

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

BRITISH VIRGIN ISLANDS

CLAIM NO: BVIHCV2017/0206

BETWEEN:

ALISTON WHEATLEY

Claimant

and

KEVIN MOOREHEAD

Defendant

Appearances: Ms. Karen Reid and Mandy Harnarinesingh of counsel for the claimant
No appearance for or on behalf of the defendant

2020: January 28,
March 5

JUDGMENT ON ASSESSMENT OF DAMAGES

Background Facts

- [1] **R. SANDCROFT, M [Ag.]**: On 2nd of November, 2011 at or around 8:30 to 8:45 a.m. the Claimant was the driver of jeep motor vehicle registration number PV-23281, which he was driving from a westerly to an easterly direction along the Sir Francis Drake Highway. The Claimant was driving from VI Motors in Duff's Bottom and was heading to the vicinity of the Prospect Reef Magistrate's Court (PRMC) where he was working at the time. The Claimant was accompanied by one of the Virgin Island Motor's employees, Mr Rommel Silao, who was seated in the front passenger seat of the vehicle that the Claimant was driving. The Defendant, whilst driving a motor jeep registration number PD 121, drove at such an excessive rate that the force of the impact caused the Claimant's vehicle to hit the wall at the Dolphin Discovery entrance, break several bricks, spin around and flip on its left

side, sustaining significant damages and causing severe injuries to the Claimant. The Claimant had lost consciousness following the collision and was in severe pain.

- [2] On 1st of November, 2017, the claimant filed a claim form and statement of claim for general damages for negligence, damages for personal injuries and loss, and special damages in a sum to be assessed by the court with costs and interest. The defendant did not acknowledge service of the claim and there was no defence filed in this matter either.
- [3] Judgment in Default was entered by the Court on 19th of March, 2019 for quantum of damages to be determined by the Court. Special damages and General damages were also to be assessed by the Master.
- [4] The claimant filed a witness statement annexing his documentary evidence in support of the assessment on 15th June 2019, pursuant to an Order of the Master dated 19th March, 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 27th of September 2019, however, at the time of filing submissions, the Defendant still had not filed any witness statements.

General Damages

- [5] 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

- [6] The claimant, Mr Wheatley, suffered the following injuries as a result of the accident which are detailed in the medical report of Dr. Krishna at the Peebles Hospital: Claimant was found to be in respiratory distress and had agonizing pain in the left side of his shoulder and the left side of his chest, Claimant was unable to move his left upper limb due to respiratory distress. CT scans were done on his chest and brain which showed a number of injuries sustained in the collision. In that report and in Mr Wheatley's witness statement, with documentary evidence annexed in support of the assessment of damages, the injuries are stated as being: (1) left hemopneumothorax; (2) fractured left clavicle; (3) fracture to 2nd to 6th ribs on left side; (4) fracture to left scapula; (5) contusion to both lungs; (6) subcutaneous emphysema to his left chest; (7) pneumothorax, left lung approximately 30%; (8) minimal hemothorax, bilateral; (9) pulmonary contusions both lungs, more severe in the left with subsegmental atelectasis in the left; (10) complete displaced fracture in the 3rd to 9th left posterior ribs segmental in 4th left lateral rib; (11) complete non-displaced fracture, left clavicle; (12) complete displaced comminute fracture, left scapula; (13) subcutaneous emphysema, left supra-clavicle and lateral chest wall; (14) moderate cervical spondylitis cervical spine with muscle spasm; and (15) subsegmental atelectasis to his left lung.
- [7] The claimant was hospitalised for two and half weeks during which time he underwent surgery to his clavicle and scapula, among other procedures at the Jackson Memorial Hospital in Miami, Florida. Upon his release from the Jackson Memorial Hospital, he was flown back to Tortola, where he commenced physical therapy at the Peebles Hospital on the 21st day of December, 2011.
- [8] The claimant had an initial evaluation done by Michelle Leslie, DPT, Physiotherapy Manager, dated 31st of October, 2017, where it was observed that the Claimant wore a sling for the support of his left arm, There was reduced range of motion for

all passive movements of his left shoulder, his flexion was reduced by 17%, his abduction was reduced by 17%, his medial rotation was reduced by 33% and his lateral rotation was reduced by 61%.

- [9] Mr Wheatley stated that he attended some twenty-five (25) physiotherapy sessions over a few months during which time he suffered tremendous pain and discomfort. He was prescribed tramadol for pain management during the time of his pain and discomfort. He also states that he has experienced excruciating pain as a result of his injuries and still suffers from shooting pain in his left shoulder and side, which negatively affects his daily life.

The nature and gravity of the resulting physical disability

- [10] Mr Wheatley states that he can no longer engage in his normal recreational activities such as basketball, touch football and swimming. Due to the shutting down of the left part of his body on him at periodic times, he is unable to enjoy a full sexual experience. He is also unable to stand or sit for long periods of time without experiencing pain and to mitigate this he has had to keep moving continuously. He continues to take cocodomol and tramadol for pain management.
- [11] Mr Wheatley also states that when he regained consciousness, he realized he was on a stretcher and was wearing a neck brace. He was in severe pain and was being assisted by some fire officers who advised him that they would have to cut him out of his motor vehicle. He then lost consciousness again, when he regained consciousness, he was at the hospital where he began feeling severe pain in his chest, head, back, left shoulder and lower abdomen.
- [12] Consultant Radiologist Dr. Jonas A. Earle, in a CT report dated the 2nd of November, 2011, also stated that there was moderate cervical spondylitis of the cervical spine with muscle spasm. It is noted that the claimant suffered a comminute fracture in the cervical spine region which is the region of the back which plays a key role in the structural and physical support of the human skeleton. That in my mind is significant as it suggests that the claimant would be

left with some spinal deformity as a result of such a fracture and excruciating pain as a result of the attendant muscle spasms being experienced by Mr Wheatley and which would also affect his prolonged periods of standing or sitting in any one position. This no doubt would also limit the physical activities of Mr Wheatley who also stated that his pre-accident extra-curricular activities were drastically impacted by the accident he was involved in.

[13] The medical report of Mr. Wheatley details inter alia that since he was discharged from the Jackson Memorial Hospital in 2011, he has had annual visits up to 2016. Each time he is advised physiotherapy and analgesia to manage his symptoms. It was even recommended that further surgical input could be attempted to remove the screws currently holding his left clavicle in place, but that it was unlikely to relieve his symptoms. He also reports frequent visits to his private doctor in Tortola due to on-going pain and other physical challenges. The severity of daily episodes of pain has reportedly affected his ability to perform certain activities of daily living which posed no challenges prior to his injury, such as certain household chores, gardening and driving. He further described difficulty functioning on a daily basis at his job as a bailiff at the High Court due to excessive pain and numbness to his left-side limbs. Despite modification of his work duties/job description; from more physical duties, he still finds it difficult to complete a full work-day. He has had many certified and uncertified sick days over the last 1-2 years.

[14] Dr. Chrisel Bovell and Dr. Alaire Khan-Frazer assessed that Mr. Alliston Wheatley was suffering from a chronic muscular and radicular/neuropathic pains secondary to previous poly-trauma and post-traumatic stress disorder. They recommended that he was unable to work in his current employment capacity, despite attempts at modifications of his duties. He was deemed permanently disabled, analgesia as necessary and psychotherapy and counselling as needed.

The loss of amenities

- [15] The claimant, in his affidavit stated that though physiotherapy helped to improve range of movement at his left shoulder joint, he has continued to experience severe, often debilitating pains at the sites of injury namely left clavicle region and scapula extending to left shoulder at times also radiating down left arm up to neck and occasionally entire left side including left leg and resulting frequently in numbness to same. He stated that he is forced to use prescription strength analgesia on a daily basis and has over the years tried several different types. He presently uses tramadol tablets, for pain control to allow for functionality. However, despite this he is never completely pain free at any given moment.
- [16] Mr. Wheatley stated that he had to retire prematurely from being a Bailiff at the High Court that he lost some of his pension benefits. He further stated that had he not become disabled as a result of the accident, he would have worked for the full 25 years until retirement. Mr. Wheatley computed that at the point of the accident he had worked three hundred months, his minimum pension, not taking into account any increases of salary from increments during the said period, would have been \$16,150.50. Thus he posited that for the rest of his life he would have lost \$1,668.88 for each year.
- [17] In his affidavit, Mr. Wheatley stated that he was unable to return to work for eight (8) months following the accident. However, following his return to work, he experienced severe pain which hampered his ability to work. The pains became so severe that he proceeded on sick leave from his job on November 22, 2017 and was retired from his job on March 1 2019 on medical grounds on the basis that his muscular and radicular/neuropathic pains made him permanently disabled.
- [18] It was clear from Mr. Wheatley's medical report that his injuries had affected his physical ability to carry out his job and that they caused him severe discomfort in the work environment. That Mr. Wheatley's job as a Bailiff at the High Court required him to be standing and doing work which required him to engage in the use of his muscles and his skeletal structure is not lost on the Court. Even though

it is to be noted that Mr. Wheatley did not provide any evidence of the work he is required to carry out when he was a Bailiff.

Assessment guidelines

- [19] 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**,²

“... 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)

- [20] In the case of **Wells v Wells**,³ 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

² [1983] 2 All ER 698 at 699.

³ [1998] 3 All ER 481 at 507.

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.⁴

[21] I am also guided by Gordon JA in the case of **Philmore Skepple v Joseph Weekes**⁵ in which he quoted with approval the dicta of Singh JA in **Fenton Auguste v Francis Neptune**⁶ 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.⁷

Pain and Suffering and Loss of Amenities

[22] 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 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 Camden and Islington Health**

⁴ Guidelines for the Assessment of Damages in Personal Injury Cases, 10th edn., Oxford University Press.

⁵ Antigua and Barbuda High Court Civil Appeal No. 10 of 2009 (delivered 25th January 2010, unreported).

⁶ Fn. 4 at p. 5.

⁷ See Sachs LJ in *George et al v Pinnock et al* [1973] 1 WLR 118.

Authority [19801 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 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.

- [23] 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.
- [24] The claimant submits a figure of \$USD100, 000.00 for pain and suffering and \$USD50, 000.00 for loss of amenities as the appropriate award to be made under this head. The claimant also submits a figure of \$USD147,009.89 as General Damages for future loss of earnings, General damages for loss of pension rights of \$USD63,955.89, Special damages of \$USD17,027.40 and prescribed costs on the sums awarded in the amount of \$USD27,925.99. The claimant has helpfully submitted authorities for the court's consideration which I will now consider.
- [25] In the case of **Philmore Skepple v Joseph Weekes**,⁸ the claimant suffered the following injuries: laceration of about 2 cm long in the right supraorbital area with mild ipsilateral periorbital hematoma, fracture of the mandible with displacement and active bleeding, fracture of the hard palate with loss of the upper incisors and canine teeth with active bleeding, dislocation of the right sternoclavicular joint, a

⁸ Supra, fn.8.

bulging deformity in the dorsum of the base of the first metacarpal bones of the left hand with tenderness and limited range of movements, laceration of about 3 cm long in the thenar region of the left hand and tenderness and crepitations in the distal phalanx of the ipsilateral thumb, swelling and tenderness of the right shoulder though with full movements and abrasions of about 4 x 1 cm on the anterior aspect of the left leg. The claimant in this case could no longer play basketball because of the pain and he indicated that he felt embarrassed to smile because of the loss of teeth and did not consider himself handsome any longer. The Court awarded \$100,000.00 damages for pain and suffering and loss of amenities, which figure was upheld on appeal.

[26] In the case of **Ulbona Morillo v. LEEANNE FORBES**,⁹ the claimant lost consciousness as a result of the collision, and suffered injuries described as contusions to the head, neck, upper back, right knee, and ankle. There was tenderness in the right knee and ankle, and in the costo-chondral joint of the chest, inflammation in the left shoulder, biceps, tendon and rotator cuff. She had muscle spasms in her cervical, thoracic and lumbo-sacral spine, numbness in the upper left extremity, paraesthesia and pain. She was suffering from a posterior subligamentous disc protrusion at the L5S1 level associated with radial annulus tear posteriorly and adhesive capsulitis of her left shoulder, and she complained of hearing loss in her left ear. She will require intermittent oral, intra-muscular and intra-articular medications and continuous physical therapy. Her prognosis was fair to poor, and her overall impairment as a result of her injuries was assessed at 19% whole body impairment. After considering the evidence and the authorities relied upon by both sides, the learned trial judge awarded damages for injuries, pain and suffering and loss of amenities in the sum of \$40,000.00. He awarded the respondent the sum of \$30,000.00 in respect of loss of earning capacity, and \$66,250.50 for cost of future medical care including medication and procedures. He awarded as special

⁹ BVIHCV2003/005

damages the sum of \$9,344.79 for loss of income and medical expenses, interest on the award for pain and suffering and loss of amenities at the rate of 5% per annum for 2 years, and interest on the award in respect of loss of income and medical expenses at the rate of 2.5% per annum for 2 years.

[27] The claimant also referred to the case of **Denroy Baptiste v. Tortola Yatch Services Ltd.**¹⁰ where the claimant suffered injuries which were detailed in Dr. Caesar's report are as follows:- (i) Temporary loss of feeling and ability to move his right arm immediately after the accident, (ii) Hills Sachs lesion to right humeral head, (iii) Labral tear in right shoulder, (iv) Continuous pain in right shoulder and back, (v) Radicular syndrome involving radicular pain, paresthesias and/or weakness in both upper extremities and left lower extremity, (vi) Dorsal and lumbosacral strain and sprain, (vii) Compression fracture of T12 and mild compression fracture of L1 discs, (viii) Bulging and/or herniated discs at levels C4-5; C5-6; C6-7; L4-5 and L5-S, (ix) Multiple levels of cervical and lumbar spinal stenosis, (x) Traction injury to brachial plexus on the right, (xi) Right index finger spasm and (xii) Bicipital tendonitis.

[29] The injuries suffered by Mr. Baptiste, to my mind, are serious as Mr. Baptiste is partially disabled as a result and he will remain so. He will require further medical attention in the form of therapy, injections and surgery to alleviate his pain and discomfort. He will never make a complete recovery as the surgery recommended is only in relation to his shoulder and not for the degenerative disc disease.

[30] I have considered all the authorities cited and the respective submissions and I have taken into consideration the matters to be regarded as per the Cornilliac. In all the circumstances, in my judgment an award of

¹⁰ BVIHCV2006/0130

US\$45,000.00 will represent fair and reasonable compensation for the injuries sustained by Mr. Baptiste.

- [28] The Jamaican case of **Duhaney v Electoral Office of Jamaica et al**¹¹ is instructive as the claimant's injuries though not all the same as Mr Wheatley's, bear some similarity. The claimant in the **Duhaney** case suffered severe and extensive personal injuries primarily to the head, face and neck. He sustained numerous facial fractures to his cheek-bones and jaw-bone, concussion, loss of teeth and whiplash injuries necessitating treatment by two Faciomaxillary Surgeons. In that case the doctor confirmed that the area of impaired sensation on the claimant's face indicated injury to the right infraorbital nerve, which was crushed against the facial bones at the time of impact and had healed with a traumatic neuritis which gave rise to the facial discomfort of which the claimant complained. The award made in this case for pain and suffering and loss of amenities was JJ\$8,000,000.00 which is equivalent to EC\$241,800.00.
- [29] In **Fenton Auguste v Neptune**¹², the court awarded \$74,000 to the 24 year old claimant for pain and suffering and loss of amenities, which rendered him a paraplegic confined to a wheelchair for the rest of his life.
- [30] In **Daphne Alves v the Attorney General**¹³ the Court awarded \$35,000 to the 33 year old claimant for general damages for pain and suffering and loss of amenities for injuries to L4-L5 annular disc tear, S1 joint arthropathy- discongenic disease of the lumbar spine, lumbar facet joint syndrome, which left the claimant in constant pain and rendered her unable to walk for long distances, sit for long periods, lie on her back for more than 10 minutes or carry any weight in excess of 10 pounds.

¹¹ Jamaica Supreme Court Suit No. C.L.D. 56 of 2001 (delivered 17th September 2009).

¹² (2000) 56 W.I.R. 229.

¹³ 3 Claim No. BVIHCV 2006/0306, Judgment delivered on 25 November 2008 [unreported]

[31] In **Kissoon v Lalla**,¹⁴ the nature of the plaintiff's injuries who was a 20 year old male, included dizziness, extensive lacerations to the left side of the face, laceration of the left temporal region severing the temporal artery resulting in extensive blood loss, pain and swelling in the right knee joint, damage to the branches of the left facial nerve, fracture of the left orbit, left molar bone fracture, multiple lacerations in the region of the left temple and both sides of the face as well as his upper lip. These resulted in marked scarring, blurring of the vision in the left eye, weakness of the right knee, inability to open mouth fully, facial asymmetry, headaches and flattening molar bone as residual effect of healing. There was also flattening of the left zygoma. General damages were awarded in the sum of TT\$7,000.00 adjusted to TT\$76,910.00 as of April 2007 which is equivalent to EC\$32,384.49.

[32] In **Darel Christopher v. Benedicta Samuels dba Samuels Richardson & Co.**, prior to the collision, Mr. Christopher worked as a plumber/plumbing supervisor. He was engaged in strenuous physical activities as he was a competitive cyclist, cycling at least once a day, swimming, walking and jogging. He also states that he was very active socially and attended various church and other social functions. He also enjoyed an active sex life with his wife. It is clear from the medical evidence, and uncontested by Mrs. Samuels Richardson that, as a result of the collision, Mr. Christopher sustained severe injuries, both physical and neurological. Taking that into consideration and the guidance on the quantum of damages awarded in the court of similar cases, Mr. Christopher suggests that the appropriate figure for his pain and suffering and loss of amenities would be \$150,000. Taking all matters into consideration including the injuries suffered by Mr. Christopher, his age and the fact that he will no longer be able to enjoy his hobby of cycling and other physical activities, I make an award of \$60,000 which in my view, represents fair and reasonable compensation for the injuries sustained by Mr. Christopher.

¹⁴ Trinidad and Tobago, HCA No. 411 of 1971 (delivered 12th December 1977).

- [33] I have considered the submissions of both Counsel and the plethora of authorities relied on. In *Ulbona Morillo v Leanne Forbes*²⁹, the court awarded \$40,000 to the fifty-year-old claimant for pain and suffering and loss of amenities for spinal injuries to L5-S1 disc which disabled her from raising her hand fully, lifting moderate weights or doing housework.
- [34] I do not consider the cases of **Steadroy Matthews v. Garna O'Neal**¹⁵ and **Diepak Paul v. Douglas Blyden**¹⁶ to be very helpful as the injuries sustained by the claimant in those cases are in no way similar to those sustained by Mr. Wheatley.
- [35] 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."¹⁷
- [36] 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"."

¹⁵ BVIHCAP2015/0019.

¹⁶ BVIHCV2011/0262.

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

- [37] 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 back region, and the fact that this is a 48 year old man who still is in the prime of his life and has to contend with excruciating pain and to be dependent on analgesics for relieve and comfort from the severe pains.
- [38] In the circumstances, and having considered all the authorities and the evidence, I consider the sum of \$100,000.00 for pain and suffering and \$50,000.00 for loss of amenities to be an appropriate, fair and reasonable award and I so award.

Handicap on the Labour Market

- [39] 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.'

- [40] 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 with, as an item of general damages and therefore, are not specifically particularized.
- [41] 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 but there was a risk of losing the current job and 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** [19771 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).
- [42] 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 compensating. 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.

[43] 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.

[44] 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)

- [45] 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.

- [46] 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.
- [47] 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. But, 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.
- [48] 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.
- [49] 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.

[50] 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.

[51] Mr. Wheatley has suffered severe joint pains which have 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 Mr. Wheatley. 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 hand 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.

[52] By parity of reasoning, from the injuries suffered by Mr. Wheatley there can be no doubt that he has suffered damage to his capacity to work, or if one prefers more familiar language, he is not able to compete with other able bodied persons on the open market.

[53] The prospect of work for a severely injured inadequately educated fifty-year-old man is not very good. If Mrs. Smith in **Gladys Smith** could secure an award under this head, even more so Mr. Wheatley.

[54] 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 award the sum of \$USD25,000.00 to the claimant under this head of damages.

Loss of Future Earnings

[55] 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, as an item of special damages and to particularize same accordingly. At the commencement of the trial, the particulars of 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, has 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.

- [56] 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 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.
- [57] 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.**'
- [58] 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.

- [59] **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.
- [60] 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.
- [61] 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 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.

[62] 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 Ms. Reid 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. Reid 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.

[63] Regarding the multiplicand, from the payment sheet exhibited at "A.W.10", the Claimant earned an annual salary of \$32,301.00 prior to his retirement. As such the multiplicand would be \$32,301.00. Ms. Reid submitted that in the circumstances, for future loss of earnings, an appropriate award ought to be \$266,483.25.

[64] **'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.

[65] 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.

[66] The claimant's evidence as to his date of birth is that he was born on February 7, 1971 and that he was a Bailiff. That evidence has been accepted by this court as being both accurate and truthful.

[67] 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.

[68] 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.’

[69] The onus was on the claimant to prove to the requisite standard, that he was earning an income as of November, 2011 and that, as a consequence of the commission of relevant tort, by the defendant, 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.

[70] Ms. Reid has proceeded on the basis that Mr. Wheatley is entitled to claim for loss of future earnings. I will make the award on the basis of the claimant's calculations. The evidence is that the claimant earned \$USD32,301.00 yearly.

There is no challenge to this. Using the multiplier/multiplicand method the calculation is \$USD32,301.00 x 8.25 is equal to \$USD266,483.25.

Loss of Pension

[71] Ms. Reid sought to urge on this court that an award should be made to the claimant for loss of pension. Regrettably, this argument has not found fertile ground to burgeon. Ms. Reid cites the case of **Auty et al v. National Coal Board** 99850 1 WLR 784. This is a case where A widow received a widow's pension under a Coal Board scheme on the death of her husband, which had been caused by the defendant's negligence in the matter at hand. The court contended with a pension-scheme.

Held: She did not have to give credit for this pension when the value of her dependency on her husband for the rest of his anticipated lifetime (from his earnings until his retirement, and thereafter from his pension until his death) was being calculated. It was maintained that she was entitled to claim, as an additional head of damage, the loss of the widow's pension she would normally have expected to receive under the scheme at the end of his life following her husband's death at a mature age. This was said to result from the operation of Section 4 of that particular legislation.

Held: The court rejected this submission. The plaintiff first had to establish a loss, and since she was receiving her widow's pension immediately she could not claim for the loss of the opportunity to receive something she already had. Oliver LJ: 'There are thus two stages in the inquiry. First there must be ascertained what 'injury ... to the dependants' has resulted from the death. Secondly, there must be assessed the damages which are to be awarded for that

injury. No doubt in ascertaining the extent of the injury suffered (for instance, the loss of dependency or of the estate duty advantage with which Davies v Whiteways Cyder Co Ltd [1973] QB 262 was concerned) you do not take into account any countervailing advantage which may have resulted to the dependant from the death in the form of pension or insurance benefit. In other words, it is no doubt right to observe the provisions of section 4(1) at both stages of the inquiry. But it is still necessary to establish that the dependant has in fact suffered an injury (i.e. lost something) as a result of the death. Here what is claimed as the injury is the loss of the very thing (i.e. a widow's pension) that the widow in fact has gained as a result of the fulfilment of the conditions of the scheme earlier rather than later, and whilst section 4 precludes setting the benefit of the pension against damage suffered under some other head, there is nothing in that section which requires one to assume, in ascertaining whether there has been any injury at all, that that which has happened in fact has not happened. The fallacy of the plaintiffs' reasoning is, in my judgment, that it premises a loss which has not occurred and which cannot be substantiated either in fact or in law.'

- [72] The aforementioned case does not assist Ms. Reid in establishing the claimant's case as it relates to loss of pension. The aforesaid case speaks of a loss of a benefit that the claimant was already receiving inter alia. The reasoning adopted by parity is that the claimant cannot claim for a future benefit that he is now not enjoying in the present or prior to the accident. It stands that this would be an overreach by the claimant to claim for loss of pension based on variegated assumptions as to whether the claimant would have worked up until the time of

pensionable age, the claimant was approximately 41 years old by my calculation when the accident occurred and was some ways off from pension.

[73] The fundamental principle is that of restitutio in integrum, meaning that damages should be assessed so that they represent no more and no less than a plaintiff's actual loss: **Livingstone v Rawyards Coal Co** (1880) 5 App Cas 25, Lord Blackburn at 39.

In personal injury matters, it has been recognised that in most cases it is not possible to measure accurately that part of the award that deals with non-economic loss so as to restore a plaintiff to the health enjoyed pre-injury. The principle has been qualified by the term "so far as money can do so": *Robinson v Harman* [1848] All ER Rep 383.

[74] I will not be detained by this submission of counsel and will not make any awards for loss of pension based on the abbreviated analysis that I have conducted above and especially in the event that there is a dearth of evidence from the claimant to prove that he was entitled to a pension at the time of the accident in 2011.

Special Damages

[75] This court accepts and understands it to be the law, that as a general rule, special damages must be specially pleaded and specially proven. In appropriate cases however, where there exists a proper basis to do so, that general rule will give way to common-sense, which is that in some circumstances, to insist on strict proof of each and every item of special damages, by means of documentation in particular, would be, as has been stated in at least one reported judgment, '**the vainest form of pedantry.**' See: **Desmond Walters v Carlene Mitchell** – [1992] 29 JLR 173; and **McGregor on Damages**, 12th ed. at paragraph 1528; and **Radcliffe v Evans** – [1892] 2 QB 524.

[76] That general rule therefore, must to my mind, give way to common-sense, in circumstances wherein, items of special damages are not particularized, but yet the claimant, during trial, seeks to recover for those alleged losses and the defendant agrees to permit recovery for same. In circumstances such as that, for all of those items of special damages that the claimant is seeking recovery of, by means of an award of damages, since the defendant has consented to the claimant's recovery of same, then, even though some of those items were not particularized in the claimant's particulars of claim, the claimant ought to be and will be able to recover for same. If the absence of notice does not perturb the opposing party and thus, the failure to particularize does not perturb that party and in addition, the opposing party consents to claims for items of special damages which either could or ought to have been particularized, but which were not, then the court should award same to the claimant.

[77] What will be awarded to the claimant as special damages therefore, will be those items of loss that were claimed for, in the claimant's particulars of claim, as well as for those items which were not itemized in the claimant's particulars of claim, as being claimed for, and which have been agreed to, by defence counsel. The sum of those items is \$17,027.00. That would be the aggregate sum for the following items which were claimed as special damages: air fare, medication, consultation and medical reports – Drs. Bovell and Khan-Frazer, cost of CT scan and cost of physiotherapy, consultation and medical report. On that aggregate sum, interest will be awarded from as of the date when the claimant's particulars of claim was served on the defendants up until the date of judgment. The sum to be awarded to the claimant as special damages therefore, is \$17,027.00.

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

Orders

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

General damages:

- a. pain and suffering \$USD100, 000.00 at 6% interest from the date of the service of the claim form to date of payment and \$USD50,000.00 for loss of amenities;
- b. loss of future earnings - \$USD266, 483.25 at no interest;
- c. handicap on the labour market - \$USD25, 000.00 at no interest
- d. 'Special damages' is awarded to the claimant, in the sum of \$17,027.40, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment.
- e. No award as to costs for loss of pension.
- f. Prescribed costs of \$32,160.60 (being 60% of \$USD53, 601.00, pursuant to Appendix B and C of Rule 65 **Civil Procedure Rules 2000** as amended).

**Ricardo Sandcroft
Master [Ag]**

By the Court

Registrar