

fell on the claimant's left hand causing severe injury. This was occasioned by the negligence of the defendant, its servants or agents.

- [3] As a result of this accident the claimant sustained a traumatic amputation of his left thumb and compound fractures of the 4th and 5th metacarpal bones with lacerated flexor tendons on the 4th and 5th fingers. He claimed special damages the particulars of which were set out in his statement of claim indorsed on his writ issued on the 31st May 1999 as follows:

(a) Cost of transportation to and from clinic (\$975.00 bds)	\$1316.25 ec
(b) Hospital charges	\$ 125.00
(c) Emergency certificate	\$ 10.00
(d) Airport service charge	\$ 30.00
(e) Airport service charge (\$25.00 bds)	\$ 33.75 ec
(f) Medicine	\$ 20.30
(g) Medicine bill	\$ 135.00
(h) Rehabilitation bill (\$758.29 bds)	\$1023.69 ec
(i) Loss of earnings (overtime) (\$543.76 per fortnight x 7)	\$3806.32
TOTAL	\$6500.31

- [4] On the 16th January 2001 judgment was entered by consent for the claimant for damages to be assessed. Upon the claimant's application for directions on the assessment of damages filed the 8th October 2002 pursuant to Rule 16.4, which application was heard on 18th October 2002, it was ordered that all documents in support of the claim be submitted to the Solicitor for the defendant on or before 25th October 2002, to include records of earnings limited to earnings for employment with the defendant. It was further ordered that the claimant submit a

draft amendment to the particulars of special damages, to be filed and served on or before 25th October 2002, with leave to the defendant to respond to the amended claim and in particular to any expert medical reports by way of affidavit on or before 9th November 2002. The matter was fixed for hearing on 29th November 2002, from which date it was adjourned to 12th December.

- [5] By 12th December the claimant had filed an affidavit, on 25th October 2002, in which, after recalling the events leading to his injury and the events immediately thereafter, he deposes to the "exquisite and excruciating pain" which he suffered and continues to suffer. The affidavit alleges that after three operations he continues to suffer excruciating pain, and that he has 100% disability of the left hand with continuous and painful neuritic pain in the left hand with hypersensitivity along the radial nerve. The claimant also deposed as to loss of amenities, including sporting, social and sexual activities, the last confirmed by his having as many as 15 children. He gives extensive particulars of his medical interventions and expenses, past and future (anticipated), domestic services and loss of earnings. The claimant's affidavit had a number of exhibits annexed, being medical reports, occupational therapy reports, bills and invoices.
- [6] The claimant filed an amended statement of claim on 30th October 2002, incorporating an amended statement of special damages totalling \$203,927.09 for expenses associated with past and future medical treatment, including transportation and accommodation expenses associated therewith, \$88,800.00 for past and future domestic care, \$103,342.80 for past loss of earnings, and \$507,319.20 for future earnings estimated over 18 years. The special damages claim amounts to a total of \$1,003,521.90.
- [7] The claimant did not comply strictly with the order referred to in paragraph 4 of this judgment, in terms of the time for filing. However, the defendant filed an amended defence to the amended statement of claim on 19th November 2002. In paragraph 8, the defendant made no admissions as to the particulars of damages and put the claimant to proof as to the quantum and the purpose for such expenditure.

- [8] Rule 16.3(6), which, strictly speaking, applies where the defendant has admitted liability for the whole or part of a claim for an unspecified sum (R. 16.3(1)), and for which there is no parallel rule relating to assessment of damages in other circumstances, e.g. on a judgment after trial of the issue of liability and a referral of the issue of quantum to be assessed, nevertheless reflects the proper procedure in assessments of damages, provides:

"The defendant is entitled to cross examine any witness called on behalf of the claimant and to make submissions to the court but is not entitled to call any evidence unless the defendant has filed a defence setting out the facts the defendant seeks to prove."

In the instant case the defendant has put the claimant to proof of damages but has not in its amended defence set out the facts on the issue of the quantum of damages which it will seek to prove.

- [9] At the hearing on 12th December the court reserved for later decision the question as to whether the issues of loss of amenities, the cost of domestic help, past and future medical expenses, and other heads of claim can be considered on the pleadings. Pending a decision on this issue, the court decided to proceed to consider the evidence. I have considered the authorities on the question submitted by learned counsel for the defendant. Much of learned counsel's submission focuses on the liability of the defendant's insurers to indemnify the defendant for payments made or damages awarded by the court. That issue is not before the court and cannot be the subject of a judgment in this matter. The only issue before this court is the question of the quantum of liability as between the claimant and the defendant.

- [10] The court's consideration on special damages will be limited to actual loss sustained at the date of trial, specifically pleaded and proved. Pain and suffering, loss of amenities, future expenses and loss of future earnings will be considered under the head of general damages; **Daly v General Steam Navigation Co. Ltd.** [1980] 3 All ER 696.

- [11] At the hearing the defendant did not seek to call any evidence, as indeed it could not, as indicated in paragraph 8 hereof. Instead counsel cross examined the claimant and his witness Dr. Arvind Salian.
- [12] Learned counsel for the claimant drew attention to **CPR 2000** R. 10.5, which requires that the defendant must say which allegations are admitted, which denied, and which neither admitted nor denied because the defendant does not know whether they are true or not. This rule is aimed at defining the issues to be tried, and the consequence of failure to do so is that the allegations are deemed to be admitted: R. 10.7.
- [13] In his amended statement of claim the claimant set out particulars of his claim for special damages, including past and future medical expenses, to a total of \$203,927.09. In the absence of pleading by the defendant to these claims, the claimant is entitled to judgment in respect of those heads of damages.
- [14] The claimant claimed further for past and future domestic services, loss of earnings, and general damages. His evidence is that since his injury in 1999, he has done no work. He lives with his mother, a pensioner, who he used to support substantially before his injury. He is no longer able to do so. His mother used to, and still does, do his washing, cooking and other domestic services.
- [15] The claimant, who was 32 years old at the time of the accident, says that it is no use his looking for work, because he is suffering too much pain. He has not sought medical advice on the question, but says if the pain is relieved there is a possibility that he could work, and he would then seek employment. He says that both the doctor in Barbados and the one in the United States advise that with surgery, there might or might not be a change in his condition. He would never again be able to work normally as a carpenter, which is his trade. He said that he would be able to do some limited handiwork which would not put too much strain on his hand. He does not expect that he would be able to earn more than \$20.00

per day (\$200.00 per fortnight), in contrast to \$543.76 per fortnight prior to the accident. I accept his evidence on this issue.

[16] Learned counsel for the defendant argued very strongly that such an operation as the claimant seeks to have done in the United States of America, given its considerable expense, should only be undertaken if it can be shown that pain and sensitivity of the hand would be reduced considerably, and that the hand could return to near normal use. He submitted that if those two things are not attainable, the operation would be pointless.

[17] In his report contained in a letter dated December 6th, 2001, Dr. Eduardo Gonzalez-Hernandez, after giving details of the claimant's condition, makes various recommendations for treatment. He says

"We would certainly recommend that once we have a supple hand and good range of motion of the fingers, we would consider a toe to hand transfer which should be the best option for reconstruction. This is a very reliable procedure providing a strong thumb which is sensate and has good cosmesis and good function."

[18] In his report of electrophysiological study dated December 7th Dr. Gonzalez said there were no signs of severe nerve damage as clinically suspected.

[19] Dr. Salian, in cross examination regarding the claimant's present condition, was of the view that he will not be able to use that hand to hold a spoon, due to the lack of grip. That relates to the prognosis in the absence of further surgery. Dr. Gonzalez holds out hope, indeed expectation, for a strong thumb which is sensate and has good cosmesis and good function. Dr. Salian is of the opinion that "some sort of surgery could lead to improvement". He says that successful operations of that type can result in functional thumbs. He admits that he has no real experience in the field, but his opinion supports the opinion of Dr. Gonzalez, who appears to have considerable experience of that type of surgery.

- [20] Learned counsel for the defendant conceded that “it is the undoubted right of the claimant to have his hand restored as nearly as possible as it was before the injury. I agree, and hold that, even given the uncertainty of the result of further surgery, the claimant is entitled to the opportunity for some, even if limited use of his hand through further surgery.
- [21] In the case of **Fenton Auguste v Francis Nelson**, a decision of the Eastern Caribbean Court of Appeal, Civil Appeal No. 6 of 1996, St. Lucia, Singh, JA examined in some depth the considerations to be applied in claims for loss of earnings and other heads of damages in personal injury cases. I propose to follow the guidelines there set out.
- [22] **The Multiplier:** In the case of this 32 year old, otherwise healthy and robust individual, I would assume a working life expectancy of 65 years and fix the multiplier at 15.
- [23] **The Multiplicand:** Applying simple mathematical formulae, the multiplicand in this case is $\$543.76 \times 26$, or $\$14,215.76$.
- [24] **Loss of future earnings:** Applying the above figures, the loss of future earnings assuming permanent total disability would be $\$213,236.40$. However, after surgery, I am satisfied that the claimant will be able to earn a reduced wage, probably on a somewhat irregular basis, and I would discount this figure by 25%, resulting in $\$159,927.30$.
- [25] **Loss of earnings:** The claimant is under a duty to mitigate damages, and it seems to me that 24 months would be a reasonable period in the circumstances of this case to allow for medical intervention, including surgery in the USA and rehabilitative physiotherapy following surgery. I would therefore allow $\$28,431.52$ under this head.

[26] **Cost of care provided by the claimant's mother:** In the circumstances of this case only limited services are necessitated, and I would allow \$150.00 per month for 36 months; \$5,400.00.

[27] **Pain, suffering and loss of amenities:** This young man, deeply involved in sporting and social activities before the accident, has been severely affected in his ability to continue to do so. He has obviously suffered severe damage in terms of his self image and his confidence has been severely undermined. His personal relationships, including his romantic involvements which were obviously very important to him, have been seriously affected, perhaps only temporarily. His lifestyle has been radically altered as a result of his injuries. The physical pain which he has suffered, and will continue to suffer for a considerable time, is described as "exquisite and excruciating", a description which I accept. Under this head I would allow \$250,000.00.

[28] **The award:** In sum, I would make an order on the assessment of damages as follows:

1. Special damages:	\$203,927.09
2. Loss of future earnings:	\$159,927.30
3. Loss of earnings:	\$ 28,431.52
4. Cost of care by mother:	\$ 5,400.00
5. Pain, suffering and loss of amenities:	\$ 250,000.00

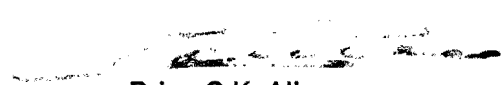
Total: **\$ 647,685.91.**

Interest on pain, suffering and loss of amenities: 5% from date of service of writ to the date of judgment, 3 years 9 months: **\$ 46,875.00.**

Interest on special damages: 2.5% from the date of the accident to the date of judgment, 4 years: **\$ 20,392.72.**

Grand total: **\$714,956.63**

Costs: **\$ 35,000.00**



Brian G.K. Alleyne
High Court Judge