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

CLAIM NO: ANUHCV 2010/0456

BETWEEN:

MICHAEL DE COSTRO

Claimant

and

ANTIGUA MASONRY PRODUCTS LIMITED

Defendant

Appearances:

Ms. Denise Jonas-Parillon for the Claimant
Ms. Monique Francis-Gordon for the Defendant

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2011: June 23
November 2, 3
2012: April 11

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JUDGMENT

[1] **MICHEL, J.**: The Claimant, Michael De Costro, was an employee of the Defendant, Antigua Masonry Products Limited, from October 2007 to March 2010. Although employed as a labourer, the Claimant appeared to have functioned in the course of his employment with the Defendant as a fork lift driver, a block plant operator, a mixer operator, a cube operator and even as a trainer. The

Defendant is engaged in the business of manufacturing and selling concrete blocks at its block making-plant at Bendals Village in St. John's, Antigua.

[2] On 11th March 2008, the Claimant was injured in the course of his employment with the Defendant at its aforesaid block-making plant, the cause and effect of which injury give rise to the dispute between the parties in this case.

[3] On 16th July 2010, the Claimant filed a claim form, with attached statement of claim, claiming against the Defendant for damages for negligence resulting in personal injuries, loss and damage to the Claimant.

[4] In his statement of claim, the Claimant alleged that on 11th March 2008 the Defendant ordered him to operate a block plant machine on its premises, which order he complied with. The block plant machine, which was set in automatic mode, stopped while he was operating it and his supervisor directed him to touch the switch to see if the block plant machine would restart. Upon touching the switch as directed, the loader rack of the machine came back on him and the machine caught his legs and "pushed them dangerously apart." He shouted desperately to his supervisor to turn off the machine, but no one came to his rescue. He eventually managed to pull himself out from the machine, but he experienced intense pain and a persistent burning sensation from his abdomen down to his legs; his entire abdominal and pelvic area felt sore. As a consequence of his injuries, he left work early that day. Thereafter, he continued to feel unwell and, about a week after the accident, he requested of his supervisor that he be sent to the Defendant's doctor, because his condition was not improving. The Defendant eventually had him examined and treated by Dr. Guillermo Miguel in Antigua and later by a neurosurgeon, Dr. Steve Mahadeo, in Trinidad. He

averred that the accident occurred solely as result of the Defendant's negligence and he set out 13 particulars of negligence of the Defendant. He claimed that, as a result of the Defendant's negligence, he suffered pain, personal injuries, loss and damage and he set out 21 particulars of personal injuries suffered by him. He averred that prior to the accident he had none of the injuries set out and experienced none of the symptoms associated with them. He claimed that, as a result of his injuries, he can no longer perform heavy manual labour and that there is little or no prospect of obtaining future employment as a labourer; and that he can no longer live the active lifestyle which he previously enjoyed, involving sports and dance. He accordingly claimed against the Defendant for special damages of $650 for medical expenses incurred, general damages, prescribed costs and interest on the amounts awarded.

[5] On 30th September 2010, the Defendant filed a defence to the Claimant's claim. Apart from admitting that the Defendant caused the Claimant to be treated by Dr. Miguel in Antigua and Dr. Mahadeo in Trinidad, and not admitting the Claimant's date of birth, the Defendant disputed every other allegation in the statement of claim. In particular, the Defendant denied any negligence on its part and alleged that the matters complained of by the Claimant were occasioned without any negligence or default on the part of the Defendant, and then detailed the reasons for its claim of lack of negligence on its part. The Defendant alleged that, further or alternatively, the accident was caused or substantially contributed to by the negligence of the Claimant and set out 7 particulars of negligence of the Claimant. The Defendant, in disputing the Claimant's averments of pain, injury, loss and damage sustained by him and the particulars of personal injuries suffered by him, averred that a seven-month delay from the date of the incident to the time when the Claimant first complained to his supervisor was too remote in time to definitively establish that the mishap of 11th March 2008 was the proximate or substantive cause of the Claimant's injuries and that there may

well have been a supervening event within the seven-month period which caused the injury which the Claimant complained of.

[6] On 4th November 2010, the Claimant filed a reply joining issue with the Defendant on its defence.

[7] Case management directions were given on 17th March 2011 and the case was fixed for trial on 23rd June 2011. The trial commenced on 23rd June and continued on 2nd and 3rd November 2011, with two witnesses giving evidence for the Claimant and four witnesses giving evidence for the Defendant.

[8] The first witness was the Claimant. His evidence (as per his witness statement) was that he was employed by the Defendant as a labourer until March 2010 when his employment was terminated. On 11th March 2008, his supervisor (Mr. Glasford Browne) ordered him to go and touch the switch on the block plant machine that he was working on. The block machine had been set in automatic mode but had stalled. Upon touching the switch of the block machine (as directed) the off loader rack of the machine came back on him and the machine caught his legs and pushed them apart. He shouted desperately to his supervisor to turn off the machine, but it appears that his supervisor didn't hear or understand what he was saying because the machine was making so much noise. He just heard his supervisor responding "huh" repeatedly, but the supervisor could not see what was going on from where he (the supervisor) was. He eventually managed to pull himself out from the machine, but he felt intense pain and a continuous burning sensation from his abdomen down to his legs; his entire abdominal and pelvic area felt sore. He then went and explained to his supervisor what happened and his supervisor asked him if he wanted to go to the doctor, but he declined, preferring to wait to see if the soreness would cool off shortly and to see if he was ok. He

left work around lunch time that day and did not return to work due to soreness. Afterwards, he continued to feel unwell and the following week he requested that he be sent to the Defendant's doctor as his condition was not improving. He repeatedly followed up with his supervisor on his request to be sent to the doctor, but each time his supervisor informed him that he was waiting on management. This continued over several months and, during that time, he was only able to manage light work. Numerous times he was not able to manage any work at all and he would just report to work, leave early and arrange with one of his co workers to sign off for him. Around 20th October 2008 he was feeling really ill, angry and fed up with how the Defendant was dealing with his situation and so he decided to go over his supervisor's head and make his complaint directly to the Defendant's plant manager, Mr. Clarvice Richards. Mr. Richards wanted to know why he took so long before he requested medical treatment and he informed Mr. Richards that he had repeatedly asked his supervisor to send him for medical treatment but Mr. Browne kept indicating that he (Mr. Browne) was waiting on management. Mr. Richards gave the excuse that Mr. Browne never told him anything about his (the Claimant's) request for medical treatment. He did not know who to believe, but by the next day he was sent to Dr. Guillermo Miguel for a medical examination and treatment. Dr. Miguel sent him to do an MRI at Belmont Clinic, which he did the following day (22nd October 2008). He went back to Dr. Miguel that day and Dr. Miguel gave him a letter to take to the Defendant and advised him that he should not continue working and recommended that he undergoes surgery. The Defendant sent him to Trinidad to see a neurosurgeon, Dr. Steve Mahadeo, who examined him on 1st December 2008 and sent him for another MRI in Trinidad. He went back to Dr. Mahadeo for review and Dr. Mahadeo indicated that the MRI showed that he needed surgery on his backbone at the L4-L5 levels. On 8th December 2008, Dr. Mahadeo performed the surgery on his back and reviewed his situation on 18th December 2008. He was reviewed again by Dr. Mahadeo on 19th January 2009; he was in a lot of intense pain at that time -

with abdominal pain, back pain and headaches. He was on painkillers, but they didn't seem to help. On 22nd April 2009, he went back to Dr. Mahadeo for review and Dr. Mahadeo advised that he should not return to do any heavy manual labour in the future and that he was permanently disabled to the extent of 25%. He was only able to perform light duties when he went back out to work and a few months later the Defendant fired him, citing the global economic turndown and financial difficulties as its basis for doing so. Because of his situation, he has not been able to obtain a job as a labourer anywhere else and he had been forced to cook and sell food and play music to get by. Throughout all this time, he continued to experience back pain, and in September and October 2009 he visited Dr. Singh of Ortho Medical Associates to see whether Dr. Sigh could help him. Since the accident, he has been unable to sleep in a bed because of pain and discomfort and he has had to sleep in a makeshift hammock.

[9] The Claimant then detailed his injuries resulting from his workplace accident of 11th March 2008 and stated that as a result of his injuries he can no longer perform heavy manual labour and there is little or no prospect of obtaining future employment as a labourer. He stated too that before the accident he used to play music and dance a lot and he used to play football and other active sports, but he can no longer live the active lifestyle that he previously enjoyed involving sports and dance. He therefore asked the Court to order the Defendant to compensate him for the injuries and loss he sustained as a result of the Defendant's negligence.

[10] In oral testimony at the trial, the Claimant testified that the exact words spoken to him by Mr. Browne on 11th March 2008 were – "Mike, go and climb over the roller bar and touch the home switch on the off loader rack so I can see what the off loader rack would do." He testified that he was working with the block plant for 7 months before the accident; that the off loader rack did not

move slowly towards him when he touched the switch and he was not able to control the movement of the off loader rack; upon touching the switch, the off loader rack immediately came back at him; at the time that he freed himself from it, the machine was not turned off and was still operating. He testified that the block plant that injured him was a new plant; it was installed sometime in 2007 (before he started to work with the Defendant in October 2007) and in January 2008 two white guys were brought in to do the fine tuning of the block plant so they could get it working; he never received any special training on use of the machine; he got two and a half hours of cube operator training by one of the white guys (the cube is a specific area of the machine); Tyrone Jackson was the cube operator, but he was on sick leave at the time when the white guys were there so Mr. Browne asked him to allow the white guys to train him so that when Mr. Jackson came back to work he could show him (Tyrone Jackson) the functioning of the cube; in the two and a half hours of training that he received he was not given a safety manual or given any safety training; the training that he was given was basic training on the functioning of the cube – just pushing of buttons, touching a computer screen. He testified that it is not true that the machine was in manual mode at the time of his accident; it was in automatic mode; the start light of the machine was on at the time, indicating that the machine was still in automatic mode; it is not true that the machine had stopped for about 20 minutes prior to his accident; it had only stopped for about 5 minutes. He testified that the switch that he touched (on the directive of his supervisor) would not start the block plant, but because the machine had stalled in automatic mode, by touching the switch the loader rack would move and complete its cycle. He testified that if the machine was in manual mode at the time that Mr. Browne asked him to touch the switch, it would mean that Mr. Browne was in control of the loader rack that injured him, meaning that Mr. Browne was controlling the loader rack from the control panel where he (Mr. Browne) was; but Mr. Browne was not in control of the loader rack; the machine was in automatic mode. He testified that it is true

that Mr. Browne asked him to press the button by the unloader to bring the carriage back home; that Mr. Browne was basically trouble shooting, because the machine was still in automatic mode and not in manual; that there was nothing about his positioning in stooping down to touch the switch which was not right.

[11] The cross examination of the Claimant by Learned Counsel for the Defendant was both intensive and extensive, in the course of which the Claimant reiterated his account of how he sustained the injuries of which he complains and for which he seeks compensation from the Defendant. The Claimant did, however, by some of his admissions, effectively concede that he had not been sensitive to and protective of his own safety. In particular, he conceded that he went into the block plant to touch a switch despite being aware of all of the warnings about not touching any part of the machine without making sure that the machine is off and despite his awareness that the machine was on and, moreover, that it was in automatic mode. He justified this course of action, however, by saying that he was following the orders of his supervisor and that he trusted his supervisor. He also conceded under cross examination that he worked his regular hours, he worked overtime and he worked on Saturdays and Sundays (which he was not required to do) during the period that he claimed to have been in serious pain and unable (on account of his injuries) to manage heavy or sometimes any work. He conceded too that he was dishonest in claiming and obtaining payment from the Defendant (as his employer) for work that he did not actually do.

[12] The Claimant's only supporting witness was his friend, Tracy Adams. The evidence of Mr. Adams (as per his witness statement) was that he assisted the Claimant after his surgery by collecting ice for him from the Defendant's premises so that he could keep cold the drinks that he was selling. Mr. Adams stated that he used the Claimant's jeep to collect the ice and he would get permission

from Mr. Browne or (in his absence) from Zenworth Joseph to take the ice. He also stated that, to the best of his knowledge, from after his operation, the Claimant never went to collect ice personally from the Defendant's premises.

[13] Under cross examination, Mr. Adams testified that the cooler with which he carried the ice for the Claimant weighed between 60 and 75 pounds when it was filled with ice and that he collected the ice for the Claimant about 97% of the time, like every morning (excluding Saturdays and Sundays) for about one year.

[14] The third intended witness for the Claimant, Tyrone Joseph, who had given a witness statement, did not appear after his name was called 3 times and so the Claimant closed his case.

[15] The first of the Defendant's four witnesses was Glasford Browne. His evidence (as per his witness statement) was that he has been an employee of the Defendant for 30 years and for 15 of those years he has been block plant supervisor. On the morning of 11th March 2008, the block plant was in manual mode for about 5 to 10 minutes before the Claimant's accident occurred. He went to the unloader area to investigate why the machine had stopped. When the machine stops, the plant is generally quiet and, if the Claimant shouted, everyone would have heard him, but he never heard the Claimant shout or in any way cry out in pain to sound an alert that something had happened. He would at the time have been no more than 10 feet away from the Claimant and the Claimant was within his line of sight and within his hearing. He remembered seeing the Claimant and Ronald Peters (since deceased) standing around the machine in the unloader area and hearing Mr. Peters saying that the machine had stopped, the carriage was not coming back. He asked the Claimant to press the button by the unloader to bring the carriage back home and he saw the

Claimant stoop down with his body too close to the machine, but before he could warn the Claimant about his positioning, the carriage came back and caught him (the Claimant) in the area of his waist. The Claimant quickly wriggled free; he did not at any time scream out; it all happened too quickly for that; the entire accident took a couple of seconds. He moved quickly to the area where the Claimant was and he asked him whether he was ok and the Claimant said "yes"; he asked the Claimant if he wanted to go to the doctor and he replied "no"; the Claimant never indicated that he was feeling any pain. There was a blockage in the machine that day, which is why the machine ended up stopping on that day. Pushing the button that he directed the Claimant to push would not start the plant; it was designed to manually operate the carriage. All the men in the block plant received safety training during the commissioning of the plant by the manufacturers some months before the accident; there was an in-house training for one day and there was daily training during the commissioning of the plant, which took 3 to 4 weeks.

[16] Mr. Browne stated that it was his belief that, having been around block plant machines for many years, the mishap could have been avoided if the Claimant had only positioned his body correctly, angling it away from the unloader; he would not have been caught by the carriage.

[17] The remainder of the Mr. Browne's witness statement did not address the issue of how the Claimant managed to get injured at the Defendant's block plant on 11th March 2008 in the process of carrying out a directive given to the Claimant by him (as the Claimant's supervisor on the job) instead, it addressed the timing of the Claimant's complain to him about his injuries and the Claimant's work record (as revealed by his time card) between 11th March 2008 and the termination of his services on 5th March 2010.

[18] Under cross examination, Mr. Browne made two significant concessions. The first is when he said: "I went to the unloader sight; I instructed Mr. De Costro to touch the switch; after he touched the switch the unloader came back and that's when he got injured." The second concession can equally be referred to as a confession, a contradiction or even a confusion. In its defence, the Defendant specifically pleaded that "in or about October 2008 [the Claimant] first reported to his Supervisor that he had suffered some injury from his mishap on 11th March 2008." Mr. Browne stated in his witness statement that it would have been in early October 2008 when the Claimant reported his injury to him and, moreover, that when the Claimant did so he contacted the operations manager, Mr. Clarvice Joseph, and told him what the Claimant had relayed to him. After some persistent cross examination, Mr. Browne testified that in August 2008 the Claimant requested to see a doctor because of the pain he was suffering due to the accident of 11th March 2008 and that he (Mr. Browne) discussed it with management. Then he said that management did not agree to allow the Claimant to see a doctor in August, but that they did so in October. Then - in an attempt by Counsel for the Defendant to clear up under re examination the confusion created by Mr. Browne's inconsistent evidence - Mr. Browne created more confusion when he said that it was not in October, but in August, that the Claimant first reported his injury and that he (Mr. Browne) first discussed it with management in October.

[19] The second witness for the defence was Lamoth Frederick. His evidence (as per his witness statement) was that he is the chief financial officer and a director of the Defendant and that the services of the Claimant and some other employees of the Defendant were terminated in March 2010 because of a serious downturn in the local economy and consequently in the sales at the block plant. He stated that in the course of 2009 he would see the Claimant come to the Defendant's compound quite often to collect ice from the Defendant's ice machine; that on these

occasions he would see the Claimant unload a large cooler from the back of his car, fill it with ice and then place the full cooler back into the trunk of his car, which did not strike him as the actions of an individual with a serious back injury. He stated that he has a clear view of the ice machine from his office window.

[20] In his oral testimony at trial, Mr. Frederick testified that he never saw Trinity Adams collecting ice.

[21] The third witness for the Defence was Shawn Watkins. His evidence (as per his witness statement) was that he is the mixer operator at the Defendant's block plant. He remembers the block plant machine and the unloader being on manual before the alleged mishap on 11th March 2008; the start light for the machine was off, which indicates that the block plant machine (which includes the unloader) is on manual to allow one to move any part of the apparatus manually; that in the automatic state one cannot touch any part of the machine. The block plant machine and the unloader had stopped about 20 minutes before the mishap and he heard no noise to alert him that anything was wrong. He was curious to see why the plant had stopped, so he proceeded to the area where he saw the Claimant and Mr. Browne. When he got there he observed nothing pinning the Claimant down and the Claimant was just walking away from the unloader, sort of hunched over, which is why he asked the Claimant if he was alright, to which the Claimant responded that he was ok. He asked the Claimant if he was sure and if he did not want to go to the doctor and the Claimant again said 'no'. He asked the Claimant if he didn't make [no] noise and the Claimant said 'no'. He said that the plant was stopped at the time so it would be easy for everybody to hear anything. In his presence, Mr. Browne asked the Claimant if he wanted to go to the doctor and the Claimant said 'no'. Mr. Watkins then stated that he asked the Claimant if he was alright on another two occasions before the end of the day, making a total of four times for the day that he had asked

the Claimant this question. He subsequently said though that the Claimant never told him what happened and that it was only some time after that he heard the Claimant say that the supervisor had sent him behind there to pull a switch.

[22] Mr. Watkins' evidence on this issue, therefore, is that on 11th March 2008 he saw nothing happen to the Claimant, never enquired of the Claimant what, if anything, had happened, but nonetheless proceeded to ask the Claimant "if he didn't make no noise" and the Claimant said "no", asked him if he wanted to go to the doctor and the Claimant said "no", and asked him four times in the course of that day if he was alright, despite the Claimant's continuous assertions that he was ok.

[23] Mr. Watkins then gave evidence (in his witness statement) about the Claimant's regular attendance at work after the occurrence of 11th March 2008, his continued performance of his duties, his never complaining about or showing any signs of being unwell, which evidence by Mr. Watkins appeared to be designed to counter blow-by-blow the evidence of the Claimant.

[24] Mr. Watkins also asserted in his witness statement that the switch that the Claimant said he was directed to touch would not restart the block plant, but would just assist to clear a blockage. The concluding statement in his witness statement (excluding the certificate of truth) is that - "I maintain that the Plant was in Manual Mode at the time of the alleged mishap."

[25] In his oral testimony at trial, Mr. Watkins (in examination in chief) explained what he meant by and how he knew that the machine was in manual mode prior to or at the time of the Claimant's accident on 11th March 2008.

[26] Under cross examination, Mr. Watkins re-asserted his evidence about having (before and after 11th March 2008) pulled the same switch that the Claimant had pulled on 11th March and the circumstances under which he (Mr. Watkins) had done so. He testified that he had not been trained in how to pull the switch but that he knew how to do it because he had watched what the white men were doing when they had come to commission the plant. He testified too that the Claimant received the same block plant training that he did, which he had stated in his witness statement was cube operator training.

[27] The fourth and final witness for the defence was Clarvice Richards, who was the representative of the Defendant present in Court throughout the testimony of the five other witnesses in this case. His evidence (as per his witness statement) was that he is the Defendant's plant manager for the last 19 years. He first became aware of the mishap which occurred on 11th March 2008 when (on 20th October 2008) he went in search of the Claimant after he (Mr. Richards) had conducted a spot review of the time sheets and time cards which caused his attention to be drawn to a pattern that had developed with the Claimant where, for a number of successive Fridays, he had failed to return to work after lunch. Then it was that the Claimant told him various unflattering things, including that management did not care about anybody as long as the work was done and, upon asking the Claimant to explain what he meant, the Claimant told him of the mishap that occurred in March and his inability to get medical attention for it. He said that he called the Claimant's supervisor, Mr. Browne, who confirmed the mishap, whereupon he went to his office and prepared a letter for the Claimant to see a doctor and he had his secretary to arrange for the Claimant to be seen by a doctor the next day. The Claimant returned from the doctor's visit with certified sick leave and remained on sick leave from then until the following year.

[28] Mr. Richards then gave detailed evidence (in his witness statement) about the Defendant's policies, practices and procedures and advanced how incredulous it was that the Claimant could have been injured as he claimed to have been and never sought medical attention, continued to work as normal from 11th March to 20th October 2008, and thereafter operate his "snackette", including carrying a heavy container of ice for use in his "snackette". He also gave evidence about the newness of the block plant, the safety precautions involved in its operation and the training provided to all employees, including the Claimant, on the operation of the block plant.

[29] Mr. Richards then made the astonishing assertion that the machine could not have been in automatic mode at the time that the Claimant claimed to have been injured by it and that if it was in the manual mode at the time, it would have been impossible for the Claimant to have been caught by the machine so as to have been injured by it.

[30] In his oral testimony at the trial, Mr. Richards repeated and reaffirmed much of what was contained in his witness statement about the operations of the block plant and the training of the Defendant's employees on its operation, including asserting (contrary to the evidence of Shawn Watkins) that Shawn Watkins and the Claimant were trained on the operation of the block plant and on how to angle their bodies when touching the switch, and he went even further by testifying that he observed both of them receiving the training. He testified under cross examination that if an employee was not trained as to how to angle his body when handling the switch then he would not send the person to touch the switch, and - in response to a question as to whether it would not be negligent for a supervisor to do so – he responded that a supervisor employed by the Defendant, which specializes in heavy machinery, would not knowingly send an employee to do something that is deemed dangerous.

[31] Mr. Richards also reaffirmed in cross examination, his assertion in his witness statement that the machine could not have been in automatic mode at the time of the Claimant's alleged injury on 11th March 2008 and that if it was in manual mode the pulling or pushing of the switch by the Claimant would not cause the loader rack to come back on him. He did however end up saying (under persistent cross examination as to how then the Claimant sustained his injuries) that he is still trying to understand how the injury happened.

[32] The attempt by Counsel for the Defendant to get clarification under re examination of the way the injuries to the Claimant could or could not have happened did not achieve that objective.

[33] Under questioning by the Court, Mr. Richards testified that he is not disputing that the Claimant was injured or that he was injured on the Defendant's block plant, but the Defendant is disputing that the Claimant was injured in the way that he said he was.

[34] Under further questioning by Counsel for the Defendant (with the leave of the Court as a result of the questions by the Court) Mr. Richards testified that it is also the position of the Defendant that any injury which the Claimant now has may not have occurred on 11th March 2008.

[35] The Defendant then closed its case and the Court rose to visit the locus in quo, which proved to be useful in enabling the Court to visualize some of the things that had been addressed in the course of the evidence. On resumption of the proceedings in the court room, the parties were then ordered to file written closing submissions by 3.00 pm on 23rd November 2011. The Claimant's closing submissions were filed on 14th December 2011. The Defendant – although granted an extension of time until 7th December 2011 – did not file its closing submissions before 30th

December 2011. The Court, however, accepts both written closing submissions and deems them to have properly filed, notwithstanding that they were filed late.

[36] The following questions fall to be determined by the Court in this case:

1. Was the Claimant injured on 11th March 2008 in the course of his employment with the Defendant?
2. Did the Claimant sustain the injuries when he attempted to comply with a directive given to him by the person designated by the Defendant to be his supervisor?
3. Did the Claimant's injuries result from the negligence of the Defendant, its servants or agents?
4. What injuries did the Claimant sustain as result of the occurrence at his workplace on 11th March 2008?
5. Did the Claimant himself contribute by his own negligence to the occurrence or extent of the injuries sustained by him?
6. What damages, if any, is the Claimant entitled to?

[37] In terms of the first and second questions, it is clear, and in fact undisputed, that the Claimant was injured on 11th March 2008 in the course of his employment with the Defendant at its block plant. It is also clear that the injuries sustained by the Claimant resulted from his attempting to comply with a directive given to him by his supervisor, Mr. Gladstone Browne.

[38] In terms of the third question, the Claimant's evidence is that on 11th March 2008 he was at work at the Defendant's block plant; the machine with which he was working had been set in automatic

mode, but had stalled; his supervisor, Mr. Gladstone Browne, directed him to go and touch the switch of the machine to see if it would restart; upon touching the switch which he was directed to do, the loader/offloader/unloader rack of the machine came back on him and the machine caught his legs and pushed them apart, thereby causing injury to him. This evidence, if accepted, would clearly establish that the Defendant (as the Claimant's employer) was negligent in failing to take reasonable care for his safety by causing him to handle a malfunctioning piece of equipment which could and did in fact cause serious injury to him and/or in directing him (through its supervisor, Mr. Browne) to undertake a task which could and did in fact cause serious injury to him.

[39] The response of the Defendant to this evidence by the Claimant was to present evidence (through its employees who gave witness statements and testified on its behalf) to the effect that the Claimant could not have been injured in the manner which he claimed to have been, that his injuries were not caused by any negligence on the part of the defendant and/or its employees, that he was the cause of or a contributor to his injuries, that his injuries were not the result of the occurrence at the Defendant's plant on 11th March 2008.

[40] The contribution of the Defendant's supervisor, Mr. Gladstone Browne, to the Defendant's defence was his evidence that pushing the button that he directed the Claimant to push would not start the block plant, but was designed to manually operate the machine; that the mishap could have been avoided if the Claimant had positioned his body correctly by angling it away from the unloader; and that the Claimant worked as normal after 11th March 2008, regularly clocked-in overtime, including by working on Saturdays and Sundays, declined to see a doctor when this was offered on the day of the mishap, and did not ask to see a doctor before August 2008.

[41] The contribution of Mr. Shawn Watkins to the defence was his evidence that the block plant and the unloader machine were in manual mode and the switch that the Claimant was directed to touch would not restart the block plant; that he believed the mishap happened due to the Claimant's carelessness, because his body should have been angled away from the unloader to avoid getting any part of his body caught in the machinery; that the Claimant went to lunch and returned after lunch as normal on the day of the mishap and continued at work as normal and that, upon being asked several times on the day of the mishap as to whether he was alright, he repeatedly said that he was and he declined to see a doctor when asked whether he wanted to.

[42] The contribution of Mr. Clarvice Richards was his assertion that the machine could not have been in automatic mode at the time that the Claimant claimed to have been injured by it and that if it was in manual mode at the time it would have been impossible for the Claimant to have been caught by the machine so as to have been injured by it. He also gave evidence about the Claimant being trained in the safe operation of the machine and of the apparent failure of the Claimant to follow safety precautions, and about the Claimant's functioning as normal until after 20th October 2008.

[43] Two aspects of the Defendant's response to the Claimant on how the accident of 11th March 2008 occurred are very telling on the issue of negligence. One is the definitive statement of Mr. Gladstone Browne under cross examination that: "I went to the unloader sight, I instructed Mr. De Costro to touch the switch, after he touched the switch the unloader came back and that's when he got injured." The second is the apparent unwillingness of the Defendant's witnesses to concede that the machine malfunctioned on 11th March 2008, resulting in injury to the Claimant, and their apparent inability to explain how the Claimant could have been injured by the machine without it malfunctioning; so that the Defendant's defence ended up being that machine was not in automatic

mode at the time that the Claimant was injured by it, but the Claimant could not have been injured by it if it was in manual mode.

[44] Having reviewed the evidence of the witnesses on the cause of the Claimant's mishap (as the Defendant's witnesses prefer to refer to the incident of 11th March 2008) and, notwithstanding the Claimant's concession under cross examination that he had not been sensitive to and protective of his own safety, I am satisfied on a balance of probability that the cause of the Claimant's workplace accident on 11th March 2008 and of the injuries occasioned to him as a result, was the negligence of the Defendant (through its supervisor, Mr. Browne) in directing the Claimant to undertake a task on a malfunctioning machine, the undertaking of which could and did cause serious injury to the Claimant.

[45] As a postscript on this issue, I want to state that, in making a determination as to negligence, I attached no significance to the evidence of the Defendant's witnesses about the Claimant still reporting to work and still functioning as normal at his workplace after the occurrence of 11th March 2008 and until he was sent on sick leave by the doctor to whom he was referred by the Defendant's plant manager. The evidence of the Defendant's witnesses on this issue appeared to have been prefabricated and then assembled in the witness statements and oral testimony of Messrs Browne, Watkins and Richards. Besides, the doctors to whom the Claimant had been referred indicate that he had sustained the injuries enumerated in the medical reports and if, despite these injuries, the Claimant continued to show up for work and function effectively at work, then kudos to him for his courage and fortitude.

[46] In terms of the fourth question, as to what injuries the Claimant sustained as a result of the occurrence at his workplace on 11th March 2008, the answer to that question can be found in the medical reports on the Claimant

[47] The first medical report on the Claimant was issued by Dr. Guillermo Miguel on 21st October 2008 and reported a finding of pain in the Claimant's abdominal and pelvic regions following injury on 11th March 2008 and a severe amount of gas in the Claimant's epigastric region, and recommended MRI of his lower spine for further evaluation.

[48] The MRI report dated 22nd October 2008 disclosed that the Claimant had disc dessication and substance degeneration in the lower lumbar discs; an 8.84 x 9.30 milimetre disc herniation at L4/5 and a 9.15 x 9.63 milimetre disc herniation at L5/S1; mass effect on the thecal sac and cauda; compromise of the lateral recesses and bilateral nerve root contacts.

[49] The third medical report on the Claimant was issued by Dr. Miguel on 23rd October 2008, following the MRI which he had recommended. Dr. Miguel reported findings of pain in the epigastric region and iliac region and pain in the lower spine with difficulty moving the left leg in flexion. He reported as well that the abdominal and pelvic ultrasounds performed by him showed the Claimant to be suffering from severe amount of gas in the epigastric region. He then related the findings of the MRI recommended by him and referred the Claimant for overseas medical treatment (by a neurosurgeon) for his lower spine.

[50] The fourth medical report was issued on 1st December 2008 by Dr. Steve Mahadeo – a neurosurgeon in Trinidad. In his report, Dr. Mahadeo reviewed the patient history of the Claimant,

including previous medical findings and previous medical treatment and reported his own findings of discomfort in the right gluteal region produced by lumbar flexion to 30 degrees, a pulling sensation in the right thigh and calf produced by straight leg raising to 60 degrees and right sided sciatic nerve irritation. Dr. Mahadeo then recommended a repeat MRI scan of the lower lumber spine, after the review of which he would make a decision as regards treatment and prognosis.

[51] There was an MRI report on the Claimant dated 2nd December 2008, on the basis of which report Dr. Mahadeo reviewed the Claimant and issued a medical report dated 3rd December 2008. Dr. Mahadeo reported that the MRI scan revealed a large extruded disc fragment at L5-S1 level and a subligamentous protrusion at the L4-L5 level. Dr. Mahadeo reported that he had recommended L4-L5 and L5-S1 discectomies and had explained the benefits and risks to the Claimant.

[52] The seventh medical report on the Claimant dated 18th December 2008 was issued by Dr. Mahadeo. Dr. Mahadeo reported that he had reviewed the Claimant following right L4-L5 and L5-S1 discectomies performed on him on 8th December 2008 and found that the Claimant's gait and posture were normal and he had only mild discomfort on bending, with tightness of the calf muscles and paraesthesiae in the soles. He reported on the medication prescribed for the patient and the advice given to him to refrain from lifting, bending below waste level, and high impact activity like running and jumping. He reported that the usual period of recuperation from the surgery performed on the Claimant is 12 weeks.

[53] The seventh medical report was issued by Dr. Mahadeo on 19th January 2009, which indicated that the Claimant had reported that he was experiencing headaches, palpitations and lower abdominal pain after eating. He also experienced nocturia and occasional PR bleeding. Dr. Mahadeo

reported that, upon examination of the Claimant, there was tenderness to palpation over the incision, lumbar flexion was limited to thirty degrees and right straight leg raising was limited to twenty degrees; examination of the abdomen revealed no tenderness but revealed the presence of an umbilical hernia.

[54] The eighth medical report on the Claimant was issued by Dr. Mahadeo on 22nd April 2009, following his review of the Claimant on that day. The report indicated that the Claimant had reported that the numbness in his right leg had resolved, but his back felt unstable; he had post operative physiotherapy, including interferential sonophoresis and cryotherapy; his evaluation on 31st March 2009 reported marked improvement in his condition with complete dissipation of symptoms of nerve compression. Dr. Mahadeo concluded that the Claimant had shown good progress following his surgery, but that he had residual pain in the back which is mainly myofascial in nature. He recommended continuation of physiotherapy for the next 3 months for strengthening of the core muscles of the Claimant's back. Dr. Mahadeo opined that, due to the nature of the Claimant's injury and subsequent surgery, he does not recommend that the Claimant should return to heavy manual labour in the future. He assessed the Claimant as having a permanent partial disability of 25%.

[55] What emerges from this review of the medical reports on the Claimant is that, as of October 2008, when he was first assessed medically following the accident of 11th March 2008, the Claimant 's injuries were as follows –

(a) a severe amount of gas in the epigastric region;

(b) disc dessication;

(c) substance degeneration;

(d) disc herniation L4/5 and L5/LS1;

(e) mass effect on cauda;

(f) compromise of lateral recesses;

(g) nerve root contacts.

[56] Subsequent medical reports on the Claimant showed steady progress by him and, by 22nd April 2009 - the date of the last medical report on him - the Claimant's only complain to Dr. Mahadeo was that his back felt unstable, and Dr. Mahadeo concluded that the Claimant had shown good progress following his surgery on 8th December 2008, but that he had residual back pain, which is mainly myofascial in nature. In other words, he had muscular back pain, for which Dr. Mahadeo recommended physiotherapy for the next 3 months. Dr. Mahadeo also made a recommendation on 22nd April 2009 that, due to the nature of the Claimant's injury and subsequent surgery, the Claimant should not return to heavy manual labour in future and he assessed that the Claimant had a permanent partial disability of 25%.

[57] The fifth question for determination by the Court raises the issue of contributory negligence, whereby the Court seeks to ascertain whether, notwithstanding the fact that the Claimant's injuries were caused by the negligence of the Defendant, the Claimant himself, however, by his own negligence, contributed either to the happening of the event occasioning injury to him or to the extent of the resulting injury.

[58] In order to establish contributory negligence, the Defendant must prove that the Claimant failed to take such care for his own safety as a reasonable man ought in the circumstances to do and that this failure on the part of the Claimant contributed to the fact and/or extent of his injuries.

[59] On the facts of this case, one may well argue that the Claimant ought to have contemplated about and catered for the possibility that the machine was in automatic mode and had malfunctioned and that if he did what he was directed to do by his supervisor, the likely consequence was that the machine would restart and the unloader rack would then have proceeded quickly towards him and forcibly push apart his legs so as to have caused the injuries which he suffered as a result. Well maybe he could have; but I do not find that a reasonable man employed as a labourer at a block plant for 5 months would, in the circumstances of this case, have declined to carry out a direct order of his supervisor, who had been employed at the block plant for 30 years and for 15 of these years was supervising workers like the Claimant, and whom the Claimant would have every reason to believe was fully aware of the mode in which the machine was, its condition, and the likely consequence of touching the switches on it.

[60] As to the allegation that the Claimant had failed to position himself in such a way as to angle his body away from the switch that he was touching and had thereby caused or contributed to his injuries, I reject it for the following reasons -

- Firstly, there is no or no credible evidence that the Claimant had ever received specific training on the operation of the switch which he had been directed by his supervisor to touch on 11th March 2008.
- Secondly, there is no or no credible evidence that the Claimant had ever previously touched that switch before being directed by his supervisor to touch it on the said 11th March.
- Thirdly, the Claimant's supervisor, in directing the Claimant to touch the switch, never directed him to position himself or angle his body in any way before or at the time of touching the switch.

- Fourthly, if one accepts the evidence of the Defendant's witnesses, in particular, the evidence of the plant manager, to the effect that the machine was not in automatic mode prior to the Claimant touching the switch on 11th March and could not have caused injury to him if it was in manual mode, then – based on this evidence - it mattered not how the Claimant had positioned himself or angled his body when touching the switch.

[61] For all of the foregoing reasons, I do not find that the Claimant had failed to take such care for his own safety as a reasonable man ought in the circumstances to do and that this failure contributed to the happening of the event occasioning his injury.

[62] In terms of the Claimant having contributed by any negligence on his part to the extent of his injuries, I find no evidence of this. The fact that the Claimant had indicated immediately after he was injured that he did not then wish to see a doctor can hardly be considered as negligent, as he may not then have had any reason to believe that his injuries were as severe as they turned out to have been. I also believe the Claimant's evidence that when he realized that the pain was not subsiding, he requested his supervisor to have the Defendant arrange for him to see a doctor and that his supervisor repeatedly told him that he was awaiting word from management on this. Mr. Browne's vacillating responses on this issue were indicative of his inveracity on this and other issues. He at first said that the Claimant did not request to see a doctor until October 2008; then he said that the Claimant first requested to see a doctor in August 2008; then he said that when the Claimant requested to see a doctor in August he reported the Claimant's request to management right away, but that it was not until October that management responded; then he said that the Claimant having requested in August to see a doctor, it was only in October that he (Mr. Browne) conveyed this to management. To cast further doubt on the veracity of Mr. Browne, Mr. Richards,

to whom he would have conveyed the Claimant's request, said that he (Mr. Richards) never knew of the Claimant's request until he spoke to the Claimant on 20th October 2008 and that when he asked Mr. Browne about it, Mr. Browne confirmed it.

[63] The Court having accepted the Claimant's evidence that from the week following his injury he requested, through his supervisor, that the Defendant arrange for him to see a doctor, and Mr. Browne having continually assured him that he was just awaiting word from management on his request, it was not unreasonable for the Claimant to have waited for the doctor's visit to have been arranged for him by the Defendant in respect of an injury sustained by him while carrying out an order by his supervisor on the Defendant's premises in the course of his employment with the Defendant. There is also no evidence, such as there was in the case of **Nigel Mason v Maundays Bay Management Ltd**[1] (cited by the Defendant) that the Claimant's injuries were exacerbated by his failure to seek, receive or follow medical advice on his injuries.

[64] For the foregoing reasons, I do not find that the Claimant had failed to take such care for his own safety or, for that matter, for his wellbeing, as a reasonable man ought in the circumstances to have done and that this failure contributed to the extent or gravity of his injuries.

[65] I come now to the final question for determination, that is, on the damages to which the Claimant is entitled.

[66] The Claimant is entitled to special and general damages consequent on the injuries which he sustained as a result of the negligence of the Defendant and/or its servants or agents.

[1] Anguilla Claim No. AXAHCV 2006/0090 (Unreported judgment delivered on 23rd June 2009)

[67] As to special damages, the Claimant is entitled to damages for the loss specifically pleaded and particularized by him in his statements of case and proved by him in his evidence, resulting from expenses incurred or income forgone by him between the occurrence of his injuries and the trial of the case. In this case, the only expenses incurred or income forgone by the Claimant which was pleaded and particularized by him in his statements of case and proved by him in his evidence are the expenses for visits to and consultations with Dr. Singh of Ortho Medical Associates, totaling $650.00. The Claimant is accordingly entitled to $650.00 in special damages.

[68] As to general damages, the Claimant is entitled (as per the judgment of Wooding, C.J. in the case of **Cornilliac v St. Louis**[2] decided by the Court of Appeal of Trinidad and Tobago in 1965) to general damages assessed by the Court on the basis of - (1) the nature and extent of the injuries sustained, (2) the nature and gravity of the resulting physical disability, (3) the pain and suffering which had to be endured, (4) the loss of amenities suffered, and (5) the extent to which pecuniary prospects were affected. Having set out the considerations to be borne in mind by a court in assessing general damages for personal injuries, Chief Justice Wooding went on to say:

> "I am fully aware that it is not the practice to quantify the damages separately under each head or, at any rate, to disclose the build-up of the global award. But I do think it is important for making a right assessment that the several heads of damage should be kept firmly in mind and that there should be a conscious, if undisclosed, quantification under each of them so as thereby to arrive at an appropriate final figure."

[69] Looking first at the nature and extent of the Claimant's injuries, the medical reports on the Claimant (as at October 2008) show that the Claimant sustained the following injuries - (a) severe amount of

[2] (1965) 7 W.I.R. 491

gas in the epigastric region; (b) disc dessication; (c) substance degeneration; (d) disc herniation L4/L5 and L5/LS1; (e) mass effect on cauda; (f) compromise of lateral recesses; and (g) nerve root contacts.

[70] As to the nature and gravity of the resulting physical disability, the Claimant (as of 22nd April 2009 - the date of his last medical report) had residual back pain, which is mainly myofascial in nature. In other words, he had muscular back pain, for which physiotherapy was recommended. It was also recommended that, due to the nature of the Claimant's injury and subsequent surgery, he should not return to heavy manual labour in future. The Claimant was assessed as having permanent partial disability of 25%.

[71] As to the pain and suffering endured, the Claimant had endured pain and suffering from the time of the occurrence of 11th March 2008 when (according to his witness statement) he felt intense pain and a continuous burning sensation from his abdomen down to his legs and his entire abdominal and pelvic area felt sore. By 23rd October 2008, the Claimant was reported to have pain in the epigastric region and iliac region and pain in the lower spine with difficulty moving the left leg in flexion. By 1st December 2008, it was reported that the Claimant's lower back pain had settled following spinal manipulations by a chiropractor, the stiffness and numbness he had experienced in his right leg had disappeared, but there was discomfort in the right gluetal region produced by lumber flexion to 30 degrees and a pulling sensation in the right thigh and calf produced by straight leg raising to 60 degrees. By 18th December 2008 (following surgery on 8th December) the Claimant was reported to have only mild discomfort on bending, with tightness of the calf muscles and paraesthesiae in the soles. On examination on 19th January 2009, the Claimant reported that he had been experiencing headaches, palpitations and lower abdominal pain approximately half an

hour after eating. He also reported experiencing nocturia and occasional PR bleeding and there was tenderness to palpation over the (surgical) incision. By the date of his final medical report on 22nd April 2009, it was being reported that the numbness in the Claimant's right leg had resolved, but his back felt unstable; there was marked improvement in his condition, with complete dissipation of symptoms of nerve compression; there was no spinal or paraspinal tenderness, but he exhibited tenderness to palpation along the incision; all tendon reflexes were normal, except for diminished archilles reflexes on the right.

[72] It would appear from the Claimant's witness statement that - as of the date of the statement (20th April 2011) - he was still experiencing back pain and had been unable to sleep in a bed because of pain and discomfort and he had to sleep sitting in a makeshift hammock.

[73] As to the loss of amenities suffered, the final medical report on the Claimant indicates that the Claimant is assessed as having a permanent partial disability of 25% and recommended that he should not return to heavy manual labour. The Claimant was not otherwise determined to have lost or be diminished in the amenities for normal enjoyment of life. The recommendation, contained in the post-surgery report of 18th December 2008, for the Claimant "to refrain from lifting, bending below waist level and high impact activity [for example] running and jumping" appeared to have been applicable only to the usual twelve-week period of recuperation from surgery and was not repeated in any of the two subsequent medical reports on the Claimant. The Claimant, in his witness statement, apart from affirming his inability to perform heavy manual labour, also added that there was little or no prospect of obtaining future employment as a labourer. He also stated that he used to play music and dance a lot and he used to play football and other active sports and that he can no longer lead the lifestyle that he previously enjoyed involving sports and dance. The

Claimant, however, admitted under cross examination that he did not play football for his community or any team and probably played football once per month. The Claimant also offered nothing by way of evidence of any previous involvement in dancing or any current restriction on dancing.

[74] In terms of the extent to which the Claimant's pecuniary prospects were affected by the accident of 11th March 2008, there are two factors which negatively affect his pecuniary prospects, one is the permanent partial disability of 25% and the other is the recommendation that he does not return to heavy manual labour. There appears to be nothing, however, to prevent the Claimant from continuing to earn a living from his other two income-earning activities of operating a "snackette" and playing music or, for that matter, from gaining employment other than engaging in heavy manual labour.

[75] Having completed a review of the pleadings and the evidence in this case, having determined the issues of liability and examined the relevant legal principles and practices in assessing damages for personal injuries, and having considered these principles and practices against the background of the facts of this case, I will now undertake the actual assessment of the general damages to be paid to the Claimant for the injuries sustained by him by virtue of the negligence of the Defendant. In so doing, I will be guided by the House of Lords in the case of **Wells v Wells**[3] where Lord Hope of Craighead said:

> "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

3 [1998] 3 ALL ER 481

court's best estimate of the plaintiff's general damages."

[76] The Defendant very helpfully provided the Court (in its written closing submissions) with a total of 17 judicial authorities, 6 of which are comparable cases from the Eastern Caribbean Supreme Court on assessment of damages for personal injuries.

[77] The first of the comparable cases cited and provided by the Defendant is the BVI case of **Cedric Dawson v Cyrus Claxton**[4], where the Court of Appeal of the Eastern Caribbean Supreme Court confirmed an award by the High Court in the British Virgin Islands of $97,200 (US$36,000) for pain, suffering and loss of amenities to a claimant who suffered a C3-C4, C4-C5 disc herniation as a result of a motor vehicle accident occasioned by the negligence of the defendant. Separate awards were made in that case for general damages for loss of future income and loss of earning capacity.

[78] The second of the comparable cases cited and provided by the Defendant is the Anguillan case of **Nigel Mason v Maundays Bay Management Ltd**[1]., where the High Court in Anguilla made an award of $50,000 for pain, suffering and loss of amenities to a claimant (a man who was 37 years old at the time of the accident and 45 at the time of the trial) who had suffered disc herniation of or at L5/S1 (which the doctor described as a slip disc in the lower back region) which produced sciatica (defined as pain affecting the back, hip and outer side of the leg caused by compression of a spinal nerve root in the lower back). A separate award was made by the court for loss of income/loss of pecuniary prospects.

[4] BVI Civil Appeal No. 23 of 2004 (Unreported Judgment delivered on 23rd May 2005)

[79] The third of the comparable cases cited and provided by the Defendant is the Antigua and Barbuda case of **Anita Tobitt v Royal Antiguan Beach Resort Limited**[5] where the Master (sitting in the High Court in Antigua and Barbuda) made an award of $50,000 for pain and suffering and loss of amenities to a claimant who had suffered from central and lateral disc herniation at L5/S1 with impingement of the thecal sac. The claimant in that case was assessed as 8% permanently disabled with a prognosis that she will develop post traumatic degenerative joint disease as she grows older, which would increase the percentage of the permanent physical impairments in future. A separate award of $20,000 was made for the effect of the injuries on her pecuniary prospects.

[80] The fourth of the comparable cases cited and provided by the Defendant is the Antigua and Barbuda case of **Rashid Pigott v Galeforce Windows & Doors Inc.**[6], where the Master (sitting in the High Court in Antigua and Barbuda) made an award of $50,000 for pain and suffering and loss of amenities to a claimant (a man who was 42 years old at the time of the accident and 45 by the time of the assessment of damages) who had suffered posterior osteophytes at C4/5, C5/6 and C6/7 which contained diffuse disc herniations at those levels. The claimant in that case was assessed as having a partial disability of 40% which should be lessened by surgical treatment to about 15%. A separate award was made in that case for loss of earning capacity.

[81] The fifth of the comparable cases cited and provided by the Defendant is the BVI case of **Celia Hatchett v First Caribbean International Bank**[7], where the High Court in the British Virgin Islands made an award of $54,000 (US$20,000) for pain and suffering and loss of amenities to a claimant (a woman who was 40 years old at the time of the accident and 46 at the time of the assessment of

[5] Antigua and Barbuda Claim No. ANUHCV 2006/0026 (Unreported Judgment delivered on 13th October 2010)
[6] Antigua and Barbuda Claim No. ANUHCV 2004/0069 (Unreported judgment delivered on 11th January 2007)
[7] BVI Claim No. BVIHCV 2006/0227 (Unreported judgment delivered on 29th November 2007)

damages) who had suffered degenerative disc disease at L5-S1 with herniation. No separate awards were made in that case for general damages for loss of future income and loss of earning capacity.

[82] The sixth of the comparable cases cited and provided by the Defendant is the Antigua and Barbuda case of **Oscar Frederick v LIAT (1974) Limited**[8], where the High Court in Antigua and Barbuda made an award of $80,000 for pain and suffering and $60,000 for loss of amenities to a claimant (a man who was 56 years old at the time of the accident and 61 at the time of the trial) for injuries to his back at the L3/L4, L4/L5 and L5/S1 levels producing severe lower extremity pain, weakness and gait dysfunction. The claimant in that case was assessed as having a permanent physical impairment of 17%, although this level of impairment resulted not only from the incident giving rise to the award to the claimant but also from a subsequent incident for which the defendant was not determined to have been liable. No separate award was made in that case for the extent to which the claimant's pecuniary prospects were affected by the injuries sustained; the court noting that the claimant's loss of future earnings was taken into account in arriving at the awards for pain and suffering and loss of amenities (together totaling $140,000). This case was also cited and provided by the Claimant.

[83] Taking into consideration the factors enumerated in the judgment of Chief Justice Wooding in **Cornilliac v St. Louis**[2] to be considered by a court in assessing general damages for personal injuries, and taking into consideration the dictum of Lord Hope of Craighead in the House of Lords in **Wells v Wells**[3] as to how to arrive at the court's best estimate of a claimant's general damages, the Court will make an award of general damages of $100,00 to the Claimant for pain and

[8] Antigua and Barbuda Claim No. ANUHCV 2007/0391 (Unreported judgment delivered on 31st May 2010)

suffering, loss of amenities and diminution of his pecuniary prospects.

[84] In arriving at this figure, the Court considered that, whereas the Claimant's injuries were more proximate to those of the claimant in the Oscar Frederick case than to those of the claimants in the other cases referred to, and whereas the Claimant in the present case was at the material time 19 years younger than the claimant in the Oscar Frederick case, the pain and suffering and loss of amenities of the claimant in the Oscar Frederick case were far more pronounced than those of the Claimant in the present case, while the degree of post-surgery recovery was far greater in the present case than in the Oscar Frederick case. There is in the Oscar Frederick case, unlike in the present one, medical evidence of insufficient function in the lower limbs, in addition to the severe lower back pain common in both cases; there is evidence in the Oscar Frederic case of unmitigated pain and discomfort notwithstanding multiple surgeries; although Mr. De Costro was assessed as having a greater degree of permanent partial disability than Mr. Frederick, the evidence of deterioration in the quality of life of Mr. Frederick is much more significant, such as his consequential incapacity to enjoy or impairment in the enjoyment of his favourite and identified hobbies, pastimes and other activities , including sexual activity.

[85] Like in the Oscar Frederick case, I will not make a separate award in this case for loss of future earnings and/or loss of earning capacity. Although the Claimant may no longer be able to engage in heavy manual labour, there is no indication that he may no longer be able to earn the same or greater income than previously by engaging himself full time in his other accustomed income-earning activities or by securing employment not involving heavy manual labour. The Claimant's diminished capacity (including earning capacity) is however factored into the award of $100,000 and, although the amount awarded may never be adequate recompense to the Claimant for the

pain, suffering and loss of amenities he has endured, it may nonetheless be helpful to him in the pursuit of his future endeavours, including his future pecuniary prospects.

[86] The Court's order is as follows:

1. The Defendant shall pay to the Claimant general damages of $100,000 for pain and suffering, loss of amenities and diminution in his pecuniary prospects.

2. The Defendant shall pay to the Claimant interest at the rate of 5% per annum on the sum of $100,000 from the date of service of the claim (29th July 2010) to the date of judgment (11th April 2012).

3. The Defendant shall pay to the Claimant special damages of $650 for medical expenses.

4. The Defendant shall pay to the Claimant interest at the rate of 2 ½% per annum on the sum of $650 from 20th October 2009 (the median point of the 4 receipts for medical expenses) and the date of judgment (11th April 2012).

5. The Defendant shall pay to the Claimant prescribed costs of $16,159.

Mario Michel
High Court Judge