TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/016

BETWEEN:

TORTOLA YACHT SERVICES LIMITED

Appellant

and

DENROY BAPTISTE

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice
The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde. Janice George-Creque — Justice of Appeal

Appearances:

Mrs. Tana'ania Small-Davis for the Appellant
Mr. John Carrington for the Respondent

2009: January 15;
June 22.

Damages for injuries sustained during the course of employment – whether the parties had arrived at a final and binding agreement to settle the claim – whether the trial judge erred in calculating the award for pain and suffering and loss of amenities – whether the judge erred in calculating loss of future earnings – whether the judge erred in the award of future medical expenses and in calculating special damages

The respondent, Mr. Baptiste, claimed damages against the appellant, Tortola Yacht Services ("the company"), for injuries which he sustained during the course of his employment with the company. The company admitted liability. The issue of quantum of damages was tried. The trial judge awarded damages to Mr. Baptiste in the global sum of $179,705.67; with interest on the general damages at 5% per annum; interest at 2½% per annum on special damages. The judge also ordered the company to pay prescribed costs under rule 65.5 of **CPR 2000**. The company appealed the quantum of damages awarded on various grounds. The first ground was that the trial judge erred in not finding that Mr. Baptiste and the company had concluded a final and binding agreement to settle the claim

for a total sum of $18,653.80 and $2,798.07 costs. The company also challenged the judge's assessment of the extent and severity of the injuries which Mr. Baptiste sustained and the resulting award of compensation for pain and suffering and loss of amenities. The company further challenged the awards for loss of future earnings and for future medical expenses. The company also challenged the sum awarded for special damages on the ground that the trial judge failed to take into account reimbursements which Mr. Baptiste received from the Social Security Board.

Held: dismissing the appeal, with costs to be calculated in accordance with rule 65.13 of **CPR 2000** to be paid by the company to Mr. Baptiste: -

1. The trial judge was correct in her decision that, on the evidence, the parties did not conclude a binding settlement of the claim.

2. The trial judge did not err in the award which she made for pain and suffering and loss of amenities. She correctly assessed the extent and severity of the injuries which Mr. Baptiste sustained and applied the correct principles in making an award which was a fair and reasonable compensation under this head, having regard to evidence.

   Cornilliac v St. Louis (1965) 7 WIR 491 and **Morillo v Forbes** BVIHCV 2003/0005 applied; **Wright v British Railways Board** [1983] 2 A.C. 773 distinguished.

3. The learned trial judge did not err in the award which she made for loss of future earnings because there was evidence on which the judge reasonably found that Mr. Baptiste had in fact lost earnings and would continue to do so because he was unable to earn at the level that he did prior to his injuries.

   Alphonso Ltd. v Ramnath 56 W.I.R. 188, applied.

4. The learned trial judge did not err in the award which she made for future medical expenses by admitting evidence as to the likely cost of surgery as at the time of the trial.

5. The learned trial judge did not err in calculating the amount awarded for special damages by not taking into account claims for loss of wages which Mr. Baptiste made under this head for which he was already compensated by the social security. Mr. Baptiste provided oral and documentary evidence which supported the expenditure of the sums which the judge awarded to him under this head and there was no evidence that the social security board had overcompensated him to render the award incorrect on account that the trial judge failed in her calculation to deduct an amount that he was overcompensated.

JUDGMENT

[1] **RAWLINS, C.J.:** This is an appeal by Tortola Yacht Services ("the company") from a judgment in which a High Court Judge awarded the respondent, Mr. Baptiste, damages in the sum of $179,705.67. In summary, the judge awarded $45,000.00 for general damages for pain and suffering and loss of amenities and 5% interest per annum thereon from 19th June, 2006 (the date of service of the claim) until judgment; $4,269.80 for special damages and 2½% interest per annum thereon from 19th June 2006 until judgment; $84,864.00 for loss of future earnings and $41,071.87 for future medical expenses. The order stated that for the avoidance of doubt there was no award of pre-judgment interest on the awards for future medical expenses and loss of future earnings. The judge also ordered the company to meet the respondent's costs on a prescribed costs basis in accordance with Part 65.2 **CPR 2000**.

The appeal

[2] The company's primary defence to the claim was that the parties concluded a final and binding settlement of the claim in the sum of $20,422.80. The learned judge found that the parties had not arrived at the final and binding settlement. The company appealed this finding.

[3] In the second place, the company challenges the judge's assessment of the extent and severity of the injuries which Mr. Baptiste sustained. The company complains that this caused the judge to award compensation for pain and suffering and loss of amenities that were above the level that should have been awarded on a fair basis. In the third place, the company challenges the learned judge's calculation of loss of future earnings. In the fourth place, the company challenges the award that the judge made for future medical expenses. In the fifth place, the company complains that the learned trial judge failed to take into account certain sums which were reimbursed to Mr. Baptiste by the Social Security Board and therefore erred in awarding him $4,269.80 for special damages.

[4] Solicitors for Mr. Baptiste purported to appeal by way of counter-notice that was

filed on 12th January 2009. They sought, among other things, to challenge the judgment on the ground that the learned trial judge erred in that she did not award damages for lack of earning capacity to Mr. Baptiste. They included submissions on this ground in their written skeleton arguments. This court however struck out the counter-notice and the related aspects of the skeleton arguments on 15th January 2009 on the ground that they were not properly before the court.

[5] The issues raised in these grounds of appeal will be considered against a brief background to the case. I think, however, that the approach to the resolution of the issues would be usefully put into perspective by reminding of the burden that the law imposes upon a person who appeals against an award of damages. This is quite succinctly stated by Satrohan Singh JA in **Alphonso and Others v Deodat Ramnath**[1] as follows:

> "In appeals, comparable in nature to the present one, it must be recognized that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award.
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> But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This court will also interfere if the judge misapprehended the facts, took irrelevant factors into consideration, or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge's judicial discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is

[1] (1997) 56 W.I.R. 183, at page 191 e-j.

possible and was therefore clearly and blatantly wrong we will not interfere."

Background

[6] Mr. Baptiste was employed as a boat painter with the company. On a day in May 2000 he was assisting in lifting a boat out of the water when the stern-line, which he was holding to steady the boat while a crane lifted it, suddenly became loose causing Mr. Baptiste to be thrown backwards into the water. He sustained injuries by the impact of his body in the water. The first apparent injury was a dislocated right shoulder. He was treated for this at the Peebles Hospital in Road Town. He was discharged on the same day after his shoulder was relocated. Mr. Baptiste also sought medical attention in St. Thomas, United States Virgin Islands.

[7] Mr. Baptiste subsequently complained of a pain in his right clavicle and shoulder; as well as swelling and pain of the right index finger and lower back. He was referred for neurological and orthopedic evaluation. He had in fact also sustained injury to his thora-columbar spine and shoulder.

[8] The evidence adduced at the trial is that Mr. Baptiste was unable to continue to work as a boat painter. He was paid sums for loss of earnings by the Social Security Board. The company also paid him $21, 854.83. This was the difference between his normal wages and the sums paid to him by the Social Security Board from the time that he was injured until he was imprisoned in 2004.

[9] The Social Security Board met some of Mr. Baptiste's medical expenses. He claimed reimbursement from the company for the expenses not met by the Board.

Ground 1 – was there a final and binding settlement?

[10] By letter dated 19th November 2001, Mr. Hayden St. Clair Douglas, a legal practitioner of the law firm McW Todman & Co., made a claim on the company's insurers on behalf of Mr. Baptiste for $18,653.80 and $2,798.07 costs. The letter was addressed to Mrs. Jaqueline Newton of Caribbean Insurers Limited. Among

other things, the letter detailed the injuries sustained by Mr. Baptiste; referred to the principles on general damages and claimed $12,000.00 as damages for pain and suffering and loss of amenities and $5,500.00 for the costs of reconstructive surgery. In its final paragraph under the sub-head "SPECIAL DAMAGES" the letter claimed $18,653.80 "for his loss and damage suffered as a result of the said collision (sic)" and $2,798.07 for legal fees.

[11] The evidence of Mr. Graham Wickens, an agent of the company's insurance adjusters, was that he became aware of the claim when he received Mr. Douglas' letter in February 2001. According to Mr. Wickens, a settlement was agreed for the sum of $20,422.80 and that Mr. Douglas accepted this. A release was issued by the insurers for Mr. Baptiste to sign, but he did not return the release to the insurers. In my view, on this evidence, there was clearly no binding agreement between the parties up to this stage to settle the claim. Additionally, there is no evidence that Mr. Baptiste received any payment in settlement of the claim up to that stage. The question therefore is whether a binding settlement arose from the contact which Ms. Williams initiated in a second letter to the insurers in October 2005.

The second letter

[12] It was on 11th October 2005, after a lapse of some four years, that Ms. Williams, solicitor of McW. Todman & Co., wrote to the company's insurers on behalf of Mr. Baptiste. The letter was addressed to Ms. Bernadine Thomas, Executive Claims Officer of Caribbean Insurers. It stated as follows:

> "Further to our telephone conversation of October 6, I confirm that my client has instructed us that he is now prepared to accept your offer to settle this matter, by paying the sum of $20,422.80, inclusive of legal costs. I also confirm that our client has not received any payments from his former employers for the injuries, which he sustained as a result of their negligence and failure to provide a proper work environment. We look forward to the receipt of your further correspondence in relation to this matter."

[13] Ms. Williams confirmed her telephone contact with someone from the insurance

company informing the person that Mr. Baptiste was then "prepared to accept" the company's offer to settle the claim. She also confirmed that Mr. Baptiste had not by then received any payments for his injuries.

[14] Mr. Wickens stated in his evidence that he spoke with Ms. Williams on 6th October 2005 by telephone and then received her letter in which she communicated that Mr. Baptiste accepted their offer. His statement then continued:

> "8. One of the things that we had discussed was the need to get confirmation of whether Mr. Baptiste had been receiving or received any payments from Tortola Yacht Services Ltd. as this would have impacted our offer. 9. Shortly after receiving the acceptance and confirmation that Mr. Baptiste had not been paid any sum by his former employer, I learned from Tortola Yacht Services that they had in fact paid Mr. Baptiste a total of $21,854.63… We sent a letter to Mrs. Williams advising her of this."

[15] Two (2) matters are noteworthy. One is Ms. Williams' statement that Mr. Baptiste was "prepared to accept" the company's offer and that he had not yet been paid for his injuries. The second matter is Mr. Wickens' indication of the need to determine whether the company had in fact paid anything to Mr. Baptiste. The company later said that they paid Mr. Baptiste $21,854.63. However, this sum was not paid by the company in settlement of the claim. The uncontroverted evidence is that it represented the continued payment of Mr. Baptiste's wages until the Labour Department instructed the company that they had no further obligation to pay wages because Mr. Baptiste was in prison. Accordingly, Mr. Julian Smith, the managing director of the company gave the following evidence:[2]

> "Tortola Yacht Services Ltd. continued paying Mr. Baptiste a sum of money representing the difference between his regular pay and the sum paid to him by the Social Security Board. The payment total $21, 854.83. On 28th October 2004 I learned that Mr. Baptiste was incarcerated in Balsam Ghut to serve a prison sentence on a conviction. I telephoned the Labour Department who informed me that Mr. Baptiste's contract of employment would have been terminated by reason of his incarceration and that we had no financial obligation to him."

[16] There is no evidence that Mr. Baptiste signed a release. His evidence is that he

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[2] See page 52 of the Record of Appeal.

did not lend his agreement to a final settlement. Accordingly, he stated as follows in his witness statement:[3]

> "While I was in prison, I had instructed Mr. Douglas of McW. Todman to act on my behalf in relation to my injury. He indicated to me that the Company's insurance company had made a proposal to settle the matter. I instructed him not to agree to this settlement. Subsequently, I instructed Ms. Williams of the same firm to act for me after Mr. Douglas' departure. I am not aware that any settlement was reached with the insurance company by Ms. Williams. All that I can say is that I never saw any evidence that a settlement had been made while Ms. Williams was acting for me and I have never received any payment from the insurance company or signed any release in relation to my claim against the Company."

[17] I would dismiss ground 1 of the appeal. In my view, the learned trial judge was correct in finding that the parties did not have a final binding agreement to settle the claim in the sum of $20,422.80. She quite correctly found that the offer to settle was made by the company; that the acceptance of the offer to settle was conditional and the conditions were not met; that the company could not rely on the $21,854.83 that was paid to Mr. Baptiste prior to his incarceration and prior to the settlement offer. It is clear that this was continued payment of wages by virtue of his employment with the company. It was not paid pursuant to a binding settlement. In my view, the learned trial judge also correctly found that the offer contained in Ms. Williams' letter was conditional upon whether Mr. Baptiste received any payments from his employer as compensation for his injuries. There is no evidence that he did. Further, the judge correctly stated that the last sentence of the letter clearly anticipated further correspondence between the parties, but there was none. The judge was also correct in her finding that the absence of a signed release by Mr. Baptiste acknowledging full and final settlement, as is customary in the insurance business, was evidence that there was no concluded agreement to settle the claim.

Pain and suffering and loss of amenities

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[3] In paragraph 16, at page 47 of the Record of Appeal.

[18] The company complains that the trial judge erred in her assessment of the extent and severity of the injuries which Mr. Baptiste sustained by failing to take into account that he did not see the need to have medical attention for a period of five years[4] immediately before he filed the claim. The company however contended that the necessary inference to have been drawn from this was that Mr. Baptiste was not in such severe pain or suffered the type of debilitating handicap that he gave evidence of at the trial. This evidence the judge totally accepted, counsel submitted, causing her to over-estimate the award for pain and suffering and loss of amenities.

[19] Counsel for the company contended that the trial judge did not properly consider the medical evidence in assessing the extent of Mr. Baptiste's injuries, and, in particular, the last report of Dr. Caesar. Learned counsel submitted that it was evident from that report that Mr. Baptiste was not experiencing debilitating pain and disability because he was mobile and was able to squat, for example. Counsel drew attention to that aspect of the medical report which states that Mr. Baptiste experienced shoulder pain once or twice per month and a low back pain and pain in the right lower extremity, which contradicts his own evidence of debilitating disability. Counsel pointed out that Dr. Caesar assessed Mr. Baptiste's residual impairment at 20% and stated that Mr. Baptiste could carry weight of up to 20 pounds.

[20] Learned counsel for the company accepted the general principle that damages are assessed as at the date of the trial. She however submitted that the claim should have been assessed on 2001 values. She relied on Lord Diplock's statement in **Wright v British Railways Board**[5] that the court has discretion to depart from the general principle in special circumstances. According to learned counsel, the special circumstances in this case are the diminution in the value of the dollar against the pound sterling and inflation. Learned counsel stated that English

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[4] Between January 2001 and March 2006.

[5] [1983] 2 A.C. 773.

cases are usually used for the purpose of assessment of damages and awards are made in pound sterling in the English cases. These factors, said counsel, have increased the exposure for the company, which was willing from the outset to settle the case. In my view, however, these contentions are unmeritorious.

[21] In the first place, it was within the judge's discretion to determine whether there were special circumstances which resulted in the assessment of damages on 2001 value. With respect, the factors proffered by learned counsel as increasing the company's exposure do not, in my view, amount to special circumstances that dictate that there should be a departure from the general rule that damages should be assessed as at the date of the trial. This is the time at which the court could best determine the nature and extent of the injuries sustained by a claimant. In the second place, the learned judge made the award under this head with specific reliance on **Morillo v Forbes**,[6] a Virgin Islands case. In the third place, the company provided no evidence or particulars to show the impact of the diminution in the value of the dollar and inflation.

[22] Mr. Baptiste was injured in 2000. Dr. Hugo Caesar, an orthopedic surgeon, examined him on 14th September, 12th October and 4th December 2000; and on 4th and 25th January 2001. Dr. James Nelson carried out a neurological evaluation in October 2000 and provided a report on 31st January 2001. Mr. Baptiste was incarcerated between March 2004 and March 2006. He was examined by Dr. Caesar on 28th March and 24th April 2006 and on 8th November 2007. Whereas Dr. Caesar's 2007 report evaluated the permanent disability resulting from the injuries at 20%, Dr. Nelson's prognosis in his 2001 report was that Mr. Baptiste's disability status was 25% impairment of his whole person. Dr. Nelson recommended that Mr. Baptiste should avoid prolonged sitting, standing, lifting, bending, squatting, crawling, pushing or pulling. He stated that Mr. Baptiste should not lift more than 20 pounds[7] and would not be able to return to his

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[6] BVIHCV 2003/0005.

[7] See paragraph 7 of Dr. Caesar's witness statement at page 58 of the Record of Appeal and his cross-examination at page 168 of the said Record.

previous employment.

[23] In assessing damages under this head, the learned trial judge relied on the principles stated by the Court of Appeal of Trinidad and Tobago Court in **Cornilliac v St. Louis**,[8] and accepted by this court in many cases as the factors which are to be taken into account in assessing general damages under this head. Those factors 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 endured; (iv) the loss of amenities; and (v) the impact on the claimant's pecuniary prospects.[9] The learned trial judge then considered Mr. Baptiste's personal and work circumstances and all of the medical evidence, which came from the reports and the oral evidence given at the trial. She considered and accepted the evidence of Mr. Baptiste in the light of the doctors' reports.[10]

[24] In accepting the doctors' reports, the learned trial judge found that Mr. Baptiste suffered temporary loss of feeling and ability to move his right arm immediately after the accident; hills sachs lesion to right humeral head; labral tear in right shoulder; continuous pain in right shoulder and back; ridiculer syndrome involving ridiculer pain, paresthesias and/or weakness in both upper extremities and left lower extremity; dorsal and lumbosacral strain and sprain; compression fracture of T12 and mild compression fracture of L1 discs; bulging and/or herniated discs at levels C4-5; C5-6; C6-7; L4-5 and L5-S1; multiple levels of cervical and lumbar spinal stenosis; traction injury to brachial plexus on the right, and right index finger spasm and (xii) bicipital tendonitis.

[25] There is no basis, in my view, to fault this decision by the judge to accept the reports and the evidence of Mr. Baptiste. She found on that evidence that Mr. Baptiste, who was 35 years old at the time of the accident and 42 years old at the trial, was unable to continue his work as a boat painter due to the injuries sustained from the accident. She accepted that Mr. Baptiste did not have any

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

[9] See particularly paragraph 15 of the judgment.

[10] See particularly paragraphs 19-24 of the judgment.

history of degenerative disease prior to the accident. The learned trial judge further accepted the doctor's prognosis that the injuries would result in a 20% whole body impairment, which with surgery may be reduced to 18% in the short term and a greater figure in the long term. There was also the possibility that the constant rubbing of cartilage could result in Mr. Baptiste having degenerative arthritis.

[26] On the evidence, it was reasonable, in my view, for the judge to find, as she did, that Mr. Baptiste suffered serious injuries which have seriously changed his life. His activities have been limited considerably and the possibility exists that if it does not remain the same, his condition may worsen. Mr. Baptiste still experiences chronic pain and discomfort in his shoulders, neck, back and thighs on average of three days a week. The judge reasonably found that he had suffered a great deal of pain and discomfort and will not be entirely free from pain in the future.[11] The judge accepted his evidence that he is no longer able to engage in his work as a painter and has only been able to engage in sporadic employment as a truck driver and handyman. He is also unable to enjoy one of his ardent interests, basketball. The judge found that Mr. Baptiste is therefore partially disabled and will never make a full recovery.[12]

[27] In my view, the judge correctly relied on **Morillo v Forbes**, a decision of the High Court of the Virgin Islands, in the assessment. In **Morillo v Forbes**, the claimant suffered whole body impairment of 19% and was awarded general damages in the sum of $40,000. Having compared the injuries sustained by Mr. Morillo in the above case and those sustained by Mr. Baptiste, the judge reasonably found that Mr. Baptiste's injuries were more severe than those sustained by Mr. Morillo but the possibility of surgery reducing the impairment brought him in the range of Mr. Morillo. She awarded him $45,000.00, which, in my view, is fair and reasonable compensation under this head, having regard to the evidence. In the premises, I would dismiss the 2nd ground of the appeal.

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[11] See paragraphs 22 and 23 of the judgment.
[12] See paragraph 24 of the judgment.

Loss of future earnings

[28] The judge found that damages are recoverable by Mr. Baptiste under this head. She held in effect, that there was evidence that Mr. Baptiste in fact suffered loss of earnings since the incident and would continue to do so.[13] The judge noted that the method by which the courts have assessed awards under this head has evolved and the guidance provided by this court in **Alphonso v Deodat Ramnath**.[14]

[29] In calculating the award, the judge considered the evidence that Mr. Baptiste gave that he worked as a painter prior to the incident but cannot continue to work in that employment because of the injuries that he sustained.[15] The judge noted the evidence of Mr. Baptiste that a painter received base wages of $400-$480 per week at the time of the trial; he had found alternative employment as a driver and works as such for three to four days a week earning $90.00 a day. The judge applied the median to those figures. To calculate the multiplicand the judge calculated the yearly salary of a painter and subtracted from it Mr. Baptiste's current salary as a driver. Having considered the possibility that Mr. Baptiste may be made slightly better because of surgery, which could enable his earning capacity to be increased, the judge used a multiplier of 12. Based on a normal working life to age 65, she found that Mr. Baptiste, who was 42 years old at the time of the trial, has an expected working life of twenty-three years. The judge then allowed a 20% discount for the vicissitudes of life and awarded $84,864.00 to Mr. Baptiste for loss of future earnings.

[30] The company challenges the calculation of this award and the quantum that was awarded. Mrs. Small-Davis submitted that the learned judge did not give a discount notwithstanding that she stated that she would have done so. However,

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[13] See paragraph 33 of the judgment.
[14] See paragraphs 33-35 of the judgment.
[15] See paragraph 36 of the judgment.

in her judgment[16] the learned judge calculated the total award in the sum of $106,080.00 and specifically discounted it by 20% for vicissitudes of life to arrive at the final award of $84,864.00.

[31] Mrs. Small-Davis further submitted that in assessing the award, the judge erred in using the multiplier/multiplicand bases because this is more suited to cases of permanent disability, whereas Mr. Baptiste did not suffer permanent disability. Learned counsel therefore contended that the more appropriate award would have been **Smith v Manchester Corp**[17] type damages which would have taken into account the difficulty faced in assessing disability like Mr. Baptiste's and compensated for the possibility that at some point in the future he may become unemployable or his chances of employment would be reduced as a result of the injury. Mrs. Small-Davis argued that the case of **Cook v Consolidated Fisheries**[18] states clearly that the questions which the trial judge should have asked when making an assessment under this head were (i) is there a real risk that the claimant will lose his job or be out of work and (ii) to what extent, if at all, would he be handicapped if he did find himself out of work.[19] It is noteworthy that in her judgment, the judge agreed with the submission by counsel for the company that a **Smith v Manchester Corp** type of award was not recoverable because there was no substantial risk that Mr. Baptiste would have become unemployable.[20] In my view the learned judge correctly made an award under this head.

[32] Mrs. Small-Davis submitted that in the absence of evidence that Mr. Baptiste was limited to working for only three days in a week, the learned trial judge should not have assessed the award on that basis. Mrs. Small-Davis contended that, had the judge calculated his earnings at $450.00 a week, Mr. Baptiste would not have been financially disadvantaged. This, counsel submitted, is because he would

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[16] See paragraph 37
[17] (1974) 17 K.I.R 1
[18] [1977] I.C.R. 635
[19] Ibid at page 640 D - G
[20] See paragraph 38 of the judgment.

have been able to work as a driver and there would have been no need for an award of loss of future earnings. In my view, however, there was sufficient evidence to form the basis on which the judge calculated the award as she did. Mr. Baptiste stated, in his witness statement, that he suffered severe pains in his neck, back, shoulder and thighs, in particular, about three days per week; that he was currently unemployed, and that it was difficult for him to find proper employment because of his disability caused by the accident. In his oral evidence he said that he worked "on and off". He also said that in the last two years since his release from prison he had worked for 6 months. In effect, there was evidence of Mr. Baptiste's diminished earnings since his injury on which the judge reasonably made the award that she did under this head. I would therefore dismiss this ground of the appeal.

Future medical expenses

[33] In her judgment,[21] the judge accepted the evidence/report of Dr. Caesar that he would recommend surgery to improve the mobility of Mr. Baptiste's shoulder. She also accepted this evidence and the estimate that Dr. Caesar made that future medical expenses would be $ 41,071.87, particularized as follows:

Surgeon's Fees ($6,875 plus 25% to reflect current rates)	- $8,593.75
Anesthesiologist ($700 - $900 for approximately 3 hours)	- $2,400.00
Hospital (3 - 4 times surgeon's fees)	- $30,078.12

[34] Mrs. Small-Davis argued that there was nothing relating to the need for surgery or the cost of it in the statement of claim or in Dr. Caesar's evidence. The only information, she said, was contained in a letter dated 6th June 2001 addressed to solicitors for Mr. Baptiste, which stated that the cost of surgery would be $5,500.00.

[35] Mrs. Small-Davis complained that the judge erred in permitting further evidence relating to the cost of the surgery to be adduced during the re-examination of Dr.

[21] See paragraph 31.

Caesar on the basis that time had elapsed since $5,500.00 was given as the estimated costs for the surgery. This, according to Mrs. Small-Davis, placed the company at a disadvantage and limited cross-examination by counsel for the company as to the benefits of such surgery, so that there was no opportunity to properly challenge the figures given by Dr. Caesar. Mrs. Small–Davis submitted that the judge should have restricted the award to $5,500.00, especially as Mr. Baptiste did not prosecute his claim in a timely manner.

[36] Mr. Carrington, learned counsel for Mr. Baptiste submitted, on the other hand, that the judge correctly exercised her discretion to adduce the evidence and to make the award that she did. He submitted that the judge exercised her discretion correctly in admitting the evidence and it was for counsel for the company to have led evidence to contest Mr. Baptiste's need for surgery or the cost of such surgery.

[37] Basically, damages are intended to be fair compensation for loss occasioned by injury as accurately as that may be determined. In my view the learned trial judge correctly admitted evidence which assisted her to make that determination. The result is that I would also dismiss this ground of appeal.

Special Damages

[38] Special damages are awarded to reimburse a claimant for actual medical expenses incurred as a result of injuries sustained. In his statement of claim, Mr. Baptiste claimed special damages in the sum of $50,087.00, as follows:

(i) Medical expenses	$2,753.00
(ii) Travel and accommodation in St. Thomas	$604.00
(iii) Loss of wages (net of Social Security benefits) for 26 weeks	$2,860.00
(iv) Loss of wages thereafter until March 2004 (net of payment by employer)	$42,670.00
(v) Loss of wages from March 2006 to date of filing claim	$1,200.00

[39] In her judgment[22] the judge accepted Mr. Baptiste's evidence that he incurred the following expenses totaling $4,269.80 for the purposes of special damages:

Water taxi	$300.00
Initial orthofoam	$295.00
Medication	$192.00
Medical consultations	$1,568.00
Travelling expenses to attend doctor in St. Thomas	$616.00
Medical procedures	$1,298.80

[40] In making this award, the learned judge correctly did not take into account Mr. Baptiste's 3 claims for loss of wages under special damages. By his own evidence Mr. Baptiste had already benefited from these payments to him by the Social Security and by the company.

[41] However, Mrs. Small-Davis contended that Mr. Baptiste was overcompensated in special damages because the trial judge failed to take into account the sum of $3,718.90 which the Social Security Board paid to him on account of his medical expenses, which should have been deducted from the $4,269.80. The result, she submitted, was that the award for special damages should have been $550.90. With respect, however, I have seen nothing in the evidence presented on behalf of the company which provided any assistance to the trial judge to consider the deduction urged by Mrs. Small-Davis.

[42] On the other hand, Mr. Baptiste gave oral evidence and presented documents at the trial which supported the expenditure of the amounts which the judge awarded him for special damages. This included some expenses that were incurred subsequently to the filing of his claim and his witness statement in October 2007. His evidence at the trial was that he had been prior reimbursed for some of his expenses and was only claiming the amounts for which he was not reimbursed. The judge correctly, in my view, found that this was $4,269.80 on the evidence.

[22] At page 32 of the judgment.

There was no cross-examination which disputed the claim under this head.[23] This ground of appeal also fails, in my view, and I would dismiss it.

Order

[43] In the foregoing premises I would dismiss the company's appeal on all of the grounds. Consequentially, I would affirm the award that the judge made and order the company to pay the costs on this appeal in accordance with rule 65.13(b) of **CPR 2000**, if not agreed.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

[23] See pages 127-143 of the Record of Appeal.