

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

CLAIM NO: ANUHCV 2004/0513

BETWEEN:

RONALD FRASER	Claimant
and	
JOE DALRIMPLE	First Defendant
VERE BIRD	Second Defendant
LESTER BIRD	Third Defendant
HENDY SIMON	Fourth Defendant
STEADROY BENJAMIN	Fifth Defendant
RODNEY WILLIAMS	Sixth Defendant
LEWELLYN SMITH	Seventh Defendant

Appearances:

Mr. Kendrickson Kentish and Ms. Kathleen Bennett for the Claimant
Ms. Leslie-Ann Brisett and Mr. Vere Bird III for the Second and Third Named Defendants
The Fifth Named Defendant in person

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2009: November 4th, 5th
2010: May 5th
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JUDGMENT ON ASSESSMENT

[1] **MICHEL, J.:** By Claim Form and Statement of Claim filed on 13th December 2004 (amended 10th February 2006) the Claimant claimed against the Defendants, damages for personal injuries

suffered by him in the course of his employment, as a result of falling off the back of a motor truck driven by the First Named Defendant and owned by the Antigua Labour Party, of which the Second, Third, Fourth, Fifth, Sixth and Seventh Named Defendants were officers. The Claimant alleged negligence on the part of the Defendants and claimed general and special damages, interest, costs and further or other relief.

- [2] After the filing of acknowledgements of service, defences and replies, and other documents preliminary to trial, and the conduct of case management, mediation and pre-trial review, the trial was scheduled for 3rd July 2007, whereupon the Court ordered, inter alia - without trial and with consent - that judgment be given for the Claimant against the Second, Third, Fourth and Fifth Named Defendants for \$34,000 on the claim for special damages (not including loss of income), that the final medical report of the Claimant be served on or before 14th September 2007, that the witness statement of the Claimant be filed on or before 14th September 2007, that witness statements of the Defendants be filed on or before 28th September 2007 and that skeleton arguments be filed by the parties on or before 16th October 2007.
- [3] No final medical report or witness statement of the Claimant was served or filed on or before 14th September 2007. Instead, a medical report on the Claimant by Dr. K.K. Singh was filed on 25th October 2007, while a witness summary of the evidence to be given by Dr. Singh was filed on 2nd October 2007. By Order of David Harris, J. on 19th October 2007, the witness statement of and medical report by Dr. Singh were deemed to have been filed on time. A witness summary of evidence to be given by one Curtis Jack on behalf of the Claimant, filed on 2nd October 2007, the medical report by Dr. Singh filed on 25th October 2007, a medical report by Dr. Fawcett Jeffrey filed on 8th April 2008, a further witness summary of Dr. Singh filed on 7th July 2009 and a witness statement of the Claimant filed on 16th July 2009 were never admitted by the Court or agreed to by the parties. Skeleton arguments, by way of submissions for the assessment of damages, were filed on behalf of the Second and Third Named Defendants on 16th October 2007 (on the last day stipulated) and on behalf of the Claimant on 19th October 2007 (three days late). The matter was eventually set down for the assessment of damages on 4th and 5th November 2009.

- [4] The matter was called on 4th November 2009 but, on application by the Fifth Named Defendant and by agreement of Counsel present (for the Claimant and for the Second and Third Named Defendants) the matter was stood down to be heard on 5th November 2009. On the said 5th November the Court pointed out that several documents filed on behalf of the Claimant have never been agreed to by the Defendants and/or admitted by the Court. The Court then heard arguments by Counsel for the Claimant and for the Second and Third Named Defendants and by the Fifth Named Defendant (an Attorney at Law) in person as to the admission of the documents concerned.
- [5] In the interest of time, and having regard to the fact that the Court was now at day two of the scheduled assessment of damages, with two witnesses (including a medical doctor) in waiting, the Court decided to hear the witnesses and to determine thereafter which documents and, consequentially, what evidence will be considered by the Court in its assessment of the damages.
- [6] The Court heard evidence from the Claimant and from his Orthopaedic Surgeon, Dr. K.K.Singh, who were both cross examined by Counsel for the Second and Third Named Defendants and by the Fifth Named Defendant personally. At the conclusion of the assessment hearing, and by agreement of Counsel, it was ordered that closing submissions (with authorities) were to be filed by the parties on or before 30th November 2009. Submissions (with authorities) were filed on 30th November 2009 on behalf of the Second and Third Named Defendants, but the submissions on behalf of the Claimant were not filed until 21st January 2010. No closing submissions were filed by or on behalf of the Fifth Named Defendant and there was no service on or participation of the First, Fourth, Sixth and Seventh Named Defendants in the assessment of damages.
- [7] The Claimant's evidence in chief was by way of acknowledging two witness statements given by him - the first dated 18th September 2006 and the second dated 16th July 2009 – the contents of which he stated were true and correct.
- [8] The Court declines to admit the Claimant's witness statement of 16th July 2009, filed as it was almost two years after the time ordered by the Court, with no explanation given for its late filing and with no application made to admit it, other than on the day of the assessment itself when the Court drew to the attention of the parties and Counsel in attendance that it was filed without leave.

[9] In his witness statement of 18th September 2006, the Claimant stated that he is a truck driver by trade and a general handyman. That he is married and is the father of four children and he lives with his wife and family. That in or about the month of January 2004 he was approached by the First Named Defendant to work for the Antigua Labour Party (ALP) which was hiring workers to do work associated with the 2004 election campaign. That in early February 2004 he commenced employment with the ALP and on the 28th day of February, in the course of his employment, he fell from a moving truck belonging to the ALP, hitting the pavement with his left foot first, and had to be taken by ambulance to the Holberton Hospital. That he was in extreme pain. That he was admitted to the hospital and, on that same evening, the doctors at the hospital operated on his left leg and ankle. That the doctors informed him that he had severe injuries to his left ankle, left leg and various cuts and bruises and that he would have to be hospitalized for several weeks; that the injury was very severe and that he would not be able to walk for several months; that they had to place several pins in his leg to try to assist in mending the ankle and leg.

[10] The Claimant stated that he was hospitalized for twenty eight days and then discharged and taken to his home where he remained bedridden from early April to mid August 2004, after which he began to move around his home and his yard with the aid of a crutch. That he has had to undergo physiotherapy from that time. That the fracture was not healing properly and he had to return to the doctor on various occasions. That he is in constant pain and cannot walk without assistance. That he has been unable to work since the accident and has not been able to participate with his wife and children in various family activities which he had previously enjoyed. That his wife has had to hire various persons to do the many odd jobs which he had previously done around his home. That he has had to spend monies on medical supplies and transportation. That in November 2005 he was examined by Dr. Jerry Thorne who advised him that he needed to have further surgery on his ankle as it was not healing. That he requires the ankle joint to be fused. That Dr. Thorne's report dated 16th November 2005 stated that he (the Claimant) has full disability of the lower left extremity. That in March 2006 he travelled to Guyana to have further surgery and treatment on his ankle. That he is still unable to walk or put any weight on the leg and the ankle area is quite swollen and inflamed. That the pain is quite intense and he is required to take pain relievers daily to try to alleviate the pain and discomfort. That he remained in Guyana until July

2006 and had to rent accommodation, hire transportation and pay for surgery and other medical and related expenses whilst he was there. That he was scheduled to return to Guyana for further treatment and evaluation in November 2006. That Dr. Singh has indicated that even if surgery is successful and he is able to walk unaided, there is significant risk that he will develop osteo-arthritis in the ankle joint. That he is still unable to properly indicate what the total cost of his rehabilitation will be.

- [11] The Claimant stated that as a result of his injuries he has been forced to suffer extreme pain and discomfort over the twenty months between the occurrence of the accident and the making of the witness statement and that his quality of life has been severely affected. That he has been housebound for this period with little or no social life. That he has been unable financially to take care of his obligations as a father and husband. That it is unlikely that he will ever be able to work as a truck driver or labourer again as the strain on his ankle would be too severe.
- [12] The Claimant stated that he was paid a weekly wage of \$550 in the course of his employment.
- [13] Under cross examination, the Claimant stated that his eldest child is 27 years old, is at work and does not live with him. That his second child is 26 years old, is at work and lives in Guyane. That his third child is a 19-year old son and that the fourth child is a 14-year old granddaughter adopted by his wife. That in Guyana he had documents qualifying him as a truck driver around 1988. That he has been resident in Antigua since 2000 and never had a licence as a truck driver in Antigua. That he heard Dr. Singh say that he (the Claimant) can weight bear. That he has never sought to find employment since the accident.
- [14] The Claimant also testified that his employer prior to the ALP was Mr. Austin George, who operates a trucking business and has a backhoe. That he commenced employment with Mr. George sometime in 2002. That his starting salary was \$110 per day and he worked 5 days per week and on weekends when requested. That he has no records to show that he did in fact receive \$550 per week. That between 2000 (when he came to Antigua) and 2002 (when he commenced employment with Mr. George) he worked in a shop owned by his wife (or by his wife

and himself) in a sedentary position. That he did not seek sedentary employment between February 2004 and November 2009.

[15] Dr. Singh's evidence in chief was that he prepared five medical reports on the Claimant (dated 26th October 2004, 22nd December 2005, 2nd August 2007, 5th October 2007 and 25th June 2009) the contents of which reports he relies on. The medical reports of 26th October 2004 and 22nd December 2005 were filed in the Core Bundle on 22nd June 2007 and form part of the evidence in this case. The medical report of 5th October 2007 was filed on 25th October 2007 and the medical reports of 2nd August 2007 and of 25th June 2009 were filed with the Claimant's witness statement on 16th July 2009. Although the Court has disallowed the Claimant's witness statement of 16th July 2009, the Court nonetheless admits all of the medical reports of Dr. Singh, including the two filed with the disallowed witness statement, so that the Court can have before it the most-up-to-date evidence on the Claimant's medical condition from the doctor who treated him right through and who came to Court to give evidence. This is necessary so that the Court can properly assess the damages to which the Claimant is entitled, as the Court may otherwise underestimate or overestimate the damages.

[16] In his medical report of 26th October 2004, Dr. Singh reported the following injuries to the Claimant as a result of a severe crush injury to his left leg and ankle:

1. Severely comminuted fracture of left ankle and lower 1/3 of leg.
2. Fracture left medial malleolus of left tibia.
3. Severely comminuted fracture of lower end fibula.
4. Lateral dislocation of left ankle/tibio talar dislocation with lateral shift of talus with ankle diastases.
5. Severely contaminated compound wound with neuro-vascular compromise.

[17] Dr. Singh also reported on the treatment of the Claimant at the Holberton Hospital as follows:

1. After thorough debridement and wound toilet, the ankle was stabilised with two Steinman's Pins as internal fixation was not possible on account of nature of injury and contamination.

2. Treated for severe post operative infection on account of contamination of ankle injuries until discharge on 8th April 2004 with appointment to be followed up as an outpatient.

[18] Dr. Singh reported that he saw the Claimant on 25th October 2004 when he showed signs of healing in medial malleolus but has resulted in lateral shift to talus and malunion at the fibular fracture site. Thus, looking at the entire clinical picture, the Claimant was advised on surgical ankle arthrodesis (fusion of ankle joint) in order to reduce his disability. Dr. Singh reported that, looking at the nature of injury and post operative infection, he would like the Claimant's ankle to remain infection free for three months before subjecting him to surgical ankle arthrodesis. He reported too that the Claimant is temporarily disabled in the full functions of his left lower extremity and will require final assessment to evaluate the total duration of his temporary disability and to calculate the percentage of permanent physical impairment which he will end up with at the end of his treatment.

[19] In his medical report of 22nd December 2005, Dr. Singh reported that, after nine months of treatment of the Claimant's left ankle, the hospital proceeded with ankle arthrodesis on 14th December 2004, with 6.5mm cancellous screws through talus and tibia after removing the articular cartilage of dome of talus and lower end tibia. He reported that post operatively, the Claimant did not show any clinical or radiological signs of fusion/arthrodesis in surgically performed arthrodesis surgery, inspite of full immobilization of ankle with the help of non-walking and walking fibre glass cast for many months. He reported that, looking at the entire clinical picture and the timely efforts of surgeries performed here in Antigua with the limited resources, he concluded that the Claimant should go overseas to have a second opinion and possibly have a second ankle arthrodesis in order to decrease his present disability.

[20] As in the previous medical report, Dr. Singh spoke of the Claimant's temporary disability and the need for further assessment.

[21] In his medical report of 2nd August 2007, Dr. Singh reported that the Claimant had a second ankle arthrodesis surgery performed by Dr. Fawcett Jeffrey in Guyana on 1st April 2006, that he (Dr. Singh) was pleased with the procedures performed by Dr. Jeffrey and he hoped that the Claimant

will in the long run be able to ambulate on his left injured lower limb. He reported that the Claimant needs constant clinical and radiological monitoring and supervised physical therapy as he is still not able to bare full weight on his left lower limb and that it is difficult to predict the progress and the duration of the Claimant's future disability because he is still ambulating on crutches.

- [22] As in his two previous medical reports on the Claimant, Dr. Singh spoke of the Claimant's temporary disability and the need for further assessment.
- [23] In his medical report of 5th October 2007, Dr. Singh reported that the Claimant had a very difficult surgical reconstruction performed by Dr. Jeffrey who removed lower end fibular/small bone of left leg and tried to graft lower 1/3 of fibula in order to tibialise the upper part of his left ankle and lower limb as a whole. He reported that the Claimant is still unable to weight bear fully on his left lower limb and would take a very long time (could be years) for this grafted fibula to mechanically weight bear in order for him to function. It is not therefore humanly possible to predict the results as there are still chances that the Claimant may not be able to weight bear on this reconstructed ankle and in the end may result in below knee amputation and prosthesis for him to function.
- [24] In his medical report of 25th June 2009, Dr. Singh reported that the Claimant gave a history of a second ankle arthrodesis surgery done in Guyana in November 2008 and that at present the Claimant is being rehabilitated without any movements in his left ankle joint. Dr. Singh reported that radiological studies have shown signs of insufficient healing at surgery site in the Claimant's left ankle joint, so that the Claimant continues to remain temporarily disabled in the functions of his left lower extremity.
- [25] Dr. Singh ended his report of 25th June 2009 by saying that the Claimant is temporarily disabled in the full functions of his left ankle and will require a final assessment to evaluate the total duration of his temporary disability and the evaluation of percentage of permanent physical impairment he will end up with at the end of his treatment.
- [26] Dr. Singh also testified in examination in chief that when he said that the Claimant continues to remain temporarily disabled in the functions of his left lower extremity, he meant that there is no

radiological evidence of healing at the operated site of the left ankle joint and so the Claimant remains disabled in order to bear his weight on account of pain and insufficient mechanical union between the ankle and the leg bone; he is not able to walk on one of his legs.

- [27] The Court also had before it several documents disclosed by the parties and contained in Volume 2 of the Core Bundle which had been filed on 22nd June 2007 in advance of the scheduled trial of the matter. These documents included other medical reports, apart from those by Dr. Singh, and in particular a medical report by Dr. Fawcett Jeffrey dated 29th March 2007 in which Dr. Jeffrey reports that the Claimant will remain with a PPD (permanent partial disability) of 24% since the joint will have no mobility and he will remain with a limp due to limb shortening.
- [28] On this evidence the Court is tasked with the responsibility of assessing the damages to which the Claimant is entitled for the injuries he sustained on 28th February 2004 as a result of being negligently thrown out of the motor vehicle driven by the First Named Defendant and owned by the Antigua Labour Party, of which the Second to Seventh Named Defendants were officers.
- [29] Special damages have already been awarded by the Court in this matter in the sum of \$34,000, which amount does not include loss of income. The Court will therefore concern itself only with general damages and special damages for loss of income, in addition of course to interest and costs.
- [30] The heads of damages under which awards will be made in this judgment will be for (1) general damages for pain and suffering, (2) general damages for loss of amenities, (3) general damages for future medical expenses and (4) general damages for loss of future earnings. Awards will also be made with respect to interest and costs. The judgment will also address the claims made for loss of income, future domestic care and future "do it yourself."
- [31] In adjudicating on claims for 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 it is possible to do so by a monetary award in the position that he would have been in had he not sustained the injuries to his person and that the best way to

achieve this is by seeking to approximate awards made by courts within the jurisdiction of this Court (or further afield if necessary) for similar-type injuries.

[32] In the Claimant's closing submissions, the following cases were put forward as containing awards by courts within the jurisdiction for similar-type injuries:

1. **Marcel Fevrier et al v. Bruno Canchan et al**¹ where in 2002 the High Court in St. Lucia awarded \$50,000 to the First Claimant for pain and suffering and loss of amenities of life for a fracture to his left leg, fractures of the toes of both feet, a fracture of the right hip and a fracture of the right knee, which resulted in tremendous pain and hospitalization for two months and a further four months at home in bed for most of the time suffering and unable to move around; and \$150,000 to the Second Claimant for excruciating pain on her right thigh and the right side of her head and a drop in the thigh where it was broken, resulting in hospitalization for three months and a further period of six months at home during which she was unable to walk because of the fracture of her right femur, which also caused her to suffer pain to her spine and shortening of her right leg, resulting in the right side of all of her shoes having to be raised to compensate for the shortening of her leg and her inability to enjoy too much dancing and other outdoor activities as she was accustomed to do.
2. **Wadadli Cats Limited v. Frances Chapman**² where in 2005 the Court of Appeal of the Eastern Caribbean Supreme Court awarded \$40,000 to the Respondent for pain and suffering and \$80,000 for loss of amenities for shock, severe bruising to the head, severe pain in the neck and arm, bruising of the inner ear and post concussion syndrome, paraesthesia (pins and needles in her right arm), numbness over the right thumb and forefinger and cervical spondylosis and a mild degree of carpal tunnel syndrome, resulting in her professional life substantially upset and to a lesser extent her social life.
3. **Keithley George et al v. Gerald Khoury**³ where, in a judgment conjoined with the judgment in Civil Appeal No. 16 of 2004, the Court of Appeal of the Eastern Caribbean

¹ Saint Lucia Civil Suit No. 313 of 1989

² Antigua and Barbuda Civil Appeal No. 16 of 2004

³ Antigua and Barbuda Civil Appeal No. 19 of 2004

Supreme Court confirmed an award by the trial judge of \$120,000 to the Respondent for pain and suffering and loss of amenities for shock and severe pain, multiple bruises and swelling of left ankle and leg, severely comminuted and crushed intra-articular fracture of the lower ends of the tibia and fibula and bruising and operation scars to left ankle.

4. **Rosetta Elouise Mayers v. Deep Bay Development Company Ltd⁴** where in 2003 the High Court in Antigua and Barbuda awarded \$230,000 to the Claimant for pain, suffering and loss of amenities for a fracture of the vertebrae resulting in hospitalization for about two months initially and thereafter on complete bed rest at home for a long period and further hospitalization, with the Claimant suffering excruciating pain for substantial periods in the past and even at the time of judgment. In fact, it was determined that she will never be free from pain for the rest of her life, that she has chronic RSD of a significant nature which will require lifelong treatment, that her pains have affected every aspect of her life, that she will remain unable to work in the future, that her personal and family life has been severely affected, she has no social life or conjugal relations with her husband and that her prospects were grim, to say the least. One of the Claimant's doctors assessed her physical impairment as 60% while the other assessed it as 100% whole person impairment.

[33] In the closing submissions filed on behalf of the Second and Third Named Defendants, the following cases were put forward as containing awards by courts within the jurisdiction to be taken account of in determining the appropriate award to be made in this case:

1. **Violine Joseph v. Terese Morris et al⁵** where in 2009 the High Court in Antigua and Barbuda awarded \$85,000 to the Claimant for pain and suffering and \$50,000 for loss of amenities for a crushing injury to her right leg, which resulted in reconstructive surgery in Antigua, amputation of the limb in Florida and fitting of an artificial limb in Antigua, resulting too in the Claimant's working life being reduced, the quality of her personal life being affected and her experiencing constant pain.

⁴Antigua and Barbuda Civil Suit No. 241 of 1993

⁵ Antigua and Barbuda Claim No. 133 of 2006

2. **Monica Lansiquot v. Geest PLC**⁶ where in 2000 the Court of Appeal of the Eastern Caribbean Supreme Court awarded the Appellant \$40,000 for pain and suffering and \$20,000 for loss of amenities for a slipped disc with associated continuing pains, resulting in her having to wear back braces when she travels, having to eat moderately because she is not allowed to gain weight, having to exercise regularly, experiencing pain from hip to toe when she sits, experiencing swelling of her knee and unable to lift anything heavy, bend properly or live the life that she was accustomed to, including doing gardening and sewing.

3. **Lincoln Carty v. Lionel Patrick**⁷ where in 2009 the High Court in St. Kitts awarded the Claimant \$175,000 for pain and suffering and loss of amenities for a fracture of the right femur, fractures of the inferior pubic ramous (pelvis), fractures of the right 3rd and 8th ribs posteriorly, laceration and contusion of the right knee, contusion of sciatic nerve in the right leg, permanent dislocation of joint in the sternum, bruising and laceration of front left rib cage and cervical strain (neck), resulting in continuous pain and discomfort, including severe and prolonged migraine headaches. The Claimant underwent surgery, during which a steel rod was placed in his femur, he remained hospitalised for 32 days and, on his release from hospital, he remained home for 6 months. Twelve months after the first surgery the Claimant underwent a second surgical procedure to remove the steel rod and was away from work for about 6 weeks. His right leg is now shorter than the left; he has received physical therapy treatment and chiropractic care and has been seen by many health care professionals. He is no longer able to be involved in sports, which he was very involved in prior to his injuries, he is forced to use a cane because his right knee buckles on a regular basis, he suffered post traumatic stress, severe bouts of depression, his relationships both at work and at home have suffered as result of the difficulty of dealing with his pain and his lack of sex drive has caused much strain in his relationship with his wife.

⁶ Saint Lucia Civil Appeal No. 1 of 1999

⁷ Saint Christopher and Nevis Claim No. 54 of 1998

4. **Rosetta Elouise Mayers v. Deep Bay Development Company Ltd⁴** earlier referred to.

- [34] Neither side referred to the case of **Fenton Auguste v. Francis Neptune⁸** in their closing submissions, probably because the Appellant's injuries in that case were not comparable to the injuries of the Claimant in the present case, but the Court finds it necessary to refer to it, representing as it does a virtual landmark of the Eastern Caribbean Supreme Court on damages in personal injury cases. In terms of its direct relevance to the issue currently under consideration, in that case the Court of Appeal of the Caribbean Supreme Court in 1997 awarded the Appellant \$75,000 for pain and suffering and \$125,000 for loss of amenities for a dislocation of his 11th and 12th thoracic vertebrae which resulted in complete spinal cord transection and paraplegia, with the Appellant being confined to a wheel chair for the rest of his life and enduring permanent and total incontinence among other disabilities.
- [35] Taking all of these cases into consideration, and taking into consideration the nature and extent of the injuries sustained by the Claimant, the nature and gravity of his resulting physical disability, the pain and suffering which he had to endure, the loss of amenities suffered by him and the extent to which his pecuniary prospects have been affected, this Court awards the Claimant \$85,000 for pain and suffering and \$65,000 for loss of amenities, the total of which is equal to the sum of \$150,000 – the figure at the higher end of the submission by Counsel for the Second and Third Named Defendants on an appropriate award for pain, suffering and loss of amenities in this case.
- [36] The next head of damages to be addressed is future medical expenses. The evidence on this is very unsatisfactory, because although this is an item of general damages (as a matter of pleading) yet the Claimant must clearly provide evidence of amount. The Court however has no choice but to make an award based on the evidence put before it. Dr. Singh testified that the Claimant would require physical therapy, pain medication, clinical follow up and the Lord's blessing for his rehabilitation. The Court certainly did not expect a value to be placed on the last of the four requirements, but the Court ought to have been provided with sufficient information to value the other three requirements. Alas, the only information the Court was provided with is that over the next year, in a case like the Claimant's, physical therapy is recommended three times per week,

⁸ Saint Lucia Civil Appeal No. 6 of 1996

with no evidence given on the cost per session; no costs were provided for the pain medication; while the clinical follow up recommended was two visits per month to the Orthopaedic Surgeon at a cost of \$270 to \$275 per consultation, but with no indication as to how long this would be required for. Dr. Singh testified that although amputation and a prosthesis was discussed with the Claimant, this course has never been recommended by him and, further, he cannot provide figures on the cost of these. The Court will, in the circumstances, make an award of \$10,000 by way of general damages for future medical expenses.

[37] The next head of damages to be addressed 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 claimed and proved as special damages. The Claimant - who was 46 years old at the date of the filing of the claim in December 2004, 48 or 49 by the time of the judgment on liability in July 2007 and 51 by the time of the assessment of damages - testified that he earned \$550 per week before the accident and is no longer able to work. Although the evidence of his earning this amount was disputed by the Defendants by way of cross examination of the Claimant, no evidence was presented by the Defendants to contradict the Claimant's evidence, leaving his evidence of having earned \$110 per day on a five-day working week with his previous employer and \$550 per week with the ALP as the only evidence before the Court on the Claimant's earning capacity. The Court will accordingly accept this figure as representing the Claimant's earning capacity and will use it to calculate the multiplicand for determining the Claimant's entitlement to loss of future earnings, so that the multiplicand will be \$28,600 (\$550 x 52), with the possibility of working overtime or on weekends being cancelled out by the possibility of not working on some days.

[38] Our courts have taken the view that the working life of a person in the Claimant's general sphere of work (unskilled/non professional) ends at 65, yielding a period of 19 years between the date of filing the claim and the end of the Claimant's working life, 16 or 17 years between the judgment on liability and age 65 or 14 years between the assessment of damages and age 65. The correct starting point for the determination of the multiplier is somewhat doubtful. The preferred view of the courts appears to be from the date of trial, which – in the present case – might more appropriately be from the date of the judgment on liability. My own view however is that the more logical starting

point is the date of the claim, especially having regard to the fact that the terminal point of the claim for special damages for loss of income approximated the date of filing the claim. Be that as it may, in moving from the starting point of 14, 16, 17 or 19 to an appropriate multiplier, the Court will take into consideration the many contingencies, vicissitudes and imponderables of life and will take into consideration too the fact that the Claimant's employment was temporary in nature with no guarantee of other settled employment, the fact that although claiming to be a truck driver in Antigua the Claimant admitted that he does not have and has never had a licence to drive trucks in Antigua and the fact too that although his doctor testified that he can do sedentary work or any work that does not require ambulation and standing for long periods, the Claimant testified that he has never sought other employment. The Court will in the circumstances use a multiplier of 4 to determine the Claimant's loss of future earnings.

[39] The Claimant is accordingly awarded general damages for loss of future earnings in the amount of \$102,960, being \$114,400 ($\$28,600 \times 4$) discounted by 10% because the Claimant will receive a lump sum rather than several smaller sums over time.

[40] The next head of damages to be addressed is special damages for loss of income. This claim is one for special damages and must therefore be specifically pleaded and strictly proved. The Claimant specifically pleaded special damages of \$18,700 for loss of wages from 24th February to 24th November 2004 – 39 weeks at \$550 per week. For starters though, the statement of this claim is erroneous because 39 weeks at \$550 per week is not mathematically equal to \$18,700. Then, having made this claim in the Statement of Claim, the Claimant made no attempt to prove this claim, strictly or at all. The only evidence which he gave even tending towards establishing this claim was his averment that he earned \$550 per week. Having however stated in his witness statement that he was recruited in the month preceding the accident to do works associated with the 2004 election campaign, which campaign would have ended with the general election in the following month, the Court cannot find that the Claimant has strictly proved that, but for the injuries sustained by him on 28th February 2004, he would have earned income of \$550 per month from 24th February to 24th November 2004. This certainly could not have been based on his recruitment a few weeks before to do work for a political party associated with an election campaign that ended within a month thereafter. The Claimant also never even really suggested, far less established,

that he had other employment immediately available to him from which he would have earned \$550 per week between 24th February and 24th November 2004. The Court cannot therefore make any award to the Claimant for loss of income from the occurrence of the injury to the filing of the claim.

[41] In the closing submissions, Counsel for the Claimant also asked the Court to award damages to the Claimant for future domestic aid and future "do it yourself" on the basis that a court can make awards for these things.

[42] Of course a court can make an award which includes provision for domestic assistance and tasks done around the home where it is established that the Claimant's injuries have incapacitated him from doing domestic chores or undertaking tasks around the house and he has to hire people to do these things or, in the case of domestic aid, that the Claimant's injuries have necessitated the provision of extra domestic help for him. Then the court would have to have information on the cost involved in these things and the duration for which they would be required. There is no evidence before the Court on any of these things and no basis therefore on which this Court can make any awards in relation to them. The award made for loss of amenities, however, takes account of the Claimant's incapacity to perform certain accustomed tasks.

[43] In terms of the claim for interest, the Court is guided by the judgment of the Court of Appeal of the Eastern Caribbean Supreme Court in **Martin Alphonso et al v. Deodat Ramnath**⁹ where the Court of Appeal laid down the following guidelines for the award of interest in personal injury cases:

1. With regard to general damages, no interest should be awarded before judgment on loss of future earnings;
2. On damages for pain, suffering and loss of amenities interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money in court placed on short term investment and, in the absence of evidence of that rate, the statutory rate of interest would be used;

⁹ British Virgin Islands Civil Appeal No. 1 of 1996

3. With regard to special damages, interest should be awarded for the period from the date of the accident to the date of trial at half of the rate payable on money in court placed on short term investment.

[44] Applying these guidelines, the Court awards interest to the Claimant on the amounts awarded for pain and suffering and loss of amenities at the rate of 5% per annum from 28th April 2005 to today's date (the claim form having been served on the Second and Third Named Defendants on 28th April 2005, having been previously served on the Fifth Named Defendant on 7th April 2005) and makes no award of interest to the Claimant on the awards for loss of future earnings or future medical expenses.

[45] In terms of the claim for costs, the Court awards costs to the Claimant in accordance with Rule 65.5 of the Civil Procedure Rules 2000, applying Appendix B and C of Part 65. However, Rule 64.6 will also be applied in this case, in particular, Rule 64.6 (3) (c).

[46] This judgment, being for the total sum of \$300,460 (\$150,000 + 25% interest thereon + \$10,000 + \$102,960) would yield prescribed costs (calculated in accordance with Appendix B) of \$51,546, of which 75% will be awarded (in accordance with Appendix C) as the highest level of costs allowed for a matter which concluded without a trial, yielding a total of \$38,659.50, which would then be discounted by 50% (by virtue of Rule 64.6) because the Claimant was extremely tardy in complying with orders and directives of the Court and in the general pursuit and prosecution of the claim. Costs will therefore be awarded to the Claimant in the sum of \$19,329.75.

[47] The Order of this Court is that the Second, Third and Fifth Named Defendants (who, with the Claimant, were the only parties to the judgment on liability and who were the only defendants given notice of the proceedings for the assessment of damages) shall pay to the Claimant the following amounts:

1. General damages for pain and suffering in the sum of \$85,000.
2. General damages for loss of amenities in the sum of \$65,000.
3. General damages for future medical expenses in the sum of \$10,000.

4. General damages for loss of future earnings in the sum of \$102,960.
5. Interest on \$85,000 and \$65,000 from 28th April 2005 to 5th May 2010 at the rate of 5% per annum.
6. Costs of \$19, 329.75.



Mario Michel
High Court Judge