

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV0050/2008

BETWEEN:

AUBREY SMITH

Claimant

And

CALVERT FLEMING

1st Defendant

ALVIN WHITE

2nd Defendant

Before: The Hon. Madame Justice Louise Blenman

Appearances:

Ms. Paulette Harrigan for the Claimant

Ms. Cora Richardson-Hodge and Ms. Sherma Blaize for the Defendant

.....
2010: October 18
November 20
2011: January 15
May 27
.....

JUDGMENT

[1] **BLENMAN, J:** This is a claim for the assessment of damages by Mr. Aubrey Smith against Mr. Calvert Fleming in circumstances where Mr. Fleming has accepted liability for the damage and loss that were sustained by Mr. Smith as a result of a vehicular accident.

Background

[2] On 27th May 2006, Mr. Aubrey Smith sustained injuries in a vehicular accident when he was driving Hyundai Taxi Registration No. A366H along George Hill main road in Anguilla; and motor truck

Registration No. A1656 driven by Mr. Alvin White struck Mr. Smith's vehicle. At the time of the accident, Mr. White was the servant or agent of Mr. Fleming.

- [3] Mr. Smith was of 57 years old at the time of the accident. He was employed on a contract and was also self-employed, while earning his living as a taxi driver. As a consequence of the accident, Mr. Smith alleges that he suffered personal injuries, damage to his vehicle and loss of earnings; he also incurred medical expenses. Mr. Smith also says that he continues to suffer much pain and can no longer enjoy the amenities of life. He complains that as a result of the injuries, he was first forced to reduce his hours of work and after corrective surgery he is unable to work. He has claimed various sums of monies as compensation for the loss and damages that he has suffered.
- [4] Mr. Gill was appointed the court's Expert and provided the court with expert evidence. He subsequently became the attending surgeon who performed the operation on Mr. Smith. This was unbeknownst to the court.
- [5] Mr. Fleming having conceded the issue of liability, the sole issue to be resolved is the quantum of damages that should be awarded to Mr. Smith. Mr. Fleming takes issue with the quantum of damages claimed by Mr. Smith; he does not dispute that Mr. Smith is entitled to be compensated for the loss and injuries which he has suffered but is adamant that Mr. Smith's claim is over exaggerated.

Evidence

- [6] Mr. Smith provided the court with a witness statement and he was cross-examined at length by learned Counsel Mrs. Cora Richardson-Hodge. Mr. Fleming did not lead any evidence in the claim for assessment.
- [7] Mr. John Gill who is a neurosurgeon provided the court and the parties with his expert reports that were dated 19th October 2009 and 18th October 2010, together with an erratum dated 19th October, 2010. He also provided the court with oral testimony and was cross-examined by both learned Counsel Ms. Paulette Harrigan and learned Counsel Mrs. Cora Richardson-Hodge.

- [8] Ms. Kaelen Richardson who is the Dispatching Supervisor of the Taxi Service was summoned by the court and she attended and provided the court with the details of the dispatching records for Blowing Point during the period of January 2006 to the present date, together with the taxi dispatching records for the Airport during the period July 2007 to current.

MRS. CORA RICHARDSON-HODGE'S SUBMISSIONS

Special Damages

- [9] Addressing the issue of special damages, learned Counsel Mrs. Cora Richardson-Hodge said that the documentary evidence supporting these special damages has been agreed by the parties. Mr. Fleming has not produced any evidence disputing the special damages which has been put forward by Mr. Smith. Both Mr. Gill and Mr. Smith gave oral evidence that Mr. Smith had undergone spinal surgery on 21st June 2010. (In relation to the costs, the court is invited to take judicial notice of the fact that the exchange rate between the Barbadian Dollar and the United States Dollar is 2:1). Mr. Smith provided evidence of the costs he has incurred.
- [10] However, in cross-examination, Mr. Smith stated that food costs were not included in the above total, but he estimated that it would be much less than US\$3,000.00. Mrs. Richardson-Hodge submitted that an award of US\$954.87 for food is reasonable, for a grand total of US\$15,000.00 (EC\$40,323.00) as compensation for expenses incurred by Mr. Smith in relation to the costs of the spinal operation.

General Damages

- [11] Learned Counsel Mrs. Richardson-Hodge said that the general principle is that damages are assessed as at the date of trial. The factors to be taken into account in assessing damages are set out in **Cornilliac v St. Louis** (1964) 7 WIR 491: (i) the nature and extent of injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects.

- [12] Learned Counsel Mrs. Richardson-Hodge referred the court to a number of authorities in seeking to persuade the court as to the quantum of damages that should be awarded. In ***Cecilia Hatchet v First Caribbean International Bank et al***, the High Court in the British Virgin Islands awarded Ms. Hatchet, who was 40 years old at the time of the accident and 46 years old at the time of the hearing, US\$20,000.00 (EC\$54,000.00) for pain and suffering and loss of amenities in a case in which she suffered from degenerative disc disease at L5-S1 with herniation.
- [13] In ***Gloria Lake v Antigua Commercial Bank***, the High Court in Antigua and Barbuda awarded Ms. Lake, who was 58 years old at the time of trial, EC\$100,000.00 for pain and suffering and loss of amenities in a case where she suffered injuries to her back as a result of walking into a puddle of water and falling. She underwent surgery and obtained some relief but still experienced severe pain and her amenities were affected.
- [14] In ***Oscar Frederick v Liat Limited***, the High Court in Antigua and Barbuda awarded Mr. Frederick who was 59 years old at the time of filing of the action in 2007, EC\$80,000.00 for pain and suffering and loss of amenities in a case where he suffered back injuries as a result of a fall at his work place. He underwent surgery to his back but still suffered as a result of the injuries.
- [15] Mrs. Richardson-Hodge urged the court to award Mr. Smith EC\$80,000.00 for pain and suffering and loss of amenities, with a forty percent reduction, based on the evidence that he had a prevailing condition at the time of the accident that contributed to the pain and suffering he experienced after the accident.

Future Loss of Earnings

- [16] Mrs. Richardson-Hodge said that this head of damage referred to as future loss of earnings is meant to compensate Mr. Smith for the loss of money which he would have earned as salary during his normal working life had the accident not occurred. The future loss of earnings is in relation to Mr. Smith's job as a taxi driver since there is no evidence before the court that he earned any monies as a result of working as a plumber.

The Multiplier

- [17] In relation to the appropriate multiplier to be utilized, Mrs. Richardson-Hodge referred the court to ***Gloria Lake's*** case. Ms. Lake was 58 years old at the time of the accident, the court, having considered the various authorities and relevant principles, was of the view that a multiplier of 4 was applicable to Ms. Lake given the fact that she was 58 years old and had a working life up to 65, this was in effect seven years which the court reduced to cater for the imponderables and vicissitudes of life.
- [18] Mrs. Richardson-Hodge said that in the case at bar, Mr. Smith was 57 years of age at the time of the motor vehicle accident (the accident occurred on 27th May 2006 and Mr. Smith turned 58 years old on 9th October 2006), Mr. Smith in his evidence stated that he always intended to work until the age of 65. Learned Counsel Mrs. Richardson-Hodge submitted that in the present case the court ought to apply a multiplier of **4**, as is consistent with the ***Gloria Lake*** case.

The Multiplicand

Contract Work

- [19] Mrs. Richardson-Hodge stated that based on the medical evidence, Mr. Smith will not be able to work again as a taxi driver. Mr. Smith does, however, continue to earn monies as a result of his subcontracting work to other taxi drivers in order to fulfill his contract with Classic Customs Vacations. He has put before the court evidence of his earnings, in 2006, from Classic Customs Vacations. Mr. Smith acknowledged on cross-examination, however, that there was a world-wide economic downturn and that his income as a taxi driver was directly impacted by the decrease of tourist arrivals to Anguilla. Mrs. Richardson-Hodge presented to him figures for the period 1993 to 2007 and 2009 to 2010 from the Anguilla Statistics Department, which verified that the number of tourist arrivals between 2007 and 2010 dropped to pre-2004 levels. Mr. Smith acknowledged that the number of tourist arrivals through Classic Customs Vacations had decreased, but he did not produce this information to the court.

[20] Mr. Smith further stated on cross-examination that he had continued to work with Classic Customs Vacations since the date of the accident and up to the date of trial. When questioned, Mr. Smith stated that during the times he was unable to work, he would have other taxi drivers collect his passengers for a fee. He stated that he would be reimbursed that fee from Classic Customs Vacations. Mr. Smith further stated that he still maintains the contract with Customs Vacations and there is no evidence on which it can be concluded that he has suffered loss of salary on the contract work.

Freelance Work

[21] In his witness statement, Mr. Smith claimed that he earned monies from freelance work in four ways; (i) developing a relationship with passengers at port of entry; (ii) referrals from existing customers and local persons/businesses; (iii) repeat visitors to the island; and (iv) queuing up with other taxi drivers at the ports, hotels and nightspots. He, however, presented no documentary evidence to support his contention that he earned approximately US\$4,800.00 per month. Moreover, he had already confirmed that the tourist arrivals had decreased as a result of the worldwide economic downturn and therefore the sum claimed could not possibly reflect the monies that he would have earned were it not for the accident.

[22] Further, on cross-examination, he conceded that he had not queued up much with the other taxi drivers since 2000, as he was well established. Ms. Kolean Richardson, Supervisor of Taxi Dispatchers, however, stated that she started working as a Taxi Dispatcher in 2008 and that she could recall that in 2008 Mr. Smith would queue up if he was at a port and his taxi number was close on the rotation list. If the oral evidence of Mr. Smith is to be believed, then it would mean that Mr. Smith is seeking compensation for freelance work that he in fact had stopped performing. If the oral evidence of Ms. Richardson is believed and accepted, however, then it would mean that Mr. Smith had in fact continued to perform freelance work even after the date of the accident on 27th May 2006.

[23] In the present case, although there is medical evidence that Mr. Smith is unable to work as a result of his injuries, there is no satisfactory evidence before the court that Mr. Smith in fact was earning monies from freelance work. If his evidence is to be believed, Mr. Smith was in fact so well

established that it was unnecessary for him to conduct the type of freelance work that he described in his witness statement. Mrs. Cora Richardson-Hodge stated that there is no real evidence before the court verifying the claims made by Mr. Smith in relation to freelance work. As such, there is no basis on which the court can award US\$4,800 per month or in fact any amount in relation to freelance work as claimed by Mr. Smith.

- [24] As Mr. Smith still maintains his contract work and inasmuch as Mr. Smith has failed to provide any documentary evidence to support his claim for freelance work, Mrs. Richardson-Hodge submitted that the multiplier in this particular case is 0. Applying the multiplicand to the multiplier, therefore, yields a figure of 0 with respect to loss of future earnings.

Future Medical Expenses

- [25] Next, Mrs. Richardson-Hodge stated that Mr. Gill gave evidence that Mr. Smith would require the following in relation to future medical expenses:

- (i) Medical Imaging: MRI, Plain x-ray; CT studies of the spine: Conservatively at least two MR studies, one CT study, and two plain x-ray studies: US\$3,500-US\$4,000;
- (ii) Medications: US\$2,500 per annum;
- (iii) Rehabilitation Treatments (eg. Physiotherapy): Assuming the requirement for six weeks of treatment per year at two sessions per week: US\$1,200;
- (iv) Medical Evaluations: one visit per quarter for at least 2 years: US\$800;
- (v) Pain Management Procedures: US\$2,000
- (vi) Further Spinal Surgical Procedures: depending upon the scope, type and surgical facility: US\$17,000-\$65,000.

- [26] It should be noted that Mr. Gill, in his Original Report, dated 19th October 2009, had stated that the cost of lumbar spine decompression and fusion ranged from US\$17,000-US\$65,000, yet the documentary evidence provided by Mr. Smith showed that the actual cost of the operation

conducted in Barbados as well as the attendant costs were approximately US\$15,000.00. It is anticipated that any further procedures will also likely take place in Barbados and conducted by Mr. Gill. In the circumstances, Mrs. Richardson-Hodge submitted that an amount in relation to further spinal surgical procedures in the sum of US\$15,000.00 is reasonable.

- [27] In the circumstances, Mrs. Richardson-Hodge submitted that the total figure for future medical expenses is US\$25,500.00 (EC\$68,549.10).

Ms. Paulette Harrigan's Submissions

- [28] Learned Counsel Ms. Paulette Harrigan said that the leading authorities dealing with damages for personal injuries are the cases of ***Cornilliac v St. Louis*** (1964) 7 WIR 491 and ***Martin Alphonso, et al v Deodat Ramnath*** 1997 56 WIR 183

- [29] Ms. Harrigan, also, reminded the court that in ***Cornilliac v St. Louis*** Wooding CJ stated the principles to be applied when assessing general damages for personal injuries.

The Nature and Extent of the Injuries Sustained

- [30] Applying the principles of ***Cornilliac v St. Louis*** to the Expert Medical Report of Mr. Gill, the trauma caused by the accident transformed Mr. Smith's pre-existing spondylotic pathologic changes of the cervical and lumbar regions of the spine to chronic pain of the neck and lower back with their associated radicular symptoms. The court must also consider Mr. Smith's evidence on this aspect of the claim.

The Nature and Gravity of the Resulting Physical Disability

- [31] Learned Counsel Ms. Harrigan stated that as a result of the accident Mr. Smith is almost in constant pain and his activity is severely impaired. He is unable to walk without assistance; he is unable to stand erect or to flex his spine. He is unable to drive, perform any kind of manual work or engage in conjugal relationships. Mr. Gill assessed Mr. Smith's condition as severe and described

Mr. Smith as totally disabled. Initially, Mr. Gill also stated that Mr. Smith has a very low chance of returning to work, but at the trial Mr. Gill indicated that Mr. Smith can no longer work. Mr. Smith is likely to suffer long term neck and lower back pain and will require medical and rehabilitative attention in future to achieve relief of his symptoms.

Pain and Suffering

- [32] Learned Counsel Ms. Harrigan said that since the accident Mr. Smith has been in constant pain. Sometimes he does not know if he should stand, sit or lie down to reduce the pain and is at times reduced to tears. The pain continues even to the date of trial.

Loss of Amenities

- [33] Mr. Smith can no longer enjoy the simple things in life like standing, sitting or lying down. He has problems sleeping. He can no longer lift items and has to rely on others to assist him. He cannot maintain his own home and needs to hire workmen to work around the house. He can no longer play dominoes, or do gardening with his wife or have the pleasure of playing with his grandchildren. He can no longer enjoy a sexual relationship with his wife due to the pain.
- [34] In ***Claudette Francis v Cecilia Martin*** HCVAP 2009/007 the Respondent in that action had been injured in a road accident. The brunt of the impact to her was received in her lower back area and she suffered a disruption of the sacroiliac joint which was developing into post-traumatic osteoarthritis lumbar spine. It meant that she could not sit or stand for any period longer than about half an hour without experiencing pain. She had to lie down to relieve the pain. She could not walk for a distance greater than some 500 yards or so. She was in constant pain or under the constant threat of pain and was seriously disabled. The court awarded her U.S.\$45,000 for pain and suffering and loss of amenity together with a modest figure to compensate the Respondent's husband for time lost in having to absent himself from work to look after her in the early period after the accident.

[35] In *Oscar Frederick v LIAT* (1974) Limited ANUHCV 2007/0391 the Claimant fell at work and injured his ankle and lower back; the injuries were aggravated by another fall whilst at work. The Claimant was awarded E.C.\$80,000 for pain and suffering and E.C.\$60,000 for loss of amenities.

[36] Ms. Harrigan said that the above authorities are very similar to the case at bar and as such Mr. Smith should be awarded damages for pain and suffering and loss of amenities in the sum of E.C.\$120,000 to E.C.\$197,000.

Pecuniary Prospects

[37] Learned Counsel Ms. Harrigan stated, that as a consequence of the accident and the resultant injury Mr. Smith does not have the physical capacity to carry out freelance work and since the accident has only been carrying out his contract work with Customs Classic Vacations and Island Reps NV. He is in constant pain, unable to lift items, and his mobility has been severely restricted by the accident. As a result, Mr. Smith has difficulties in fulfilling his contract work with Customs Classic Vacations. His ability to work has been hampered over the last few years and since having surgery in June 2010 he has not carried out any of the contract work in person. Mr. Gill has described him as fully disabled for his vocation as a taxi driver. Mr. Smith had planned to work until he was 65 but since he is unable to now perform that work he will lose income from the contract work for 4 years as from June 2010 to 9th October 2013 and has lost income from the freelance work for 8 years from the 27th day of May 2006 to 9th October 2013. Ms. Harrigan urged the court to compensate him for his loss.

FUTURE LOSS OF EARNINGS

[38] Mr. Smith gave evidence that he is a taxi driver and that prior to the accident he made his income in two ways. The first was under a contract which he had with Classic Customs Vacations who are worldwide travel agents. The second was through freelance work. He said that after the accident he could no longer carry out freelance work and restricted himself to the contract work; in cross-examination, he made it clear that he did not indulge in freelance work after the accident.

[39] Ms. Harrigan argued that as a result of Mr. Smith's physical condition he was not able to carry out the freelance work but continued to perform the contract work thereby mitigating his loss.

In cross-examination, Mr. Fleming challenged whether Mr. Smith would have earned the monies claimed for future loss of earnings in light of the economic downturn and submitted statistics showing a downturn in visitor arrivals. Learned Counsel Ms. Harrigan said that he admitted that there was a drop in his income as a result of the economic downturn but not by much and was adamant that by reason of the way in which he obtained his initial fares and the system that he had developed over the years in establishing his business and contacts that he would not have suffered a substantial loss of income from the freelance work if he had been able to work. In any event, in **Martin Alphonso et al v Deodat Ramnath** (2000) 56 WIR 183 Satrohan Singh JA stated

"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. (Lloyd v Phillip)"

The Multiplier

[40] In the unreported case of **Lloyd v Phillip** referred to in the **Martin Alphonso et al v Deodat Ramnath** case at page 192 (e) a multiplier of 10 was used when the Plaintiff was 57 at the time of the accident and had a working life of up to 70 years. In the **Martin Alphonso** case on appeal, the multiplier was 12 for a Plaintiff of 45 years of age at the time of the accident with a working life of up to 65 years. In the **Claudette Francis v Cecilia Martin** HCVAP 2009/007, the multiplier was 3 for a Plaintiff of 57 years at the time of the trial with a working life up to 65 years.

[41] Ms. Harrigan said that in the present case, Mr. Smith was 57 years of age at the time of the accident with plans to work up to 65 years of age. Ms. Harrigan argued that taking into consideration the contingencies, vicissitudes and imponderables of life a multiplier of 8 years would

be too high and a multiplier of 3 years would be too low. In the premises of this case, a multiplier of 6 years for the freelance work and a multiplier of 2 years for the contract work would be reasonable.

The Multiplicand

[42] Mr. Smith gave evidence that he earned approximately U.S.\$4,800 per month from freelance work and that he has not been able to carry out freelance work since the accident and that he earns approximately U.S.\$2,400 per month from contract work. A total of U.S.\$7,200 per month.

[43] Accordingly, Ms. Harrigan said that he was entitled to be compensated for future loss of earnings as follows:-

U.S.\$4,800 x 12 x 6 = U.S.\$345,600.00

U.S.\$2,400 x 12 x 2= U.S.\$ 57,600.00

U.S.\$403,200.00

Less expenses U.S.\$393.17x12x6= U.S.\$ 28,308.24

Less 10% U.S.\$ 37,489.18

TOTAL U.S.\$337,402.58

[44] Ms. Harrigan said that Mr. Smith should be compensated for the future loss of earnings in the sum of U.S.\$337,402.58.

Future Medical Expenses

[45] Next, Ms. Harrigan said that Mr. Smith was suffering from constant pain and Mr. Gill in his Expert Medical Report indicates that he would experience pain for the rest of his life. Mr. Smith wanted relief from the pain and so in June of 2010 Mr. Smith went to Mr. Gill in Barbados for a total of 27 days where he underwent tests and surgery.

[46] Mr. Gill in his Expert Medical Report stated that Mr. Smith will require medical and rehabilitative attention in the future in order to achieve relief of his symptoms. He stated that Mr. Smith's requirements will range from physician evaluations by spinal and pain management specialist, the purchase of prescribed medications and the use of physical therapy on occasions when the spinal pain is severe. Ms. Harrigan advocated that the court ought not to reduce Mr. Gill's award of damages due to his prevailing medical condition. She referred the court to **Smith v Leach Brain** [1961] 3 ALL ER 1159.

[47] In **Claudette Francis v Cecilia Martin** HCVAP 2009/007 the Claimant was 57 at the time of the trial and using a life span of 75 years the court applied a multiplier of 10 for future medical expenses. Also, Ms. Harrigan submitted that in awarding damages for future medical expenses the court should award a sum which includes the cost of possible surgery. Mr. Gill assessed the cost of surgery between U.S.\$17,000 and U.S.\$65,000.

[48] Mr. Smith in his evidence states that on average he spends U.S.\$130 per month on medication and U.S.\$40 for travel expenses. Mr. Gill proposes to prescribe Mr. Smith with the same medication which Dr. Vialenc has been prescribing Mr. Smith with since the accident and so Mr. Smith in mitigation of his loss proposes to continue to use Dr. Vialenc whose medical practice is in St. Martin to obtain his prescriptions since it would be absurd to travel to Barbados each time he needs a prescription for pain management. Dr. Vialenc's present consultation fee is U.S. \$30 per visit.

[49] Mr. Harrigan said that, Mr. Smith is entitled to be compensated as follows for his future medical expenses:-

- i. Surgery in Barbados US\$15,200.48
- ii. Dr. Vialenc Consultation $\text{US\$ } 30 \times 12 = \text{US\$}360 \times 10 = \text{US\$}3,600.00$
- iii Medication $\text{US\$}130 \times 12 = \text{US\$}1,560 \times 10 = \text{US\$}15,600.00$
- iv Travel to St.Martin $\text{US\$ } 40 \times 12 = \text{US\$}480 \times 10 = \text{US\$}4,800.00$
- v Physiotherapy $\text{US\$}110 \times 12 = \text{US\$}1,320 \times 10 = \text{US\$}13,200.00$
- vi Treadmill US\$1,247.99

vii Epidural injection US\$100 x 10= US\$1,000.00
viii Travel to Barbados US\$562 x 4 = US\$2,248 x2 US\$4,496.00
ix Mr. Gill Consultation US\$100 x 4 = 800.00
x Hotel fees in Barbados US\$ 40 x 76 days over 2 yrs US\$3,040.00
xi Food in Barbados US\$ 42 x 76 days over 2 yrs 3,192.00
xii MRI, X-ray & CT Scans 4,000.00
xiii Medication in Barbados US\$2,500 x 2 5,000.00
xiv Pain Management Procedures 2,000.00
xv Surgery 65,000.00
TOTAL US\$142,176.47

[50] Accordingly, the total sum to which Mr. Smith is entitled for future medical expenses is US\$142,176.47.

[51] Ms. Harrigan urged the court to award Mr. Smith interests and prescribed costs.

Court Analysis and Conclusions

[52] The court has given careful consideration to the evidence that was adduced in this matter. In addition, deliberate attention was given to the very helpful and lucid submissions of learned Counsel for both sides.

[53] The following represents the courts findings of fact or otherwise the agreed facts:

[54] Mr. Smith is now 58 years of age. He is a licensed taxi driver. He was the owner of a licensed taxi bus registration number A366H which seated 12 persons including the driver. He used the vehicle to earn his living and worked as the Anguillian Representative for Classic Customs Vacations, who are travel agents. Through this arrangement, he transported passengers who arrived in Anguilla, to their hotels and back to the airport or port of departure. In addition, Mr. Smith worked freelance as a taxi driver at divers places including the seaport of entry into Anguilla and at the airport. He worked in these capacities while at the same time working as a plumber.

- [55] On the day 27th May 2006, while he was driving his motor vehicle it was involved in a collision with a truck that was being driven by Mr. White. Mr. Smith suffered personal injuries. Contrary to what he has stated, the court accepts that he experienced some amount of pain to his back prior to the accident. This is borne out by the documentary evidence. However, there is no basis to disbelieve him that he was able to work for 6 days per week, once work was available. As a consequence of the accident and the injury that he received, Mr. Smith started to experience pain in his neck and back. Initially, he thought that the pain would subside and when it did not he was forced to consult Dr. Vialenc, in St. Martin, for medical treatment. He incurred transportation costs for the several visits which he made to Dr. Vialenc. The doctor prescribed pain killers, muscle relaxants and other medications to him on several occasions, all of which he purchased.
- [56] As a result of the accident, his vehicle was badly damaged. Even though, Mr. Fleming provided him with a vehicle to use for a few days, Mr. Smith was unable to ply his trade due to the unroadworthy nature of the motor vehicle and its unsuitability for his work as a taxi driver. Fortunately, before the accident he had purchased another taxi which was delivered to him on 22nd June 2006.
- [57] There is absolutely no doubt that prior to the accident, Mr. Smith suffered from a chronic degenerative disease/injury as stated in the medical report that was provided by Mr. Gill. However, his medical condition was exacerbated by the injuries which he suffered as a consequence of the accident. Over the ensuing months, the pain intensified and he was unable to do much without experiencing great pain. Even though he had received medical attention from Dr. Vialenc, Mr. Smith still continued to be afflicted by pain and this hampered his ability to work, garden, sit or even sleep at times. He was unable to enjoy conjugal relationship with his wife.
- [58] Mr. Gill was appointed a medical expert by the court and was ordered to be a Joint Medical Expert and it was in that context that he provided the court with a medical report. Mr. Gill diagnosed Mr. Smith's injuries as follows:

“.....Hence the more likely scenario of pathological events leading to Mr. Smith's neck pain is the existence of asymptomatic moderately severe cervical spondylosis prior to the accident of May 27th 2006, and the transformation by the traumatic forces of that accident of his degenerative pathology into a chronic symptomatic entity. Recall that Mr. Smith's head struck the roof of the vehicle several times, inflicting force through the cranio-spinal axis, and in this case unto a pathological spine. These symptoms tend to fluctuate in intensity and frequency over the long term, but will almost never disappear once established in a person who is in the 7th decade of life. Therefore a mild-moderately symptomatic lumbar spine has also been transformed into a generator of almost constant pain, that impairs any activity that requires vigorous physical effort, sitting for more than 45 minutes, standing for more than one hour or bending. The temporal event this is linked to the exacerbation of lower back pain and the worsening of radicular lower limb symptoms is the trauma of the accident of 27th of May 2006...

In conclusion the then 58 year old Aubrey Smith had pre-existing spondylotic pathologic changes of the cervical and lumbar regions of the spine. The trauma of the May 27th 2006 accident, transformed him into his current state of chronic affliction by pain of the neck and lower back with their associated radicular symptoms.

Prognostic Statement:

Once activated to become a symptomatic entity by the effect of trauma, the pain and radicular symptoms that occur on the basis of degenerative spine. Hence it is likely that at 61 years of age Mr. Aubrey Smith is likely to be afflicted by chronic pain of the neck of varying severity for the long term. The radicular symptoms of the lower limbs may be relieved by a surgical procedure to decompress and fuse the lower lumbar spine. Therefore Mr. Smith is likely to require medical and rehabilitative attention in the future in order to achieve relief of his symptoms. His requirements will range from physician evaluations by spinal and pain management specialist, and the purchase of prescribed medications, to use of physical therapy on occasion when the spinal pain is severe”.

- [59] On 10th June 2010, Mr. Gill, performed surgery on Mr. Smith and there after provided the court with a medical report dated 18th October 2010.
- [60] On the eve of the hearing, 18th October 2010, Mr. Gill examined Mr. Smith and provided the court with further evidence on oath as to the state of Mr. Smith's disability. He said that having examined Mr. Smith on the 18th day of October 2010 he found that Mr. Smith's degenerative condition had worsened and that this was caused by the accident. Mr. Gill concluded that Mr. Smith's mild to moderate condition had turned into a chronic severe condition as a result of which Mr. Smith was permanently disabled. He also said in cross examination that Mr. Smith's pre existing degenerative condition contributed 40% to his state.
- [61] The court digresses to state that the expert witness' evidence is provided to the court to assist in its determination of the live issues in the matter. The expert should be independent of both parties and even though he is jointly instructed he is nevertheless the court's expert. It may not be very prudent for a court appointed medical expert to, subsequent to the court's order so appointing him, perform corrective medical surgery on Mr. Smith. The perception of the independence of the medical practitioner in the proffering of his evidence may give one cause for pause. These comments in no way serve to cast any aspersion on the professionalism or integrity of Mr. Gill but are stated with the view to saying perhaps this was not the most desired approach to be adopted by Mr. Smith. This approach is definitely not one which the court countenances since the weight given to such an expert witness' evidence can be affected.
- [62] The court now proposes to determine the quantum of damages Mr. Smith should be awarded.

Special Damages

- [63] It is the law that special damages must be specifically pleaded and proved. See **British Transport Commission v Gourley** [1956] A.C. 185 at p. 206. Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized, it is plain law that one can recover in an action only special damage which has been pleaded and, of course proved. See **Lord Diplock L J in I K I W v Samuel** [1963] 1 W.L.R 991 at 1006.

[64] The parties, in the claim at bar, have quite helpfully agreed to the documentary evidence in support of the special damages. In addition, there is very little, if any, dispute between the parties as it relates to much of the special damages that Mr. Smith claims.

[65] The court will now address the various sub heads of special damages.

Motor Vehicle

[66] Mr. Smith claims the sum of US\$5, 298.10 for repairs to his vehicle. Mr. Fleming does not challenge or contradict this sum accordingly the court has no basis for not awarding Mr. Smith the entire sum. The court orders that Mr. Smith be compensated in the sum of US\$5,298.00 as special damages which represents the cost of repairing his vehicle.

Loss of Earnings

[67] The court has no doubt that Mr. Smith did freelance work in addition to the contract work. The uncontroverted evidence of Mr. Smith is that he did not have a replacement vehicle from the 27th May 2006 to the 22nd June 2006. However, it is disputed that he earned US\$200.00 per day for freelance work. The court has no doubt that he earned some monies from the freelance work but not as much as he would have the court believe. The court feels that a reasonable sum, he would have earned taking into account the totality of evidence is US\$2000.00 per month. In the circumstances, he would have suffered losses in the sum of US\$4400.00 during the period stated herein. The court is of the view that it is reasonable and just to award Mr. Smith compensation in the sum of US\$4400.00 for the loss of the use of his vehicle for the period 27th May 2006 to 22nd June 2006 which represents the loss of earnings for the contract work and the freelance work.

Medical Expenses and Travel

[68] Mr. Smith provided the court with clear and compelling evidence that he consulted Dr. Vialenc, in St. Martin, on several occasions in order to obtain medical treatment for the injury and severe pain. His proven medical expenses as of the date of the filing of the claim are US\$2,337.39. The court is

satisfied that Mr. Smith expended the sum of US\$650.00 for travel expenses to St. Martin to buttress the court's position is the fact that Mr. Fleming has not contradicted this aspect of the claim. While, Mr. Smith was unable to provide receipts in order substantiate his travel expenses, nevertheless the court has no doubt that Mr. Smith has proven, on a balance of probabilities, that he expended the above sums. See **Grant v Motilal Moonan Ltd** [1998] 43 WIR 3 to 2.

[69] The total damages that Mr. Smith is awarded for medical expenses, consultations and travel to and from St. Martin are US\$2,987.39.

[70] Based on the evidence adduced it is clear that since the filing of the claim, on the 21st June 2006, Mr. Smith underwent corrective surgery. This surgery was performed by Mr. Gill. Mr. Smith is entitled to be compensated, as special damages, for his proven expenditure up to the date of the trial.

[71] The court accepts that the total cost of the surgery and the attendant medical expenses are US\$15,248.00. The court orders that he be compensated in the sum of US\$15,248.00 which represents the cost of the corrective surgery that he had. In addition, he is to be reimbursed the cost of travel to and from Barbados in the sum of US\$562.00 together with the sum of US\$1,080.00 for food and board.

[72] The total sum for further special damages is US\$16,890.00.

General Damages

[73] The court now proposes to determine the amount of compensation that Mr. Smith should be awarded as general damages. **Cornilliac v St. Louis** *ibid* as referred to by both learned Counsel, is very instructive on the approach and factors that the court should take into consideration namely:

- (a) The nature and extent of the injuries sustained;
- (b) The nature and gravity of the resulting physical disability;
- (c) The pain and suffering endured;
- (d) The loss of amenities and;
- (e) The impact on the claimant's pecuniary prospects.

Nature and Extent of the Injuries Sustained

- [74] In his first report, Mr. Gill stated that the trauma of the accident transformed Mr. Smith who had pre-existing spondylotic pathological changes of the cervical and lumbar region of the spine into his current state of affliction by pain of the neck and lower back with their associated radicular symptoms.

The Nature and Gravity of the Resulting Physical Disability

- [75] In his subsequent report of 18th October 2010, Mr. Gill concluded that Mr. Smith had pre-existing spondylotic pathological changes of the cervical and lumbar region however due to the accident, he had multilevel cervical and lumbar spine degenerative disease and there was severe stenosis of the spinal canal. He experiences back and leg pain and is unable to flex his spine. Importantly, he is unable to walk without assistance. He is unable to stand erect. Mr. Smith is unable to drive. Mr. Gill was clear that Mr. Smith is likely to suffer long term neck and back pain. He will require medical and rehabilitative attention in future in order to obtain relief for his symptoms. He will never be able to work.

Pain and Suffering

- [76] Mr. Smith's uncontroverted evidence is that as a consequence of the accident he suffered severe pain and this has continued up to the day of the assessment. There is no doubt that he experiences severe pain as he told the court. On the date of the hearing, Mr. Smith ambled into court on the support of a pair of crutches. He explained however, that it was only a few days before the hearing of the claim that he had started to utilize the crutches. This revelation has given the court cause for pause.
- [77] In seeking to determine the quantum of damages that should be awarded to Mr. Smith, the court must bear in mind the medical evidence provided by Mr. Gill who confirmed that Mr. Smith experienced severe pain as a consequence of the injury and had to be provided with pain relievers and other types of medication. Mr. Gill opined that "in future Mr. Smith will require pain

management procedures to alleviate the pain. The evidence indicates that the early recurrence of pain after surgery. Mr. Smith's age (greater than 60 years) and the extensive degenerative changes do not augur a good prognosis for Mr. Smith's lower back pain. Although the pain may be mitigated to some degree by further surgery in combination with pain management procedures, the probability of being pain free with respect to his lower back is less than 50%". Since, despite Mr. Gill having performed the surgery the pain has not abated, Mr. Gill seems to be saying that since he performed the surgery, Mr. Smith's condition has worsened, all of this Mr. Gill attributes to the injuries that Mr. Smith received in the accident. It must however be borne in mind that under the skilful cross examination of learned Counsel Mrs. Cora Richardson-Hodge, Mr. Gill very candidly admitted that Mr. Smith pre-existing medical condition contributed 40% to his present state of disability.

Loss of Amenities of Life

[78] It is clear that the injuries that resulted from the accident impacted negatively on Mr. Smith's amenities of life. There is no reason to disbelieve him that at one stage the pain was so debilitating that he was unable to do much around the house or garden. He cannot lift heavy items; he could no longer have conjugal relationship with his wife since this too was very painful. Equally, he could not sit and watch television or play a game of dominoes as he used to, the pain is unbearable. The court accepts that at times the pain was so excruciating that it prevented him from sleeping. He could not stand for long periods of time due to the pain in his neck and back which radiated to his legs. His quality of life has been adversely affected. The court in seeking to compensate Mr. Smith for the pain and suffering loss of amenities of life and the gravity of the injuries he has suffered much ensure that he is fairly and adequately compensated.

[79] It is impossible to award damages for the above heads with exact estimation; their assessment must be based on the facts of each case taking into consideration comparable cases. In **Wells v Wells** [1998] 3 ALL E.R 481 Lord Hope stated that

"The amount of the award to be made for pain and suffering and loss of amenity cannot be precisely calculated. All that can be done is to award such sum, within the broad range 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."

- [80] The court has paid regard to the authorities from our jurisdiction to which both learned Counsel have helpfully referred:

In ***Lealia Hatchet v First Caribbean International Bank et al*** Claim No.BVIHCV2006/0227 the Claimant who was 40 years old at the time of the accident and who suffered from a degenerative disc disease with herniation was awarded EC\$54,000.00 for pain and suffering and loss of amenities of life.

- [81] In ***Gloria Lake v Antigua Commercial Bank*** Claim No. ANUHCV1999/0123 the Claimant, who was 58 years old at the time of the trial, was awarded EC\$100,000.00 for pain and suffering and loss of amenities.

- [82] In ***Anita Tobitt v Grant Royal Antiguan Beach Resort Limited and Stanford Frederick*** Claim No. ANUHCV2006/0026 the Claimant who was 35 years old at the time of the accident and 41 years old at the time of trial and who had suffered back injuries in a vehicular accident while she was a passenger, was awarded EC\$50,000.00 for pain and suffering.

- [83] In ***Claudette Francis v Cecilia Martin*** the Respondent in the claim had been injured in a road accident. She suffered a disruption of the sacroiliac joint which developed into post-traumatic osteoarthritis lumbar spine. She could not sit or stand for any period longer than about half an hour without experiencing pain. The court awarded her US\$45,000.00 for pain and suffering and loss of amenities.

- [84] In ***Oscar Frederick v Liat*** Claim No. ANUHCV2007/0391 the High Court of Barbuda awarded the Claimant who had suffered back injuries when he fell at work.EC\$80,000.00 for pain and suffering and EC\$60,000.00 for loss of amenities. The Claimant provided the court with evidence that he was no longer able to assist his wife and that he could not stand for long periods. He said that his sexual life and sexual activity have been severely affected.

- [85] There are other cases from Eastern Caribbean Supreme Court:
- [86] In ***Ulbona Morella v Leane Forbes*** Claim No. BVIHCV2003/0005 the court awarded US\$40,000.00 to the 50 year old Claimant for pain and suffering and loss of amenities for injuries to L5-S1 disc which disabled her from raising her hand fully, lifting moderate weights or doing housework.
- [87] In ***Daphne Alves v Attorney General*** Claim No. BVIHCV2006/0306 the court awarded US\$35,000.00, to the Claimant who was 35 years old, for general damages for pain and suffering and loss of amenities for injuries to L4-L5 annular disc tear, 51 joint arthropathy – discongenic disease of the lumbar spine, lumbar facet joint syndrome, which left her in constant pain, and rendered her unable to sit for long periods, lie on her back for more than 10 minutes or vary any weight in excess of 10 pounds.
- [88] In ***Monica Lansight v Geest PLC*** the Court of Appeal awarded the Appellant EC\$40,000.00 for pain and suffering and EC\$20,000.00 for loss of amenities. In this case the appellant suffered a slipped disc associated with continuing pains. She also experienced pain from her hip to her toe when she sat. After the injury she was no longer able to lead a normal life and was unable to do her gardening and sewing.
- [89] In ***Wadali Cats Limited v Frances Chapman*** in Civil Appeal No. 16 of 2004 Antigua and Barbuda, the Court of Appeal awarded the Respondent EC\$40,000.00 for pain and suffering and EC\$80,000.00 for loss of amenities. The Respondent had severe bruising to the head, severe pain in the neck and arm, bruising of the inner ear together with cervical spondylosis which impacted negatively on both her professional and social life.
- [90] In the case at bar, the court, in determining the award of damages which would adequately compensate Mr. Smith for his pain and suffering and loss of amenities, must have regard to the circumstances of the case and should strive for a high measure of uniformity. In so doing, the

approach of the court should be to give due consideration to the range of awards in other cases which are comparable.

- [91] The cases to which the court have been referred are comparable to the case at bar. Taking into account the totality of circumstances the court is of the view that Mr. Smith is entitled to compensation in the sum of US\$25,000.00 for pain and suffering US\$20,000.00 for loss of amenities of life. The court is satisfied that the above compensation is reasonable and will be able to put Mr. Smith in the same position he would have been in had he not sustained injuries. Accordingly, the total sum of US\$45,000.00 is awarded to Mr. Smith for his pain and suffering and loss of amenities of life.

Loss of Future Earnings

- [92] This item of general damages is meant to compensate a Claimant for the loss of money which he would have earned as salary but for the injury.
- [93] Mr. Smith is entitled to be compensated for his loss of future earnings. It is accepted that he had intended to work until the age of 65 years but that this intention has now been cut since he is unable to do freelance work as a taxi driver. Fortunately for him a few weeks after the accident he acquired a new vehicle and was able to have the contract work continued albeit using other drivers.
- [94] The court had the benefit of hearing and observing Mr. Smith when he testified during cross-examination that sought to test the veracity of his evidence. This was an invaluable opportunity. While there is no doubt that before the accident Mr. Smith carried out some free lance work, the court is far from satisfied that it was as extensive or as regular as he would have the court believe. In the absence of any documentary proof that he earned a large sum of US\$4,800.00 per month as a free lance driver, the court is unable to accept this unsubstantiated evidence as correct. There is other evidence which he has accepted namely that with the downturn of the economy his work has been somewhat affected. In view of this evidence the court must state quite respectfully that it can hardly be acceptable for a Claimant to simply state that he earned US\$4,800.00 a month as a freelance driver and expect the court to believe that without more; the

court has already held that at the time of the accident it is reasonable to conclude that he earned US\$2000.00 per month. The court has no doubt that the figures provided by Mr. Smith were highly inflated, given his age, the state of the economy coupled with the fact that he did contract work. Even though Mr. Smith indicated in his witness statement the manner in which he charged the fares for the freelance work, the court is not satisfied that he earned as much as US\$4,800.00 per month. Taking into account the totality of circumstances including the fact that he also worked on contract for Classic Customs Vacation as a taxi driver, the court is of the considered view that it is reasonable to conclude that the net salary Mr. Smith earned from his freelance work is US\$2,000.00 per month. However, with the downturn of the economy he would have earned less. Therefore, the court reduces this sum to US\$1000.00 per month for freelance work. The multiplicand is US\$1000.00.

[95] In order to determine his loss of income from the freelance work given his age of 58 years at the date of trial, when he was no longer able to work, and taking into account that he intended to work until the age of 65 years, the court is of the view that a multiplier of 4 years is appropriate. This would adequately take into account the contingencies, vicissitudes and imponderables of life. See **Gloria Lake v Antigua Commercial Bank** in which a Claimant who was 58 years old at trial and had suffered injuries to her back and had a work life up to 65 years, the court used a multiplier of 4. The court has no doubt that since he intended to work until 65 years it is fair to use a multiplier of 4. See also **Claudette Francis v Cecilia Martin** ibid in which a multiplier of 3 was used in relation to the Claimant who was 57 years old at the date of trial with a working life up to 65 years old.

[96] In relation to the freelance work, Mr. Smith's future loss of earnings will be calculated as follows $US\$1000 \times 12 \times 4 = US\$48,000.00$. His total loss of future earnings from the freelance work is US\$48,000.00.

[97] Mr. Smith has not led any credible evidence to substantiate his assertion that he has suffered loss of future earnings in relation to his contract work with Classic Customs Vacations contract. It is very unfortunate that he chose to place no evidence before the court to show exactly how much he has earned from 2007 to the date of trial from the contract work. This can hardly be the sort of evidence in which the court can feel able to properly and justly arrive at a decision in relation to an alleged

loss of earnings. The court accepts that he sub-contracts the work to other taxi drivers and pays them a fee which he is reimbursed by Classic Customs Vacation. There is no cogent evidence that he has suffered any future loss of earning in relation to his contract work.

- [98] The court is unable to conclude that Mr. Smith has suffered any loss of future earnings in relation to the contract work. Accordingly, the court disallows this aspect of Mr. Smith's claim.

General Damages

Future Medical Expenses.

- [99] In appropriate circumstances, the court ought to compensate an injured person for the costs of future medical expenses. It behoves Mr. Smith to provide clear evidence in order to support his claim of the need for future medical care. In the case at bar, there is no doubt that Mr. Smith will require continued treatment for the management of permanent pain, this was clearly articulated in Mr. Gill's evidence and the court accepts this to be so. He would need to consult Mr. Gill and have MRI and CT studies done to his spine. He also requires physiotherapy. However, what is clear is that there very little compelling and credible evidence before the court as to the exact nature of the medical procedure which Mr. Smith will have to undergo in the future. Mr. Smith must provide the court with reliable evidence from which the court can determine the nature of the pain management procedures that he has to undergo. Mr. Gill could not speak to this since this is not within his expertise. Except for information in relation to the MRI, CT Scan, and his consultations, and if at all, possible surgery, much of the evidence he provided was not within Mr. Gill's expertise. The court was unable to accord great weight to this aspect of Mr. Gill's evidence. I reiterate that Mr. Gill is a neurosurgeon; pain management and physiotherapy are not within his area of specialty.
- [100] Mr. Gill was unable to provide the court with cogent evidence as to the nature of the future medical care that Mr. Smith would require in order to achieve relief for his symptoms. Even though, Mr. Gill, in the 18th October 2010 report, spoke about the need for physiotherapy and the attendant costs, he was not in a position to substantiate the figures that he had provided as the costs, in an earlier report. In fact, in the said report, Mr. Gill stated that in the future Mr. Smith will require the following:

- (a) Medical Imaging :MRI, Plain x-ray CT studies of the spine:US\$3500 –US\$4000
- (b) Medications US\$2500 per annum
- (c) Rehabilitation Treatment (e.g. Physiotherapy for six weeks per year:US\$1,200
- (d) Medical Evaluations: One visit per quarter for at least 2 years
- (e) Pain Management Procedures:US\$2,000
- (f) Further Spinal Procedures: depending upon the scope type and surgical faculty:
US\$17,000-65,000.

[101] In oral testimony, Mr. Gill stated that Mr. Smith would require an extended period of rehabilitation. In explaining in his oral evidence, Mr. Gill was less than convincing in relation to the nature of medical care which Mr. Smith would require. While Mr. Gill was sure that Mr. Smith would require pain medication and other muscle relaxants, x-ray and Medical Imaging and Physiotherapy, he was forced to admit that most of this care was not in his expertise neither did he know the costs to provide these services. In passing, in the court's considered view Mr. Gill appeared to be very uncomfortable when providing this sort of evidence. Recalling that he had not seen Mr. Smith since June 2010 when he operated on him and only again the day before the trial and he was now providing this evidence most of which was outside of his expertise. The court attaches very little weight to his evidence even though learned Counsel Mrs. Richardson-Hodge did not seem to object to his giving much of this evidence which the neurosurgeon admitted was not within his expertise.

[102] Another aspect of Mr. Gill's evidence that require some attention is when he told the court that Mr. Smith would require further medication either from himself (Mr. Gill or one of the doctors to whom Mr. Smith attends). He said it was prescribed medication. During cross-examination by learned Counsel Mrs. Cora Richardson-Hodge, Mr. Gill was forced to accept that it did not require any specialized training for a doctor to be able to prescribe the medication to Mr. Smith in the future. In explaining to the court, Mr. Gill stated that the prescribed medication to which he referred was pain killers. He further told Mrs. Cora Richardson-Hodge that the prescribed medication which Mr. Smith would require in the future are pain killers and muscle relaxants.

- [103] Taking into consideration the quality of the evidence that was adduced on behalf of Mr. Smith, the court finds much guidance in ***Greer v Alstons Engineering Sales Service Ltd*** [2003] UKPC 46: that an otherwise good claim for general damages should not be dismissed, even if no evidence or quantum is led and the prospective loss remains unquantified.
- [104] Of equal significance is the principle enunciated by the Court of Appeal in BVI Civil Appeal No.007/2009 ***Claudette Francis v Cecilia Martin*** namely: “that to base a claim for future medical expenses upon the cost of a surgical procedure where there is no evidence that it is necessary and where the Claimant has given no indication of any intention to undergo it is to take into account an irrelevant consideration”.
- [105] Indeed, the court is of the respectful opinion that Mr. Gill also stated in a rather unconvincing manner that Mr. Smith “might probably” require further surgery. He did not elaborate on this in his evidence and neither was the court persuaded that this was his considered and definitive belief. In addition, there was absolutely no evidence forthcoming from Mr. Smith which even hinted at a willingness to undergo further surgical intervention. With the greatest of respect, having had the opportunity to observe Mr. Gill and having listened to his evidence the court is not at all satisfied that he holds the view that it is possible that Mr. Smith would require further surgical intervention. With respect, his evidence was very speculative. The court must state that this is not the sort of evidence on which it can properly act in order to make an award of damages for possible surgical procedures.
- [106] The court is fortified by the principle enunciated in ***Claudette Francis v Cecilia Martin*** that it is not necessary to make an award to Mr. Smith for the cost of future surgical procedure even though Mr. Fleming seems not to have taken issue with this aspect of Mr. Smith’s claim.
- [107] The case at bar is in contradistinction to the very helpful case of See ***Persaud v Persaud*** (2004) 64 WIR 378 to which learned Counsel Ms. Harrigan referred. In that case the Privy Council held that where there was the possibility that the Claimant might have surgery the court should award a sum to reflect that possibility.

- [108] As alluded to earlier, in the case at bar, the court is far from satisfied that Mr. Gill is really of the view that there is any possibility of Mr. Smith undergoing any further surgery and neither did Mr. Smith give any such indication that he has even considered it. Accordingly, it would be quite improper to take into account the irrelevant consideration and to award Mr. Smith damages which represent the cost of a future surgery of which there is no possibility of him undertaking.
- [109] There are other aspects of the evidence that are of concern. The evidence that has been presented by Mr. Gill in relation to the future medical expenses is less than satisfactory. For example, he has provided the court with no basis for concluding that Mr. Smith has to go to St. Martin in order to obtain prescriptions for pain killers or for that matter to be able to fill prescriptions neither has Mr. Smith provided the court with any basis for obtaining his prescriptions for pain killers from a doctor in St. Martin as distinct from one in Anguilla.
- [110] Even if the court accepts that Mr. Smith would require future pain management, physiotherapy, medications, Medical Imaging: MRI and Plain X-ray, the court did not form the impression that Mr. Gill was saying that Mr. Smith would have required this sort of treatment for the rest of his life. This is not the way in which the evidence was adduced. In relation to some aspects of the future medical expenses, Mr. Gill seemed to have confined his evidence to the requirement of medical treatment for the next two years.
- [111] The quality of the evidence that Mr. Smith provided to the court in relation to the future medical expenses going forward leaves much to be desired.
- [112] Taking into account the totality of circumstances including Mr. Smith's age, his injury, the pain he experiences, the need for pain medication and further testing, the need for MRI and CT scans, the need for physiotherapy, the Court can do no more than award him a global figure which is reasonable. The court is of the respectful view; Mr. Smith in his closing submission provided a

highly inflated/exaggerated claim for future medical expenses. The court is buttressed in its view based on the fact that much of the evidence on this aspect of the case, is not reliable. It is not possible for the court to form an accurate or verifiable estimate of future medical costs. The court can do no more than to award a global sum which can do justice between the parties. Learned Counsel Mrs. Richardson-Hodge urged the court to award Mr. Smith US\$25,000.00.

The court is of the view that taking the totality of circumstances into an account an award of US\$30,000.00 for future medical expenses is just and reasonable.

Interest

[113] Mr. Smith claims interest on the special damages from the 27th day of May 2006 at the rate of 2.5% per annum until the date of the payment. The court so awards him. He's entitled to receive interest at the rate of 5% from the date of service of the writ to date of judgment on the general damages awarded for pain and suffering and loss of amenities. He also receives interest at the rate of 5% per annum on his loss of earnings. See *Martin Alphonso v Deodat Ramnah*, (1997) 57 WIR 183 at letter g-h, it was held that interest is payable at the rate of 2.5% on special damages from the date of the accident. Interest on general damages for pain and suffering and loss of amenities should be calculated from the date of the service of the writ to the date of trial at the rate payable on money in court placed on short term investment and 5% per annum on the loss of earnings from the date of the judgment.

[114] Total Damages are awarded in the sum of US\$152,575.39. He is also awarded prescribed costs, unless otherwise agreed.

Conclusion

[115] In view of the premises, it is hereby ordered that there will be judgment for Mr. Aubrey Smith against Mr. Calvert Fleming as follows:

(a) Mr. Smith is awarded general damages in the sum of US\$123,000.00. (b) He is awarded special damages in the sum of US\$29,575.39 together with prescribed costs and interests.

[116] The court gratefully acknowledges the invaluable assistance of learned Counsel.

Louise Esther Blenman
Resident High Court Judge
Anguilla