant's witness statement and supplemental witness statement divulged his earnings before and after the accident. However, though not much consistent documentary proof was submitted to the Court. In my view, this is astonishing because his job was not informal in nature. In other words, the claimant was not in the position of the pushcart vendor.²³ No 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 his employer Wally's Refrigeration and Air Conditioners to calculate the award. The figure of five thousand Eastern Caribbean dollars (ECD\$5,000.00) will therefore be used.
- [105] This figure would have to be multiplied by 52²⁴ (12 in this case) to ascertain a yearly figure. The resulting figure, the multiplicand, is sixty thousand Eastern Caribbean dollars (ECD\$60, 000.00).
- [106] 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 life²⁵.
- [107] Having been born on May 15, 1982, the claimant was almost thirty-eight (38) years old at the date of the judgment. The retirement age for men is sixty five (65). When 38 is subtracted from 65, 27 is the result, the multiplier. This number should be discounted to take account of the following factors: receipt of earnings lost as a

²³ 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.

²⁴ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

²⁵ See *Lai Wee Lian v Singapore Bus Service (1978) Ltd* [1984] A.C. 729.

lump sum and the vicissitudes of life (the claimant might have lost his job at some point in the future through redundancy or illness).

- [108] I believe that an appropriate multiplier would be 18. Consequently, the mathematical calculation for the claimant's loss of earning capacity is as follows:
 $\text{ECD\$60,000} \times 18 = \text{ECD\$1,080,000}.$

Future Medical Services

- [109] The claimant seeks an award of ECD\$52,000.00 for future medical care. Dr. N. Dagbue in his letter states that the claimant may need, total knee replacement surgery and Anthroplasty of the right wrist which would be required in the future if the post traumatic osteoarthritis of the wrist and left knee which Mr. Edwin has worsens.
- [110] The defendant concedes to some degree the probability of the replacement surgery but not necessarily the amount of ECD\$52,000.00, and the evaluation as advised by the medical practitioner in the event that the claimant's condition deteriorates and surgery is needed in the future. He also objects to the unsubstantiated additional sum of ECD\$1,000.00 requested by the claimant for incidentals and out of pocket expenses.
- [111] I make a nominal award of ECD\$1,000.00 to cover the costs of out of pocket expenses and other incidentals thus making a total sum of ECD\$53,000.00 for future medical care.
- [112] Finally, I wish to thank learned Counsel for their submissions in this matter.

Orders

- [105] The order on the assessment of damages is as follows:

General damages:

a. pain and suffering ECD\$105,000.00 at 6% interest from the date of the service of the claim form to the date of payment and ECD\$15,000.00 for loss of amenities;

- b. loss of future earnings/loss of earning capacity - ECD\$1,080,000.00 at no interest;
- c. no order as to handicap on the labour market;
- d. future medical expenses in the amount of- ECD\$53,000.00 at no interest;
- e. 'Special damages' is awarded to the claimant, in the sum of ECD\$66,262.01, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment.
- f. all the aforesaid amounts are to be discounted by 30% for contributory negligence;
- g. 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