

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

Claim No. ANUHCV 2007/0403

Between:

RANDY JAMES

Claimant/Applicant

-And-

LEROY LEWIS

ALDEN SAMUEL

SAMMY'S CONCRETE IN CORPORATED

Defendants/Respondents

Appearances: Mr. D. Raimon Hamilton for

Mrs. Denise Jonas – Parillon for

Claimant

Defendants

.....
2009: June 18, 25 & 26
2009: July 31
.....

JUDGMENT

1. **Harris J:** This action began by way of Claim form filed on 23rd July 2007. The Claimant, Randy James claimed against the Defendants, Damages arising from a motor vehicular accident that occurred on the 20th day of August 2005.
2. The Claimant obtained Judgment on the 4th December 2008, after a trial on liability only. Damages are now to be assessed. The parties, by consent, rely on their affidavits in support, oral testimony, and written submissions in this assessment of damages.

THE FACTS

3. The Claimant was 35 years of age at the time of the accident and is now 39 years of age. As a result of the collision the Claimant was rendered unconscious for approximately five (5) days and was initially treated at the Intensive Care at the Holberton Hospital. He further states that he had several injuries. These injuries are detailed in Paragraph 5 of the Claimant's Affidavit. The Claimant refers the Court to the Medical Reports of DR. S. Paleti, Dr. Benedict Owusu, Dr. K.K. Singh and Dr. Teri F. Ali. In particular, the Claimant relies on the description of his injuries contained in the Medical Report of DR. K.K. Singh, dated the 5th day of March 2006, that is:

- Facial Injuries;
- Injury to right eye;
- Injury to right ear;
- Fracture of both bones of the right forearm;
- Severe Internal de – arrangement of the left knee with rupture of all ligament support.

In particular the Claimant suffered:

- i. Rupture to both Collateral Ligaments of the knee;
- ii. Complete rupture of the Anterior Cruciate Ligament,
- iii. Meniscus tear and injury to Posterior Cruciate Ligament.

4. The Claimant spent a total of four (4) months at the Hospital and suffered pain to the left knee, right arm, the shoulders, neck, face and ear. The Claimant's facial injuries were treated by Surgery on the day of the accident. On the 30th day of August 2005 the Claimant underwent surgery to correct the fractures to the radius and ulna bones of his right forearm. On the 20th day of September 2005 the Claimant's left lower and right upper extremities were immobilized in full cast, and he was subsequently discharged in December of 2005. The cast was removed on the 3rd day of November 2005. The Claimant, subsequent to his discharge, began physiotherapy sessions as an outpatient.
5. The Claimant was seen by Dr. K.K. Singh on the 26th day of January 2006 and was sent for a MRI scan of his left knee, which was performed at the Belmont Clinic in Antigua. After examination by Dr. Singh, it was recommended that the Claimant see Dr. Teri F. Ali in Trinidad and Tobago for further treatment of his knee injuries.

6. The Claimant attended Dr. T. Ali for specialist treatment of his injuries on the 23rd day of June 2006 in Trinidad and Tobago and refers the Court to the Report of Dr. Teri F. Ali dated the 18th day January 2007. Dr. Ali has recommended a staged course of treatment in respect of the surgeries required for the Claimant's treatment.

THE CLAIM – SPECIAL DAMAGES

7. The Claimants Statement of case, more particularly his statement of claim, sets out its particulars of Special Damages at “B1” and ‘B11’, “B111” at pp 8 of the substantive Trial Bundle (“TB”). This itemized chronicle of injuries sustained and expenses thereto, provide sub totals under the following headings and values:
“MEDICAL AND HOSPITALIZATION EXPENSES” \$5, 4950.00 (this presumably is in EC\$ currency);
(ii) Reconstruction Surgery of left knee in mixed currency sums of TT\$21, 461.00 for Westshore Medical Ltd. a private hospital, Family Care Pharmacy TT\$95.00, Airline Travel EC\$1684.54 and Travel Taxes EC\$324.00. **(iii)** Honda Integra - EC\$29, 000.00 - and he claims loss of use from 20th August, 2005.
8. The Defendants contend that when added up, the Claimants Special Damages as pleaded; amount to \$47, 854.12 and, indeed it does. The Defendants submit that the Law provides that a party may only obtain judgment for what he has pleaded in his Statement of Case and proved. **Therefore, the sum of \$84, 144.62 claimed by the Claimant as Special Damages on the hearing of the assessment of damages is not permissible.**
9. The Defendant cites in support of this proposition; the well established authority on this point; *Ilkiw v. Samuels* [1963] 1 WLR 991 at 1006, per Diplock L.J. that; “*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*”.
10. I note that although the Claimant has pleaded loss of use from 2005, he has not led sufficient evidence to prove the whole of it. Some modicum of evidence must be led by the Claimant to prove each aspect of its case even if there is no contending factual position pleaded and proved by the Defendant, if it is to elevate from a mere pleaded fact to one of evidence.¹ Further, the claimant has not convinced me by way of submissions, of his entitlement to the

¹ The claimant pleaded; “Loss of use from 20th August, 2005”.

said loss of use award for the period from 20th August 2005 to the 8th October 2008 as set out in the “Submissions on Behalf of The Claimant”.

11. In the circumstances, I adopt the submission of the Defendant on this pleadings issue, in relation to the special damages claim and for the award for special damages at \$47, 854.12. The Defendants in their submissions, have conceded this reduced sum and state that they will not object to this Special Damage award.

GENERAL DAMAGES

The Defendants Submission

12. The Defendants agree that the Claimant suffered serious multiple injuries but submit, that following the precedent court awards for similar injuries in Antigua and Barbuda, an award of EC\$120, 000.00 as general damages for pain and suffering and loss of amenities is reasonable¹.
13. In arriving at this proposed sum as general damages the Defendant proceeded by way of identifying the multiple injuries suffered by the Claimant detailed in the medical reports exhibited without objection, in this matter.
14. The Respondent sets out the claimant's injuries as **(i)** open fractures of the right radius and ulna² **(ii)** Multiple abrasion and lacerations of the face left leg and right forearm, elbow and arm³ **(iii)** The left knee suffered a partial tear of the lateral collated ligament, a complete tear of the anterior cruciate ligament, a partial tear of the posterior cruciate ligament, a small tear of both menisci and loss of articular cartilage and irregular joint margins⁴.
15. The Respondent compared these injuries with those set out in the Antiguan cases of Laura Marrocco v The Attorney General of Antigua and Barbuda⁵. Wadadli Cats Limited v Frances Chapman⁶ and; Keithly George & Francis Trading Agency Limited v Gerald Khoury⁷.

¹ See pp 5 of the Respondent Submission on Assessment of Damages

² Medical report of Dr. Benedict Owusu

³ *ibid*

⁴ Medical report of Dr. Terry Ali.

⁵ Claim No. ANUHCv 1997/0240

⁶ Civil Appeal No. 16 of 2004

⁷ Civil Appeal No. 19 of 2004

16. In the Marrocco case, the court awarded the sum of EC\$60,000.00 for pain and suffering and loss of amenities; in the **Wadadli Cats** Case the award at the Court of just instance for pain and suffering and loss of amenities EC\$500,000.00. This was reduced on appeal, to a sum of \$120,000.00 (being \$40 000.00 for pain and suffering and \$80,000.00 for loss of amenities). The court in this matter found that the Claimant would suffer from long life chronic pain and loss of amenity; and finally in the **Khoury** case, the sum of EC\$129, 000.00 was awarded for pain and suffering and loss of amenities.
17. The Respondent submits, that following the precedent awards referred to and taking them together with the authoritative schedules of precedent awards¹ and Dr. Ali's report which suggests that further medical treatment is not an obvious necessity and further, by simple observation of the Claimants ease of movement in the courtroom at the hearing, there is **(i)** no reason to allow the Claimant damage under the head of further medical expenses and **(ii)** that the amount proposed as damages by the Defendant is reasonable.

Claimant's Submission

18. The Claimant was 25 years of age at the time of the accident. As a result of the accident the Claimant suffered various injuries to his face, right arm, and left leg. In this respect the Claimant relies on the following Medical Reports:
- Dr. S. Paleti 20th January 2008
 - Dr. Benedict Owusu 25th January 2008
 - Dr. K.K. Singh 5th March 2006
 - Dr. Terry F. Ali 23rd June 2006
 - Dr. Terry F. Ali 18th January 2007
19. The principles for assessment of General Damages for personal injuries are well established. The Court must award a fair and reasonable compensation having regard to five (5) heads of damage including: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the loss of amenities; and the extent to which pecuniary prospects are affected.²

¹ The 'Guidelines for the assessment of general damages in personal injury cases', 8th edit and the Supplement on damages for personal injuries, the LAWYER, Vol. 7.

² See wooding C.J. in *Cornilliac v St. Louis* (1965) 7 WIR 491; see also *Heeralal v Hack Bros* (1977) 15 WIR 117.

20. **Pain and Suffering.** The Claimant claims damages for pain and suffering caused by the injuries and the medical/surgical treatment rendered necessary by the said injuries. The evidence in this regard is found at Paragraphs 3, 5, 11 13, 14 and 22 of the Claimant's Affidavit. I am able to infer much pain and suffering to the claimant before trial (the most intense appearing to be in 2005 and 2006), now and in the future (albeit diminishing in intensity to a point) based on the description and nature of the injuries,,treatment of the injuries and prognosis for recovery. Further to this, the claimant has deposed to his ongoing experience with pain.
21. **Loss of Amenities.** The injuries caused by the accident have adversely affected the Claimant's enjoyment of life in the circumstances, the Claimant also claims for loss of amenities.
22. The Claimant deposes that at the time of the accident he was a young (25 years of age) and outgoing man. He was unblemished by scars, and played competitive cricket as a promising all – rounder. He represented the Antigua and Barbuda national side and was considered for selection to the Leeward Islands team. Since the accident, and directly due to the injuries to his forearm and knee, the Claimant avers that he is now unable to develop his cricketing career. The Claimant's face is scarred; in particular there are visible injuries to his forehead and eyelashes. As a result he now considers himself to be scarred and no longer attends parties and has become shy around females.
23. Further, the Defendant is employed as a Security Officer with the Government of Antigua. However he contends that he is currently handicapped on the job market due to his injuries.
24. **Nature and extent of Injuries.** It is submitted by the claimant, that having regard to the nature of the injury sustained (left leg and right arm mainly) and the course of treatment recommended, that the knee injury is to be regarded as severe. At his last assessment Mr. James was diagnosed with temporary disability for that limb at 40% while his overall disability as a person, is 30%. The facial scaring and injury to his forearm can be described as moderate.
25. The Claimant contends that he is likely to have scheduled, an assessment of his condition and at least two (2) further surgeries on his knee.

26. The Claimant invites the Court to consider the guidance provided in the United Kingdom in the Guidelines for the Assessment of General Damages in Personal Injury Cases; and in the Supplement on Damages for Personal Injuries published by, '**the LAWYER**'.

27. Counsel for the claimant submits that interest ought to be assessed on the special damages awarded at the rate of 2 1/2% from the date of the accident to the date of the judgment, and at the rate of 5% per annum on awards of general damages from the date of filing to the date of the judgment on assessment. Thereafter, Interest ought to be awarded at 5% per annum pursuant to the Judgment Act.

28. The claimant claims on the Assessment:

- | | |
|---------------------------|-----------------|
| • General Damages | EC\$240, 000.00 |
| • Future Medical Expenses | EC\$20, 000.00 |
| • Special Damages | EC\$84, 144.62 |

29. The Claimant invites the Court to give judgment for the Claimant and assess damages in the sum of EC\$344, 144.62 together with interest thereon as well as the Claimant's prescribed costs pursuant to the Civil Procedure Rules 2000.

THE EFFECT AND TREATMENT OF THE INJURIES

30. The affidavit evidence of the Claimant together with the medical reports chronicle the effects that the injuries have had on the life of the Claimant and the effect it is likely to have in the future.

31. The uncontested evidence is that as a result of the collision the Claimant was rendered unconscious for about five (5) days. The accident and admission to the Hospital took place on the 20th August 2005 and the Claimant was discharged from the hospital in 22 December 2005, some for months after. I acknowledge at the onset, the significance of being admitted and retained at the hospital for a continuous period as long as 4 months. Quite apart from his length of stay, the evidence suggests the claimant's injuries were significant and debilitating.

32. During the period at the Holberton public hospital, he was operated on. The reports of Dr. Paleti of the 20th January and of Dr. Owusu of the 25th January 2006 describe their findings and their treatment of the claimant at the Holberton Hospital in Antigua. The latter report by Dr. Owusu concluded that: *"He had gradual good immediate recovery and on the 20/09, after the wounds had completely healed, the left lower and the right upper extremities were immobilized in full cast and he was discharged with follow up appointments. Subsequently, he has been seen on four occasions at the Outpatient Clinic. Both cast were removed on the 03/11 and physiotherapy was advised. His last visit was on the 5th January 2006 during which improvement of the laxity of the left knee joint and atrophy of the ipsilateral quadriceps muscle were noted. Consequently, he was advised to continue with the physiotherapy. He therefore continues to be under our care."*
33. On the 26th January 2006 the claimant was seen by Dr. K.K. Singh, Consultant Orthopedic Surgeon. Dr. Singh noted that the claimant had undergone treatment and surgery at the Holberton Hospital and was under the care of Doctors there, along with himself. Dr. Singh noted injuries including: 4. *Fracture of both bones[sic] right forearm treated surgically at the Holberton Hospital by me with DCP plating. He was discharged from the hospital on the 22nd of December, 2005.* 5. *Severe internal de-arrangement of left knee with rupture of all ligament support"*
34. Dr. Singh said in his report that a recent MRI scan revealed that there was injury to both the claimants collateral ligaments with complete rupture of the Anterior Cruciate Ligament (ACL) and, a Meniscus tear and injury to the posterior Cruciate Ligament. Dr. Singh recommended that the claimant go overseas for the ACL reconstruction and further Arthroscopic surgery. One, Dr. Teri Ali was recommended. Dr. Singh then concluded as follows: *"Mr. Randy James is still temporarily disabled in the full functions of his lower extremity and will require a final assessment to evaluate the total duration of his physical temporary disability and to calculate the percentage of permanent physical impairment if he ends up with any at the end of his treatment."* (emphasis mine).¹ It appears to me that at this time Dr. Singh recognized the prospect of permanent injury.
35. The claimant visited Dr. Ali in Trinidad and Tobago as recommended. Dr. Ali's report of the 23rd June 2006 refers to having carried out clinical tests and confirmed the findings that the claimant sustained; *"severe trauma to his left knee with rupture of the patellar tendon, the*

¹ The claimant acknowledges this assessment in his affidavit filed in this matter.

anterior and posterior cruciate ligaments, the medial and lateral co-lateral ligaments , the medial and lateral menisci and bone bruises “. Dr. Ali recommends reconstructive surgery on a staged basis and goes on to describe the nature of the surgery. Dr. Ali recommended a supervised physiotherapy program thereafter and said that after rehabilitation, the claimant should be assessed. He referred to further reconstruction at a second stage and considered that the claimant may even need a 3rd stage operation. He directed that the claimant will have to return for post operative assessments.

36. Dr Terri Ali produced a further report dated the 18th January 2007 where he referred to his first meeting with the Claimant on June 23rd 2006. He refers also to the claimants 1st surgery done in September 2006 and the fact that the claimant wore a cast for 6 weeks before it was removed. The claimant was put on a supervised program of physiotherapy and seen by Dr. Ali “*intermittently to assess his functional improvements*”. During this time the claimant “*developed an infected sinus over the wire suture*” which resulted in having to remove the wire and associated dead tissue. At that date, in 2007, Dr. Ali’s assessment was that the claimant’s present disability for the left leg was forty percent (40%) and his overall disability was thirty percent (30%). In my view, the claimant is entitled to know the final prognosis.

37. For the claimants part, in 2009 he says that he attended physiotherapy at the therapy unit until he gained a measure of strength in his knee. He said that he had been advised that he cannot run or dance with that knee. Further, he deposes, that any sudden movement in his knee results in sharp and intense pain. He goes on to say that on occasion he has to wear a brace to support his knee and at times he would wake up from sleep feeling intense pain in his knee.¹

38. The Claimant deposes that both bones in his right forearm had been broken as a result of the accident (there is no dispute over this) and that part of the therapy was geared to strengthening his arm. He acknowledges that he has since recovered use of his right arm but that the arm is still weak and he experiences frequent bouts of soreness and pain in the arm. He cannot lift heavy objects and he experiences stiffness in his shoulders. ²

¹ See para 5 of Claimant’s Affidavit in support of the application for the assessment of Damages filed on the 25th March 2009.

² See para. 13, *ibid*.

39. Further, the Claimant said: *"I had injuries to my face as a result of the accident. I was treated at the Hospital and also saw Dr. Walwyn who dealt with my right eye. As stated above my eyelid was split in the left corner eye. Dr. Walwyn performed corrective surgery on my eye to correct this split. There is still however a gap at the corner of my right eyelid, as a result my top and bottom eye lids do not join at that left corner. My eyelashes now grow downwards rather than upwards, and constantly irritate me eye. I have to keep plucking my eyelids in order to lessen the irritation and to avoid them from looking uneven. I paid Dr. Walwyn EC\$1,000.00 for the surgery which he performed"*.
40. The claimant said that he has scars on his face, ear, hand and leg. He can feel a flat spot running down his forehead towards his right eye. He explains that whenever he touches this spot he still feels *'some measure of pain'*. On or about the 17th day of December 2005 he said he sought paid advice from Dr. Bertrand Lacotte, a Plastic and Consultant Surgeon, on the best way to manage these scars. The cuts have healed but the scars are still visible at conversational distance, he deposed. The flat spot, he says, is clearly visible to him. Whenever he looks into the mirror he can see what he describes as these disfiguring features and he feels disfigured. He is uncomfortable whenever he notices or believes that people looking directly at him. He said, in his affidavit, that he did ask Dr. Walwyn about the flat spot, who said it should disappear over time, but to date, it has not disappeared. The claimant exhibited to his Affidavit In Support, copies of the receipts for payment for both Dr. Walwyn and Dr. Lacotte.

ANALYSIS AND AWARD

41. The criteria that a judge should apply in the exercise of his discretion on the question of general damages for personal injuries is well set out in the Civil Appeal out of St. Vincent and the Grenadines in the case of CCCA Limited v Julius Jeffrey C.A. No. 10 of 2003 SVG and reads as follows: *"...it is, in my view, a function of the law, as far as possible, to be predictable, given the infinite variety of the affairs of human king. In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based ; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further afield. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a*

comparative scale. This is not a precise science, leaving much room for the trial judge's discretion".

42. This statement of the law is buttressed by citing the observation of Lord Hope of Craighead in the House of Lords decision in Wells v Wells [1998] 3 ALL ER 481, that : *"The amount of the award to be made for pain, suffering and the loss of amenity cannot be precisely calculated. All that can be done is to award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the plaintiffs general damages"*

43. The injuries to the Claimant, although traumatic and debilitating at the beginning, have improved somewhat over the period to date. The severity of the disability resulting from Joint injuries are by there nature, to some extent peculiarly within the knowledge and experience of the injured. A mathematical, formulaic type assessment is not necessarily productive of a fair award. It cannot be said that the additional surgeries that the claimant is desirous of having are merely fanciful. He is the victim - the patient - the injured - and would be best placed, with a knee-joint injury of this nature, to know whether he has healed or not. It is not desirable that he be first awarded the cost of attending a medical assessment and then made to return to the court for a further sum for the cost of the further surgeries when they are ordered by the doctor. Mindful of avoiding any prejudice to either party, a judgment here that brings final closure to this matter is desirable. On all the evidence, it is more likely than not, that the claimant would require at least one(1) additional surgery. I award a sum that is based on the costs of the earlier operation by Dr. Ali in **the sum of EC\$10,000.00** inclusive of travel costs.¹ This award is in the nature of a General Damage award.²

44. The Respondents, for the reasons they have provided, have conceded a General damages award of EC\$120,000.00. I am of the view that having regard to the evidence and the applicable considerations in law that the court is called upon to apply, this sum is an appropriate starting point in determining the award of general damages. I make the observation here, that a man such as the claimant, operating as he was and still is, at the lower end of the income, academic and skills continuum, is not now in a position to recoup the losses sustained to his capacity to improve his lot by dint of enduring physical effort. The

¹ See part 'B11' of "Particulars of Damage" of the Statement of Claim for the figures pleaded..

² See Jefford v Gee (1970) 2Q.B. 130.; Kemp & Kemp, The Quantum of Damages, Vol. 1, para 4 -005.

prospect of improving one's lot, including one's social standing in the community, by way of achievement in sport is well established. For the claimant, that prospect, in the field of local, Leeward Island and West Indies cricket, not to mention the spin off possibilities that now present themselves in what is commonly referred to as the '20/20' form of the game, have been taken away from the claimant. There is no evidence before me that disproves the claimant's alleged prospects in the game of cricket. In jurisdictions such as the U.K. for instance, a welfare state, that is by its culture, economy and legislative framework, committed and able to provide a protective net, including extensive state funded medical benefits and support to all its subjects, a lower rather than higher award can suffice there, and be backed up by the ample largesse of the tax payers. Antigua and Barbuda is not without its protective net also, but, as is to be expected, it does not go nearly as far as that of the '*metropole*'. I am mindful of this as one factor for my consideration, when equating injuries with awards from the UK with the injuries, loss and claims thereto, of the instant case.

45. The costs of the additional surgery is a prospective pecuniary cost and as stated above, I add that item to the general damages award. I have considered the evidence above, the precedent awards in the region and abroad and the ***Cornelliac*** and the ***Hack Bros*** principles, for the assessment of General Damages. The Pain and suffering of the claimant for the first four months after the accident, I place as intense. The pain and suffering from December 2005, immediately after his discharge from the hospital, to his last operation on or about October 2007, I determine to have started at moderately intense and steadily decreasing to a moderate level in 2007. It appears as proved, that his pain and suffering continue - some 4 years after the accident - at a much lower, but discernable level. I have no reason to believe, on the evidence, that the bouts of pain and suffering, although possibly ending up in the future as sporadic, will ever cease to exist. The injury to the left knee involves a critical and complex moving body part that carries the weight and movement of the entire body in carrying out even ordinary human activities. **An award of EC\$70,000.00 is in my view a fair assessment under the head of Pain and Suffering.**

The claimant's Loss of Amenity, is considerable. The considerations under this head of damage include those set out in paras. 22 and 44 above, notably, but not limited to, the considerations that impact on his 'social standing in society'. Not much else can be said on this head. **An award of \$60,000.00 is in my view a fair assessment under the head of, Loss of Amenities.**

46. The evidence in this matter discloses that the claimant is generating a higher salary income now than he did prior to the accident. He is in fact doing the same type of work – security work with the same employer it appears. At para. 19 of the claimant's 'Affidavit in Support', he speaks of his fear of not being retained in his employment and not being able to pass a fitness test to retain his employment and that if he were ever to have to seek employment outside of his present employment as Airport security, he would be handicapped as a direct result of his injury.
47. Kodilyne, in Commonwealth Caribbean Tort Law, 3rd ed. at pp 380, says that a claimant can recover damages for loss of earning capacity (in similar circumstances of this case I note) *"...where there is a real risk he could lose his existing employment at some time in the future and may then, as a result of his injury, be at a disadvantage in finding an equivalent employment or an equally well paid job"* ¹. This is the position in the instant case. The claimant has on or about 30 years of normal working life in which he has to sustain himself with his reduced capacity, albeit, not a substantially reduced capacity.
48. Again, having regard to the usual considerations in matters of this nature, the evidence referred to above, and with reference to an indefinite future, subject to vicissitudes and contingencies and the limited evidence led on the future earning capacity of the claimant, **an award of EC\$60,000.00 is in my view a fair assessment of an award under this head of damage - Loss of Earning Capacity.**² There is no basis or evidence upon which an award of 'loss of future earnings' can be made.
49. The Special Damages pleaded were less than the expenses actually incurred and proved. The special medical and related expenses of \$25,544.62³, absolute loss of motor vehicle of EC\$29,000.00⁴ and loss of use of \$5000.00⁵ were proved, to a total of EC\$59,544.62.

¹ Alphonso v Ramnath (1997) 56 WIR 183, p 194 (C.A. ECSC)

² This works out to about EC\$2000.00 per annum.

³ See pp 9 para 24 of the claimants Affidavit in support; see also pp 7 of the 'Submissions on behalf of the Claimant'.

⁴ \$30,000.00 pre accident value, less \$1000.00 scrap value; see pp 2 of the Respondent's written submissions.

⁵ This has been calculated for a period sufficient to allow for a claimant to carry out all the necessary procedures with respect to insurance, the police, assessment of roadworthiness or scrap value and a replacement purchase (The Greta Holme, (1897) A.C. 596 at 601 per Lord Halsbury). I have allowed 4 weeks for this, at EC\$174.00 per day, based on the rate he actually paid to rent a car for 9 days. (see para. 22 of Affidavit in Support)

50. The Claimant has actually pleaded only \$47,854.00 of these special damages. The questions arising here are whether the claimant is bound by his pleadings and if so, do the 'pleadings' encompass expenses incurred after the filing of the action and before trial. In McGregor on Damages, 16th edit. (2003) para 43-006, the extent of the requirement to plead special damages is stated as; *"Where the precise amount of a particular item of damage has become clear before the trial, either because it has already occurred and so become crystallized or because it can become measured with complete accuracy, this exact loss must be pleaded as special damage"*. It appears that expenses incurred after filing will not fall to be considered as special damages unless the pleadings are amended accordingly.
51. In para. 24 of the claimants Affidavit in Support, filed in the Assessment of Damages hearing, he says "To date my expenses are as follows" and then lists the nature and quantum of those expenses. These expenses are of a similar class of expenses as set out in the claim form and statement of claim on the substantive liability action. However, I cannot glean from this, whether the latter expenses are in addition to those pleaded in the substantive action, or form part of the special damages pleaded. Para 24 lists expenses to a total of EC\$25,544.62. The Statement of Case in the substantive action lists expenses of \$47,854.12.
52. I am guided by the common law rule for pleading Damage, as stated by Lord Dunedin in The Susquehenna [1926] A.C. 655 at 661 that: *"If there be any special damage which is attributed to the wrongful act that special damage must be averred and proved, and if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question."*
53. In the instant case, a deduction of the sum of \$17,779.00 is to be made from the special damage award. This sum is the sum advanced to the claimant by the Defendant's insurers. Having regard to the law set out above, and the total special damage pleaded; the calculation of the **Special Damage award is simply EC\$47,854.12 plus the EC\$2690.00 for the loss of use¹ less EC\$17,779.00 = EC\$32,765.12.**

¹ I assessed *the loss of use* at \$5000.00. This calculation factored in the car rental claim for \$2310.00. I have therefore deducted it from the \$5000.00 before adding the Loss of Use to the Special Damage award..

INTEREST

54. The Claimant claims interest under the Eastern Caribbean Supreme Court Act. The award of interest under this Act is discretionary and in the circumstances applies to the special damages award. The rate of interest is also in the discretion of the Court. It is applied from the date of the cause of action to the date of this Judgment Order. Interest under the Judgment Act however, is not discretionary and runs from the date of Judgment to full satisfaction. The rate is fixed at 5% per annum.
55. Although counsel may suggest to the Court a discretionary rate of interest, the rate applicable in the circumstances in any matter, is entirely in the discretion of the court. This rate can range up to the higher scale of commercial interest rates of 10% - 12% per annum.
56. In the instant case, expenses covered by the special damage award were incurred over wide a period of time; so an interest rate discounted to a median rate, would be fair and appropriate in the circumstances. There is good authority for the proposition that the rate fixed by the Judgment Act – 5% p.a. – is a good starting point in determining the discretionary rate. The editors of the U.K White Book, CIVIL PROCEDURE 2000 Volume 1 at 7.0.15. put it thus: *“It is within the discretion of the court to award interest at the Judgment Act rate, and there is nothing exceptional about using such rate as an exercise of discretion. When a Court is considering an appropriate rate of interest for a period from the date of the cause of action to the date of judgment, the rate payable on Judgment debts is a convenient starting point”*. In the circumstances of this case, the Judgment Act rate of 5% p.a. impresses me as a fair median rate . This rate is applicable to the special damages only, for the pre-judgment period and I believe, reflects a fair assessment of the cost to the claimant of accessing and using that money.
57. I note that the Insurance Company of the Defendant/Respondents has advanced to the claimant, the sum of EC\$17,779.00. The said discretionary interest rate is to apply only to the balance of the special damages after applying the advance.

58. On the other hand, the Judgment Act interest award and rate, is applied as a matter of right, and is fixed by that statute at 5% p.a. and runs from the date of this final Assessment Award/Judgment Order to the date of payment in full satisfaction of the award.¹

59. For the reasons set out above **IT IS HEREBY PROVIDED** THAT the claimant is awarded the following sums;

- (i) **General Damages:-** Pain and Suffering= EC\$70,000.00 ; Loss of Amenities= EC\$60,000.00 ; Loss of Earning Capacity = EC\$60,000.00; SUB-TOTAL – EC\$180,000.00;
- (ii) **Special Damages:-** EC\$30,075.12;
- (iii) **TOTAL Damages award :- EC\$220,075.00**
- (iv) **Interest :-** Interest pursuant to the Eastern Caribbean Supreme Court Act, Cap 143, at 5% p.a. from the date of the accident to the date of this Order. Such Interest to be applicable to the special damage award only;
- (v) **Interest :-** Interest pursuant to the Judgment Act, Cap 227, on the whole of the principal Judgment award, from the date of entering this Judgment to full satisfaction;
- (vi) **Costs :** Prescribed Costs to the Claimant unless otherwise agreed by the parties.

David C. Harris
High Court Judge
Antigua and Barbuda

¹ There is no Judgment award at the date of the Judgment on liability upon which to apply the Judgment Act interest. For the purpose of applying both types of interest, the effective date of Judgment is the date of the award on the assessment of damages.

