

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA**

CLAIM NO: ANUHCv 2007/0391

BETWEEN:

OSCAR FREDERICK

Claimant

and

LIAT (1974) LIMITED

Defendant

Appearances:

Mr. Steadroy Benjamin for the Claimant
Ms. Samantha May and Ms. Veronica Thomas for the Defendant

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2009: November 30
2010: May 31
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JUDGMENT

- [1] **MICHEL, J.:** By Claim Form and Statement and Claim filed on 13th July 2007 the Claimant, Oscar Frederick, claimed against the Defendant, LIAT (1974) Limited, damages for personal injuries sustained and loss and damage suffered in the month of August 2004 as an employee and lawful invitee to the Defendant's head office building and premises caused by the negligence of the Defendant.

- [2] By Defence filed on 1st October 2007 the Defendant denied negligence on its part resulting in injury to the Claimant and, further or alternatively, averred that any injury, loss or damage to the Claimant was caused or contributed to by the negligence of the Claimant.
- [3] By Reply filed on 17th October 2007 the Claimant joined issue with the Defendant on its Defence.
- [4] Case management directions were given in the matter by Master Cheryl Mathurin on 28th May 2009, after the hearing of an interlocutory application and the referral of the matter to mediation.
- [5] Pre-trial review took place on 23rd October 2009 and the trial of the matter took place on 30th November 2009.
- [6] At the trial, the Claimant gave evidence on his own behalf and called two other witnesses, while Mr. William Tomlinson, the Human Resource Director of the Defendant, was the sole witness for the Defendant.
- [7] The first witness for the Claimant was Dr. Sir Prince Ramsey. In a witness summary of the evidence proposed to be led by Dr. Ramsey, it was stated that he is a medical doctor and one of those who treated the Claimant from the date of his injury. It was stated that Dr. Ramsey will give evidence as to the nature of the injuries suffered by the Claimant as a result of his fall on the Defendant's premises in the month of August 2004; as to the Claimant's need for future procedures and attention and the likelihood that he may have to undergo further operations; as to the effect such injuries will have on the Claimant's future; and relating to Dr. Ramsey's medical report dated 4th April 2008 and several other medical reports concerning the Claimant.
- [8] In his testimony in Court, Dr. Ramsey said that he saw the Claimant on 23rd August 2004. That the Claimant complained of left ankle and lower back pain. That the Claimant said that he fell at work. That he (Dr. Ramsey) examined the Claimant and found that he had

tenderness at the left ankle, lower back pains on bending forward and a rotation of his lower spine. That he saw the Claimant on several occasions after that in connection with these injuries. That he saw him on 22nd June 2005 and advised him to seek medical attention overseas because at that time there was no MRI machine in Antigua. That between 23rd August 2004 and 22nd June 2005 he referred the Claimant to Dr. K.K. Singh, an Orthopaedic Specialist, for his opinion and management.

[9] Dr. Ramsey said that in his medical opinion the severe pains which the Claimant still has are the result of the fall.

[10] Under cross examination, Dr. Ramsey said that he was not aware that the Claimant had fallen in Guadeloupe.

[11] The second witness for the Claimant was Dr. Kunwar Kaushalendra Singh. In a witness summary of the evidence proposed to be led by Dr. Singh, it was stated that he is an Orthopaedic Consultant and Surgeon and is one of the doctors who examined and treated the Claimant from the date of his injury. It was stated that Dr. Singh will give evidence as to the nature and extent of the injuries suffered by the Claimant as a result of the Claimant's fall on the Defendant's premises in the month of August 2004. That he will give evidence as to the Claimant's need for future procedures and attention and as to the likelihood that the Claimant may have to undergo further operations. That he will give evidence as to the effect that the injuries will have on the Claimant's future and will give evidence in relation to his medical reports dated 7th July 2005 and 8th March 2007 and several other medical reports concerning the Claimant.

[12] In his testimony in Court, Dr. Singh said that, from his recollection, the Claimant was referred to him by Dr. Ramsey. That he first saw the Claimant at his clinic on 24th June 2005. That the Claimant's complain was about his lower back pain and insufficient function in his lower limbs. That the Claimant gave a history of sustaining injury to his back while at work in August 2004. That the Claimant mentioned that this was at the LIAT compound and that he re-injured himself in Guadeloupe when he was sent there on

company work on 26th May 2005. That the Claimant mentioned that he had surgery in New York in January 2005 on account of his first injury.

[13] Under cross examination, Dr. Singh said that when the Claimant first came to him on 24th June 2005 he complained of a fall in Guadeloupe in May 2005. That the Claimant actually gave a history of two occupational injuries – one in August 2004 and the other in May 2005. That he agrees that he could not determine from his examination of the Claimant in June 2005 whether the injuries he found were sustained as a result of a fall in August 2004 or otherwise.

[14] Under re examination, Dr. Singh said that his conclusion is that the Claimant sustained the present existing pathology and disability on account of the first fall and the second fall resulted from disabilities occasioned by the first fall and that the 17% physical impairment of the Claimant is the product of both falls.

[15] The final witness for the Claimant was the Claimant himself. In his witness statement, the Claimant stated that he was employed by the Defendant as its Internal Auditor from 1st August 1997 to 24th June 2005. That the Defendant employed several persons, including himself, to work at its headquarters, which comprises enclosed premises over which the Defendant has exclusive possession and control and to which entry is granted only to authorized persons, employees and invitees through a secured and tightly regulated security gate as part of an elaborate security system devised by the Defendant. That in the course of his employment with the Defendant, having entered the premises through the security gate, he had to walk for some distance over the Defendant's premises from the security gate to his office located in the headquarters building. That in or about the month of August 2004, whilst he was making his way from the security gate to his office, he stepped on some gravel and into an uncovered hole, twisted his right ankle and fell heavily to the ground, causing severe injury to his back. That the Defendant did not put up or cause to be put up in, around or in the vicinity of the gravel and the uncovered hole any warning signs putting unsuspecting pedestrians (like him) on notice that the area was unsafe and that they should exercise caution whilst walking in that area. That there was

no warning signs near to, in, around or close to the gravel and uncovered hole into which he stepped, causing him to twist his ankle and fall. That the immediate area where the gravel and uncovered hole were had not been cordoned off by the Defendant. That no warning sign was put up or caused to be put up by the Defendant directing pedestrians who used the pathway in that area to use an alternate pathway in order to avoid the danger.

[16] The Claimant stated that after he got up from the fall he went to his office and started to work, but about an hour later he began to experience pain in his ankle, lower back and neck. That he immediately went to the office of his supervisor, the Chief Financial Officer, to report the incident, but he was not in office, so he went to the office of Mr. William Tomlinson and reported the matter to him. That Mr. Tomlinson gave him a form which he (Mr. Tomlinson) signed and told him (the Claimant) to go and see Dr. Ramsey. That he went to see Dr. Ramsey, as directed by Mr. Tomlinson, and was medically attended to. That he suffered so much from the injury he received from the fall that he had to seek medical attention from the doctor on about eight occasions. That after one of the visits to Dr. Ramsey, Dr. Ramsey referred him to Dr. Singh for evaluation and for his opinion on his (the Claimant's) physical condition.

[17] The Claimant stated that, as a result of the injury which he sustained on the Defendant's compound, whilst on assignment by the Defendant in Guadeloupe on 26th May 2005 he fell on the Defendant's premises and further aggravated the injury he had sustained on his back. That upon returning to Antigua on the same day, he reported the incident to Mr. Tomlinson. That LIAT's offices in Guadeloupe are located on the upper floor of the airport building. That after sitting for some time whilst working in the office, he experienced numbness in his leg and discomfort to his back. That he decided to walk in an attempt to ease the numbness and discomfort. That on the way down the staircase he fell. That he subsequently experienced pain and continued numbness to his leg as well as pain in his neck and back. That indeed the pain in his back intensified. That he received and is still receiving medical attention and care for that injury. That there is still numbness to his leg and occasional pain to his neck. That as there was no respite from the blinding pain and

great discomfort he was experiencing, he was advised to seek medical attention in the USA. That he had several consultations with different medical doctors in the USA and on 20th October 2005 an operation to his back was performed in the USA by Dr. John Houten. That he has received and still receives spinal needle injections and even had a steroid injection to relieve the pain in his lower spine which has become arthritic due to the multiple open surgeries to his back.

- [18] The Claimant stated that he incurred expenses in Antigua, Trinidad, the USA and elsewhere pertaining to the injury. That in addition to the sums claimed as special damages in his Statement of Claim, he spent a further \$135, 473.19 in medical care in the USA, the receipts for which are listed as Item 63 in his List of Documents filed on 3rd July 2009.
- [19] The Claimant stated that his injury and the aggravation of it were caused by the negligence of the Defendant.
- [20] The Claimant then proceeded to particularise the Defendant's alleged negligence in respect only of the injury of August 2004 and stated that, by reason of the Defendant's said negligence, he (the Claimant) suffered severe personal injuries and has suffered loss and damage.
- [21] The Claimant stated that this has drastically affected the quality of life that he enjoyed. That he is no longer able to swim, to do vigorous exercise or to engage in any demanding physical activity. That he is no longer able to assist his wife in doing household or yard chores because he cannot stand for long periods. That this has affected his ability to garden, cook, wash clothes, mop or sweep the house as he cannot stand for long or lift heavy objects. That the joy and satisfaction of caring for his wife and family have been diminished. That his sexual life and sexual activity have been severely affected. That he experiences all of this now because of the Defendant's negligence in August 2004. That he is in constant pain and is no longer able to take care of himself and his loved ones as he used to. That he will never be the person that he once was. That as a result of his

injuries, his working life has been reduced because he cannot sit upright for long periods. That as an Accountant, and especially as an Internal Auditor, he will not be able to function effectively, if at all, in performing his duties, which involve sitting for long periods. That his earning power has declined significantly as a direct result of his injury.

[22] The Claimant particularised his injuries as follows:

- (a) Compression of sciatic nerve roots at L4-L5;
- (b) Multiple disc herniation in cervical spine C4/C5, CC3/4 and C5/C6;
- (c) Surgery at the level of L4/L5 and L5/S1.

[23] The Claimant stated that he has been in extreme pain and discomfort as a result of his injury for over five years with no end in sight. That he has been taking pain killers and other sedatives to relieve the constant and blinding pain he is forced to endure every day of his life. That his social life and self esteem have been affected negatively.

[24] In his testimony in Court, the Claimant said that he presently sits as Judge on the Industrial Court. He also said that he walked down the flight of steps in Guadeloupe despite experiencing numbness in his legs and discomfort in his back in the hope of alleviating the pain or numbness that he was experiencing.

[25] The sole witness for the Claimant and the final witness in the case was Mr. William Tomlinson. In his witness statement, Mr. Tomlinson stated that he is employed by the Defendant as its Human Resource Manager. That it is the policy of the Defendant, as recorded in its Personnel Administration Policy Manual dated October 1987 under the heading "Accidents on the Job," that a full report of any accident must be given to the supervisor on duty as soon after the accident as possible, but before the end of the shift; that employees will be required to be examined by the Defendant's doctor if the Defendant is to accept liability and that employees wishing to see another doctor may do so at their own expense. That the Defendant's written policy regarding accidents on the job was known to the Claimant. That he has perused the Claimant's personal file to see whether, in connection with the matter before the Court, there was a written report of the accident

alleged by the Claimant as is required by the Defendant's Policy Manual. That other than a memorandum dated 22nd June 2005 written by the Claimant to the Defendant informing of a "re-injury" to his back on 26th May 2005 while on assignment in Guadeloupe and making reference to a visit to Dr. Ramsey in August 2004 for ankle and back injury sustained while at work, the Defendant did not receive any report from the Claimant of any accident on the job or injury as a result of such accident as is required by the guidelines set out in the Policy Manual.

[26] Mr. Tomlinson stated that at a meeting with the Claimant on 23rd June 2005, it was agreed and later confirmed (by letters dated 30th June and 4th July 2005) that the Defendant would settle any legitimate receipts or invoices submitted by the Claimant relating to his claim for injury while on the job. That the Claimant submitted two receipts only, totalling \$150, which amount was paid by the Defendant. That the Defendant's agreement to settle this amount was made in accordance with good industrial relations practice as workman's compensation and not as an acceptance of any liability on the part of the Defendant whatsoever.

[27] Mr. Tomlinson stated that he has been employed by the Defendant for the past thirty five years and he has never observed any uncovered manhole on the Defendant's compound and that approximately five hundred employees use the entry pathway from the security gate to the Defendant's offices on a daily basis and he has never received a report of any uncovered manhole. That the Claimant – who held a senior management position with the Defendant - was entitled to drive through the security gate and park adjacent to his office. That the Defendant disputes the contents of the medical reports submitted by the Claimant in support of his claim on the basis that the alleged injuries reported therein are remote and bear no relation to the claim for negligence as alleged against the Defendant. That the Defendant wholly and completely denies the Claimant's claim for negligence and for loss and injury resulting therefrom.

[28] Under cross examination, Mr. Tomlinson testified that it was in a person's discretion whether or not to use the parking provided to members of management and the Claimant

breached no company policy by opting to park outside and walk to his office. He testified that he never discussed with the Claimant the Defendant's Personnel Administration Policy Manual or knew whether anyone had discussed it with the Claimant and that perhaps the Claimant was not aware of the policy regarding accidents. That the Policy Manual referred to people who worked shifts and that the Claimant did not work on shift.

[29] Mr. Tomlinson testified that he cannot recall whether he saw the Claimant on 23rd August 2004. That he does not specifically recall the Claimant coming to his office and telling him that he had a fall. That he has no direct recollection of asking the Claimant to go to Dr. Ramsey. That perhaps a member of his administrative staff may have told the Claimant so. That to the best of his knowledge he did not tell the Claimant so. That he does not recall this particular incident at this time.

[30] Mr. Tomlinson testified that he does not agree that the Defendant was negligent in its duty to the Claimant on 23rd August 2004. That he does not agree that there was a hole on the Defendant's compound and no warning sign. That he does not agree that the Defendant failed to create a safe pathway for the Claimant to walk on that day. That he does not agree that because of the fall on the Defendant's premises the Claimant suffered the injuries described by Dr. Singh. That he does not agree that five years later the Claimant is still suffering because of the negligence of the Defendant. That he is not aware of any negligence on the part of the Defendant on 23rd August 2004.

[31] On the evidence, the Court is required to determine the following questions:

1. Did the Claimant fall on the Defendant's compound in the month of August 2004 and sustain injuries as a result?
2. If the Claimant did fall as aforesaid, was the fall as a result of the negligence of the Defendant as the occupier of the premises where the Claimant fell and/or as the employer of the Claimant?

3. What injuries did the Claimant sustain as a result of the fall?
4. Did the Claimant himself contribute by his own negligence to the occurrence or extent of the injuries sustained by him?
5. Was there a policy on accidents on the job binding on the Claimant which would in any way impact on this case?
6. Did the Claimant fall on the Defendant's compound in Guadeloupe in May 2005 while on assignment by the Defendant and sustain further injury thereby or aggravate his injuries sustained in August 2004?
7. If the Claimant did fall in Guadeloupe as aforesaid, was the fall as a result of the Defendant's negligence as occupier of the premises and/or as the Claimant's employer?
8. What injuries did the Claimant sustain as a result of the fall in Guadeloupe or to what extent was the Claimant's existing injuries exacerbated or aggravated by the fall in Guadeloupe?
9. If the Claimant's fall in Guadeloupe was not the product of the Defendant's negligence, was it a nova causa interveniens and can the injuries resulting therefrom be disaggregated from the injuries sustained from the fall in August 2004?
10. Is the Claimant entitled to damages and, if so, what types and what amount of damages?

[32] On the first question to be determined by the Court - having seen and heard the witnesses in the case and read their statements or summaries – the Court accepts the unequivocal evidence of the Claimant that in or about the month of August 2004, as he was walking

and making his way from the security gate to his office at the Defendant's headquarters, he stepped on some gravel and into an uncovered hole, twisted his ankle and fell to the ground, thereby sustaining injuries. The evidence to the contrary by the Defendant's witness. Mr. Tomlinson, is made up of a number of generalized non admissions, hardly even rising to the level of a denial of the Claimant's averments, and could not therefore be relied on by the Court as a basis to determine this crucial issue.

[33] On the second question to be determined by the Court, the Court once again prefers the evidence of the Claimant that the Defendant did not put up or cause to be put up in, around or in the vicinity of the gravel and the uncovered hole, any warning signs that would have alerted the Claimant and other employees or invitees to the Defendant's headquarters of the lurking danger so that an accident could be averted, and the Defendant - as employer and occupier - is negligently liable to the Claimant for the injuries sustained by him. Here again, the evidence to the contrary by the Defendant's witness was general and equivocal, with the witness not even indicating for instance that on the day of the alleged accident he had passed in the area of the Claimant's alleged fall and noticed or did not notice anything or that he received a report even from anyone who had passed there.

[34] On the third question to be determined by the Court, the most reliable indicator of the injuries sustained by the Claimant as a result of the fall in August 2004 would be the medical reports on the Claimant preceding May 2005 (when he was alleged to have had a second fall). In accordance with the lists of documents disclosed by both parties in this case, these would be medical reports dated 21st December 2004, 7th January 2005 and 20th January 2005 (the post operative report). These reports indicate that the Claimant sustained injuries to his lumbar spine manifested by disc desiccation at L3/L4 and L4/L5, with mild to moderate disc bulges at L3/L4 and L4/L5 and a small disc bulge at L5/S1; that the Claimant experienced facet hypertrophy from L3 through L5, with fluid in the right facet at L4/L5, extrusion of disc material into the neural foramen bilaterally at L3/L4 abutting the existing nerve roots and a 1.3 cm loculated fluid collection impinging on the right posterior thecal sac and fibres of the cauda equina at the level of L4, which may represent a

herniated synovial cyst; that the Claimant also had fatty atrophy of the distal paraspinal muscles and subcutaneous edema in the soft tissues posterior to the spine; and that the Claimant had severe lower extremity pain, weakness and gait dysfunction. Although the injuries spoken of by Dr. Singh in his reports and in his testimony in Court were significantly more extensive than those enumerated here, it is not certain whether the more extensive injuries were occasioned by the second fall in Guadeloupe or resulted from the first fall in Antigua in August 2004.

- [35] On the fourth question for determination by the Court, there was no evidence before the Court that the Claimant had contributed to the occurrence or the extent of his injuries sustained in August 2004 by any negligence on his part. That the Claimant chose to park outside the Defendant's compound and walk across to his office can in no way be deemed to be an act of negligence on his part, even if it were open to him to drive into the compound and park adjacent to his office. The fact is that this was a discretionary option available to him and his exercise of this discretion in a particular way was not a cause of his injuries or of the extent of them.
- [36] On the fifth question for determination, this Court finds that there was no evidence that there was any policy on accidents on the job which applied to the Claimant as a non shift worker, or a policy that was in any event ever brought to the Claimant's attention, or that would if it was brought to his attention excuse or exclude the Defendant, on the facts of this case, from liability for the injuries sustained by the Claimant consequent on his falling on the Defendant's compound in circumstances of want of care by the Defendant as occupier of the premises and employer of the Claimant.
- [37] On the sixth question for determination by the Court, there is uncontroverted evidence that the Claimant did fall on the premises occupied by the Defendant in Guadeloupe while on assignment by the Defendant there in May 2005 and aggravated the injuries he had sustained in August 2004.

- [38] On the seventh question though, there is not a scintilla of evidence of negligence on the part of the Defendant in causing or contributing to the Claimant's fall in Guadeloupe and the averment in the Statement of Claim and the Claimant's witness statement that the injury in May 2005 was as a result of the injury in August 2004 is a leap beyond the accepted principles of causation and reasonable foreseeability.
- [39] The eighth question to be determined by the Court is among the most difficult on the facts of this case, because there is no medical report or other medical evidence which speaks to the Guadeloupe injuries in particular or which specifically addresses the impact of the Guadeloupe fall on the Claimant's injuries. A medical report of 24th October 2005 disclosed in both parties' list of documents refers to diffuse disc desiccation most significant at L2/L3 through L4/L5 and to the fact that there is now a small disc bulge at L2/L3 (in addition to the disc bulges at L3/L4 through L5/S1), whereas a medical report by the same doctor dated 21st December 2004 only referred to disc desiccation at L3/L4 and L4/L5 and disc bulges at L3/L4, L4/L5 and L5/S1. So it is apparent from a comparison of these two reports forming part of the evidence in this case that the Claimant's injuries were exacerbated or aggravated by the fall in Guadeloupe, at least to the extent of producing additional disc desiccation and disc bulges at L2/L3. There is no indication, however, whether the injuries to the cervical segment (C3-C4, C4-C5 and C5-C6) revealed by Dr. Singh in testimony before the Court were the result of the August 2004 fall or the product of the May 2005 fall or the combined effect of both.
- [40] The answer to the ninth question would appear to be in the affirmative, as to the first part, that the Claimant's fall in Guadeloupe was a novus actus interveniens. The facts of the case of **Mc Kew v Holland & Hannen & Cubitts (Scotland) Ltd**¹ cited by Learned Counsel for the Defendant appear to be analogous to the facts of the present case and the principles enunciated by the House of Lords in that case would seem to apply equally to this case.

¹ [1969] 3 All ER 1621

[41] The brief facts of that case were that the appellant sustained injury in the course of his employment for which the respondents were liable. As a result, on occasion, he unexpectedly lost control of his left leg which gave way beneath him. He would have recovered within a week or two but for a second injury which he suffered. On leaving a flat, accompanied by his wife and child and brother in law, his leg collapsed as he made to descend some steep stairs where there was no handrail. The appellant pushed his daughter aside to avoid pulling her down the stairs and tried to jump so that he would land in a standing position rather than falling down the stairs. On landing, he suffered a severe fracture of the ankle. On the question whether the respondents were liable for the injuries caused by the second accident, it was held that the act of the appellant in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance when his leg had previously given way on occasions was unreasonable and, accordingly, the chain of causation was broken and the respondents were not liable in damages for this second injury.

[42] In the present case, the Claimant - knowing of his existing injury and in fact experiencing numbness in his leg and discomfort to his back at the time - decided to leave the office and walk down a flight of stairs unassisted, in the course of which he fell. This course of action by the Claimant in this case was as unreasonable as was the action of the appellant in the Mc Kew case and the chain of causation would equally be broken, relieving the Defendant in this case of liability in damages for the Claimant's second injury or the aggravation of his first injury thereby occasioned.

[43] The second part of the ninth question required to be determined by the Court poses some challenges, that is, whether the injuries sustained or aggravated by the second fall can be disaggregated from the injuries sustained from the fall of August 2004. The challenges result from the fact that, but for the medical reports of Dr. David H. Stermerman dated 21st December 2004 and 24th October 2005, there is nothing on the medical evidence – written or oral – to assist in the disaggregating exercise. The Court's approach will therefore have to be one of assessing damages based on the injuries to the Claimant identified in the medical reports preceding May 2005.

- [44] The answer to the final question must therefore be that the Claimant is entitled to damages – special and general damages – in an amount to be determined in the course of this judgment. Although the Claimant had claimed aggravated and exemplary damages in his Statement of Claim, no attempt was ever made to substantiate this claim – whether by evidence at the trial or in the submission after the trial – and the claim appears to have been effectively abandoned.
- [45] Turning now to the award of damages, the Claimant claimed special damages of \$10,959.83. In the Defendant's closing submission, it was submitted that only \$5,772.76 has been proven by the Claimant and can therefore be awarded as special damages, which submission was accepted in the Claimant's closing submission. The Court will therefore make an award to the Claimant of \$5,772.76 as special damages, based on the consensus between the parties (as expressed in their closing submissions) on the quantum of special damages pleaded and proved by the Claimant.
- [46] In terms of general damages, these will be awarded under the heads of general damages for pain and suffering, general damages for loss of amenities, general damages for future medical expenses and general damages for loss of future earnings.
- [47] In assessing general damages for pain and suffering and loss of amenities in a personal injury case, it is the judicially-accepted approach that the Court should seek by an award of damages to put the Claimant as far as possible to do so by a monetary award in the position that he would have been in had he not sustained the injury to his person and that the best way to do this is by seeking to approximate awards made by courts within the jurisdiction of this Court for similar-type injuries.
- [48] In the closing submissions in this case, the Court was referred to the following cases as containing awards by courts within the jurisdiction for similar-type injuries:

1. **Cedric Dawson v Cyrus Claxton**² - where in 2005 the Court of Appeal of the Eastern Caribbean Supreme Court upheld an award of US\$36,000 (EC\$97,200) for pain, suffering and loss of amenities in a case in which a claimant (who was the respondent before the Court of Appeal) suffered a C3-C4 and C4-C5 disc herniation.
2. **Cecilia Hatchett v First Caribbean International Bank et al**³ – where in 2007 the High Court in the British Virgin Islands awarded a claimant US\$20,000 (EC\$54,000) for pain and suffering and loss of amenities in a case in which the claimant suffered from degenerative disc disease at L5-S1 with herniation.
3. **Rashid Pigott v Galeforce Windows & Doors Inc.**⁴ – where in 2007 the High Court in Antigua and Barbuda, in an assessment of damages by Master Mathurin, awarded a claimant \$50,000 for pain and suffering and loss of amenities in a case in which the claimant suffered posterior osteophytes at C4/5, C5/6 and C6/7 which contained diffuse disc herniations at those levels.
4. **Peter Kelsick v Andrew Josiah**⁵ – where in 2004 the High Court in Antigua and Barbuda awarded a claimant \$40,000 for pain and suffering and \$20,000 for loss of amenities in a case in which the claimant suffered severe whiplash soft tissue cervical spine injury, fracture of spur in the tip of right olecranon with local cyst, formation and haemarthrosis to his right elbow, ligament strain to his left wrist joint, partial tear to his talo-fibular and calcaneo-fibular ligament of right ankle joint.

[49] Taking all of these cases into consideration and taking into consideration too the nature and extent of the injuries sustained by the Claimant (which appear to be more severe than those of the claimants in any of the above-referenced cases), the nature and gravity of his resulting physical disability, the pain and suffering which he had to endure, the loss of

² BVI Civil Appeal No. 23 of 2004

³ BVIHCV 2006/0227

⁴ ANUHCV 2004/0069

⁵ ANUHCV 2000/0412

amenities suffered by him and the extent to which his pecuniary prospects have been affected, this Court awards the Claimant \$80,000 for pain and suffering and \$60,000 for loss of amenities.

[50] As to an award of general damages for future medical expenses, the evidence on this was very unsatisfactory. In his Statement of Claim the Claimant pleaded as one of his particulars of loss and damage, future medical expenses of US\$9,500 or EC\$25,650. He made no mention of the subject in his witness statement, but in his testimony in Court he said that there have been several discussions about future treatment; that the first one was with Dr. Lee, who indicated that it would cost around US\$9,500 to US\$10,000; that when he checked with Dr. Houten he said that because of the spinal injury, surgery will cost about US\$100,000. No documentation was presented by the Claimant to substantiate any claim for future medical expenses, nor was any attempt made by him to bridge a 900% gap between the costs allegedly given to him by Dr. Lee and Dr. Houten, nor indeed was any attempt made to question the two medical doctors who gave evidence in the case as to the probable course or cost of future medical treatment. On this very unsatisfactory state of evidence, the Court makes an award of general damages for future medical expenses in the sum of \$25,650, as per the Claimant's pleaded estimate of the cost of future treatment.

[51] The final head of damages for assessment in this case is loss of future earnings, calculated on the basis of the earnings lost to the Claimant as a result of the injury, other than income lost between the occurrence of the injury and the filing of the case, which income should be pleaded and proved as special damages.

[52] The Claimant, who was 59 years old at the date of filing the case, would have an expected working life of six to eleven years after that date on the basis of which a court could assess his loss of future earnings.

[53] There is evidence that the Claimant earned a monthly salary of US\$4,000 with the Defendant and that his employment with the Defendant was terminated by the Defendant

on 24th June 2005. There is also evidence that the Claimant is presently a Judge of the Industrial Court, but no evidence as to what his earnings are in this office. There is therefore nothing from which the Court can determine any loss of future earnings of the Claimant or even to determine that the Claimant has lost or is likely to lose any future earnings because of the injuries sustained by him on the Defendant's premises in August 2004. The Court cannot therefore make any award under this head.

[54] It is to be noted though that the award made for pain and suffering and loss of amenities (together totalling \$140,000) did take into consideration the extent to which the Claimant's pecuniary prospects have been affected by the injuries which he sustained.

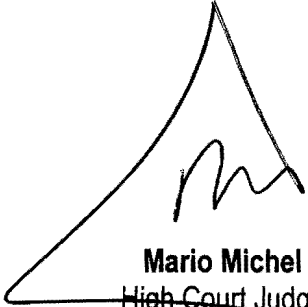
[55] In his Claim Form filed on 13th July 2007, the Claimant did claim interest pursuant to statute on the damages awarded and will be awarded interest of 5% on the general damages for pain and suffering and loss of amenities from the date of the claim to the date of judgment at the rate of 5% per annum and interest on the special damages from the date of the accident to the date of judgment at the rate of 2 ½ % per annum.

[56] The Claimant will also be awarded prescribed costs on the total amount of the damages awarded as per Rule 65.5 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

[57] The Order of this Court is as follows:

1. The Defendant shall pay to the Claimant general damages for pain and suffering in the sum of \$80,000, with interest thereon at the rate of 5% per annum from 13th July 2007 to 31st May 2010.
2. The Defendant shall pay to the Claimant general damages for loss of amenities in the sum of \$60,000, with interest at the rate of 5% per annum from 13th July 2007 to 31st May 2010.

3. The Defendant shall pay to the Claimant general damages for future medical expenses in the sum of \$25,650 without interest.
4. The Defendant shall pay to the Claimant special damages of \$5,772.76, with interest at the rate of 2 ½% per annum from 23rd August 2004 to 31st May 2010.
5. The Defendant shall pay to the Claimant prescribed costs of \$34,016.67.



Mario Michel
High Court Judge