

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

Claim No. SVGHCV1996/0288

Between:

CLAIRE OLIVER GILKES

Claimant

And

ST. CLAIR THOMAS

1st Defendant

JOSEPH RAJKUMAR

2nd Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Grahame Bollers with Richard Williams for the Claimant
Bertram Commissiong QC for the 1st defendant

2016: December, 7

Assessment of Damages - Negligent Medical Care – Permanent Tracheostomy – Loss of Income - Loss of Housekeeping Ability – Future Loss of Income

- [1] CORBIN LINCOLN M: Mrs. Claire Gilkes commenced this claim against Dr. St. Clair Thomas and Dr. Joseph Rajkumar for damages for personal injuries sustained as a result of their alleged negligent medical treatment.

Background

- [2] Mrs. Gilkes visited Dr. Thomas' office in August 1990 complaining of a sore throat and was treated for tonsillitis. During the course of the next three (3) years she visited Dr. Thomas' office on a number of occasions for soreness of her throat. At the time she was suffering

from a thyroid condition and had a goiter on her neck. Dr. Thomas repeatedly told her that she should consider undergoing surgery to remove the goiter but she never bothered because it was never a source of bother to her.

[3] In or around June 1993 she went to Dr. Thomas' office accompanied by her husband because she was suffering from a sore throat and hoarseness. Dr. Thomas again raised the issue of having the goiter surgically removed and informed them that he had performed the procedure on numerous occasions both in St. Vincent and Barbados and that it was a simple operation. He informed her that she would lose her voice for a short time after the operation but would regain it fully.

[4] At no time during any of the consultations did Dr. Thomas tell her:

(1) that there was a risk of permanent damage to the nerves surrounding her voice box and if that happened her voice box could be paralysed;

(2) of any other risks associated with thyroid surgery or advise her of alternative forms of treatment that were available; or

(3) that there was a risk of vocal paralysis which could result in difficulty breathing and if that happened she would possibly have to have a tracheotomy.

[5] Mrs. Gilkes contends that if Dr. Thomas had provided her with any information regarding the risks associated with the operation she would not have considered the operation. She decided to proceed with the operation and was admitted to hospital on 27th July 1993.¹ She signed a consent form which stated that she was consenting to undergo a thyroidectomy. She was assured that Dr. Thomas would perform the operation. The operation was performed on 29th July 1993 but Dr. Thomas later informed her that the operation was in fact performed by Dr. Rajkumar with Dr. Thomas acting as his assistant.

¹ Certificate from Kingstown General Hospital

- [6] In the evening after the surgery she started wheezing and vomiting and felt like she could not breathe. On 30th July 1993 Dr. Thomas performed an emergency tracheostomy whereby she was only able to breathe through a tube. She was discharged from the hospital on 6th August 1993 with a hole in her neck which she had to have dressed at a clinic.
- [7] The discharge certificate shows that she was admitted to the hospital under the care of Dr. Thomas and that both a subtotal thyroidectomy and a tracheotomy were performed. On 12th August 1993 she went back to the hospital to have the hole sutured.
- [8] Mrs. Gilkes continued to be treated by Dr. Thomas as an out- patient. During her visits to him between 9th August 1993 and 14th September 1993 she complained that she was having headaches, snored excessively, had shortness of breathe and difficulty breathing. On 18th August 1993 Dr. Thomas removed the sutures at the hospital. She visited him again at his office on 30th August 1993 complaining about snoring, headaches and shortness of breathe. He told her it was a cold.
- [9] She later met Dr. Elsworth Charles while he was collecting his child from Vinsave, the school at which she was employed, and discussed her medical problems with him. She went to his office and he gave her asthma medication and an inhaler. On the following Monday morning while at work she was experiencing difficulty breathing and Dr. Charles took her to the hospital to have an x-ray. He consulted with Dr. Wilfred Layne who advised him that she was suffering from laryngeal nerve injury following the thyroidectomy. Dr. Charles referred her to Dr. Dennis Bailey, an ENT specialist in Barbados. Between December 1994 and March 1995 she had to undergo several procedures to determine the extent of the damage done and to remedy the damage including a diagnostic fiberoptic laryngoscopy in December 1994. On 8th February 1995 Dr. Dr. Bailey operated on her but the operation was unsuccessful. Consequently, she was forced to consider having a permanent tracheotomy which Dr. Bailey performed on 21st March 1995. The result of the permanent tracheotomy is that she has to breathe through a tube in the throat area.

[10] Dr. Bailey informed her that it was all a result of the operation which was performed without her informed consent.

[11] Mrs. Gilkes commenced this claim against Dr. Thomas and Dr. Rajkumar. On 26th November 2012 Mrs. Gilkes obtained a consent judgment against Dr. Thomas. The judgment states:

“This action having on the 26th November 2012 been called on for trial before.....at the High Court of Justice...

AND WHEREAS the Claimant instituted these proceedings against the Defendant for failure to inform the Claimant of the risks associated with the surgical procedure and failing to inform her that the operation would be conducted by the Added Defendant.

AND WHEREAS the claimant also instituted these proceedings against the Added defendant for (a) failing to inform the Claimant that he would be performing the surgical procedure and obtaining her consent to the operation ; (b) failure to inform the Claimant of the significant risks associated with the medical procedure and (c) negligence.

AND THE CLAIMANT has suffered injury as set out in the Claim Form the risk of which she should have been informed

AND UPON hearing counsel for the Defendant. Added Defendant and counsel for the clamant;

IT IS BY CONSENT ADJUDGED as follows:

1. Judgment is hereby entered for the Claimant against the Defendant for the personal injury resulting from the Defendant's failure to fully inform the Claimant of the risks associated with the surgical procedure and failing to inform her that the operation would be conducted by the Added Defendant and for payment by the Defendant to the Claimant of an amount to be decided by the Court and prescribed costs to be assessed. “

[12] On 27th November 2012 Mrs. Gilkes obtained judgment against Dr. Rajkumar in an amount to be decided by the court.

[13] The issue before the court is the quantum of damages that should be awarded to Mrs. Gilkes.

Preliminary Issue

[14] Mrs. Gilkes filed witness statements and submissions prior to the date fixed for the assessment of damages. The defendants failed to file witness statements or submissions prior to the date fixed for the assessment.

[15] On the date fixed for the assessment of damages Queen's Counsel for Dr. Thomas stated that he has been instructed that Dr. Thomas never instructed Ms. Mira Commission , counsel with conduct of the case, to enter into a consent judgment and the consent judgment was entered in his absence and without his consent. Further, Dr. Thomas instructs that he only recently became aware of the consent judgment and intends to take steps to have the consent judgment set aside. Queen's Counsel also sought an extension of time to file witness statements and submissions.

[16] The 1st defendant was granted an extension of 14 days to file affidavits and submissions and the matter was adjourned. The 1st defendant filed an affidavit but no submissions. At the adjourned hearing the court was not provided with evidence of the filing of any proceedings and, more significantly, there was no application for or an order staying the proceedings. In the circumstance the hearing proceeded.

[17] At the end of the hearing the parties were given 21 days to file any further submissions. Neither party filed further submissions within the time fixed by the court.

SPECIAL DAMAGES

[18] It is well established that generally damages must be pleaded and proved.²

Loss of Income

[19] Mrs. Gilkes pleaded loss of income from August 1993 to the date of filing of the claim in the sum of \$60,775.00 and continuing thereafter at a rate of \$425.00 per month. Her evidence however is that she was employed at as a teacher at Vinsave and earned a monthly salary of \$750.00. There was no explanation provided for the discrepancy between the quantum pleaded and the evidence given. Under cross examination Mrs. Gilkes confirmed that she earned \$750.00 per month from her job at Vinsave. I accept that Mrs. Gilkes earned \$750.00 monthly from her job at Vinsave.

[20] Mrs. Gilkes states that she is seeking loss of income from August 1993 “to date” - *presumably to the date of filing of the witness statement* - in the sum of \$204,750.00 and continuing thereafter at a rate of \$750.00. Her evidence with respect to date when her loss of income commenced is however contradictory. She states:

“as a result of what happened to me I was obviously unable to speak to my pupils and I had to resign from my job because I had no energy and suffered shortness of breath and felt tired all of the time and in fact I would fall asleep in class.”³

[21] She does not state the date she resigned from her job and stopped receiving an income but I infer that she is asserting that she resigned and ceased earning an income in August 1993 since this is the period from which loss of income is claimed. Mrs. Gilkes’ claim to have resigned from her job since August 1993 is contradicted by other evidence. Specifically:

² Ashcroft v Curtin [1971] 1 WLR 1731. Grant v Motilal Moonan Ltd. and Another (1988) 3 WIR 372

³ Paragraph 21 of the witness statement filed on 3rd May 2016

- (1) Mrs. Gilkes states that she was being treated by Dr. Thomas as an out patient and during her visits to him privately between 9th August 1993 and 14th September 1993 she complained of various symptoms including headaches, shortness of breathe and difficulty breathing. She states that “one day” she met Dr. Elsworth Charles when he was collecting his child from Vinsave and she discussed her medical problems with him , especially her breathing difficulties. She states “ *He told me to come to his office and I did and he gave me asthma medication and an inhaler to take. On the Monday morning at work I was experiencing difficulty breathing and Dr. Charles took me to the Hospital to have an x-ray taken.*”
- (2) Mrs. Gilkes tendered a medical report from Dr. Charles. In the report Dr. Charles states that he first became aware of Mrs. Gilkes' problem of breathing difficulties when he talked to her at her work place (Vinsave) in *November 1994*. He suggested that she should come to his office the following Saturday for examination and she was examined on 19th November 1994. If Dr. Charles met Mrs. Gilkes at her workplace in November 1994 it follows that she was still employed at least up to November 1994 – *more than one year after the time that she asserts or infers that she ceased employment and ceased earning an income.*
- (3) Under cross examination Mrs. Gilkes stated that she could not recall the exact dates she travelled to Barbados but knows that she travelled there for the first time in 1994 and returned again in 1995 for an operation. She states that she did return to work at Vinsave after she “came back from Barbados”. It is unclear whether it was after her return from Barbados in 1994 or her return in 1995 that she did not return to work. What is clear is that if she only stopped working after returning from Barbados in 1994 or 1995 her evidence that she resigned and ceased earning an income in August 1993 could not be true.

[22] In the circumstance the claimant has failed to provide clear and credible evidence of when she ceased employment and ceased earning an income.

- [23] With respect to the period for which loss of income is claimed, Mrs. Gilkes is claiming loss of income from August 1993 and continuing. Under cross examination she stated that she has not looked for any other form of employment since 1993 because of her breathing problems.
- [24] Under cross examination Mrs. Gilkes admitted that neither Dr. Charles nor Dr. Hughes Dougan told her that she could not work. Under further cross examination, she admitted that after returning from Barbados she was looking for disability benefits from the National Insurance Scheme and went to the medical board to be examined as to whether she was physically and mentally fit to return to work.
- [25] Dr. Thomas exhibited a letter from the director of the National Insurance Scheme to the Permanent Secretary in the Ministry of Health, dated 12th May 1995, which states :

*"Mrs. Claire Oliver Gilkes has applied to the National Insurance Scheme for payment of Invalidity benefit on the recommendation of Dr. E.H Charles.
Grateful if this case be referred to the medical board for examination. We would appreciate a definite statement on the patient's ability to engage in any form of gainful employment."*

- [26] Mrs. Gilkes was referred to the report of the medical board dated 1st June 1995, which states:

" A medical board was convened on the 31st May to assess the ability of Mrs. Claire Gilkes to engage in any form of gainful employment.

Mrs. Gilkes has a permanent tracheostomy and as such is unable to continue in her former employ as a pre-school teacher.

However, her mental and other physical attributes are quite normal and she has already shown an interest in retraining herself for the job market (she has started a fashion design and fabric painting course at home).

The board recommends that if possible, some financial support be given to Mrs. Gilkes for the next two years, during which time she will continue her retraining exercise. At the end of this period she should be able to return to the productive labour force"

[27] Mrs. Gilkes stated that she was aware that the board gave a report and was also aware of the content of the report. However, she did not return to work and did not make a second attempt to get an assessment from the board. She denied telling the board that she was doing a fashion painting course.

[28] The medical board found that while Mrs. Gilkes could not continue in her employment as a school teacher her mental and other physical attributes are normal and that upon retraining she could reenter the job market. There is therefore no medical evidence that Mrs. Gilkes was unable to work at all since August 1993 as alleged.

[29] McGregor on Damages, ⁴ states that the onus of proof on the issue of mitigation is on the defendant, and approval is given at page 191 to the statement of Sir John Donaldson MR in Sotiros Shipping Inc v Sameiet Solholt ⁵, where he said:

"A plaintiff is under no duty to mitigate his loss, despite the habitual use by the lawyers of the phrase 'duty to mitigate'. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendants' breach of duty."

[30] It is clear that for some period Mrs. Gilkes would have lost income as a result of her injuries. There is no clear evidence of the exact period from which she started to lose income. There is no medical evidence which states that Mrs. Gilkes could not work at all

⁴ 16th ed (1997) at page 190

⁵ [1983] 1 Lloyd's Rep 605 at 608

after August 1993 to support a claim for a total loss of income from August 1993 and continuing to the date of filing of the claim in 1999. In the absence of any medical evidence that Mrs. Gilkes was unable to work at all or any evidence of real and substantial obstacles to her retraining and reentering the labour market the defendants in my view should not be held liable for Mrs. Gilkes' choice not to take any steps whatsoever to return to some form of employment.

[31] In determining what is a reasonable period for which loss of income should be awarded, I have taken into consideration all the circumstances and, in particular, the fact that there is inconsistent evidence with respect to the date when Mrs. Gilkes' loss of income commenced and the recommendation of the medical board that Mrs. Gilkes be given financial assistance for two (2) years during which time she could retrain and return to the labour market.

[32] I find that the sum of \$18,000.00 being loss of income for a period of two (2) years at a rate of \$750.00 per month is reasonable compensation for Mrs. Gilkes.

Loss of Domestic Care

[33] Mrs. Gilkes pleaded a loss of \$52,800.00 for "domestic care" at a rate of \$400.00 per month from July 1993 "to date" – presumably the date of filing of the claim. In her witness statement however she claims the sum of \$700.00 per month for domestic care from July 1993 "to date" i.e presumably to 3rd May 2016 when the witness statement was filed. She states that she is aware that the cost of employing domestic assistance to perform domestic chores would amount to \$700.00.

[34] There was no evidence led to address the difference between the pleaded cost and the evidence given with respect to the cost of monthly domestic care.

[35] Mrs. Gilkes' evidence is that since her final operation in 1995 her life has not been the same. She used to be able to perform household duties like cooking, cleaning, washing and other household chores. All her chores in and around the house such as cooking ,

cleaning, and sweeping are now performed by her husband and brother. The evidence of Mr. Benson Gilkes, Mrs. Gilkes' husband, is that prior to the operation Mrs. Gilkes *"was a good home-maker; she is no longer [sic] to do anything around the home. The Domestic chores around the house are now performed by myself and the claimant's brother. The cost of providing these domestic services is \$700.00 per month."*⁶

[36] Under cross examination Mrs. Gilkes was asked how she came to the view that the cost of employing someone to perform household chores is \$700.00 per month. She stated that she asked around. She admitted that she did not go to the Labour Department to make any enquiries and is not aware that the statutory rate for domestic help is cheaper than \$700.00 per month.

[37] In further cross examination Mrs. Gillkes admitted that she succeeds in doing her household chores, including sweeping , but she does so with pain. She admitted that she cooks, cleans and does laundry with a washing machine. Thus while both Mr. and Mrs. Gilkes testified that Mrs. Gilkes is no longer able to perform household chores and that all her chores in and around the house are performed by Mr. Gilkes and Mrs. Gilkes' brother, Mrs. Gilkes' evidence under cross examination contradicted this. In the circumstance I find that there is no credible evidence that Mrs. Gilkes lost her ability to perform household chores as a result of the injury and consequently there is no evidence to support the claim for compensation for the cost of "domestic care".

[38] In any event, while this claim is made under the heading of 'domestic care' it appears to me from the evidence that this is in essence a claim for loss of housekeeping ability. It is well established that an award of damages can be made for loss of housekeeping ability. Halsbury's Laws of England ⁷states:

"Where the plaintiff has suffered an impairment of his ability to perform household chores, that loss will be assessed on the basis of the cost of employing a

⁶ Paragraph 14 of Mr. Gilkes' witness statement.

⁷ 4th Edition, Volume 12 (1) paragraph 891

housekeeper to perform them, even though the plaintiff may choose not to employ a housekeeper.

Where a member of the plaintiff's family voluntarily undertakes to perform the chores previously performed by the plaintiff, the plaintiff is entitled to an award of damages representing the value of those services. Where, prior to the accident, the plaintiff performed an unfair proportion of the household chores, he will not be entitled to damages representing the full amount of those chores actually performed, only those which could fairly be said to represent the plaintiff's share of such chores."

- [39] In *Daly v General Steam Navigation* ⁸ the Court of Appeal held that in assessing claims for loss of housekeeping ability for a *pre-trial period* :

"...the court had to look at the actual loss sustained by the plaintiff, and therefore, in regard to that period, it was not correct to evaluate the loss of housekeeping ability by reference to the amount it would have cost to employ the necessary domestic help when the plaintiff had not in fact employed such help. The pre-trial loss properly fell to be assessed as part of the plaintiff's general damages for pain, suffering and loss of amenity by considering to what extent her difficulties in performing her housekeeping duties due to her disability had increased those damages." (emphasis mine)

- [40] With respect to a claim for *future loss of housekeeping ability*, the Court held:

"...the proper measure of damages was the estimated cost of employing domestic help for eight hours a week during the plaintiff's life expectancy, even though she might not use the award to employ domestic help and might struggle to do the housekeeping herself and use the award for another purpose, for the award so

⁸ [1980] 3 All ER 696 te

assessed represented the court's view of reasonable compensation for the future loss of housekeeping ability."

- [41] Based on the evidence before the court, I am not satisfied on a balance of probabilities that Mrs. Gilkes lost her ability to perform household chores as a result of the injury sustained, remains unable to perform any household chores and that Mr. Gilkes and Mrs. Gilkes brother have been performing these chores as alleged. Mrs. Gilkes states that she performs her household chores albeit with pain. In any event, there is no evidence of any actual pre-trial costs incurred to engage household help and thus any pre-trial loss falls to be assessed as part of general damages for pain, suffering and loss of amenities. This will be taken into consideration in the award made for pain and suffering and loss of amenities.
- [42] I therefore make no award for the claim for "domestic care", pre-trial or future loss of housekeeping ability.

Lawn Care

- [43] The statement of claim avers a loss of \$11,440.00 for lawn care at a rate of \$400.00 per month from July 1993 "to date".
- [44] Mrs. Gilkes' evidence is that prior to the operation " *she was tasked with the job of cutting the lawn with a weed eater and or lawn mower and maintaining the yard*" ⁹ but "*since the operation I can no longer perform this task. I was forced to hire my brother Alexander Oliver to cut the lawn and to maintain the yard for this service we paid him \$400.00 per month.*"¹⁰
- [45] The sum of \$108,400.00 is claimed for lawn care at a rate of \$400.00 per month from July 1993 "to date." Mr. Gilkes also gave evidence to this effect.

⁹ Paragraph 27 of the witness statement

¹⁰ Paragraph 27 of the witness statement.

[46] Under cross examination in relation to the claim for lawn care Mrs. Gilkes stated:

- My brother is 58.
- Yes, my brother lives with me.
- Yes, he is part of the household.
- When I gave the witness statement in May 2016 I was living in Prospect.
- I am living on the road going down the hill to Salt Pond.
- I moved to prospect about 7-8 years ago.
- The size of my the land that I live on is about 12,000 sq ft.
- I don't know how much the house takes up.
- I can't give you the area of my lawn
- Yes I have enquired about the cost of mowing the lawn.
- Yes, I pay my brother Alexander Oliver \$400.00 a month to mow the lawn where he lives.
- The lawn is mowed twice a month
- No I do not pay \$200 for every time the lawn is mowed.
- No, I do not understand that it is my duty to cut my losses as far as I reasonably can.

[47] The claim for lawn care appears to me to capable of being considered within the scope of a claim for loss of housekeeping ability.

[48] In essence, Mrs. Gilkes' evidence is that while in full time employment as a teacher she did all household chores and gardening and was also tasked with mowing the lawn. In the absence of any evidence other than oral evidence I am not satisfied about the veracity of the claim that since July 1993 when Mrs. Gilkes was admitted to hospital she has paid her brother, a member of the household, \$400.00 every month to mow the lawn. My serious reservations about accepting this evidence stems not only from seeing and hearing Mr. and Mrs. Gilkes give evidence but also from the nature and quality of the evidence adduced with respect to other elements of the claim. This includes but is not limited to : (a) Mrs. Gilkes' evidence that she ceased employment in August 1993 which could not be true

and; (b) Mr. and Mrs. Gilkes' evidence in chief that she is unable to perform household chores and thus those chores are performed by Mr. Gilkes and Mr. Oliver which was admitted not to be accurate under cross examination.

- [49] In the circumstance I am not satisfied on a balance of probabilities that Mrs. Gilkes incurred or will in the future incur the cost of \$400.00 monthly for lawn care. I will take into consideration the loss of ability to mow the lawn in the award for pain and suffering and loss of amenities.

Medical and Related Expenses

- [50] Mrs. Gilkes' evidence is that she incurred costs of \$35,806.83 for medical and related expenses and that the receipts evidencing this expenditure are exhibited. A careful scrutiny of the receipts discloses that several claimed expenses are unsupported by the receipts. This was conceded by counsel for the Mrs. Gilkes.

- [51] The receipts were not marked, numbered or in any chronology order thus creating great difficulty identifying which receipts supported the costs claimed. The claimant and her counsel were therefore required to identify the receipt that supported each claim during the hearing. The schedule of expenses provided by Mrs. Gilkes is as follows:

	DATE	PARTICULARS	USD	BDS	EC\$	COMMENT
1.	06.08.1993	Surgery (St. Vincent)			1,500.00	No receipt
2.	06.08.1993	Anesthetist (St. Vincent)			100.00	No receipt
3.	09.08.1993	Hospital Fees (St. Vincent)			159.60	No receipt
4.	Feb-April 1994	Medication (Barbados)		67.44	91.04	No receipt
5.	06.12.1994	Diagnostic visit		260.00	351.00	No receipt

6.	28.12.1994	X-Rays (local)			50.00	No receipt
7.	...12.1994	Airfare to Barbados			380.00	No receipt
8.	00.12.1994	Departure Tax		25.00	33.75	No receipt
9.	00.02.1995	Airfare to Barbados			499.80	No receipt
10.	00.02.1995	Departure Tax			20.00	No receipt
11.	06.02.1995	Laboratory Fees			115.25	No receipt
12.	07.02.1995	Surgery (Barbados)		6,000.00	8,100.00	No receipt
13.	08.02.1995	Anaesthetist fees (Barbados)		750.00	1,012.50	No receipt
14.	08.02.1995	Hospital fees (Barbados)		3,982.00	5,375.70	No receipt
15.	03.04.1995	Hospital fees (Barbados)		2,299.00	3,103.65	No receipt
16.	13.04.1995	Fed Ex to Claire Gilkes			39.90	Receipt provided.
17.	23.10.1995	MCMH Lab Fee			20.00	Receipt provided.
18.	29.04.1996	MCMH Lab Fee			20.00	Receipt provided.
19.	20.02.1997	MCMH Lab Fee			20.00	Receipt provided .
20.	02.12.1997	Insurance – Dennis Bailey		100.00	135.00	Receipt provided
21.	16.01.1999	Fed Ex to Dennis Bailey			43.20	No Receipt
22.	08.02.1999	Laundry		420.00	567.00	No Receipt
23.	08.02.1999	Food/Miscellaneous Expenses		500.00	675.00	No Receipt
24.	08.02.1999	Transportation (12 days Benon Gilkes)		960.00	1,296.00	No Receipt

25.	24.07.2001	Insurance – Dennis Bailey		100.00	135.00	Receipt provided
26.	04.09.2003	Caribbean Star Flight to Barbados			334.80	Receipt provided
27.	04.09.2003	Departure Tax		25.00	33.75	Receipt provided
28.	09.02.2005	Insurance – Dennis Bailey		150.00	202.50	Receipt provided
29.	16.02.2005	MCMH Lab Fee			50.00	Receipt provided.
30.	21.02.2005	Fex Ex to Dennis Bailey			59.67	Receipt provided
31.	25.02.2005	People's Pharmacy			12.75	Receipt provided.
32.	02.09.2005	Maryfield Medical		30.00	40.50	Receipt provided
33.	13.11.2006	Airfare to Barbados	142.75		387.84	Receipt provided
34.	13.11.2006	Queen Elizabeth Hospital		40.00	54.00	Receipt provided
35.	13.11.2006	Queen Elizabeth Hospital		20.00	27.00	Receipt provided
36.	13.11.2006	Medical Attention – Dr. Bell		100.00	135.00	Receipt provided
37.	13.11.2006	Insurance Dr. Bailey		150.00	202.00	Receipt provided
38.	06.00.2007	Fed Ex to Dennis Bailey			68.78	Receipt provided
39.	02.07.2008	Airfare to Barbados	310.00		843.87	Receipt provided

40.	15.08.2008	Caribbean Reference Lab			135.00	Receipt provided.
41.	20.10.2008	Caribbean Medical Imaging Lab			80.00	Receipt provided
42.	03.09.2009	Caribbean Reference Lab			75.00	Receipt provided.
43.	12.09.2003	Consultation Vincent Clarke		250.00	337.50	Receipt provided.
44.	28.10.2009	Caribbean Reference Lab			110.00	Receipt provided.
45.	26.10.2009	Caribbean Medical Imaging Lab			80.00	Receipt provided
46.	24.11.2009-2.12.2009	Airfare to Barbados			1,595.50	Receipt provided
47.	24.11.2009	Mayfair Medical		50.00	67.50	Receipt provided.
48.	27.11.2009	Imaging & Ultrasound Inc		100.00	135.00	No Receipt
49.	27.11.2009	Medical Services – Vincent Clarke		150.00	202.50	Receipt provided.
50.	12.02.10 – 3.3.10	Mustique Airways to Barbados	356.50		968.60	Receipt provided
51.	07.03.10-28.03.10	Airfare to Barbados	224.60		610.22	Receipt .provided
52.	13.06.2010	Airfare to Barbados	84.40		229.31	Receipt provided.
53.	20.08.2010	Airfare to Barbados	146.80		398.85	Receipt provided
54.	28.06.2011	Airfare to Barbados	129.60		352.12	Receipt provided.

55.	28.06.01	Airfare to Barbados	488.62		1,327.54	Receipt provided
56.	28.06.2011	Haresh Gopwani Medical		100.00	135.00	Receipt provided
57.	08.12.2011	MCMH Lab			765.00	Receipt provided
58.	08.12.2011	MCMH Lab			15.00	Receipt provided.
59.	27.08.2012	Airfare to Barbados	142.10		386.09	Receipt provided.
60.	30.08.2012	Imaging & Ultrasound		250.00	337.50	Receipt provided.
61.	09.11.2013	Imaging & Ultrasound		250.00	337.50	Receipt provided
62.	28.08.2012	Medical services – Vincent Clarke		130.00	175.00	Receipt provided
63.	10.09.2013	Medical Services – Vincent Clarke		180.00	243.00	Receipt provided
		Consultation Vincent Carke		250.00	337.50	No Receipt.
		Departure Tax		25.00	33.75	No Receipt
		Overseas Telephone Calls			767.08	No Receipt
		Departure Tax			20.00	No Receipt
		Airfare to Barbados and Departure Tax – B Gilkes			348.75	Receipt provided
		Departure Tax		25.00	33.75	No Receipt
		Insurance – Dennis Bailey		100.00	135.00	No Receipt

		Consultation – ARS		250.00	337.50	No Receipt
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- [52] With respect to the expenses listed from numbers 1 to 15 of the schedule, no receipts were provided. However, in addition to the oral evidence of Mrs. Gilkes that these expenses were incurred there are medical reports which confirm that Mrs. Gilkes was referred to Dr. Bailey in Barbados and received medical treatment there. The defendants did not challenge these costs. I therefore accept on a balance of probabilities that these costs were incurred and do not find the quantum claimed unreasonable. Applying the approach of the court in *Grant v Motilal Moonan Ltd. and Another*¹¹ I award Mrs. Gilkes \$20,892.29 being the total costs set out in numbers 1 to 15 of the schedule.
- [53] There is no evidence of how the claim for Fed Ex charges, listed at numbers 16, 30 and 38 of the schedule relate to or flow from the injuries sustained. I therefore do not award these sums.
- [54] The claims listed at numbers 17,18,19, 29,40,41, 42,44 and 58 relate to laboratory fees incurred at various laboratories. There is however no evidence of what laboratory tests were conducted in some cases and where some reference is made to the nature of the test there is no evidence of how they relate to or flow from the injury sustained. I therefore do not award these sums.
- [55] I am however satisfied that the claims for \$12.00 for bronclair listed at number 31 of the schedule, laboratory fee of \$765.00 for a CT scan of the neck listed at number 57 of the schedule and the claim for \$80.00 for a chest x-ray listed at number 45 of the schedule likely bear some connection to the injury and I therefore award these sums.
- [56] With respect to the items listed between numbers 20 to 63 related to travel expenses to and costs incurred in Barbados after 1995, Mrs. Gilkes' evidence is that between December 1994 and March 1995 she had to undergo several procedures in Barbados to

¹¹ (1988) 3 WIR 372

determine the extent of the damages done to her and to remedy the damage including a fiberoptic laryngoscopy performed in December 1994.¹² Her final operation was in 1995.¹³ There is no evidence that Mrs. Gilkes:

- (1) Was required to or underwent any other operation after 1995; or
- (2) was required to and did travel out of the jurisdiction after 1995 to receive medical treatment related to the injuries caused by the negligence of Dr. Thomas and Dr. Rajkumar.

[57] Notwithstanding the absence of pleadings or evidence that Mrs. Gilkes was required to travel out of the jurisdiction for medical treatment after 1995 there are receipts evidencing travel to Barbados and expenses incurred there after 1995. At the hearing it was conceded that these claimed expenses were not pleaded or supported by the evidence. In the circumstance I am unable to award special damages for travel to and medical treatment in Barbados after 1995.

[58] Mrs. Gilkes is therefore awarded a total of \$ 21,749.29 for medical and related expenses.

GENERAL DAMAGES

Principles for Assessing General Damages

[59] The legal principles governing the assessment of general damages are well established. The main factors to be taken into account are: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering endured; the loss of amenities suffered; and the extent to which the claimant's pecuniary prospects have been affected

¹² Paragraph 15 of the witness statement

¹³ Paragraph 20 of the witness statement

(1) Nature and Extent of Injuries Sustained

- [60] A medical report dated 25th October 1995 by Dr. Charles states that he examined Mrs. Gilkes on 19th November 1994. He gave her a Berotec Inhaler and Berotec Liquid for use over the weekend. When he went to her school on Monday, 21st November 1994 she was experiencing stridor and using all necessary muscles of respiration. He took her to Kingstown General Hospital where a chest x-ray and lateral x-ray were performed. The chest x-ray showed increased bronchial markings while the lateral x-ray showed a normal caliber trachea. A consultation was obtained that same morning from Dr. Wilfred Layne who diagnosed Mrs. Gilkes with *"damage to the recurrent laryngeal nerve at prior surgery."* He states that Mrs. Gilkes had a partial thyroidectomy on 29th July 1993 and that her surgery was complicated by *"Chronic Laryngeal Obstruction due to Bilateral Recurrent Laryngeal Nerve Damage."* He referred her to Dr. Dennis Bailey FSRC (Edin), Consultant in Ear Nose and Throat /Head and Neck Surgery in Barbados.
- [61] Under cross examination Mrs. Gilkes states that she is aware that Dr. Charles is a gynecologist and that she knows the difference between a gynecologist and an ENT specialist.
- [62] A letter from Dr. Wilfred Layne to Dr. Charles dated 10th March 2016 states that he examined Mrs. Gilkes on 21st November 1994. The letter states:

"Her history of hoarseness and difficulty breathing followed Total Thyroidectomy in August 1993 performed by Mr. St. Clair Thomas ENT Surgeon. Her current complaints of vocal tiredness, poor sleep and general fatigue have improved with the medically imposed rest from her Pre-School duties. However, the underlying problems of vocal cord paralysis due to laryngeal nerve injury following her thyroidectomy is unresolved. She needs further E.N.T evaluation from an independent consultant to assess if any useful intervention is possible."

[63] Dr. Bailey's report, dated 13th October 1995, states that he first saw Mrs. Gilkes on 6th December 1994 and she complained that she had developed acute respiratory obstruction following thyroid surgery on 29th July 1993. He states that this was apparently due to surgical trauma to the recurrent laryngeal nerves of her larynx (the motor nerves to her larynx), a well recognized complication of Thyroid surgery. A laryngofissure tracheostomy procedure was attempted on 8th February 1995 but acute respiratory difficulty recurred on 21st March after decannulation. A tracheostomy tube had to be reinserted to overcome the acute respiratory difficulty which ensued. A final decision was made by Mr. and Mrs. Gilkes following further medial consultation with him to abandon all further attempts at corrective laryngeal surgery and persist with the tracheostomy tube as a permanent solution.

(2) Nature And Gravity Of The Resulting Physical Disability

[64] Dr. Bailey's report states that a permanent tracheostomy preserves a patient's life by guaranteeing adequate respiration via a tube inserted in the neck. However, it imposes certain obvious limitations on a patient's life. He states that *"there can be no swimming, no lifting of heavy weights, and limited exertion; and the tracheostomy tube requires constant hygienic lifelong care."*

[65] He states that Mrs. Gilkes will have to live the rest of her life with a permanent tracheostomy tube and all the limitations on her lifestyle it imposes.

[66] A report by Dr. Hughes Dougan, dated 1st October 2015, states that his evaluation on 24th September 2015 shows a permanent tracheostomy tube with a flap valve. In his opinion her condition is irreversible and will not improve in the future.

(3) Pain, Suffering and Loss of Amenities

[67] Mrs. Gilkes was admitted to the hospital on 27th July 1993 for a thyroidectomy. An emergency tracheotomy had to be performed on 30th July 1993. She was discharged on 6th August 1993 with a hole in her neck. The hole was sutured on 12th August 1993. After

her discharge she began suffering from headaches, excessive snoring and shortness of breath. She was referred to Dr. Bailey in Barbados . On 8th February 1995 Mrs. Gilkes had to undergo a laryngofissure tracheostomy but suffered acute respiratory difficulty which resulted in a tracheostomy tube being inserted.

[68] Mrs. Gilkes states that since her final operation in 1995 her life has never been the same. She still suffers with insomnia and persistent pain and discomfort day and night from the tube in her neck. Her tracheotomy has caused her to withdraw from society and lack self esteem and self worth and she is conscious that she is different from everyone else who has the ability to breathe through their nose. Her condition has caused her to loose interest in anything that may make her happy and she feels at times that she is no use to anyone. She is constantly in a state of depression and feels like her life has been taken away from her.

[69] Before her life changed she enjoyed simple pleasures like fishing, cycling, sewing, painting, playing table tennis, swimming and walking. She was able to perform household duties like cooking, cleaning and washing. She can no longer enjoy any of these things and her chores around the house have to be performed by her husband and brother.

[70] She once enjoyed a healthy sexual relationship with her husband but she no longer enjoys sex and if she does has sex it cannot be prolonged because she is unable to breathe properly and may suffocate. This has put a strain on her marriage as she is not able to sexually satisfy her husband like any wife should. Mrs. Gilkes' evidence in this regard was supported by Mr. Gilkes who states that they do not have a healthy sexual relationship. Under cross examination Mr. Gilkes explained that a healthy sexual relationship is when you have sex and it lasts for a long time. It is not a healthy sexual relationship if sex does not last for a long time. He confirmed that he and Mrs. Gilkes still have sexual intercourse but it does not last a long time.

[71] All of the above has caused her to loose interest in anything that may make her happy and she does not socialise.

[72] Under cross examination Mrs. Gilkes states that when she saw the medial board in May 1995 and Dr. Dougan in 2015 she did not tell them of any of the matters referred to in paragraphs 26 to 28 above.

[73] Mrs. Gilkes' evidence is that and she and her husband were considering children but she was advised by her doctor that as a result of her condition "*she cannot have children*".¹⁴ Under cross examination Mr. Gilkes states that he was informed by Dr. Bailey, who he knows is an ENT specialist, that Mrs. Gilkes could not have children because of her condition.

(4) Extent to Which Pecuniary Prospects Have Been Effected

[74] This aspect of the claim will be addressed under the heading of future loss of earnings.

Quantification of General Damages for Pain and Suffering and Loss of Amenities

[75] Counsel for Mrs. Gilkes cites the cases of *Travia Douglas v Shivougn Warde et al*¹⁵ where the court awarded the claimant, who was rendered a paraplegic, \$100,000 for pain and suffering and \$170,000 for loss of amenities in 2012; *Winston George v Anderson Franklyn et al*¹⁶ where the court awarded the claimant \$90,000 for pain and suffering for the loss of an eye; and the Canadian case of *Thorsell v Hoem*¹⁷ where the claimant was awarded CND\$125,000. It is submitted that the sum of \$97,500 would be reasonable compensation for pain and suffering and loss of amenities

¹⁴ Paragraph 25 of the witness statement

¹⁵ SKBHCV2008/0120

¹⁶ GDAHCV2000/0346

¹⁷ 1984 CanLII 890 (BC SC)

- [76] In 1997 the Court of appeal awarded the claimant in *Fenton Auguste v Francis Neptune*¹⁸ \$75,000 for pain and suffering and \$125,000 for loss of amenities for injuries which resulted in him being a paraplegic and confined to a wheelchair for the rest of his life.
- [77] In *Cletus Dolor v Alcide Antoine et al*¹⁹ the claimant became a quadriplegic as a result of his injuries sustained in a motor vehicle accident. The medical evidence disclosed that the claimant would never walk again and could not do anything for himself. He spent most of his days in a wheel chair with special convoluted foam behind him for support. He had to be bathed, cleaned and fed, drank from a straw with someone holding the glass for him and had to use pampers and a catheter. He continued to experience pain in his neck and often got bedsores. The claimant, who was an acrobatic dancer, who regularly performed at various hotels and public functions. He had a normal and active sex life prior to the accident but could no longer enjoy this. His girlfriend left him and took away their two children and his prospects of marriage were virtually non-existent. In 2004 the court awarded the claimant \$100,000 for pain and suffering and \$150,000 for loss of amenities.
- [78] While the nature and extent of the injuries and the resulting disability of the claimants in the above cases and the case of *Travia Douglas* were more severe than that of Mrs. Gilkes I propose to use the awards made in those cases as a benchmark with due regard being given to their antiquity and the effect of inflation on the awards.
- [79] In *Sheldon Jules v Brent Williams*²⁰ the claimant suffered multiple injuries including internal bleeding, fractures to the facial bones and wound to the face. The claimant was hospitalised for 9 days and was operated on to deal with the internal bleeding. At the time of his admission to the hospital it was noted that there was severe deformity of the face. The claimant was referred to a plastic and reconstructive surgeon since it was discovered that the claimant had "*malocclusion, inability to open his mouth and loss of sensation of his lower lips.*" The medical report diagnosed fracture of several bones in the face. The

¹⁸ SLUHCVP1996/0006

¹⁹ SLUHCV2001/0555

²⁰ DOMHCV2009/0018

claimant had to undergo further surgery and the appearance of his face was permanently altered. The claimant, who was 26 years old and an amateur boxer who represented his country, was awarded \$55,000 for pain and suffering and \$45,000 for loss of amenities in 2012.

[80] The injuries and resulting disability suffered by the claimant in *Sheldon Jules* are also not the same as *Mrs. Gilkes*. I however find the award in that case a useful tool since the claimant suffered injuries to the facial area which affected his appearance.

[81] The court exercises its discretion in determining the quantum of damages that would be fair and reasonable compensation in all the circumstances. In determining how to exercise its discretion on the question of general damages for personal injuries it is well established that:

“ In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based ; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further a field. Awards of similar injuries would be clearly very helpful in relating the claimant’s injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge’s discretion”.²¹

[82] In *Darel Christopher v Benedicta Samuels dba Samuel Richardson & Co*²² Hariprashad-Charles J stated:

“It is obvious that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the plaintiff’s necessary medical care, operations and treatment.”

²¹ *CCCA Limited v Julius Jeffrey* SVGHCVAP2003/0010

²² *BVIHCV2008/0183*

- [83] It is clear that Mrs. Gilkes suffered and continues to suffer pain and discomfort. She underwent several surgical procedures following the thyroidectomy culminating in a permanent tracheostomy in 1995. She still suffers with insomnia and persistent pain and discomfort day and night from the tube in her neck. She performs her household chores but experiences pain while doing so. The permanent tracheostomy will require lifelong hygienic care and will continue to cause discomfort for the foreseeable future. I find that \$60,000.00 is reasonable compensation for pain and suffering.
- [84] With respect to loss of amenities the medical report by Dr. Bailey states that Mrs. Gilkes will be unable to swim or lift heavy weights and must limit her exertion.
- [85] Mrs. Gilkes' evidence is that she used to enjoy fishing, cycling, sewing, painting, playing table tennis, swimming and walking and that since her injury she has been unable to enjoy any of these activities or perform duties like cooking, cleaning, washing and mowing the lawn. Her chores around the house have to be performed by her husband and brother.
- [86] As discussed previously,²³ Mrs. Gilkes admitted under cross examination that she is able to perform her household chores but experiences pain while doing so. I therefore find that Mrs. Gilkes was not being candid when she asserted that she is unable to perform any household chores and that these chores are performed by her husband and brother.
- [87] Both Mr. and Mrs. Gilkes' evidence was that they were informed by a doctor that Mrs. Gilkes cannot have children as a result of her tracheostomy. Under cross examination Mrs. Gilkes stated that it is not that she cannot have children but was advised that she should not. There is no medical evidence to support the assertion by Mr. and Mrs. Gilkes that Mrs. Gilkes is unable to and ought not to have children as a result of her condition. In the absence of medical evidence I am unable to accept this evidence.
- [88] Mrs. Gilkes' evidence was that the permanent tracheostomy has caused her to "withdraw from society" and lack self esteem. She is constantly in a state of depression

²³ paragraph 36

and feels like her life has been taken away from her. Mr. Gilkes' evidence was also that Mrs. Gilkes no longer socialises. Under cross examination he stated that when he says that she no longer socializes he means that she no longer goes to parties. She however goes to church and friends and family come to visit her. He is not sure whether she goes to visit friends and family.

[89] I note that while Mrs. Gilkes gives extensive evidence regarding her loss of amenities she failed to mention any of these issues to the medical board or to Dr. Dougan during her recent visit in 2015. Mrs. Gilkes and provided no explanation for her failure to do so.

[90] Taking all the evidence into consideration I find that Mrs. Gilkes' ability to enjoy activities she once enjoyed has been affected. Mrs. Gilkes is able to and does perform household chores, but she experiences pain in the process. She is no longer able to mow the lawn. I accept that the permanent tracheostomy has negatively impacted her enjoyment of sexual relations with her husband. While there is no medical evidence that Mrs. Gilkes suffers from depression as a result of her condition, I accept that her happiness and self esteem have been negatively affected by her condition. The medical evidence is that her condition is irreversible and will not improve in the future. I find that \$30,000 is reasonable compensation for loss of amenities.

Future Loss of Earnings/Impact on Pecuniary Prospects

[91] Mrs. Gilkes seeks damages for future loss of earnings. Damages for future loss of earnings is the amount which a claimant has been prevented by the injury from earning in the future.²⁴ The conventional approach to calculating this head of damage is the multiplier/multiplicand approach. Alternatively, the court may use a lump sum approach where there are evidentiary uncertainties.²⁵

²⁴ Heeralall v Hack Brothers Constructing Co. Ltd and another 1977) 25 WIR117 at pages 132

²⁵ Blamire v South Cumbria Health Authority P.I.Q.R Q1, C.A

- [92] Mrs. Gilkes' evidence is that she earned \$750.00 from her job as a teacher and prior to her injury she intended to open her own preschool from which, after expenses, she would have earned \$1800.00 per month. Mrs. Gilkes asserts that she has been unable to engage in any employment as a result of her injury.
- [93] Counsel for Mrs. Gilkes submits that using a multiplier of 11.52 and a multiplicand of \$21,600 per annum (\$1,800 x 12) an award of \$248,832.00 should be made for future loss of earnings. Alternatively, using the same multiplier and a multiplicand of \$9000.00 per annum (\$750 x 12) Mrs. Gilkes should be awarded \$103,680.00.
- [94] I do not accept Mrs. Gilkes' uncorroborated evidence that she would have earned a monthly net income of \$1800.00 if she had opened the intended preschool without any basis being provided for this estimate. I find this evidence purely speculative.
- [95] I accept that, as stated by the medical board, Mrs. Gilkes is unable to continue to work as a teacher and consequently I accept that she would be unable to earn the \$750.00 which she earned as a teacher prior to sustaining the injury.
- [96] In *Parahoo v S.M. Jaleel Company Limited* Hamel-Smith JA noted that a claimant who claims loss of pecuniary prospects must show that the injury was of such a nature that it rendered her incapable of performing her pre-accident job or any other form of work whatsoever. Where she is rendered incapable of performing the prior job but is not prevented from doing other work, it was necessary to show that in order to mitigate the loss.
- [97] The learned authors of *Halsbury's Laws of England*²⁶ state:

“ 378. Claimant's Duty to Mitigate Loss

The claimant must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, whether that wrong be a

²⁶ Volume 29 (2004) paragraph 378

breach of contract or a tort¹. If he fails to do so, he is not in breach of duty as such, but he cannot claim damages for any such loss which he ought reasonably to have avoided², the reason being that such loss is regarded as flowing not from the defendant's wrong but from the claimant's unreasonable behaviour³.

.... A personal injury claimant must mitigate his loss by obtaining proper medical treatment and not acting so as to retard his recovery, and he is not entitled to damages in respect of any pain, suffering, loss of amenities or loss of earnings consequent upon his failing to do so ⁸. Furthermore, even if disabled from continuing his present employment, he should be prepared to accept reasonable alternative work⁹...

The law of mitigation may exceptionally operate in favour of the claimant. If, in taking reasonable steps to mitigate, he incurs expenses or further loss, he may recover such expenses ¹² or loss ¹³ from the defendant, even if the resulting damage is greater than it would have been had the mitigating steps not been taken at all."

[98] Mrs. Giles will not be permitted to recover damages which could have been avoided by acting reasonably. What is reasonable is a question of fact.

[99] The essence of Mrs. Gilkes' evidence is that her injury has prevented her from performing any work at all and thus she has suffered a loss of future earnings to be calculated a rate of \$750.00 per month - being her earnings prior to sustaining the injury. Her oral evidence is however unsupported by the medical evidence. None of the medical reports she tendered stated that she is incapable of working. The medical board found that her mental and other physical attributes are normal and that she could retrain and reenter the job market. While Mrs. Gilkes denies telling the medical board that she was taking a fashion design and fabric painting course, it is clear that the board found that the injury did not create a permanent disability so as to prevent her from engaging in any form of employment whatsoever.

[100] I accept that Mrs. Gilkes is unable to engage in any employment which requires heavy lifting or too much exertion ²⁷. These limitations do not however restrict every form of employment. Mrs. Gilkes has provided no evidence that: (a) she took any steps whatsoever to retrain in another field which does not require heavy lifting or too much exertion ; or (b) she made efforts to engage in alternative employment not requiring heavy lifting or too much exertion. She has provided no medical or other credible evidence of obstacles to her retraining or finding alternative employment.

[101] Based on the evidence before me I find that Mrs. Gilkes' failure to take any steps to retrain in a different field or seek some form of alternative employment to mitigate her loss without any medical or credible evidence being provided for her failure to do so was unreasonable. Mrs. Gilkes is therefore not entitled to recover any damages for future loss of income which could have been avoided if she had acted reasonably and sought alternative employment.

[102] The difficulty facing the court is how to quantify Mrs. Gilkes' future loss taking into consideration her failure to mitigate. The task is rendered more difficult by the absence of direct evidence of what Mrs. Gilkes could have earned had she retrained or engaged in some form of alternative employment.

[103] The court can only do the best that it can with the evidence before it. I propose to use the multiplier/multiplicand approach to determine what Mrs. Gilkes would have been entitled to if she was unable to engage in any employment and discount this sum to take into consideration the fact that she was under a duty to mitigate her loss.

[104] I propose to use \$9000.00 per annum as the multiplicand based on a monthly income of \$750.00. With respect to the multiplier, counsel for Mrs. Gilkes submitted that 11.52 was an appropriate multiplier.

²⁷ Medical report by Dr. Bailey

[105] In *Martin Alphonso et al v Deodat Ramnath*²⁸ the Court of Appeal reduced the multiplier to 12 for a claimant who was 45 years old at the time of the accident with a working life of up to 65 years. Singh JA stated:

“Dr. Gonsalves presented this Court, for our guidance, with nine other unreported authorities from the region showing comparable injuries and the multipliers adopted e.g. 32 years old, multiplier 13, 33 years old, multiplier 13, 26 years old, multiplier 9, 30 years old, multiplier 13, 24 years old, multiplier 14, 52 years old, multiplier 5, 40 years old, multiplier 12, 31 years old, multiplier 10, 47 years old, multiplier 9 (but reduced to 6). It is obvious from these authorities that the identification of the true multiplier depended on the individual facts and circumstances of each case and that there was no rigid formula...

In determining the multiplier a Court should be mindful that it is assessing general and not special damages. That it is evaluating prospects and that it is a once for all and final assessment. It must take into account the many contingencies, vicissitudes and imponderables of life. It must remember that the plaintiff is getting a lump sum instead of several smaller sums spread over the years and that the award is intended to compensate the plaintiff for the money he would have earned during his normal working life but for the accident.”

[106] In *Claudette Francis v Cecilia Marti*²⁹ a multiplier of 3 was used for a plaintiff who was 57 years at the time of the trial with a working life up to 65 years. In *Aubrey Smith v Calvert Fleming et al*³⁰ a multiplier of 6 years for the freelance work and a multiplier of 2 years for the contract work was used for a claimant who was 57 years old at the time of the accident and planned to work up to 65.

[107] Mrs. Gilkes was approximately 28 years old when the thyroidectomy and emergency tracheostomy were performed, 30 years old when the permanent tracheostomy was

²⁸ BVIHCVAP1996/0001

²⁹ HCVAP 2009/007

³⁰ AXAHCV2008/0050

performed , 47 at the time of the consent judgment on liability and is now 51 years old. On the premise that Mrs. Gilkes would have had a working life of up to 65 years of age and taking into consideration “*the many contingencies, vicissitudes and imponderables of life*” I find that a multiplier of 9 would be reasonable.

[108] Using a multiplicand of \$9000.00 and a multiplier of 9 Mrs. Gilkes would have been entitled to \$81,000.00 if she was unable to engage in any employment in the future as a result of her injury.

[109] In considering the discount that should be applied for Mrs. Gilkes’ duty to mitigate I have taken into consideration all the circumstances including that Mrs. Gilkes cannot engage in employment requiring heavy lifting or too much exertion, her ability to speak and give clear oral evidence at the hearing and the minimum wage in this jurisdiction. The minimum wage for jobs such as an accounts clerk, search clerks, cashiers or a typists is between \$600-\$800.00 per month ³¹. If Mrs. Gilkes had retrained and/or sought employment in any of these or a similar field there is a real likelihood that she would have been able to earn at least an income within the range of the minimum wage or slightly less if she was unable to work full time.

[110] In all the circumstances I find that a discount of 75% is reasonable to take into account that Mrs. Gilkes failed to mitigate her loss by making any effort to retrain or find any kind of alternative employment whatsoever. I therefore award Mrs. Gilkes \$20,250.00 for loss of future earnings.

[111] In summary, Mrs. Gilkes is awarded:

(1) Special Damages

(a) Loss of income for two (2) years	\$18, 000.00
(b) Medical and Related Expense	<u>\$ 21,749.29</u>

³¹ Department of Labour, Ministry of National Reconciliation, The Public Service, Labour, Information and Ecclesiastical Affairs, Government of St. Vincent and the Grenadines <http://www.dol.gov.vc/dol/>

Total Special Damages	\$ 39,749.29
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(2) General Damages

(a) Pain and suffering	\$ 60,000.00
(b) Loss of amenities	\$ 30,000.00
(c) Future Loss of Earnings	<u>\$ 20,250.00</u>
	\$110,250.00

Interest and Costs

[112] Interest is awarded on special damages of \$39,749.29 at a rate of 2 ½ % from 6th August 1993 to 27 November 2012.

[113] Interest is awarded on the \$90,000.00 awarded for pain and suffering and loss of amenities at a rate of 2 ½ % from the date of service of the claim to 27th November 2012.

[114] The defendants shall pay Mrs. Gilkes prescribed costs.

Fidela Corbin Lincoln
Master