**BRITISH VIRGIN ISLANDS**

**THE EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**(CIVIL)**

**Claim No. BVIHCV2005/0006**

**HEIDI BINDER**

**Claimant**

**-and-**

**PATRICK MCVEY**
**(An Owner of the Ship S/V Sea Horse including its dinghy)**

**First Defendant**

**LISA MCVEY**
**(An Owner of the Ship S/V Sea Horse including its dinghy)**

**Second Defendant**

**RONALD EVANS**
**(The driver of the motor ship M/V Sheppard III)**

**Third Defendant**

**SHEPPARD POWER BOAT RENTAL LTD.**
**(The Owner of and permitted lessee of the motor ship M/V Sheppard III)**

**Fourth Defendant**

**Appearances:**

Dr Joseph S. Archibald QC and Ms Michelle Worrell of J.S. Archibald & Co for the Claimant
Mr Paul Dennis and Mr Malcolm Arthurs of O'Neal Webster for the First and Second Defendants
Mr Herbert McKenzie of Farara Kerins for the Third and Fourth Defendants

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2007: October 30, 31, November 01, 09
2008: March 04

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**JUDGMENT**

**Introduction**

[1] **HARIPRASHAD-CHARLES J:** One of the biggest events on the island of Jost Van Dyke in the British Virgin Islands ("the BVI") is Foxy's New Year Eve Party. It is internationally

famed. Even the rich and famous flock this party mecca to enjoy a great line-up of activities, drinks and gastronomic delicacies to see them through the New Year. The Claimant, Heidi Binder ("Ms Binder") and her boyfriend, Justin Egbert from St. Thomas, U.S.V.I. were among those party lovers at that party. At about 2.00 o'clock in the morning on 1 January 2004, Ms Binder and others were making their way back to their vessel in a dinghy captained by the First Defendant, Patrick McVey ("Mr McVey") when tragedy struck. A motor vessel driven by the Third Defendant, Ronald Evans ("Mr Ronald Evans) collided with the dinghy they were in. Ms Binder suffered injuries. As a result, she instituted this claim in negligence against the First, Second, Third and Fourth Defendants (collectively "the Defendants") for damages as a result of personal injuries which she sustained as a result of the accident.

[2] The Second Defendant, Lisa McVey ("Mrs McVey") is joined as a party by virtue of the fact that she and her husband, Mr McVey were at all material times, the joint owners of the S/V Seahorse, a 32 foot Tayana sailing vessel and its dinghy. The Fourth Defendant, Sheppard Power Boat Rental Ltd, is a limited liability company registered in the BVI and was at all material times, the owner of the M/V Sheppard III, a 26 foot fiberglass dinghy which collided with the dinghy of the S/V Seahorse.

**Some background facts**

[3] Most of what I now state reflects the uncontroverted and unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

[4] Every year, on New Year's Eve, hundreds of yachts descend on the jam-packed Great Harbour in Jost Van Dyke. A big challenge to yachtsmen is finding their yachts after the celebrations are over. At about 2.00 a.m. on 1 January 2004, while the New Year's celebrations were still going on, Ms Binder, her boyfriend and another friend were trying to get to their vessel but the other party lovers who came with them in their vessel were not ready to go. As a result, they solicited a ride from a good Samaritan named Mr McVey who was using his dinghy to voluntarily assist persons to find their respective vessels. The

dinghy left the dinghy dock with 6 passengers from 3 different vessels; 3 from "The Proud Mary" (Ms Binder's vessel), 2 from the sailing vessel "Westward", and 1 from another large sailing vessel. It was captained by Mr McVey. Ms Binder's vessel was closest to shore however, they were experiencing some difficulty in locating it so Mr McVey decided to first go and drop off another passenger to his vessel which was anchored in the outer harbour in deeper waters and whose position was known. On its way to the large sailing boat, the dinghy encountered other boats passing ahead of the vessel.

[5] The dinghy then headed back in a northeasterly course towards the inner harbour in search of the other vessels. It was traveling at a speed of about 3 to 4 knots which translates to about 3 ½ to 5 m.p.h. After moving about 50 yards, a passenger in the dinghy shouted "boat". As Mr McVey looked, he saw to his starboard side, a powerboat with green and red sidelights bearing on them. At that instant, the motor vessel, thought to be the M/V Mermaid but now correctly identified as the M/V Sheppard III, driven at an excessive speed by Mr Ronald Evans collided with the dinghy which was being operated in navigable waters on a dark night without proper or adequate lights. The dinghy was hit on the starboard side, in the area forward of amidships. All passengers (including Mr McVey and Ms Binder) were thrown into the water.

[6] After the accident, Mr McVey and the passengers managed to stay afloat. However, Ms Binder who had been injured remained unconscious. Her body was pulled under the Sheppard III and she was pulled through the propeller 3 times. She was struck on her right ankle, left pubic area and the right side of her head which caused her to lose consciousness for approximately 20 minutes. The other passengers from the dinghy were afloat and they assisted her into the dinghy that was damaged and partially deflated. Only the after part (rear part) buoyancy chambers were supporting the dinghy.

[7] The Sheppard III returned to the site of the collision immediately, picked up the passengers from the dinghy and called for help. The Marine Police responded to the emergency call and Ms Binder was transferred to the police boat. She was taken ashore and after receiving initial medical attention at the Jost Van Dyke Community Clinic, she

was transferred to Peebles Hospital in Tortola for further medical care. At Peebles Hospital, she was admitted and treated. On 3 January 2004, Ms Binder was transferred to Roy Lester Schneider Hospital in St. Thomas. She remained there until 7 January 2004 when she was discharged. Following her discharge, she was unable to work for 3 months as she was bedridden and confined to a wheelchair. In February 2004, she was placed on crutches.

**The trial**

[8] The trial was a fairly lengthy one. It lasted for 4 days. Ms Binder gave evidence for the Claimant and called Dr James Nelson (Dr Nelson"), a neurologist from St. Thomas, as her witness. He was unable to be personally present at Court because of his busy medical practice in St. Thomas. As a result, he gave his evidence-in-chief and was extensively cross-examined via the medium of tele-conferencing. Mr McVey gave evidence for the First and Second Defendants. Mr Ronald Evans swore a witness statement but did not attend for cross-examination. That could have been for the fact that he is currently abroad pursuing a Bachelor of Science Degree in Electronics Engineering at DeVry University in Florida, USA. As such, his witness statement had to be expunged. His mother, Mrs Phyllis Evans and his father, Mr Terry Evans swore witness statements and they were both cross-examined. They were not present at the time of the accident so their evidence was limited to what occurred after the accident. Regrettably, their evidence did not significantly assist the Court.

[9] Prior to the trial, an application was made by Ms Binder's legal representatives to solicit the expertise of Mr Gamaralalage Nawaratne commonly called Captain Pat. It was agreed by all parties that his expertise as a marine collision investigator would be of immeasurable assistance to the Court. Consequently, by an Order of the Court, Captain Pat was deemed the expert witness. The Court places on record its appreciation to Captain Pat for the colossal assistance he has afforded not only to the Virgin Islands Shipping Registry but to this Court.

**Liability**

[10] Negligence involves a breach of duty causing damage. A claimant who claims negligence on the part of another must establish on a balance of probabilities that:

1. the defendant owed a duty of care to the claimant;
2. the defendant breached that duty; and
3. the breach of that duty resulted in foreseeable loss and damage to the Claimant.[1]

[11] The First and Second Defendants ("the McVeys") have accepted liability, albeit belatedly. The Third and Fourth Defendants ("the Evans") have also accepted liability. They did so at an early stage. However, the Defendants deny that they are jointly and severally liable in negligence, as contended by Learned Queen's Counsel, Dr Archibald who appeared for Ms Binder. The McVeys say that liability should be apportioned as follows: McVeys - 30%; Evans - 70%. The Evans say that it should be McVeys - 75%; Evans – 25%.

[12] Liability, having been accepted, two remaining issues fall for determination namely: (i) does the court have jurisdiction to apportion liability and if so, what is the percentage of apportionment and (ii) the quantum of damages.

**Apportionment of liability: the evidence**

[13] The most significant evidence on liability is that of Captain Pat because he is an expert witness who is independent and impartial in his findings and opinions. As an expert witness, it is a trite principle of law that the Court does not have to accept his evidence. However, as there is no other evidence to contradict most of Captain Pat's evidence, it would be imprudent not to accept his evidence which remains largely uncontradicted. I will however deal with those aspects of Captain Pat's evidence which is contradicted as I go through his evidence.

[14] Captain Pat is a well-qualified marine collision investigator. He has appeared in the High Courts of this Territory in criminal as well as civil proceedings. He holds a Master of Science Degree in Marine Technology from New Castle University, United Kingdom. In

[1] Overseas Tankship (UK) Lit. v Morts Dock & Engineering Co. Ltd (The Wagon) Mound [1961] AC 388

addition, he is a Master Mariner of the United Kingdom, a shipbroker of the Institute of Chartered Ship Brokers in London; a member of the Nautical Institute of London, a Chartered Engineer of the Engineering Council of the United Kingdom, a Naval Architect and a member of the Naval Institution of Naval Architects in London.

[15] Captain Pat examined the Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS 72") which is applicable to vessels registered in the Territory of the BVI and other vessels while they are within the Territory or the territorial waters thereof [2]. Captain Pat also scrutinized the pleadings in this case, the Statement of Ms Binder to the Marine Police, VISAR Report and a memorandum of facts dated 23 August 2004. Additionally, he made a visit during the day to the *locus in quo* at Great Harbour, Jost Van Dyke, met with Inspector of Police, Mr Amory, obtained copies of witness statements from the police and met with the owner of the Sheppard III.

**Did the vessels breach the navigation lights requirements?**

**(a) The dinghy**

[16] There is conflicting evidence as to whether or not there was a flashlight aboard the dinghy. Mr McVey testified that he had a flashlight which he gave to Ms Binder to hold and shine. Ms Binder emphatically denied that Mr McVey gave her any flashlight. Learned Counsel for Mr McVey sought to discredit Ms Binder's evidence on the fact that she may have suffered amnesia as a result of the accident. He also referred to a statement from Matthew Caplins taken by the police shortly after the accident in which he said that "the skipper of the dinghy had handed a flashlight to someone on board and asked them to shine it at the other dinghies we met along the way, at least 2 times. I think it was a girl named Heidi who had the flashlight".

[17] On a balance of probabilities, I accept this aspect of Mr McVey's evidence to that of Ms Binder. I do believe that Ms Binder, although very lucid in her evidence, may have suffered

[2] See Section 3 of the prevention of Sea Act, Cap. 262 which provides that COLREGS 72 as amended by a resolution of Inter-Governmental Maritime Consultative Organization in November 1981 is applicable to vessels registered in the BVI and other vessels while they are within the Territory or the territorial waters thereof.

loss of memory after the trauma and as such, could not recall with clarity all the events which occurred before and after the accident. I am fortified in my finding that Mr McVey is credible because of the statement of Mr Caplins. Although unsworn, the Court would give it the weight it deserves. I see no reason why Mr Caplins would tell such a falsehood.

[18] However, there is another aspect to this case. The law of this Territory mandates that a vessel such as the dinghy in question should exhibit an all-round white light and shall, if practicable also exhibit sidelights.

[19] In his evidence, Mr McVey admitted that his dinghy did not possess the all-round white light. According to COLREGS 72, the dinghy in question would be defined as a **power-driven** vessel of less than 7 metres in length.[3]. Rule 23 (d) (ii) states as follows:

> "A power-driven vessel of less than 7 metres in length whose maximum speed does not exceed 7 knots may in lieu of lights prescribed in paragraph (a) of this Rule **exhibit an all-round white light and shall, if practicable, also exhibit sidelights**" [emphasis added].

[20] Even though I have found that Mr McVey had a flashlight, he was still contravening the laws of this Territory in not exhibiting the all-round white light. A practice has developed in the BVI where many dinghies operate at nights without any lights; not even a flashlight. Mr Terry Evans, an experienced boat captain and a former police-officer, confirmed that it is common practice that the light typically used on dinghies are flashlights and that they do not usually have the all round white lights and the green and red lights.

[21] I admonish such bad practice and it must be halted forthwith. Too many accidents occur at sea as a result of bad seafaring practice. Just as a motor-car driver must respect traffic laws and drive with adequate lights, so must seafarers respect maritime laws. The time is opportune for seafarers to start practising good nautical traits. This is not the first time that this Court has been confronted with a situation of this nature whereby dinghies operate in the territorial waters of this country with no lights at all and/or inadequate lights. The

[3] COLREGS 72-Rule 3 (b) – The term "power-driven" vessel means any vessel propelled by machinery.

Marine Police and perhaps, Customs should without hesitation apprehend and prosecute offenders.

[22] In his analysis, Captain Pat stated that "the dinghy was not exhibiting the required all-round white light having a range of visibility of 2 miles, at a position 2.5 metre above the gunwale. Also, it was not exhibiting the optional red and green side lights with a range of visibility of 1 mile".

[23] At paragraph 3.9 of his report, Captain Pat concluded "If the required lights, specially the all-round white light were exhibited, the dinghy would have been visible to other vessels within a range of 2 miles." He continued:

> "The skipper of the 'Sheppard III' could not have seen the dinghy as it was not exhibiting the all-round white light visible all round the horizon. (An electric torch light cannot be considered as meeting the requirements of an all-round white light approved under the provisions of COLREG 72.")

[24] This Court accepts Captain Pat's conclusion that the dinghy skippered by Mr McVey was in breach of Rule 23 of COLREGS 72 in that it was not exhibiting the all-round white light mandated by law nor the optional sidelights thereby not making it visible to approaching vessels.

[25] In addition, VISAR report indicated that the weather was fine having light breeze and smooth seas with clear visibility, I believe Ms Binder that the area on the sea was dark although the moon was half full and there were some lights from the other boats. The harbour was extremely crowded. In my judgment, the lighting condition would have been poor and maneuvering a dinghy even with a flashlight in those conditions in a chock-a-block harbour would have been dangerous as it would be almost impossible for another vessel to see the dinghy.

**(b) Sheppard III**

[26] According to COLREGS 72, the Sheppard III would fall in the category of a "**power-driven**" vessel.[4] The length of the vessel is 25 feet (7.62 m). Rule 23 (a) of COLREGS 72 stipulates as follows:

> "A power-driven vessel underway shall exhibit:
>
> (i) a masthead light forward;
>
> (ii) a second masthead light abaft of and higher than the forward one, except that a vessel of less than 50 metres in length shall not be obliged to exhibit such light but may do so;
>
> (iii) sidelights;
>
> (iv) a stern light."

[27] However, being a power-driven vessel of less than 12 m in length, the Sheppard III had the option of exhibiting the lights prescribed in Rule 23 (c ) as reflected below:

> "A power-driven vessel of less than 12 metres in length may in lieu of the lights prescribed in paragraph (a) of this Rule exhibit an all-round white light and sidelights."

[28] Under these Regulations, the lights mandated to be exhibited by the Sheppard III were (i) an all-round white light and (ii) green and red lights. It has the option of exhibiting (a) a masthead light; (ii) green and red sidelights and (iii) a stern light.

[29] Mr Dennis argued that the Sheppard III was not exhibiting the masthead light or the all-round white light as required by the COLREGS. However, Mr Terry Evans stated that on the fateful morning in question, the Sheppard III was equipped with all the navigation lights and they were in good working condition prior to his son going out with it on 1 January 2004. He was extensively cross-examined by Mr Dennis.

[4] COLREGS72 - Rule 3 (b)

[30] Captain Pat's Report supports the evidence of Mr McVey that the Sheppard III was fitted with the green and red sidelights and a stern light. He opined that if the required lights, specially the white masthead light, or the all-round white light were exhibited, the Sheppard III would have been visible to other vessels within a range of 2 miles. In the case of this vessel, the white light would have been fitted at least 1 metre above the 'red and green' side lights which would have made it easier for other vessels to see it at night.

[31] There is no reason why this Court should not accept the independent evidence of Captain Pat which is at idem with the evidence of Mr McVey and Ms Binder. Mr Terry Evans was not the driver on the night in question nor was he present at the time of the accident. He does however, have an interest to serve in escaping liability or reducing the degree of liability to be apportioned to the Evans.

**Was speed a cause of the accident?**

[32] It is the law that every vessel must proceed at a safe speed when navigating in areas where other traffic is encountered. There is no definition of safe speed but Rule 6 of COLREGS reads:

> "Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. In determining a safe speed the following factors shall be among those taken into account:
>
> a) by all vessels:
>
> i. the state of visibility;
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> ii. the traffic density including concentrations of fishing vessels;
>
> iii. the manoeuvrability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
>
> iv. at night the presence of background light such as from shore lights or from back scatter of her own lights;
>
> v. the state of wind, sea and current, and the proximity of navigational hazards;

vi. the draught in relation to the available depth of water."

[33] The only direct evidence of the speed at which the Sheppard III was traveling came from Ms Binder and Mr McVey. Ms Binder's evidence is that the Sheppard III was far exceeding the speed rate to be observed in a "no wake" zone. Mr McVey, an experienced seaman, deposed that he was not sure of the exact speed of the Sheppard III but he could remember that it was traveling at a speed which was sufficient to cause the boat to hydroplane. He explained that when a boat hydroplanes, it travels at a speed sufficient to cause the bow to rise up in the water and ride on a wave or a spray of water which is pushed forward in front of the boat.

[34] Mr Terry Evans was not present at the time of the accident and his son, the skipper of the Sheppard III did not given evidence. Essentially, the only evidence of speed may be gleaned from the evidence of Ms Binder and Mr McVey.

[35] It is common ground that when a boat is hydroplaning, it is going fast. There is no evidence of the exact speed of the Sheppard III when the accident occurred so reasonable inferences have to be drawn to determine whether speed was a factor in the cause of the accident. Captain Pat concluded that owing to the density of traffic, any speed over 5 knots would be considered as unsafe in a crowded anchorage, during hours of darkness.

[36] Mr McKenzie suggested that the Sheppard III was traveling between 2 to 4 knots and that Mr McVey referred to "plunging" and not "hydroplaning". In my opinion, this is a vain attempt to discredit Captain Pat's evidence. Captain Pat remarked that a vessel such as the Sheppard III is capable of moving at high speeds in a range of 35 to 40 knots on full power. It is common for such high speed engines to operate around 4000 RPM on full throttle. He opined that the Sheppard III was operating at 3000 RPM at the time the accident occurred and as the vessel was planning, it is unlikely that it was moving at 2 to 4 knots but at a substantially higher speed.

[37] Captain Pat estimated the speed that the Sheppard III was traveling to be approximately 12 to 14 knots. He came to that conclusion based on the following factors namely (i) the corroborative evidence of both Ms Binder and Mr McVey; (ii) the resulting damage to the dinghy and (iii) the force that would be required to throw six persons overboard. I will accept the conclusion of Captain Pat and the other witnesses that the Sheppard III was speeding in the crowded anchorage and that the excessive speed contributed to the accident.

[38] No issue arose to whether the dinghy was speeding but Captain Pat concluded that it may have been traveling no more than 4 knots.

**Did the skippers keep a proper look-out?**

[39] Rule 5 of COLREGS provides:

> "Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and the risk of collision."

[40] There is no evidence that a proper look-out had been maintained by either vessel. The reality is that Mr Ronald Evans could not have seen the dinghy as it was low down in the water and it was not exhibiting the all-round white light, or any other white light visible all round the horizon. Captain Pat opined that a flashlight could not be considered as meeting the requirements of an all-round white light approved under the provisions of COLREG 72.

[41] There is evidence of the improper seating position of Mr McVey. Ms Binder gave testimony to that effect. It appears to me that Mr McVey had not suitably positioned himself rendering him unable to keep a proper look-out. Mr McVey did not see the Sheppard III until it was at very close range. In fact, he only became aware of the approaching vessel when someone in his dinghy yelled "boat". Sadly, it was too late. Almost immediately, the Sheppard III collided with the dinghy.

[42] Captain Pat came to the conclusion that both skippers were not keeping proper look out that morning and it was one of the causes of the collision. He opined that they breached Rule 5 of COLREGS.

[43] Captain Pat explained that proper look-out also includes verification of vessels, vessel's course, speed and position on the chart. According to Captain Pat, maintaining a proper look-out is of supreme importance for the safety of navigation and avoidance of collisions and it is the responsibility of the person in charge of the watch to ensure that a proper look-out is maintained on board at all times. He concluded there is no evidence that a proper look-out had been maintained by either skipper.

[44] He testified that had the Sheppard III exhibited the all-round white light or the white masthead light, then the skipper of the dinghy would have seen it as the white light has a range of twice as much as the red and green lights. It could be properly inferred that since the Sheppard III had the green and red lights which has a range of 1 mile, if Mr McVey were keeping a proper look-out, he would have seen the Sheppard III at least 1 mile away and he would have had plenty of time to move out of the path of that vessel. In his evidence, Mr McVey mentioned that the Sheppard III approached the dinghy from the starboard side and he was sitting on that side so it was difficult for him to see. In my opinion, that is exactly what not keeping a proper look-out is. A skipper should be aware of vessels that are in front, beside and behind his vessel. I would however add that Mr Ronald Evans should have been cognizant of the fact that small vessels like dinghies would be navigating the waters around Great Harbour on New Year's Day and he himself had a duty to other users to keep a proper look- out for such vessels. I agree with Captain Pat that both skippers did not keep a proper look-out.

**Did the skipper of the Sheppard III fail to have due regard to all dangers of navigation and collision?**

[45] Rule 2 of COLREGS states:

> "(a) Nothing in these Rules shall exonerate any vessel or owner, master or crew thereof from the consequence of any neglect to comply with these Rules or the

neglect of any precautions which may be required by the ordinary practice of seamen, or the special circumstances of the case.

(b) In construing and complying with these Rules due regards shall be had to all dangers of navigation and collision including the limitation of craft involved, which may render a departure from these Rules necessary to avoid immediate danger."

[46] Captain Pat indicated that Rule 2 requires an operator of a vessel to make full appraisal of the situation and act accordingly. Rule 2 recognizes the limitation of the craft involved, for example, the inability of a rowing boat to get out of the way of a fast approaching vessel and the inability to see an unlit small craft in the water. He also stated that Rule 2 places an added responsibility on a power driven vessel to keep clear of sailing vessels, vessels under oars and to observe precautions in areas where such vessels frequent. Captain Pat was also of the opinion that based on the statements he was given and the damage to the dinghy, the Sheppard III was overtaking the dinghy when the collision occurred and it was the responsibility of the skipper of the Sheppard III in those circumstances to keep out of the way of the dinghy. He came to the conclusion that the skipper neglected to observe the precautions required by the ordinary practice of seamen and thereby contributed to the collision.[5] In this respect, the evidence of the expert is not contradicted and I therefore find that Mr Ronald Evans contributed to the collision by failing to have due regards to all dangers of navigation and collision.

**Other possible factors that contributed to the accident**

[47] Captain Pat gave other possible reasons for the accident including "fatigue on the part of both Mr McVey and Mr Ronald Evans". There is no doubt that any opinion about this would either be speculation or an educated guess. Mr McKenzie insisted that this is pure speculation on the part of Captain Pat. Captain Pat stated that this was an educated guess. I therefore place no reliance on fatigue playing any part in the collision although at 2.00 a.m., fatigue may not be an unrealistic guess.

[48] There was evidence from the Evans from which if accepted, the inference could be drawn that Mr McVey was drunk on the morning in question. Mr Evans stated that when he saw

[5] See paragraph 3.11 of his report

Mr McVey that morning at the Customs and Immigration Office, he appeared intoxicated as he was walking steadily, his speech was slurred and he had a beer bottle in his hand. His wife, Phyllis Evans deposed that subsequently, on that very morning, she was introduced to Mr McVey and his wife. He was sitting on the boat having a drink. Ms Binder stated quite the contrary. She deposed that Mr McVey was not drunk because she smelled no alcohol on his breath.

[49] Having had the opportunity of seeing and hearing Mr McVey in Court, the evidence of the Evans sounds incredible. It is difficult to believe that Mr McVey, a foreigner in this Territory, having just been involved in an accident, would be swaggering in the vicinity of the Customs and Immigration Office (the Police Station being in the same building) with a beer bottle in his hand. I therefore disbelieve the Evans' story and came to the conclusion that it was a ploy to discredit Mr McVey.

**Apportionment of Liability: the law**

[50] Captain Pat opined that the dinghy belonging to the sailing vessel "Seahorse" and the power boat "Sheppard III" were both responsible for causing the collision and the resulting damages. Quite properly, he left the apportionment of liability for the Court.

[51] Dr Archibald argued that the Defendants are jointly and severally liable in negligence. He relied on sections 149 (6) and 409 (1) of the Merchant Shipping Act, No 13 of 2001 of the Laws of the Virgin Islands ("the Merchant Shipping Act"). Section 149 (6) provides:

> "In respect of damage caused by death or personal injuries, the vessels in fault shall be jointly and severally liable to third parties, without prejudice, however, to the right of the vessel which has paid a larger part than that which, in accordance with the provisions of subsections (1) and (2), it ought ultimately to bear, to obtain a contribution from the other vessel or vessels at fault."

[52] In a nutshell, Dr Archibald QC attractively argued that any finding of liability should be joint and several as amongst the Defendants. He submitted that admiralty law mandates that the liability "shall be joint and several" where personal injury occurs as a result of the faults

of two ships as in this case; therefore there is no jurisdiction and scope for a finding of proportional liability binding on the Claimant.

[53] Mr Dennis and Mr McKenzie are of a contrary opinion. They both submit that the Court has jurisdiction to apportion liability.

[54] The learned authors of Halsbury Laws of England 4th edition, Volume 12 (1), paragraph 683 state as follows:

> "Where, in a contract or tort action, a plaintiff sues two or more defendants who are liable in respect of the same damage, the plaintiff will be awarded his entire damages against each defendant. **Although the court has the power to apportion the damages as between the defendants,** [emphasis added] and frequently does so, it has no power to apportion them as against the plaintiff, even though the defendants sever their defences and plead several pleas and even though their capability may vary."

[55] It is a well-established principle of law that the Court has the power to apportion liability as between two defendants who have caused damage to the plaintiff. In **Gertrude Ann Daniel v The St. Lucia National Housing Corporation and another**[6], I apportioned liability between the two defendants. I concluded that:

> "Both the SLNHC and Mr Howell are jointly and severally liable to Ms Daniel for her loss. In apportioning damages, like Mr Walcott, I am also of the view that the blameworthiness of Mr Howell is far greater than that of the SLNHC. I therefore enter judgment in favour of the Claimant against the Defendants jointly and severally in the sum of $196,515.63 with 25% of the liability being apportioned to the SLNHC and 75% to Mr Howell …"

[56] Mr Dennis persuasively submitted that liability should be apportioned between the two sets of Defendants as follows; 30% to the McVeys and 70% to the Evans. He argued that the number of contributing factors attributed to the Sheppard III are greater in number than those attributed to the dinghy of the M/V Seahorse. He next argued that the primary cause of the accident and the resulting injuries to Ms Binder was the speed at which the Sheppard III was traveling in a crowded anchorage. Learned Counsel submitted that the

[6] Claim No. SLUHCV2003/0240 St. Lucia [unreported]

collision could, on a balance of probabilities, be avoided altogether or the impact from the collision would arguably have been greatly reduced and consequently, Ms Binder would not have suffered the injuries she received.

[57] Mr McKenzie argued the converse. He forcefully submitted that liability should be apportioned as follows: 75% to the McVeys and 25% to the Evans. He argued that the Sheppard III was not speeding because Captain Pat prefaced his statements in regard to the Sheppard III speeding with "if" for example "if the Sheppard III was traveling at 5 knots and its skipper had seen the dinghy…" and he also in his conclusion used the word "if".

[58] Learned Counsel submitted that on Mr McVey's own evidence, the Sheppard III was not speeding. Mr McKenzie argued that according to Mr McVey, when he saw the Sheppard III, it was pushing water to the front of the boat. He invited the Court to compare this evidence with that of Mr Evans who is an experienced boat man. Mr Evans stated that when a vessel is planing, the water goes out to the sides as opposed to when the vessel is plunging, in which case, the water is pushed to the front of the bow. Mr McKenzie submitted it is clear that the Sheppard III was not speeding on that morning.

[59] The Court is not bound to accept the expert evidence if it is unreliable, capricious and unsubstantiated by evidence. Having analyzed the evidence in its entirety and taking into consideration (i) the corroborative evidence of Ms Binder and Mr McVey; (ii) the resulting damage to the dinghy and (iii) the force that would be required to throw 6 persons overboard, I am also of the view that the Sheppard III was traveling at an excessive speed to cause such impact and throw 6 persons overboard. I cannot accept that the Sheppard III was traveling at 2 to 4 knots which meant that it was traveling even slower than the dinghy.

[60] In my judgment, the primary factors that caused the collision are (i) the inadequate light on the dinghy and (ii) the speed at which the Sheppard III was traveling. There were other factors which played secondary roles in this accident and these have been dealt with above.

[61] Finally, on the question of apportionment, in my judgment, both drivers are jointly and severally liable for the accident with 50% of the liability being apportioned to the McVeys and 50% to the Evans. In essence, they are equally responsible for the accident.

**Assessment of Damages**

[62] The assessment of damages for injuries sustained as a result of an accident falls under two heads: general and special damages. In the case of **Cornilliac v St. Louis**[7], it was stated that the factors which ought to be borne in mind in assessing general damages are (i) the nature and extent of the injuries sustained; (ii) the nature and gravity of the resulting physical disability; (iii) the pain and suffering which had been endured; (iv) the loss of amenities suffered and (v) the extent to which, consequently the injured person's pecuniary prospects have been materially affected.

[63] In **Cornilliac**, at 494 G-H, Sir Hugh Wooding CJ cautioned that it is not the practice to quantify damages separately under each of these heads or to disclose the build-up of the global award. But, it is critical to keep these heads firmly in mind and make a conscious, even if undisclosed, quantification under each of them in order to arrive at an approximate final figure.

[64] In **Alphonso and Others v Deodat Ramnath**[8], our Court of Appeal appropriately referred to the exercise of assessment as the judge's discretionary quantification upon the application of the principles. There are instances, however, in which a court has disclosed amounts awarded under one or several heads. In **Cornilliac**, for example, the sum that was awarded for loss of pecuniary prospects was quantified because of the extent to which the parties differed on that head.

[65] The practice is to grant a global sum for general damages for pain and suffering and loss of amenities. These are considered against the backdrop of the nature and extent of the injuries sustained and the nature and gravity of the resulting physical disability. There is

[7] (1965) 7 W.I.R. 491
[8] [1997] 56 W.I.R. 183.

usually an attempt to calculate pecuniary loss and, in addition, loss of earning capacity where applicable.[9]

[66] A conventional sum for general damages is arrived at based on comparable awards in similar jurisdictions. Above all, the award must be fair and reasonable.

**The nature and extent of the injuries sustained**

[67] The evidence disclosed, that as a result of the accident, Ms Binder suffered the following injuries namely (i) concussive head injury; (ii) frequent headaches; (iii) 5 cm laceration to her head; (iv) 3 cm laceration to her right ankle; (v) soft tissue injury to left chest wall; (vi) chest pains and tenderness of chest wall; (vii) difficulty in breathing; (viii) fractured pelvis; (ix) minimally displaced fracture to inferior and superior rami of left pubic bones; (x) undisplaced fracture of the right pubic superior ramus; (xi) long crack of the left ilium; (xii) mild separation of the right sacro-iliac joint; (xiii) 5cm longitudinal laceration of the left labia majora with slowly expanding haematoma; (xiv) spinal tenderness; (xv) tenderness over left chest wall; (xvi) tenderness of left iliac wing; (xvii) inflammation of thoracic spine; (xviii) spinal trauma which has left her spine "curved"; (xix) chronic back pain; (xx) severe insomnia; (xxi) cognitive dysfunction; (xxii) chronic pelvic pain; (xxiii) discomfort urinating and (xxiv) sexual dysfunction.

[68] Ms Binder alleged that she suffered 3 broken ribs. It was observed by Learned Counsel, Mr Dennis that the medical reports and x-ray do not reveal that she suffered any broken ribs.

[69] The learned authors of Expert Evidence: Law and Practice[10] state:

> "Medical reports prepared for personal injuries litigation are likely to contain both fact and opinion, though much of the factual evidence may presuppose expert knowledge. They will also include, in the usual case, a summary of the plaintiff's history, and of his present suffering and disability, some of which may have been gained from hospital or general practitioner notes, but other parts of which may

[9] See paragraphs 5 to 8 of Craig Hartwell v the Attorney General (Claim No. 152 of 1994) – High Court of Justice, BVI Judgment delivered on 8 and 10 February 2006.
[10] Tristram Hodgkinson, LL.B, LL.M with a foreword by The Right Honourable Lord Scarman O.B.E.

> simply have been given by the plaintiff in response to questions. Of course it is open to the defendant, if relevant aspects of such evidence are challenged, to cross-examine the plaintiff and call original evidence in rebuttal, both in order to discredit the plaintiff, and to attempt to show that the expert's opinion is founded upon erroneous premises. Hearsay evidence of this kind, however, is not proved when recorded in a medical report unless either the plaintiff gives evidence of these matters, or the parties agree them, as they should be encouraged to do. The mere fact that such material is solemnly recorded by the expert in his report invests it with no more weight unless it is independently proved or agreed."

[70] Both Ms Binder and Dr Nelson were extensively cross-examined on this issue. Ms Binder insisted that she had 3 broken ribs but admitted that she does not see 'broken ribs' recorded in the reports of Dr Lewis and Dr Petersons.

[71] Dr Nelson admitted in cross-examination that the medical reports do not speak to broken ribs and he has not seen an x-ray report which shows broken ribs. He however stated that the medical report issued by Dr Lewis from Peebles Hospital makes mention of "chest LAR 9th, 10th, 11th." According to him, those words seem to refer to the 9th, 10th and 11th ribs and LAR means Left Anterior Rib. Initially, he deposed that this reference is highly suggestive that Ms Binder had 3 fractured ribs. He later opined that those letters and numbers indicate that there was something of interest at the level of the 9th, 10th and 11th ribs and that something of interest could be tenderness, redness or fracture.

[72] Dr Nelson fortified his point by referring to two medical reports (one from Dr Chase and the other from Dr Weisher) which speak to fractured ribs. However, nowhere in Dr Chase's report is there any mention of fractured ribs while Dr Weisher stated that Ms Binder suffered from fractured pelvic and 4 broken ribs. Dr Weisher gave no indication where this information originated. He made no reference to other medical reports or x-ray.

[73] On a balance of probabilities, I find that Ms Binder did not receive any fractured ribs as she asserted.

**The nature and gravity of the resulting physical disability**

[74] Ms Binder was unable to walk immediately following the accident. She needed assistance to use the bedpan. She was discharged from Roy Lester Schneider Hospital on 7 January 2004 in a wheelchair. At home, a portable toilet was placed beside her bed and her boyfriend emptied it for a period of one month. In January 2004, she could not stand for lengthy periods as prolonged standing intensified the pain which would radiate down her right leg. She used the wheelchair until 3 February 2004 when she was placed on crutches. She was on crutches until about the second week of March 2004. She did weight bearing, physiotherapy and strengthening exercises. On 23 March 2004, Dr Chase found that she had no tenderness in the pelvis and had full range of motion of the hips without any pain. He diagnosed her with inflammation of the thoracic spine as she indicated that she was having back pains and was treated. He recommended that she continued with the massages.

[75] Dr Nelson gave evidence of Ms Binder's minimum percentage disability. He based his opinion on the book entitled 'The Guides to the Evaluation of Permanent Impairment', printed by the American Medical Association. In respect of her head injury, he opined that she would fall under mild impairment which is considered to be up to 14% of the whole person. He gave her a range of between 5% and 14%. With regard to the pelvis and pelvic fractures, he gave her a range of 19% to 21%. With respect of the lumbar and the cervical spine, he gave ranges of 5% to 13% and 5% to 8% respectively. He stated that when all of the ranges are added, the percentage disability is 31% to 50%. Under intense cross-examination, Dr Nelson could not be faltered. He maintained his relaxed composure indicative of a doctor with many years of experience. He explained the ranges. He stated that the low estimate given above assumes that all further diagnostic testing is unrevealing while the high estimate assumes that the further diagnostic test reveals more information that they do not know now.

[76] Dr Nelson also iterated that further diagnostic testing needs to be done to make a proper prognosis of Ms Binder's injuries. He conceded that he is in no position at this stage to say that Ms Binder still suffers from cognitive dysfunction in circumstances where no neuro-

psychological testing has been done. In fact, in his report, he stated that Ms Binder spoke fluently and showed no signs of disorientation or memory deficit. I also found so having heard and observed her in Court.

[77] The Court does not have the benefit of the results from further testing and therefore, cannot speculate. I will accept the low estimates as the percentages of disability. The accepted overall percentage disability is 31%. Based on the medical evidence, I am of the view that Ms Binder did suffer from cognitive dysfunction immediately after the accident but this is no longer the case; at least since Dr Nelson last saw her.

**Pain, suffering and loss of amenities.**

[78] In **Wells v Wells**[11], Lord Hope of Craighead observed that:

> "The amount of the award to be made for pain, suffering and 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 plaintiff's general damages."

[79] It is clear that damages for pain and suffering are incapable of exact estimation and their assessment must necessarily be a matter of degree, based on the facts of each case. They must be assessed on the basis of giving reasonable compensation for the actual and prospective suffering entailed including that derived from the claimant's necessary medical care, operations and treatment.

[80] In terms of loss of amenities, it is authoritatively settled that it is in respect of the objective loss of amenities that the damages will be determined. Hence, loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life, with the probable effect on the health and spirits of the injured party, are all proper considerations to be taken into account. Amongst the loss of the amenities of life, there are to be considered: the injured person's inability to engage in indoor and outdoor

[11] [1998] 3 All ER 481 at 507, HL.

games, any prejudice to the prospects of marriage[12] and her inability to lead the life she wants to lead and was able to lead before the injuries.[13] In this regard, the age of the injured person must be taken into account, since an elderly person or a very young child will not suffer the same loss as a young adult.[14]

[81] In the present case, I have had regard to the evidence adduced. I note particularly Ms Binder's evidence and all the medical reports revealing that she suffered tremendous physical pain from the moment the accident occurred. She described the pain she felt while being transported to Tortola from Jost Van Dyke in the Virgin Islands Search and Rescue (VISAR) boat as the worst pain she has ever felt in her life. Her lacerations were sutured at the Peebles Hospital. She felt tremendous pain although she was given morphine. She felt a huge portion of her labia being stitched. She was also catheterized and this must have been extremely painful. She experienced chest pains and difficulty in breathing. She is still experiencing back pain, headaches and pain in the pelvis on a daily basis. She has endured almost 4 years of pain and suffering. It is evident that Ms Binder will not be free from pain for many more years to come.

[82] She was unable to walk and had to rely on a wheel chair for the month of January and in February, she was placed on crutches. It was not until 23 March 2004 that she became ambulant.

[83] Ms Binder is only 27 years old. It is indeed unfortunate that this accident occurred. She appears to have been an active young lady with a social life. She had a boyfriend who remained with her for about 6 to 7 months and then, ended the relationship. She intimated that one of the reasons why she is unable to have another relationship is the pain she endures during lovemaking. She associates sex with pain and therefore cannot enjoy lovemaking. Dr Nelson correctly diagnosed that the quality of Ms Binder's life is reduced if she cannot enjoy sex.

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[12] Moriarty v McCarthy [1978] 1 W.L.R. 155

[13] Heaps v Perrie [1937] All ER 60, where a young labourer lost both his hands and would require daily assistance.

[14] Gray v Mid Herts Group Hospital Management Committee, the Times, March 30, 1974.

[84] Ms Binder was a vivacious young woman who enjoyed swimming, boating, diving, dancing, hiking and running. She used to roller blade and play soccer. She is no longer able to enjoy these activities because of the pain which persists. She added that she previously dove, about once every two years.

[85] The medical reports reveal that she received lacerations to her head, right ankle and her labia. These have left scars that cause her embarrassment. The scar on her head was not visible to the naked eye. The scar on her ankle was also barely visible. However, it is to be observed that any scar, visible or barely visible is revolting to any young and attractive lady.

[86] The learned authors of Expert Evidence: Law and Practice at page 352 state:

> "The decision in the case is for the court, not for the witness. Therefore it must always be open to the judge to make findings contrary to the opinions of experts, even where the reports are agreed. It is clear that, having heard evidence from the plaintiff, the court can draw conclusions directly contrary to those of the experts in agreed reports, whether as to the causation of particular symptoms, or as to the issue of prognosis….Ormrod L.J. has taken the view that the prognosis, if it is not specially agreed as a fact, is "no more than an intelligent estimate by experienced doctors of a plaintiff's future condition," for which reason the judge may form his own view as to prognosis."

[87] Dr Nelson intimated that there is a question as to whether or not her injuries will affect her ability to have children. He confirmed that this would have to be closely monitored. Dr Chase's final report dated 23 March 2004 indicated that there was "no tenderness in the pelvis and full range of motion of the hips without any pain." He made no prognosis as to her child bearing ability. As a result, further testing will have to be done to determine this.

[88] Dr Archibald QC referred to several English and West Indian cases to support his arguments that damages should be awarded for pain and suffering and loss of amenities in an amount in the bracket of $100,000 to $140,000. The injuries suffered by Ms Binder are undoubtedly serious. This finding is based on the Judicial Studies Board. I have

considered other cases from this Territory such as **Cedric Dawson v Cyrus Claxton**,[15] **Leanne Forbes v Ulbana Morillio**,[16] **Alphonso v Ramnath**, **Kathleen McNally v Eric Lotte and CITCO (BVI) Ltd**[17]and **Craig Hartwell v Attorney General**[18]. The injuries suffered by Ms Binder are dissimilar to those suffered by the Claimants in the cases cited above. None of the Claimants sustained pelvic and groin injuries. In **Craig Hartwell v Attorney General**, the Court awarded the sum of $125,000 for damages for pain and suffering and loss of amenities. I agree with Mr McKenzie that Mr Hartwell's injuries were certainly more serious than those of Ms. Binder.

[89] Mr Dennis relied on several English cases where the injuries are similar to those of Ms Binder. I found two of those cases to be extremely helpful: **Oake v Biddlecome**[19] and **Rattray v Hinds**[20].In **Oake**, the injuries include dislocation of the right sacroiliac joint, fracture of the left inferior pubic rami, fracture of the left superior pubic rami, fracture of the transverse process at L5, miscarriage, depression and anxiety. Her injuries resulted in an unstable ununited pelvis which left the claimant with a pronounced limp and in addition, she suffered severe emotional pain due to her miscarriage. She was awarded £32,500 in 1998.

[90] In **Rattray v Hinds**, the claimant suffered severe communited displaced fracture of the floor of the acetabulum, proximal femur displaced towards the pelvis, fracture of the superior and inferior pubic rami on the right side, fracture of the inferior pubic ramus on the left, laceration of the left iliac vein necessitating a laparotomy, multi-fragmented fracture of the left clavicle and nerve damage to the shin and dorsum of the left foot. In addition, she experienced stiffness when she had to walk or stand for 20 minutes or more. She was awarded £45,000 for damages for pain and suffering and loss of amenities.

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[15] Civil Appeal No. 23 of 2004 (BVI) [unreported] where the Court of Appeal did not interfere with the award of $36,000 for pain, suffering and loss of amenities for disc herniations at C3-C4 and C5-C6.
[16] BVIHCV2003/005 where the trial judge awarded $40,000 for pain, suffering and loss of amenities for pain in her neck, left shoulder and upper back. The Court of Appeal affirmed this award.
[17] BVIHCV2001/0068 Unreported , Judgment delivered on 2 July 2003.
[18] BVIHCV1994/0152, Unreported, Judgment delivered on 10 February 2006.
[19] Kemp and Kemp The Quantum of Damages Volume 4H1015
[20] Kemp and Kemp The Quantum of Damages Volume 4H1009

[91] In the Antiguan case of **Rosetta Elouise Mayers v Deep Bay Development Company Ltd**[21], Joseph-Olivetti J. awarded the sum of EC$230,000 to a claimant who fractured a vertebrae. She was subsequently diagnosed as having Reflex Sympathetic Dystrophy Syndrome.

[92] I observe that these cases are not from this jurisdiction but they give the Court some insight as to how serious injuries are viewed.

[93] Dr Archibald QC also relied on **Alphonso v Ramnath**, one of the personal injury cases from this very jurisdiction. In that case, the respondent who lost one leg and now wears a wooden leg was awarded the sum of $45,000 for pain, suffering and loss of amenities. However, **Alphonso v Ramnath** was decided in July 1997 and the award of $45,000 is no longer consistent with more recent awards made in this jurisdiction.

[94] The only general principles which can be applied are that damages must be fair and reasonable, that a just proportion must be observed between the damages awarded for the less serious and those awarded for the more serious injuries, and that, although it is impossible to standardize damages, an attempt ought to be made to award a sum which accords "with the general run of assessments made over the years in comparable cases.[22] It is important that conventional award of damages are realistic at the date of judgment and have kept pace with the times in which we live.[23] There has been a gradual rise over the years of the "conventional" sum. Salmon LJ pertinently had observed in **Fletcher v Autocar and Transporters Ltd**[24], that "the damages awarded should be such that the ordinary sensible man would not instinctively regard them as either mean or extravagant but would consider them to be sensible and fair in all the circumstances."

[95] In **Kathleen McNally v Eric Lotte and CITCO (BVI) Ltd**, Rawlins J. [as he then was] stated that: "*The practice is to grant a global sum for general damages for pain and*

[21] High Court Civil Suit No. 241 of 1993 [unreported].
[22] See Bird v Cocking & Sons Ltd [1951] 2 T.L.R. 1260 at 1263, per Birkett LJ.
[23] Senior v Barker & Allen Ltd [1965] 1 W.L.R. 429.
[24] [1968]2 QB at 363, 364.

*suffering and loss of amenities, considering these against the background of the nature and extent of the injuries sustained and the nature and gravity of the resulting impairment and physical disability."*

[96] In all of the circumstances of the case and having regard to **Alphonso v Ramnath**, **Craig Hartwell v AG**, **Oake v Biddlecome** and **Rattray v Hinds**, I am of the view that a global sum for general damages for pain and suffering and loss of amenities of $100,000 is fair and reasonable.

**Loss of future earnings/ loss of earning capacity**

[97] The learned authors of McGregor on Damages[25] state that "*the plaintiff is entitled to damages for loss of his earning capacity resulting from the injury:… Both earnings already lost by the time of trial and prospective loss of earnings are included…"*

[98] I will deal first with the loss of earning capacity and then past earnings. For assessment of loss of future earnings, it is necessary to ascertain a multiplicand and a multiplier. This analysis would not necessary in light of my findings below.

[99] In her witness statement, Ms Binder averred that at the time of the accident she was employed as an Administrative Assistant at Galt Capital LLC in St. Thomas earning a gross salary of $36,000 per annum. Her net salary was $31,200. She added that, as a result of the accident, she began experiencing cognitive dysfunction and this caused the company to reduce her responsibility which deprived her of the opportunity for increased salary and promotion which her employers' estimated would have been about $10,000 per annum. According to her, she could have been earning about $56,000 to $60,000 per annum. She said that she stopped working at Galt Capital in June 2006 when the firm closed operations. At the time she appended her signature to her witness statement, she was working as a bartender at the Lotus and Lotus Asian Grill where she was earning approximately $36,000 per annum.

[25] Sixteenth edition, paragraph 562 at pages 1020 to 1021

[100] Under oath, Ms Binder indicated that because of her injuries she could not multitask. This, I think, would be as a result of her decreased cognitive abilities. She suffered concussive head injury and was unconscious for about 20 minutes immediately following the accident. Dr Weisher's report dated 28 May 2004 stated that she suffered wounds to her left hemicranium and that the highest index of suspicion favours that this patient suffers from a rather significant closed head injury syndrome and extreme emotional trauma. He indicated that he would like to review all the imaging studies that were performed of the brain.

[101] In examination in chief, Dr Nelson stated that a letter from Galt Capital explained that Ms Binder's performance had deteriorated since her injury. He opined that her performance weakened because of her problem with cognition and memory. Dr Nelson based his opinion on the medical report of Dr Weisher and his conversation with Ms Binder but added that there is no real objective documentation as to severity of her head injury. Dr Nelson promptly explained that there are, however, objective evidence of some type of neurological dysfunction and it includes (i) the abnormal finding on examination by Dr Weisher of bilateral extensive plantar responses which means that either in the brain or in the spinal cord, there was damage to the motor system which caused a release of primitive reflex called a plantar reflex; (however, I have not seen this finding in Dr Weisher's report); (ii) the fact that she was initially unconscious; (iii) the laceration to her head and (iv)the fact that she suffered from amnesia. He concluded that in his opinion, it would be difficult for her to attain the same type of job that she had.

[102] In cross-examination, Dr Nelson admitted that he had not observed any physical injury to the brain with reference to any CT scans or any such diagnostic information. He agreed with Mr Dennis that it would not be unusual for someone who suffered an injury that within the immediate aftermath or period, his/her performance might be affected. He added that if her performance is affected up to 3 years later, then that is a different story. Mr Dennis cross-examined him on his medical report where he stated that "the patient was alert and oriented. She spoke fluently and showed no elements of disorientation or memory deficit."

[103] Dr Nelson sought to clarify his opinion by stating that it is not unusual to have testing in the office to be normal and to have psychological testing to bring out deficits. He reiterated that no such psychological testing has been done.

[104] The letter from her employers indicates that prior to her accident, Ms Binder was able to multitask and comprehend verbal instructions quickly and without repetition. However, since the accident, she has exhibited diminished intellectual function and cannot perform more than one assignment at a time resulting in poor work on occasions. It appears that letter was written only to show that Ms Binder's salary and benefit package would have increased had it not been for the accident.

[105] It is plain that Ms Binder did not lose her job because of any decrease in her cognitive abilities but because Galt Capital closed their operations. In the letter, Mr Tizes stated that she is a loyal employee. It follows also that this Court cannot take into consideration any increase in salary she might have obtained were she still working at Galt Capital.

[106] Since leaving Galt Capital, she worked at Lotus Grill where she earned a comparable salary to what she was earning at Galt Capital. She stopped working at Lotus Grill in May 2007 when she was laid off. She has not advanced any reason for this job loss. It appears therefore, that her earning capacity has not diminished.

[107] Since July 2007, she had been in her present job. She works between 5 to 7 hours daily earning $6.00 per hour. She gave evidence that she has not obtained a position as an executive assistant or in a similar field because she feels bad that she is incompetent and her former boss felt that she lacked competence. She subsequently admitted that she has not sought employment in positions similar to that of an executive assistant since she left Galt Capital. She insisted that as a bartender, she does not have to multitask as she usually serves one customer at a time.

[108] In the first few months after the accident, Ms Binder suffered from loss of memory, loss of concentration and cognitive dysfunction. However, in my judgment, her present condition

has improved dramatically. Dr Nelson, who most recently examined Ms Binder, found that she showed no elements of disorientation or amnesia. I therefore find that her contention that the decrease in her cognitive abilities has prevented her from obtaining employment as an executive assistant or other similar employment is not supported by medical evidence.

[109] Ms Binder alleged that she used to earn between $800 and $1,500 per day working as a model. She worked 6 to 8 days per month. She was paid in cheques but was unable to produce any documentary evidence to substantiate her allegation. This claim fails.

[110] It is a well established principle of law that Ms Binder must prove her case. It is incumbent on her to provide the best evidence of which she is capable. In **Cedric Dawson v Cyrus Claxton** [supra], Gordon JA in delivering the judgment of the Court of Appeal in a personal injury case said at para. 7: *"I will, however make one comment in passing. It is the obligation of the claimant in any claim for damages to provide the best evidence of which he is capable."*

[111] Ms Binder further asserted that as a result of her problems with cognitive function, she had to dispense with her plans to go back to University to earn a tertiary education. She added that she is not capable of going to school now and in addition, she cannot afford it. I will first deal with her inability to afford further education. She explained that she had previously applied to University while she was working at Galt Capital as the company had promised to pay for part of her courses. The Court cannot place reliance on this promise as I have found [supra] that her loss of employment from Galt Capital had nothing to do with the accident. She was earning gross salary of $35,352 before the accident and as I have found, she still has the ability to earn this sum. I am unable to find that the accident has affected her ability to afford to return to school.

[112] I have already made a finding in respect of her problems with cognitive functions in relation to her work. The same applies to her ability to go back to school. I will add that having seen and heard Ms Binder giving evidence in this Court, I was impressed with her

recovery. She was extensively cross-examined for several hours and during the entire period, she was well-oriented and articulate.

[113] In my opinion, having regard to the above findings, Ms Binder is not entitled to any award for loss of future earnings/loss of earning capacity. I will deal with earnings already loss at the time of trial under the head of special damages.

**Special Damages**

[114] Special damages consist of out-of-pocket expenses and loss of earnings incurred down to the date of trial. In the Statement of Claim, Ms Binder claims special damages under the following heads:

| | | |
|---|---|---|
| 1. | Items lost in accident | $570.00 |
| 2. | Medical and related expenses | $7,365.18 |
| 3. | Transportation expenses | $662.00 |
| 4. | Care and assistance expenses | $23, 206.18 |
| 5. | Travel expenses incurred by her mother | $1,949.00 |
| 6. | Loss of wages for 3 months | $9,000.00 |

[115] In his submissions, Dr Archibald QC correctly included a claim for special damages incurred since the Statement of Claim and up to the date of trial. These are:

| | | |
|---|---|---|
| 1. | Receipts admitted to evidence as "HB2" | $398.00 |
| 2. | Up to date Medical Report and Evidence of Dr Nelson | $3,700.00 |
| 3. | Captain Pat's expert report | $3,000.00 |
| 4. | Lost of earnings up to date of trial | $57,485.00 |

[116] The Defendants are not challenging the claims for expenses incurred by her mother to travel to St. Thomas from main land USA. The sum claimed for medical and related expenses including the sum claimed for Dr Nelson's report and evidence is not challenged. So also is Captain Pat's expert report. In respect of the travel expenses, Ms Binder

included the transportation costs to see her attorneys. Mr Dennis correctly submitted that this is not recoverable as special damages. Therefore, that sum is irrecoverable and will be deducted from the overall sum claimed for under this head.

[117] Ms Binder claimed $9,000 for loss of earnings for the 3 months immediately following the accident. It was subsequently revealed that her gross salary was $35,352 per annum and the net salary after deductions was $31,200 per annum. Using this figure, her loss of earnings for 3 months would be $7,800. Dr Archibald QC also claimed loss of earnings since the statement of claim up to the date of trial in the sum of $57,485.50. He calculated this based on Ms Binder's assertion of loss of earning capacity and the increase she might have obtained if she were still working at Galt Capital. I have already made a finding. It follows therefore, that Ms Binder cannot recover this sum because her loss of salary during that period is not attributable to the accident.

[118] Ms Binder indicated that her boyfriend did not go to work for three months and remained with her day and night during that period. He lost earnings at about $14.00 per hour and he took care of her for 10 hours or more per day. She estimated his total loss of wages as $12,470. Under intense cross-examination by Mr McKenzie, she conceded that her boyfriend did not charge her but she paid him for everything that he did as much as she could. She produced no receipts and did not give an amount that she paid him. It appears that the hourly rate claimed is the alleged rate that her boyfriend would have earned if he were working. There is however, no documents submitted to support this assertion and indeed there could be none.

[119] Undoubtedly, Ms Binder would have had to pay someone to take care of her after the accident. She was unable to walk for approximately one month and was put on crutches until 23 March 2004. She was catheterized and needed assistance to empty her bed pan. She should obtain a reasonable sum under this head. I am of the view that $14.00 per hour is not unreasonable and therefore, I would award her the full amount of $12,470.

[120] She also claimed the sum of $570 for items lost in the accident. I would award her the full amount.

**Future Medical Expenses**

[121] Dr Nelson recommended future medical treatments and diagnostic testing. He indicated that these treatments will cost approximately $7,000. This is not contested. He also asserted that there are other kinds of therapy which are recognized as being beneficial to patients with her symptoms and this will costs approximately $4,000.00 annually. He gave no clear indication of the type of therapy and the number of years she may need it. It is plain that Ms Binder is still having discomfort and pain as a result of her injuries. She still has severe back pains and therefore will need to take medication, continue with her massages and any other therapy which will assist her. I therefore accept the figure of $4,000.00 annually as a reasonable sum. I would allow this figure for a period of 5 years.

**The Outcome**

[122] The outcome is as follows:

**General Damages**

| | | | |
|---|---|---|---|
| a) | Pain, Suffering and Loss of amenities | $100,000 | Interest at the rate of 5% per annum from the date of service of the statement of claim: 13 January 2006 to date of trial: 9 November 2007. |
| b) | Total Future Expenses | $7,000 | No Interest before Judgment |
| c) | Future Medical Expenses | $20,000 | No interest before Judgment |

**Total General Damages** are in the amount of $127,000.

**Special Damages**

| | | |
|---|---|---|
| 1. | Medical and related expenses | $7,365.18 |
| 2. | Transportation expenses | $553.00 |
| 3. | Care and assistance expenses | $12, 470.00 |
| 4. | Travel expenses incurred by her mother | $1,949.00 |

| | | |
|---|---|---|
| 5. | Lost of wages for three months | $7,800.00 |
| 6. | Receipts admitted to evidence as "HB2" | $398.00 |
| 7. | Up to date Medical Report and Evidence of Dr Nelson | $3,700.00 |
| 8. | Captain Pat's expert report | $3,000.00 |
| 9. | Loss of items | $570.00 |
| | TOTAL | $37,805.18 |

**Total Special Damages** in the amount of $37,805.18 with interest at the rate of 2.5% from 1January 2004 to date of judgment.

[123] The total global sum awarded to Ms Binder will be $164,823.30 with interest at the rate of 5% per annum from the date of judgment to the date of payment.

[124] I make no deductions for Income Tax or NIS Contributions as no evidence was adduced in that regard.

**Costs**

[125] The costs will be borne jointly and severally by the defendants. Such costs will be prescribed costs under CPR 65.5 (3) Appendix B.

**Summary**

[126] In summary, the following is the award of this Court:

| | |
|---|---|
| General Damages | $127,000.00 |
| Interest on Pain, suffering and loss of amenities ((100,000) | $9,166.00 |
| Special Damages | $37,805.18 |
| Interest on special damages (2.5%) | $3,969.00 |
| Total General Damages, Special Damages and Interest | $178,000.00 |
| Prescribed Costs | $35,700.00 |
| **Judgment of damages and costs payable to the Claimant** | **$213,700.00** |

[127] Last but not least, I am grateful to all Counsel and to the parties for their valuable assistance to this Court and their patience in awaiting this judgment.

**Indra Hariprashad-Charles**
High Court Judge