THE EASTERN CARIBBEAN SUPREME COURT
GRENADA

IN THE HIGH COURT OF JUSTICE

Claim No. GDAHCV2014/0097

Between:

SIDNEY BINDA

Claimant

And

JUAN CALISTE

1st Defendant

MARTIN JOHN

2nd Defendant

Before:

Master Fidela Corbin Lincoln

Appearances:

Ms. Sabina Gibbs for the Claimant
Ms. Skeeta Chitan for the 1st defendant

2015: December, 2
2016: February 10

Assessment of Damages - Facial Injuries and Injury to Lumbo- sacral Spine – Nursing and Domestic Care - Whether Loss of Earning Capacity and Future Loss of Earnings are two aspects of the same head of damages or separate heads of damages – Future Medical Care

JUDGMENT

[1] **CORBIN LINCOLN M:** On 4th March 2008 the claimant suffered personal injuries, loss and damages as a result of a motor vehicle accident caused by the negligence of the defendants. Judgment on admissions was entered against the 1st defendant with damages to be assessed.

[2] The claimant was born on 2nd February 1961. He is married and has two daughters, now aged 21 and 16. At the time of the accident he states that he was self employed as a landscaper, fisherman and farmer.

SPECIAL DAMAGES

[3] The claimant pleaded special damages of $7,944.50. This sum includes:

(1) Loss of Income from landscaping and maintenance of grounds for six weeks from seven (7) clients at various rates - $3,544.50
(2) Letters before action (2 @ $300.00 each) - $600.00
(3) Cost of medical report - $150.00
(4) Loss of earnings from fishing for six (6) weeks - $ 3000.00
(5) Medical Expenses and Transportation - $650.00

[4] It is well established that damages must be pleaded and proved. [1] This rule is however not absolute. [2] In **Desmond Walters v Carlene Mitchell** [3] Wolfe J.A. (Ag.) upheld the approach of the trial judge who took cognisance of evidence from the respondent concerning his loss of earnings without supporting documentary proof. Wolfe J.A. stated:[4]

> "*There is support for the approach which the judge adopted. At paragraph 1528 of McGregor on Damages12th Edition the learned Author states:..*
>
> > *"However, with proof as with pleading, the Courts are realistic and accept that the particularity must be tailored to the facts: Bowen,L.J.,laid this down in the leading case on pleading and proof of damage, Radcliffe v. Evans [1892]2Q.B.524(C.A.).* □

[1] Ashcroft v Curtin [1971] 1 WLR 1731.
[2] Per Barrow JA in The Attorney General for Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al, Antigua and Barbuda High Court Civil Appeal ANUHCVAP2004/0022 (delivered 6th February 2006, unreported) at paras. 23 and 24 cited in Brown's Bay Resort Limited c Luca Pozzoni ANUHCVAP2010/0033
[3] (1992) 29 JLR 173
[4] ibid page 176

In relation to special damage he said:

> *"The character of the acts themselves which produce the damage and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." (Emphasis added)*

Without attempting to lay down any general principle as to what is strict proof, to expect a sidewalk or a push cart vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen,L.J. referred to as "the vainest pedantry". □

***…**This principle is no less applicable to a plaintiff involved in the sidewalk vending trade. This is a small scale of trading. Persons so involved do not engage themselves in the keeping of books of accounts. They buy, and replenish their stock from each day's transaction. They pay their domestic bills from the day's sale. They provide their children with lunch money and bus fares from the day's sales without regard to accounting. "*

[5] The principle I extract from these cases and bear in mind in assessing damages is that there will clearly be cases where a claimant who engages in informal business trade may be unable to provide documentary proof of loss of earnings given the nature of such businesses. The absence of such documentary proof does not necessarily mean that it is not a genuine claim. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances. However, the claimant still has an obligation to provide the best evidence of which he is capable in any claim for damages. [5]□

Loss of Earnings

(1) Landscaping

[5] Gordan JA in Cedric Dawson v Cyrus Claxton □BVIHCVAP2004/0023

[6] The claimant states he was a self-employed landscaper and owned three (3) weed eaters. He worked for a number of persons in St. George's, St. Paul's and St. David's. He named eleven (11) persons for whom he worked. He worked for some clients once a week, others twice a week and some twice a month. The payments varied according to the size of the yard and his remuneration ranged from about $100.00 to $300.00. He worked every day (Monday to Sunday) from 6 a.m to 6.pm and his average earnings from landscaping were $8,000.00 per month.

[7] Curiously, while the claimant states that he earned $8000.00 per month from landscaping, he has only pleaded and led evidence of a loss of earnings of $3,544.00 for a period of six (6) weeks following the accident. The loss of $3,544.00 is stated to be income lost from seven (7) clients.

[8] Statements from, or in relation to, six (6) clients support the claimant's evidence in relation to his loss of earning for six (6) weeks. I note that in the case of one client - Ivan Griffith - the evidence relied on to support the claim that the claimant did work for Mr. Griffith was provided by a Ferron Lowe. I accept that the claimant did work for Mr. Griffith. I also accept the claimant's evidence that he earned $200.00 every fortnight from Mr. Dudley Marshall and lost $600.00 for the six weeks that he was unable to work for him.

[9] I therefore award the claimant the sum of $**3,544.00** for loss of earnings as claimed.

(2) Fishing

[10] The claimant pleaded a loss of $3000.00 as loss of earnings from fishing for six (6) weeks following the accident when he was unable to work. This means that the claimant is asserting that his average monthly earnings from fishing were approximately $2000.00.

[11] The claimant's evidence is that he had two big nets and six fish pots and did fishing every evening or at least every other evening and would return home around 11 or 12 in the night. He would sometimes go in the morning to raise the net. He earned different amounts of money according to the catch and employed another person at a cost of $50.00 a day to work with him. It is not clear whether the $2000.00 which the claimant states that he earned from fishing was earned before or after deducting his employee's wages.

[12] The only evidence that the claimant earned $2000.00 per month from fishing is the evidence of the claimant as no documentary or other supporting evidence was adduced.

[13] I recognise that given the nature of his fishing business the claimant may be unable to adduce documentary evidence in support of his alleged earnings from fishing. Consequently, I may have been minded to accept the claimant's evidence regarding the quantum of his earnings from fishing notwithstanding the absence of documentary evidence. However, having considered the totality of the evidence, and for the reasons stated below and other reasons which will be addressed later, I harbor serious doubts about the veracity of the claimant's evidence with respect to the extent of his work and the quantum of his monthly earnings generally.

[14] The claimant states that he did landscaping seven (7) days a week from 6.am to 6.pm. He did fishing every evening or at least every other evening after landscaping until 11- 12 pm. He would sometimes go out early in the morning to raise his net. This evidence on its own might be plausible but the claimant goes on to say that somewhere in between landscaping every day of the week from 6 a.m to 6 p.m and fishing in the evenings he farmed quarter of an acre on weekends and did farming with Mr. Ferron Lowe. Mr. Lowe, a person for whom the claimant did landscaping, gave written confirmation that he engaged the claimant as a landscaper but I note that he said nothing about the alleged joint farming operation with the claimant.

[15] Anna Binda, the claimant's wife, gave evidence that the claimant did fishing but gave no evidence that he sold fish or that he earned an income of $2000.00 per month or any income from fishing. In fact she gave no evidence whatsoever about the earnings of the claimant. Of course, it may very well be that Mrs. Binda is not privy to the claimant's earnings and therefore I will not attach weight to the fact that her evidence was silent on these issues. Suffice it to say that her evidence did not assist the claimant in establishing the quantum of his earnings from fishing in circumstances where there is no documentary evidence.

[16] For the above reasons and reasons which will be addressed when assessing future loss, I find that the claimant's evidence regarding his earnings to be somewhat exaggerated and inflated. Since as a whole I do not find the claimant's evidence regarding the quantum of his earnings credible and the only evidence of his earnings from fishing is his evidence, I am not satisfied that the claimant earned $2000.00 per month from fishing as claimed.

[17] While the claimant has failed to prove on a balance on probabilities that he earned $2000.00 per month from fishing and thus suffered a loss of income of $3000.00 for the six (6) weeks he was unable to fish after the accident, I accept that the claimant may have earned *some* money from fishing. In the circumstance I would award the claimant nominal damages [6] of $1,000.00 for loss of earnings from fishing for the six (6) weeks following the accident.

Cost of Medical report

[6] Greer v Alstons Engineering Sales and Services Ltd (2003) 63 WIR 388; Andre Winter & Another v Charles Richardson Antigua High Court Civil Appeal No 0125 of 2006 □

[18] The claimant claims the sum of $150.00 for a medical report. This is supported by a receipt. I therefore award the claimant the sum of **$150.00** for his medical report.

Medical Expenses and Transportation

[19] The claimant pleaded special damages of $650.00 for medical and transportation expenses but has provided neither a breakdown of this sum nor documentary evidence in support of same. I am therefore unable to award the claimant the sum of $650.00 as claimed.

Letters Before Action

[20] The claimant seeks the sum of $600.00 for two letters before action and has provided evidence in support of this cost. This claim is not challenged by the defendant. I therefore award the claimant the sum of **$300.00** as claimed.

Interest on Special Damages

[21] The claimant is awarded interest of 2½% on special damages from the date of the accident to the date of judgment on liability.

GENERAL DAMAGES

Principles for Assessing General Damages

[22] The legal principles governing the assessment of general damages are well established. The main factors to be taken into account are: the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering

endured; the loss of amenities suffered; and the extent to which the claimant's pecuniary prospects have been affected

(1) Nature and Extent of Injuries Sustained

[23] The claimant tendered two medical reports. The first medical report, dated 30th April 2009, states that the claimant was admitted to hospital on 4th March 2008 with an injury to his forehead, complained of back pain and *"he allegedly had loss of consciousness for an undetermined period*". An x-ray disclosed no fractures of the skull or c-spine. The claimant was treated and discharged on 5th March 2008 "*with appropriate medication to follow up at Surgical Outpatient Clinic."*

[24] The claimant states that following his discharge he was required to attend the outpatient clinic to dress the wound on his forehead. He states that he had to seek further medical attention on numerous occasions due to continued pain in the back. I note that there is no medical report supporting the alleged numerous visits made by the claimant to the doctor.

[25] The second medical report is by Dr. Kester Dragon who examined the claimant six (6) years after the accident.

[26] Dr. Dragon states that he examined the claimant on 14th August 2014 and noted that he ambulated with an abnormal gait and had lost the 4th and 5th toes. He states further that there was obligate flexion of his back and tenderness was elicited on palpation in the midline of the dorso-lumbar spine. Dr. Dragon states:

> *" From the history, physical examination and complementary investigation, I conclude that this patient would have sustained the following injuries as a result of the Motor vehicle-Pedestrian Accident which occurred on 4/3/08:*
>
> - *Head Injury*
> - *Lacerated Wound to Left Frontal Region*
> - *Injury to the Interspinous Ligament Lumbo-sacral spine.*
>
> *…The scar on the left side of his face is sequelae of the lacerated wound.*

[27] Dr. Dragon also noted the absence of the 4th and 5th toes on the claimant's left foot but states that the toes were amputated in July 2014 due to complications of diabetes and is unrelated to the accident.

[28] Counsel for the 1st defendant submitted that it was only upon examination six (6) years after the accident that Dr. Dragon diagnosed the claimant with the interspinous ligament lumbo –sacral spine. Counsel submits that Dr. Dragon did not have the benefit of examining the claimant immediately after the accident. Counsel submitted:

> *"…hence the reason why the Doctor is drawing conclusions from the Claimant's history, physical examination and complementary investigations to forge a link between the accident and the claimant's complaints In fact Dr. Kester Dragon …introduces for the first time this new finding of injury to the interspinous ligament lumbo –sacral spine. The defendant has great difficulty accepting that this condition or ailment is a result of the accident six (6) years prior especially when one considers that medical report A discloses no such condition."*

[29] In oral evidence, Dr. Dragon stated that in order to prepare his report he considered the history of the accident (how the accident occurred, the symptoms complained of by the claimant) and he also physically examined the claimant. He stated that the claimant's injury to the interspinous ligament lumbo –sacral spine is an injury to the posterior aspect of the spine. His finding of this injury was not based on the earlier medical report but on the claimant's medical history and his examination.

[30] I drew Dr. Dragon's attention to the fact that the earlier medical report does not state that the claimant suffered a lumbo-sacral spine injury. In fact, it indicates that an x-ray of the spine revealed no fractures. Dr. Dragon stated that the ligament injury would not have been revealed on a plain x-ray which the earlier report states was done as diagnosis is based on a physical examination and the patient's history. Dr. Dragon accepts that the claimant was physically examined after the accident and states that it is possible that the ligament injury was missed. Dr. Dragon pointed out that in fact the earlier report contains no diagnosis at all. It only states the results of various tests, how the claimant was

managed and that the claimant was discharged on 5th March 2008 with appropriate medication to follow up at the Surgical Outpatient Clinic. What he can say is that upon his examination he found the claimant to be suffering from the ligament injury.

[31] Dr. Dragon's evidence is that he is able to say that the ligament injury was caused by the accident because ligament injuries have either direct or indirect causes. It is direct when there is a direct blow to the ligament. It can be caused indirectly where for e.g. a patient falls in hyperflexion (going forward) or hyperextension (going backwards). This is the most common indirect cause. The symptom is mainly pain especially when bending forward or going backward. In cases of the injury to the inter spinus ligament the pain could extend from neck distally towards the lumber region.

[32] Dr. Dragon states that his diagnostic impression is that the ligament injury was caused from the accident given the claimant's medical history including his complaints of pain and the fact that the x-rays done after the accident disclosed no fracture.

(2) The Nature And Gravity Of The Resulting Physical Disability

[33] Dr. Dragon states that that there is scarring in the area of the laceration and that he is of the opinion that:

> *"…in the future, he may experience pain and discomfort in his lower back, especially when he is engaged in activities which require prolonged and repetitive bending."*

[34] Dr. Dragon states further that the claimant will have permanent cosmetic disfigurement as a result of the extensive facial scarring causing unfavorable self-image. Management of the facial legion would be with the objective of improving appearance and is better under the care of a plastic surgeon. There is presently no available technique which would completely eliminate the scar. The claimant has obtained a quotation from Dr. Victor

Blackburn who is based in Trinidad and Tobago and performs plastic and reconstructive surgery. Dr. Blackburn states that revision surgery can be performed and will still leave a scar but *"it is hoped that, when mature and settled, these scars will be smooth (i.e. no contour deformity) – and thus much less noticeable."*

[35] The claimant's evidence is that at the time of the accident he was a fisherman, landscaper and farmer. He states that prior to the accident he considered himself *"a whole and perfect man"*. He still gets a lot of pain in his back, his forehead itches and he gets headaches often. Because of the pain in his back he is unable to do many things such as bend, fish, use his weed eater or sit for long. He is often depressed, feels quite disfigured with the ugly mark on his forehead, has to endure many questions about the scar and always has to wear a cap.

(3) Pain and suffering and Loss of Amenities

[36] The claimant's evidence is that he was in excruciating pain on the day of the accident and had to get stitches. He states that he was hospitalized for 2 days. The medical report states however that he was discharged the day after he was admitted. He further states that after his discharge he was unable to move on his own for about six (6) weeks due to headaches and dizziness. The accident also negatively affected his sex life.

(4) Impact on Pecuniary Prospects

[37] The medical report by Dr. Dragon states that the claimant may experience pain and discomfort in his lower back especially when he is engaged in activities which require prolonged repetitive bending.

[38] The claimant states that after the accident he tried to return to his landscaping work but due to the continuous pain in the back he had to give it up. He loaned his two weed eaters to his brother and the other is at home. He tried to resume fishing but was unable to do this due to the pain in his back. He also tried to start making coals but was hampered due to the back pains.

Quantification of General Damages for Pain Suffering and Loss of Amenities

[39] The court exercises its discretion in determining the quantum of damages that would be fair and reasonable compensation in all the circumstances. In determining how to exercise its discretion on the question of general damages for personal injuries it is well established that:

> " *In the context of damages for personal injuries, there are certain principles which apply and there is a discretion which needs to be exercised. In the case of pain, suffering and loss of amenity, that discretion could be wholly subjective and hence unpredictable, or it could be precedent based ; that is to say; the trial judge, having considered all of the evidence led before him, would take into account other awards within the jurisdiction and further a field. Awards of similar injuries would be clearly very helpful in relating the claimant's injuries on a comparative scale. This is not a precise science, leaving much room for the trial judge's discretion".* [7]

[40] In **Megan Julien -Bishop v John Buckmire** [8] the claimant received several injuries to her forehead when it struck the windshield of the motor vehicle in which she was travelling. She lost consciousness and was hospitalised for three weeks. She suffered numerous injuries including post concussion syndrome, ligamentous injury to the spine, loss of sensation to the left side of the forehead, generalized scarring to the left forehead, depression in the skull and abnormal corrugation of scar tissue between the eyebrows when she attempts to wrinkle. The claimant, who was left with a permanent depression in the supra orbital region and suffered extensive scarring was awarded $35,000 for pain suffering and loss of amenities and $10,000 for the continued facial scarring and sensitivity to this in 2006.

[41] In **Sheldon Jules v Brent Williams**[9] the claimant suffered multiple injuries including internal bleeding, factures to the facial bones and wound to the face. The claimant was hospitalised for 9 days and was operated on to deal with the internal bleeding. At the time of his admission to the hospital it was noted that there was severe deformity of the face.

[7] CCCA Limited v Julius Jeffrey SVGHCVAP2003/0010
[8] GDAHCV2004/0289
[9] DOMHCV2009/0018

The claimant was referred to a plastic and reconstructive surgeon since it was discovered that the claimant had "*malocclusion, inability to open his mouth and loss of sensation of his lower lips*." The medical report diagnosed fracture of several bones in the face. The claimant had to undergo further surgery and the appearance of his face was permanently altered. The claimant, who was 26 years old and an amateur boxer who represented his country, was awarded $55,000 for pain and suffering and $45,000 for loss of amenities in 2012.

[42] In **Mercedes Delplesche v Samuel DeRoche** [10] the claimant suffered trauma to head and left knee, abrasions to face and laceration to forehead, nose and lower lip. She was hospitalized for four (4) days and thereafter received treatment as an outpatient. The accident left scars on her forehead and face. The claimant was awarded $65,000.00 in 2013 for pain suffering and loss of amenities.

[43] In **Darel Christopher v Benedicta Samuels dba Samuel Richardson & Co** [11] Hariprashad-Charles J stated:

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

[44] The claimant in this case has suffered permanent cosmetic disfigurement and a back injury. While the surgery to be performed will not totally eliminate the scar, it is anticipated that after surgery the scar will be much less noticeable. The claimant states that he is a landscaper, farmer and fisherman and his pecuniary prospects have been affected. Having considered the awards made in the cited cases and the facts of this case I find that

[10] SVGHCV2012/0041
[11] BVIHCV2008/0183

$65,000.00 is reasonable compensation to the claimant for pain, suffering and loss of amenities.

[45] Interest at of 2½% is awarded from the date of service of the claim to the date of judgment on liability.

OTHER GENERAL DAMAGES

Nursing /Domestic Care

[46] The claimant states that after he was discharged from hospital he was taken care of by his family, particularly his wife. He states that they provided him with the necessary care and assistance with the performance of "daily essentials". After the accident his daughter had to go out with him as he was getting dizzy. She would accompany him to the clinic to dress his head wound. His wife had to help him buy medication because he could not work.

[47] The claimant submits that the sum of $10,000.00 would be reasonable compensation under this head of damage. The basis of the calculation of this sum was not provided.

[48] The learned authors of **Halsbury's Laws of England** [12] state:

> *"Where the injured plaintiff is cared for, not by professional, paid carers, but by volunteers, whether members of his family or otherwise, the award of damages will reflect the value of the services provided. The value of such gratuitous services may be determined either by applying the cost of buying such care on the open market, or by assessing the loss of income suffered by a carer who has given up paid employment to care for the plaintiff, or a combination of the two. A plaintiff who receives damages for services rendered by another holds the relevant amount on trust for that other."*

[12] (4th edn reissue) vol 12 (1), para 898

[49] The word “care" may attract different labels. *“ It may be child minding: attending the child when, but for the illness, it would not be necessary. It may be nursing care in the narrow sense: helping to the lavatory, administering medicine, changing the bedding, or cleaning up after an accident. It may be care (or attendance) in the wider sense: being at the bedside, to provide comfort and support to an ill child. These different roles all fall within the generic term "care and attendance" or (where the provision is by a parent and not a professionally engaged carer) "gratuitous care".* [13]

[50] Awards for gratuitous care are not only reserved for very serious cases [14] but the care given must be over and above that which would have been given in the ordinary course of family life.

[51] There is no evidence that the claimant’s wife or any other person had to give up employment and thus lost income to help to care for the claimant after his discharge. Indeed if this was basis of the claim for the sum of $10,000.00 this would be considered special damages and it would have to be pleaded and particularized. A review of the pleadings discloses that no loss of income by any carer was pleaded.

[52] The claimant must therefore be claiming this sum as general damages. The claimant states that after he was discharged from hospital he was taken care of by his family, particularly his wife. He states that they provided him with the necessary care and assistance with the performance of ‘daily essentials.’ After the accident his daughter had to go out with him as he was getting dizzy. She would accompany him to the clinic to dress his head wound. His wife had to help him buy medication because he could not work.

[53] The evidence of Anne Marie Binda, the claimant’s wife, is that after the claimant was discharged from hospital she did much of the work around the house including washing cooking and cleaning since the claimant was unable to do anything around the house for a

[13] McDuff J in Giambrone and others v JMC Holidays Ltd (formerly Sunworld Holidays Ltd) [2003] 4 All ER 1212):

[14] Giambrone and others v JMC Holidays Ltd (formerly Sunworld Holidays Ltd) (No 2) [2004] 2 All ER 891

while. She states that the claimant to this day suffers from back pain and she has helped to rub his back on several occasions to ease the pain.

[54] There is no medical evidence before me that the claimant required home nursing care after his discharge or that he was so incapacitated after his discharge that he would have been unable to perform 'daily essentials' - which I take to mean tasks such as bathing, going to the bathroom and general daily hygiene.

[55] There is also no evidence that prior to the accident the claimant performed tasks such as washing, cleaning and cooking so that an extra burden was placed on Mrs. Binda to carry out these tasks due to the claimant's inability to do same. Indeed, from the claimant's evidence I find it difficult to comprehend how he would have been performing any significant tasks around the house prior to the accident since he states that he is out of the house from 6 a.m to 11 or 12 at night daily to do his landscaping, fishing and farming.

[56] In my view an award under this head must depend on the circumstances of each case and particularly on the extent of the services provided. In this case the claimant's wife states that she helped him rub his back. His daughter accompanied him to get his wounds dressed. There is no evidence of how much time was spent by these third parties attending to and caring for the claimant. I infer from the evidence that some time may have been given by third parties to assist and care for the claimant and, presumably, comfort and support was also provided to the claimant over the six (6) week period he states it took him to recover.

[57] I find that an appropriate award on the facts of this case is $1000.00. No pre judgment interest is awarded on this sum.

Future Medical Care

[58] Dr. Dragon confirms that that the claimant will have permanent cosmetic disfigurement as a result of the facial scarring. He states

"management of the facial lesion will be with the objective of improving and is better under the care of a Plastic Surgeon. It should be understood however that there is no available technique presently to completely eliminate the scar"

[59] A cost estimate of TT$36,900.00 for scar revision surgery to improve the appearance of the scars was provided by Dr. Victor Blackburn.

[60] The evidence shows that the claimant would be required to travel to Trinidad for the surgery and would be required to spend about one (1) week. Dr. Blackburn states that he would need to review the claimant about eight weeks after surgery. The claimant's evidence is that his estimated travel expense for him and his wife for two (2) trips to Trinidad is EC$3,850.29.

[61] I therefore award the claimant the sum of TT$36,900 for the cost of surgery and EC$3,850.29 for the cost of two trips to Trinidad for the claimant and his wife.

[62] Counsel for the claimant submits that a separate award should be made for the claimant's back pains and "*likely medical attention he will have to seek in the future as to date he still gets back pains.*" Counsel submits that a separate award of $30,000 should be made for "*the contemplated operation*" that he "*may require for the pains he gets from his back.*

[63] While the medical report of Dr. Dragon states that in the future the claimant may experience pain and discomfort in his lower back there is no medical evidence that the claimant will require surgery or any future medical care in relation to his back pain. In the absence of any medical evidence I decline to make any award for future back surgery.

Loss of Earning Capacity & Future Loss of Earnings

[64] Under this heading counsel for the claimant submits that using a multiplier of 7 and a multiplicand of $120,000 the claimant's expected loss of earnings would be $840,000.00. Counsel submits that in light of the impact the injuries had on the claimant *"physically,*

mentally, emotionally, and psychologically, a lump sum should be awarded for his loss of earning capacity and future loss of earnings". It is then submitted that the claimant should be awarded a lump sum of $100,000.00 for *"economic loss*."

[65] My understanding of the submissions by counsel for the claimant is that the court should award a lump sum for both loss of earning capacity and future loss of earnings. Indeed, Lloyd LJ in **Foster v Tyne and Wear County Council** [15] stated that there was some discussion with respect to whether loss of earning capacity and loss of future earnings are two aspects of the same head of damages, or whether they should be regarded as two separate heads of damage. Lloyd LJ noted that there are cases which go both ways but stated:

> *"For myself, I would be inclined to agree with the views expressed by the Law Commission in their Report on Personal Injury Litigation, Assessment of Damages (Law Com no 56) para 204. That paragraph reads:*
>
> > *'The courts sometimes draw a distinction between "loss of future earnings" and "loss of earning capacity" [and there is a footnote which refers to Fairley v John Thompson] but this distinction seems to be based on nothing more concrete than the precision with which, from the evidence available, it is possible to quantify the loss. There is, we think, no real distinction between these two heads of damage; where the evidence precludes mathematical assessment the court has perforce to make the best estimate it can, but that estimate is still an estimate of probable future pecuniary loss.'…*
>
> *It is also the view which is expressed in McGregor on Damages (14th edn, 1980) para 1193, n 76, in which the editor says:*
>
> > *'For this reason Kemp and Kemp ... prefer to treat "handicap in the labour market" as a separate head of damage [this may be a reference to an earlier edition of Kemp and Kemp] But it is thought that such a head of damage can be subsumed under "loss of prospective earnings" in this connection."*

[15] [1986] 1 All ER 567

[66] A perusal of several cases from this jurisdiction shows that our courts have generally treated loss of earning capacity and future loss of earnings as separate heads of damages. Thus in **Martin Alphonso et al v Deodat Ramanath**[16] the Court of Appeal upheld the award of $10,000 for loss of earning capacity and reduced the damages for future loss of earnings . In relation to loss of earning capacity, the Court, citing the cases of **Moeliker v. A Rey Rolle and Co. Ltd** [17] and **Fairley v John Thompson (Design and Contracting Division Ltd)** [18] stated:

> "*The learning from the aforementioned two cases is that this head of damage would arise where a plaintiff is, at the time of trial, in employment but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. The cases show that it is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial. As* ***Denning MR*** *put it in the* ***Fairley*** *case.*
>
> > *"It is important to realize that there is a difference between award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages."*

[67] In **Randy James v Leroy Lewis et al** [19] the evidence disclosed that the claimant, an airport security officer, was doing the same type of work he did prior to the accident and was generating a higher salary at the time of trial than he did at the time of the accident. However, the claimant expressed his fear of being able to retain his employment and not being able to pass a fitness test to retain his employment and that if he were ever to have to seek employment outside of his present employment he would be handicapped as a direct result of his injury. The learned trial judge noted

> *"Kodilyne, in Commonwealth Caribbean Tort Law, 3rd ed. at pp 380, says that a claimant can recover damages for loss of earning capacity (in similar*

[16] BVIHCVAP1996/0001
[17] [1977] 1 All E.R. 9
[18] [1973] 2 Lloyds Rep. 40
[19] ANUHCV2007/0403

circumstances of this case I note) "...where there is a real risk he could lose his existing employment at some time in the future and may then, as a result of his injury, be at a disadvantage in finding an equivalent employment or an equally well paid job"

[68] The learned trial judge awarded damages for loss of earning capacity but found that there was no basis or evidence upon which an award for future loss of earnings could be made.

[69] In the present case, there is no evidence that the claimant is in employment which he is at risk of losing some time in the future. In the circumstance I do not find that an award for loss of earning capacity is appropriate in this case.

[70] The claimant's evidence is that as a result of his injury he is unable to continue to do landscaping and fishing and "can hardly do farming".[20] Damages for future loss of earnings is the amount which a claimant has been prevented by the injury from earning in the future. It is calculated mainly by: (a) taking the annual earnings of the claimant at the time of the injury and deducting the amount which he can now earn annually (***the multiplicand)***; and (b) multiplying this sum by a figure based upon the number of years during which the loss of earning power will last ***(multiplier)***.

The Multiplicand

[71] Determining the multiplicand in this case presents some difficulty.

[72] The first difficulty is ascertaining the claimant's monthly income prior to the accident. As stated earlier,[21] I do not accept the claimant's evidence regarding the quantum of his earnings and, specifically, I do not accept that he earned an average of $10,000.00 per month from landscaping, fishing and farming as alleged. In addition to reasons already stated I have noted the following:

(1) The claimant's evidence with respect to his average monthly earnings is somewhat inconsistent. On the one hand the claimant's evidence suggests

[20] paragraph 41 (xii)
[21] Paragraphs 13-17

that prior to the accident he earned an average of $8000.00 per month from landscaping, $2000.00 per month from fishing (based on what was pleaded as special damages) and $500.00 per month from farming – a total of $10,500.00 per month. The claimant however later states that his average monthly earnings were $10,000 [22] rather than $10,500.00.

(2) With respect to the earnings from landscaping, the claimant states that he earned about $8000.00 per month. There is no evidence of whether this was his gross or net earnings. The claimant's evidence is that he did landscaping for several persons. He named eleven (11) persons for whom he worked and states that he also did one-off jobs. Notwithstanding the assertion that his average monthly earnings from landscaping was $8000.00, the claimant pleaded and led evidence of a loss of income of $3,544.00 from landscaping for six (6) weeks following the accident - a loss of approximately $2,362.66 per month. This pleaded loss related to earnings from seven (7) clients who paid between $100.00 - $503.00 per month for twice monthly services. If in fact the claimant earned an average of $8000.00 per month from landscaping I find it strange that he has only pleaded and led evidence of a monthly loss of income of $2,362.66 as special damages rather than a monthly loss of $8000.00.

(3) Apart from the loss of earnings from the seven (7) clients pleaded as special damages, the claimant led no evidence of how much he earned from each of the additional four (4) clients whom he identified or any other regular clients he may have had. Even if it is accepted that in addition to the seven (7) clients the claimant also earned from all 11 persons identified and perhaps one - off jobs, I am still not satisfied on a balance of probabilities that the claimant was earning an average of $8000.00 per month from landscaping as claimed. The

[22] Paragraph 17 of claimant's affidavit sworn and filed on 12th June 2015.

claimant produced letters from six (6) of his clients to confirm his income but not from any other clients. I do not believe that it is unrealistic or unreasonable to expect more certainty and particularity with respect to proof of loss of earnings from landscaping.

(4) Even if the monthly loss of income of $2,362.66 (of which evidence was led) is doubled to take into consideration one-off jobs and any other additional clients the claimant's monthly income from landscaping would not exceed $4,725.32. The claimant may well have doubled his monthly income as pleaded some months due to his other clients and one off jobs. However, for the purposes of the multiplicand the basis is *the least amount* the claimant would have been earning if he had continued working without injuring himself.[23] In the circumstance I would apply the sum of $3,500.00 as the least amount of monthly earnings from landscaping. This figure takes into consideration any other clients the claimant may have had and one off jobs.

(5) With respect to his earnings from fishing, I have already found that the claimant failed to prove a monthly loss of $2000.00 from fishing as alleged and I awarded the claimant the nominal damages of $1000.00 for his loss of earnings from fishing for the six weeks following the accident. Since this nominal sum covered earnings for a period of six (6) weeks the monthly earnings based on this figure would be $166.66.

(6) The claimant states further that his monthly income of $10,000.00 was made up of $500.00 earned from farming and selling vegetables. The vegetables were sold from a parlour at the front of his house. I note that while the claimant gave evidence that he earned $500.00 per month from farming to support a claim for future loss of earnings he neither pleaded nor led any evidence of

[23] Cookson v Knowles (1979) A.C. 556 cited with approval in Alphonso v Ramnath 1997] 56 W.I.R. 183.

any loss of earnings from farming for the six (6) following the accident when he was unable to work.

(7) The claimant's evidence is that he farmed a quarter of an acre on weekends and also did farming with Mr. Ferron Lowe. While Mr. Lowe gave a statement that he employed the claimant as a landscaper at the sum of $503.00 monthly he gave no evidence regarding the alleged farming which the claimant stated that they did together. Secondly, the claimant's wife gave evidence that the claimant *"used to plant in and take care of a garden and has been unable to do so since the accident."* Surely she would be aware of the claimant being engaged in farming a quarter of an acre , farming with Mr. Lowe and selling vegetable from a parlour at home from which he earned about $500.00 per month. She gave no evidence of any of this.

(8) The claimant relies solely on his evidence to prove his earnings from farming. . I accept that it may be difficult for a small scale farmer like the claimant to provide documentary evidence of earnings from farming but having regard the evidence as a whole, I am not satisfied on a balance of probabilities that he earned $500.00 per month from farming as alleged.

[73] The second obstacle to ascertaining the multiplicand is that the next stage of ascertaining the multiplicand requires the court to take into consideration the claimant's current earnings. The claimant states that since the accident he cannot work as he used to. He sells fruits and vegetable obtained from the land but cannot do large scale farming due to the pain in his back. The claimant's evidence is that he earns an income from selling vegetables and fruits. The claimant has however led no evidence of the quantum of his current earnings. Any effort to ascribe a figure as the claimant's current earnings would in my view be speculative.

[74] In the absence of the claimant leading evidence of his current earnings I am unable to ascertain the appropriate multiplicand and apply the conventional multiplier-multiplicand approach. The failure of the claimant to lead the necessary evidence does not in my view mean that no award should be made under this head of damages as this would not in my view be just having regard to all the circumstances and specifically to the evidence that the claimant's ability to earn in the future has been impaired.

[75] In **Greer v Alston's Engineering Sales and Services Ltd,** [24] Sir Andrew Leggatt, who delivered the opinion of the Court, quoted with approval from **McGregor on Damages**, 13th Edition, paragraph 295:

> *" Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss, but of absence of evidence of the amount of loss."*

[76] Sir Leggatt stated further: [25]

> *"Although the loss under this head was unquantified, it is the duty of the court to recognise it by an award that is not out of scale."*

[77] Applying the principle enunciated in **Greer**, I propose to award the claimant nominal damages. The term "nominal damages" does not mean small damages.[26] Having regard to all the circumstances I find that an award of $40,000.00 is not unreasonable.

[78] In summary, the claimant is awarded damages as follows:

(1) **Special Damages**

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[24] [2003] UKPC 46

[25] ibid paragraph 9

[26] Lord Halsbury LC in Owners of ss 'Mediana' v Owners, master and crew of the lightship 'Comet' ('The Mediana') [1900] AC 113 at page 116

(a)	Loss of income for six (6) weeks from landscaping	$ 3,544.50
(b)	Loss of Income for six (6) weeks from fishing	$ 1,000.00
(c)	Cost of medical report	$ 150.00
(d)	Letters before Action	$ 600.00
	Total Special Damages	**$ 5,294.50**

(2) **General Damages**

(a)	Pain suffering and loss of amenities	$ 65,000.00
(b)	Nursing/Domestic Care	$ 1,000.00
(c)	Future Loss of Earnings	$ 40,000.00
		EC$106,000.00
(d)	Future medical care	
	(1) Scar Revision Surgery	TT$36,900.00
	(2) Cost of two (2) trips to Trinidad for two	EC$3,850.29

[79] The claimant is awarded interest of 2½% on special damages from the date of the accident to the date of judgment on liability.

[80] The claimant is awarded interest at of 2½% on damages for pain suffering and loss of amenities from the date of service of the claim to the date of judgment on liability.

[81] No pre- judgment interest is awarded on damages for nursing/domestic care, future loss of earnings or future medical care.

[82] The claimant is awarded prescribed costs.

Fidela Corbin Lincoln
Master