IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. CL DO96/1998

BETWEEN	**DONOVAN DeS0UZA**	**CLAIMANT**
AND	**CB DUNCAN & ASSOCIATES LTD.**	**FIRST DEFENDANT**
AND	**VICTOR WHYNE**	**SECOND DEFENDANT**
AND	**ROHAN ROBERTS (Administrator Ad Litem in the Estate of Anthony Roberts, deceased)**	**THIRD DEFENDANT**
AND	**ROHAN ROBERTS**	**FOURTH DEFENDANT**

Mr. Leonard Green and **Miss Sylvan Edwards** for the claimant

Mr. Kent Gammon instructed by Dunn Cox for the first and second defendants

Miss Jacqueline Cummings and **Mr. Sylvester Hemmings** instructed by Archer & Cummings for the third and fourth defendants

May 18 and 19, 2004 and June 18, 2004

Sykes J (Ag)

PERSONAL INJURY

THE ACCIDENT

On the night of December 16, 1993, along a straight stretch of the Old Harbour Main Road, the truck driven by Mr. Rohan Roberts (third defendant), stopped under a street light. Messieurs Roberts and Rose (the handy man and witness for the fourth defendant) were hunched over the engine of the truck when their concentration was

interrupted by a bang that came from the rear of the truck. They went to investigate. They saw a van. The van had hit the right rear wheel of the truck. The truck had reflectors and had on its park lights. All this is based upon the testimony of Mssrs. Roberts and Rose.

The following facts were agreed by all the parties:

(a) Mr. Victor Whyne (the second defendant) was the driver of the van;
(b) Mr. DeSouza (the claimant) was a passenger in the van;
(c) CB Duncan and Associates Ltd. (the first defendant) owned the van and Mr. Whyne was their servant and/or agent at the time of the accident;
(d) Mr. Anthony Roberts (the original third defendant) has since died.

The first and second defendants did not call anyone to testify on their behalf. Neither Mr. Whyne nor anyone who was in the van, other than Mr. DeSouza, can now be found.

Mr. DeSouza, the claimant, cannot explain how the accident occurred. This is not surprising. He was in the rear of the van. The van was traveling in the direction of Old Harbour. His back was to the cab. He was facing the rear of the van. He said that he heard squealing brakes and then felt the impact. He also said that the scene of the accident was dark. He further added that he was aided by "the other car light (sic)" in seeing that his right hand was injured. This suggests that the area where the accident took place was not lit by any street light as alleged by Mr. Roberts and his witness.

WAS THERE LIGHT?

Mr. DeSouza's evidence about the light is unclear. Mr. DeSouza stated, in his evidence dealing with the street light, that:

(a) the spot where the accident took place was dark and not properly lit;
(b) he could not say if there was a street light at the scene;
(c) he does not recall where the accident took place. He could not pin point the spot.

This evidence is not necessarily inconsistent with the testimony of Roberts and Rose who say that there was a street light there. Given Mr. DeSouza's inability to say definitively whether there was a street light and his express evidence that he does not recall where the accident took place, I have had to resolve this question by looking at other evidence. This evidence comes from Roberts and Rose, the only other witnesses who can speak to this issue. I accept their evidence not because it was uncontradicted but because I find that their testimony to be credible. There is no evidence suggesting that their testimony is inaccurate, in the sense that they may be honest but mistaken about what they saw. The effect of this is that I conclude that the truck was parked under a street light along the Old Harbour main road on the night of December 16, 1993.

Mr. Gammon suggested that Roberts and Rose ought not to be believed. He could not point to any important contradictions between them or inconsistencies in their individual testimony or even a lack of internal coherence in their account. Neither could he point to evidence that cast doubt on their accuracy or veracity. Consequently I could not accede to Mr. Gammon's request.

Mr. DeSouza was not asked whether the truck had on park lights or reflectors. Only Roberts and Rose speak to this. Mr. Roberts specifically stated that the park lights were on and the truck was decorated with reflective tapes on the tail gate and rear mud flaps. Mr. Rose said that when the truck stopped all the indicators were on. Indicators were at the front, rear and side. On this issue I prefer the testimony of Mr. Roberts. Mr. Rose was exaggerating a bit but this did not affect his overall credibility. I therefore accept that the truck was properly lit and had reflectors at the rear to indicate its presence to oncoming traffic.

LIABILITY

At the end of the case the following facts were established to the satisfaction of the court:

(a) a truck driven by Mr. Roberts had stopped under a street light;

(b) the truck was illuminated by park lights and further illuminated by reflectors;

(c) the truck had pulled completely off the road way;

(d) the van driven by Mr. Whyne collided in the right rear wheel of the truck;

(e) Mr. Whyne was the servant of CB Duncan and Associates Ltd.

(f) Mr. DeSouza was a passenger in the van. He was in the rear sitting with his back to the cab.

(g) Mr. DeSouza received his injuries as a result of this accident

The inference from these objective facts is that Mr. Whyne must have been negligent. The accident would not have occurred if Mr. Whyne had driven the van properly and with due care and attention. The court finds that he was negligent. CB Duncan and Associates Ltd are liable for his negligence. There is no issue here of the "frolic" defence or any other kind of defence that could deflect liability from CB Duncan and Associates Ltd.

From what has been said it necessarily follows that the court finds that the Estate of Mr. Anthony Roberts and Mr. Rohan Roberts are not liable. Mr. Rohan Roberts was not negligent in anyway whatsoever. He had pulled completely off the road. The truck was properly lit and had reflectors at the rear on the mud flaps and tail gate to indicate its presence. This leaves the issue of the quantum of damages.

THE METHOD OF ASSESSMENT

In dealing with the measure of damages I will use the format suggested by Wooding CJ in ***Cornilliac v St. Louis*** (1965) 7 WIR 491 (see also ***Alladat Khan v Khanai Bhairo*** (1970) 17 WIR 192).

(a) The nature and injuries sustained

All the injuries described are in respect of Mr. DeSouza's right hand. He lost the little finger and fourth finger. His middle finger is stiff at the first two joints. The middle finger can move but cannot bend. The forefinger on the hand was also injured.

Dr. Paul Brown of the Spanish Town Hospital wrote in his report that

(a) Mr. DeSouza suffered a traumatic amputation of the 5th finger of his right hand;
(b) he also had partial amputation of the 2nd, 3rd and 4th finger. There was residual stiffness in the joints.

Dr. Trevor McCartney, Senior Medical Officer of the Kingston Public Hospital produced a medical report dated December 21, 1994 that speaks to Mr. DeSouza's injuries. The report states:

(a) fracture of the distal phalanx of the right index finger;
(b) fracture of the middle phalanx of the right middle finger;
(c) fracture of the proximal phalanx of the right ring finger;
(d) traumatic amputation through the proximal phalanx of the right little finger.

He was discharged from the Kingston Public Hospital on January 17, 1994. He was referred to the physiotherapy department of the hospital.

Dr. Dixon of the Department of Orthopaedics at the Kingston Public Hospital wrote in a report dated July 19, 1995 that when Mr. DeSouza was seen on June 12, 1995 he had:

(a) amputation of 4th and 5th fingers of the right hand;
(b) stiffness of the proximal interphalanx joint of the right middle finger;
(c) numbness of the tip of the right index finger.

Dr. Dixon said that he has a thirty percent (30%) permanent disability of his right hand. There is no assessment of the disability of his whole body.

(b) **The nature and gravity of the resulting physical disability**

The claimant says that he is a painter. The injury to his right hand has affected his ability to earn. He cannot now hold a paint brush in his right hand. He used to build fowl coops and divans. He can no longer do that because he cannot hold a saw or swing a hammer to strike the nails. The injury has affected his ability to write. He can still write but not as well as he could before the injury.

Again there is nothing coming from the defence or from within the internal logic of the claimant's case to suggest that the court should not accept what the claimant says regarding his injuries. I accept that he has suffered in the way he has stated.

(c) **Pain and suffering**

The claimant did not say that he suffered any pain at the time of the accident. Even assuming he suffered some pain, the court cannot say how great or how little it was. He did not say whether he suffered any pain during the treatment. There is no evidence of any pain after the treatment and neither is there any evidence of whether there would be pain in the future. The most that the evidence revealed was that he felt weak shortly after the impact. He did not speak of any pain or discomfort either on his way to the hospital or during his hospitalization. Mr. DeSouza said he went back to the hospital for further treatment but there was no evidence of any discomfort suffered during his course of treatment. In light of the lack of evidence on this point Mr. Green suggested that I should presume that there was pain and suffering. If Mr. Green is correct this still leaves the question of the extent and duration of the pain and suffering.

Conceptually and in the eyes of the law, pain, suffering **and** loss of amenity are distinct from each other (see Lord Scarman in ***Lim Poh Choo v Camden and Islington Health Authority*** [1980] A.C.174, 189G). It is common in cases to award damages under the compendious head of "pain, suffering and loss of amenities". Nonetheless, if

there is little or no evidence of the pain and suffering then the amount awarded under this head should reflect that fact. In other words, the learning in the authorities suggests that an award under this head does not include in the global figure for "pain, suffering and loss of amenities" an amount for "pain and suffering" merely because the head of damage is called "pain, suffering and loss of amenities." It is not the label that attracts the award but the evidence in support of the claim for damages. So while it is convenient to have "pain, suffering and loss of amenities" as one head the figure will vary upwards or downwards depending on the evidence in support of actual pain and suffering even if there is loss of amenity. However, the award under this head can be substantial even if there is an absence of evidence of "pain and suffering" provided the injury is very serious and by itself, means a great loss of amenity (see ***Lim Poh Choo v Camden and Islington Health Authority*** [1980] A.C.174). I intend to analyse the evidence in this case with this understanding.

Mr. Green says that the court should presume that the claimant suffered pain. I am prepared to accept that he suffered some pain between the accident and the beginning of treatment at the hospital. I cannot assume that he suffered any pain during his hospitalization or his subsequent treatment after he was discharged. Neither can I say that he was suffering any pain at the time of the trial. Needless to say I cannot conclude that he will suffer any pain in the future. The claimant has not testified that he is suffering any pain at the moment. There is no evidence of any pain or discomfort during hospitalization or even during the period of recuperation. Even if I were to assume he suffered pain during these periods I would be hampered in the assessment because there is no evidence of its duration or intensity.

Compensation is not for the generic claimant but the one actually before the court and in my view evidence has to be adduced in relation to him. This is the inevitable conclusion from the idea of full restitution.

The reason for distinguishing the period between accident and admission to hospital from post hospitalization is that it is more probable than not that the claimant experienced pain and suffering when his little finger was severed in the accident or shortly after. Four other fingers were injured. Before he arrived at the hospital he might not have had access to any pain killers. It is quite likely that pain killers would have

been administered after his arrival in hospital. Therefore in the absence of specific evidence on the hospitalization and the post hospitalization periods I cannot conclude that he suffered physical pain and suffering in this period.

This is really a medical matter as well as a matter of sensation of the claimant. As an example of why it is not right to make assumptions on matters like this I illustrate the point through the report of Dr. R. Dixon. Intuition would suggest that if a person has lost two fingers, suffered numbness in tip of the index finger and stiffness in the middle joint of the middle finger the permanent disability would be more than thirty percent of the hand. The report, however, states that it is thirty percent.

(d) **Loss of amenity.**

This is a quality of life matter. This is not to say that pain and suffering are not quality of life matters but this head speaks directly to the effect of the injuries on the claimant. It has to do with the decreased enjoyment of life suffered by the claimant. An award is made here on the basis that the claimant has in fact suffered deterioration in his quality of life whether or not he is aware of it, even if it is temporary. An injury that results in loss of limbs inevitably involves a decrease in the enjoyment of life. The person is impaired, however slight. The claimant is entitled to an award here despite the quality of evidence relating to pain and suffering.

Here the claimant has been deprived of two fingers on his dominant hand. His middle finger is not of much use and he has suffered injury to his forefinger. There can be no doubt that he has suffered a serious injury. Equally there can be no doubt that he has suffered loss of amenity. He says that he is embarrassed by his present condition. Looking at his hand distresses him. Matters were not helped by his insensitive friend who enquired of him, "A oo fa 'ouse yuh did a bruk eena mek dem chap off yuh 'an?"

He can no longer make his fowl coops or divans. There was no other evidence of how his life has been affected by the injury to his right hand.

(e) ***The extent to which, consequentially, the appellant's pecuniary prospects have been materially affected***

Let me state at the outset here that I have treated Mr. DeSouza as a person with two careers: one as a farm worker and the other as painter/casual worker. He worked on the Canadian farm work programme between the second week in May to the second week in November. In the off season he worked with CB Duncan and Associates. It is the income from these two activities that is involved in the assessments that follow. I will refer to his farm work career as his primary career and the off season career as his secondary one.

The guiding light is the dictum of Windeyer J of the High Court of Australia which I accept is an accurate statement of principle, in ***Skelton v Collins*** (1965-66) 115 C.L.R. 94, 128 where he said:

> *The one principle that is absolutely firm, and which* ***must control*** *all else, is that damages for the consequences of mere negligence are compensatory. They are not punitive. They are given to compensate the injured person for what he has suffered and will suffer in mind, body or estate.* (my emphasis)

Special damages

i. pre trial loss of income

At the beginning of the trial Mr. Green applied to amend the particulars of claim by deleting "*Loss of earnings (and continuing) (24 weeks at CA$500 per/week)*" and substituting "*Loss of earning for 17 months (68 weeks) at JA$1,350 per week*". This amounted to JA$91,800. The amendment was granted.

As the evidence unfolded it became clear that this amendment dealt with the loss of earnings from his employment at CB Duncan and Associates Ltd and not dealing with the loss of earnings from the Canadian farm work programme. The particulars as they stood before the amendment, in light of the evidence, were dealing with the loss of income from the Canadian farm work programme. However the evidence led was in

respect of loss of income from his primary and secondary carreers. There was no application to amend the particulars of claim to bring it in harmony with the evidence concerning the Canadian farm work programme (see Rowe P in ***Michael Thomas v James Arscott*** (1986) 23 J.L.R. 144, 151B-152B). It is not possible to argue that the amendment covered both careers. The evidence is too plain that the amendment was dealing with the secondary career.

Despite this Mr. Green submitted that I should award special damages beyond the amount pleaded. His submissions made reference to the earnings of both the primary and secondary careers. I cannot accept Mr. Green's proposition. I accept Mr. Gammon's submission that after the amendment there was nothing in the particulars that spoke to the farm work programme since the amendment got rid of that aspect of the case, at least as far as special damages are concerned. Consequently nothing can be recovered as pre trial loss of income in respect of the Canadian farm work programme. This would be an item of special damages that must be specifically pleaded **and** proved. That was not done.

The law on this is very clear. In the case of ***Ilkiw v Samuels*** [1963] 2 All ER 879 Diplock LJ (as he then was) made it very clear that special damages must be pleaded and proved. His Lordship regarded it as the law for the last one hundred years and so well established that there was no direct authority on the point. The Lord Justice went on to say not only must it be pleaded but it must be particularized (see page 890I). The Jamaican Court of Appeal also regarded Diplock LJ's pronouncement as the law in Jamaica. So strict is the rule that even if evidence is led regarding special damages that is not pleaded, if there is no amendment to the pleadings the court cannot take account of that evidence. In ***Thomas v Arscott & Another*** (supra) Rowe P at page 151I-152A could hardly have been more emphatic:

> ***In my opinion special damages must both be pleaded and proved.*** *The addition of the term "and continuing" in a claim for loss of earnings etc. is to give advance warning to the defendant that the sum claimed is not a final sum.* ***When, however, evidence is led which established the extra amount of the claim, it is the duty of the plaintiff to amend his statement***

of claim to reflect the additional sum. If this is not done the court is in no position to make an award for the extra sum. (my emphasis)

In ***Arscott*** (supra) the Court of Appeal reduced the damages awarded by the trial judge from the amount proven to the amount pleaded. The result of this conclusion is that Mr. DeSouza cannot recover, in respect of his secondary career, more than JA$98, 100. He cannot recover any loss of income in respect of his primary career – it was not pleaded as special damages and so no award can be made. Incidentally, the offending pleading in ***Arscott*** (supra) was for loss of income.

The next issue is whether the claimant is entitled to recover the full income lost from his secondary career. Mr. Gammon submits, powerfully, that the claimant should not be compensated for any period between January 17, 2004 (the date he came out of hospital) and August 16, 1995 (the day he got the job at KFC). According to Mr. Gammon the claimant did not mitigate his losses and is therefore not entitled to even the JA$98,100 which was pleaded. I agree.

The principle of mitigation of losses

The light on the path is the dictum of Sir John Donaldson MR in ***Sotiros Shipping Inc. and Aeco Maritime SA v Samiet Solholt*** [1983] 1 Lloyd's R 605, 608

A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase "duty to mitigate". He is completely free to act as he judges to be in his interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendant's breach of duty.

This was said in a contract case but the principles relating to mitigation of loss is the same in contract and tort. Sir John Donaldson's dictum was approved by the Judicial Committee of the Privy Council in ***Geest plc v Lansiquot*** (2002) 61 W.I.R. 212 – a

personal injury case. His Lordship (Sir John) was saying that there is no "duty to mitigate" in the sense of an enforceable legal obligation. No one can compel the claimant to lessen his loss. However, his failure to do so will be reflected in decreased compensation once the court is satisfied that the claimant acted unreasonably, thereby making the loss greater than it would have been had he mitigated. If it were otherwise the defendant would be at the mercy of the claimant.

There is one point arising from the ***Lansiquot*** case (supra) that can be conveniently dealt with here. Their Lordships stated that where the defendant intends to say that the claimant acted unreasonably in not mitigating the loss then the defendant should give notice of that intention to the claimant (see para. 17 of judgment). That was not done here, but since the conduct of the case made it clear that this was an issue and by all indications the claimant was not taken by surprise the omission to give the notice did not prejudice the claimant. This is similar to what happened in the ***Lansiquot*** case (supra) as well, where no suggestion was made that the claimant was hampered by the lack of notice.

The evidence relating to the claimant's failure to mitigate

The claimant said that after his hospitalization his next period of employment was for three and one half months between June/July 1994 to September/October 1994. He earned JA$1,350 per forty hour work week. He was paid hourly. He cannot say how many weeks of that period he worked the full forty hours but he says it was the majority of the weeks. Neither can he say how much less than the forty hours he worked during the weeks he did not work for the forty hours. I will treat this period as if he worked the full forty hours each week and received JA$1,350 per week. Thus for this period he will not be awarded any damages since he lost no income from his secondary career.

Mr. DeSouza said in examination in chief that he tried to get a better paying job than that at KFC. The KFC job now pays him JA$5,600 per fortnight. He alleged that he could not get a better paying job because he was told that he would not be employed because of his injury. As an example of his plight he said that he applied to Denoes &

Geddes (D&G) for a job as a supervisor but was turned down after successfully completing the written test. He was told, he said, that his injured hand was the reason he would not be employed by D&G. After this experience he did not make any more enquiries for jobs anywhere because he felt that he would be treated in the same way.

When cross examined a different picture emerged. It turned out that the claimant only went to look for two jobs: one at KFC in 1995 and the other at D & G in 1998. I do not believe, on a balance of probabilities, the claimant's account of what he says occurred at D & G. My reasons now follow.

He says that he applied for a job as a supervisor. This job was to "check stock when it was going out." He said that he passed the written test. He was short listed for an interview. He was interviewed and it was then he was told that he would not be employed because of his disability. From Mr. DeSouza's account, this job had nothing to do with manual work. It was a job that required writing skills which he demonstrated he could do by successfully completing the written part of the assessment. It does seem remarkable that this employer who was seeking to employ a person with writing skills would reject Mr. DeSouza who, on his version, clearly met the requirements. He was rejected on a basis that had nothing to do with his ability to perform the job. To compound this remarkable account, he says that no qualifications were stated for the job. I do not accept this at all. I conclude that Mr. DeSouza only made efforts to find employment in 1995 when he was employed by KFC. This is other than the period he worked in 1994.

I will now examine more closely the period June/July 1994 to September/October 1994 when he said he worked with CB Duncan. He said that when the job ended he went home and sat down. He added, under cross examination, that he was told by his aunt that CB Duncan wanted workers with greater skill. Significantly he did not say that his understanding was that CB Duncan would not employ him because of his injury. In other words, in the mind of Mr. DeSouza, it was not his disability that prevented him from working any more with CB Duncan but rather his lack of the skills they required. There is no evidence that he himself went to the company to seek further employment after summer 1994.

Indeed when pressed in cross examination about any alternative employment other than the KFC and D&G jobs he could not say where else he tried to find a job.

Since he actually found a job with an employer other than CB Duncan in 1995, can it really be said that he could not have found any other job prior to that time then because of or by reason of his disability? In other words, can any loss of income, other than the income lost because of ineligibility for the farm work programme, after he was discharged from hospital be attributed to his injury? I do not think so.

It was, therefore, not true that he was told that he could not get jobs because of his disability. The real truth is that he never tried to get a job before 1995, other than the three and one half months in 1994, and when he finally made the effort, he landed a job paying him more than he earned with CB Duncan and Associates Ltd.

Mr. DeSouza cannot therefore recover, completely, the income lost from his secondary career, from the date of injury to August 1995. He will only be awarded pre trial loss of income from the date of the accident to the end of May 1994 because he began working again in June 1994. By taking an extremely favourable view of the evidence put forward by the claimant, he is therefore awarded loss of income for twenty four weeks at JA$1,350 per week. This gives a total of JA$32,400.

ii. other items of special damages

The following were pleaded as special damages:

(a)	JA$12,800	extra domestic help
(b)	JA$5,180	transportation
(c)	JA$2,897	hospital fees, dressing, medical and police reports.

Mr. Green thought that Mr. Gammon had agreed all these items of special damage. My notes and recollection do not reflect any agreement on the quantum of special damages at the beginning of this matter. It seemed to me that Mr. Gammon reserved his position to see what the claimant could prove. There is nothing wrong with

this. It is not for the defendant to say whether he objects; it is for the claimant to prove his claim. In the absence of a clear and unequivocal agreement, the burden, therefore, is on the claimant to prove his case.

The only items of special damages that were accepted by the first and second defendant, at the end of the case, were those at (c).

No evidence was led in respect of the claim for extra domestic help so this part of the claim is denied.

For transportation the amount pleaded was JA$5,810. The amount proven was JA$3,000. The claimant said he made ten round trips at JA$300 per round trip. These trips were to receive treatment for his injury. He took taxis rather than buses because the buses tended to be very crowded. I infer from this that he meant that traveling in a crowded bus with an injured hand would prove to quite a challenge and perhaps unwise. This is an entirely reasonable position to take. Mr. Gammon submits that the absence of receipts evidencing the travel by the claimant is fatal to his claim. He says that it must be strictly proved.

I accept the point as a pristine statement of law but if may misquote the great American jurist Oliver Wendell Holmes Jnr, the life of the law, at times, is not logic but experience. Speaking of the Jamaican experience, Wolfe JA (Ag) (as he then was) indicated in ***Walters v Mitchell*** (1992) 29 J.L.R. 173, 176C, the court must take into account that it may well be "vainest pedantry" (quoting Bowen LJ in ***Radcliff v Evans*** [1892] 2 QB 524) to expect from someone who is a sidewalk or push cart vendor to prove loss of earnings with mathematical precision. Similarly here, it is the "vainest pedantry" to expect Mr. DeSouza, a farm worker/painter, to prove his travel by taxi by receipts. The sum proven is not excessive. The JA$3000 is awarded.

The total special damages are JA$38,297.60.

(e) General damages

Pain, suffering and loss of amenity

In awarding general damages for pain, suffering and loss of amenity I have noted the authorities cited by counsel on both sides. No disrespect is intended but I will not reproduce them here.

I award the sum of JA$1,200,000 for pain, suffering and loss of amenity. I take account of the following:

(1) fact that the claimant's dominant hand was injured;

(2) he lost one finger at the scene of the accident. That quite likely caused pain and suffering;

(3) he subsequently lost his fourth finger;

(4) there is a 30% disability of his right hand;

(5) the proximal interphalangeal joint is now not just stiff but fixed;

(6) he has lost sensation in tip of the index finger;

(7) he feels embarrassed by his present condition;

(8) has lost something of real value, namely his fingers on his dominant hand and he can no longer indulge his passion for making things with his hands.

Loss of future income and loss of earning capacity

The claimant is no longer able to go on the farm work programme because of his injury. He said he was told that he would not be accepted even though his Canadian employer requested him. This was supported by Mr. Maurice Henry, Director from the Ministry of Labour. Mr. Henry testified that if a person loses a finger they will not be taken on the programme. The reason is that the Canadian employer does not want the risk of the disabled worker being injured while in Canada and be visited with legal and/or insurance claims.

The evidence is that the contract between the farm worker and the Canadian employer is a seasonal one. Each year the worker has to pass medical tests in order to become eligible to go on the programme.

This led Mr. Gammon to submit that since Mr. DeSouza had to pass this test each year before he could go on the programme the most he had was a legitimate expectation of employment once he passed the test. This submission ignores the reality

of the situation. Mr. DeSouza was on this programme since 1988. Mr. Henry said that indolent, the slothful and the lazy do not remain in this programme for any appreciable length of time. I infer from this that Mr. DeSouza must have proven to be satisfactory to his Canadian employer over the years. Thus subject to good health he would have continued on the programme. There is no evidence of poor health of the claimant. The only cause of exclusion from the programme is the injury resulting from the negligence of the second defendant.

Mr. DeSouza's real loss is not just the opportunity to be employed as a farm worker but the actual job itself. He can no longer pursue that career even if he is otherwise healthy. For him there is no longer a risk handicap on the farm work labour market; it is a reality. He must be compensated. The only remaining question now is whether the multiplier/multiplicand approach should be used or the lump sum approach.

In deciding which method to use I have to bear in mind that there is also a claim for loss of future earnings. The method of calculating the loss of future earnings is based upon the multiplier/multiplicand method. It will yield virtually the same result as the loss of earning capacity, if the same method is used.

There is a distinct difference between loss of future earnings and loss of earning capacity (see ***Gravesandy v Moore*** (1986) 40 WIR 222 per Carey J.A. and ***Monex Ltd. v Derrick Mitchell*** SCCA No. 83/96 (December 15, 1998) per Harrison J.A. slip op at pages 13-14). However the overlap between the two, based upon the multiplier/multiplicand method, may result in overcompensation or to put it another way, the defendant is in danger of increased damages being assessed against him. This concern is a necessary corollary of the principle that the claimant is to be compensated in full, in so far as money can do that, for the damage suffered that flows from the negligence of the defendant, subject to the rules of remoteness and the principle of mitigation of losses. As Windeyer J in ***Skelton*** (supra) has reminded us the objective, in a case of mere negligence, is compensation, not punishment.

I have therefore decided to use the multiplier/multiplicand approach for the loss of future income for the Canadian farm work programme. I will award a lump sum for loss of earning capacity in respect of this programme.

Mr. DeSouza would have continued in the programme until retirement age which I take to be sixty five years old. This is the retirement age, according to Mr. Henry, though some workers have continued past that age. I will use sixty five as the retirement age in this case. Mr. DeSouza had a good track record. There is no evidence that he had any debilitating illness that would have taken him out of the programme or shortened his expected working life.

Mr. DeSouza said that he worked from about the middle of May to the first or second week of November each year. In examination in chief he said that he earned CA$500 per week. When cross examined he expressly agreed that he earned between CA$300-$400 per week. He also expressly agreed that he did not earn CA$500 per week. I will use CA$300 per week as the basis for calculating his loss of future income because this was at least the minimum sum that he earned. There is to much uncertainty, on the evidence of the frequency with which he might have earned the upper limit or the sums between CA$300 and CA$400.

In this case he worked for twenty eight weeks per year in Canada earning CA$300 per week. This gives a sum of CA$8,400 per year. This sum in Jamaica dollars at an exchange rate of JA$49.39 is JA$414,876. This is the multiplicand.

The claimant is now forty four years old. He has another twenty one years of work. An appropriate multiplier is seven. This yields a sum of JA$2,904,132.

The lump sum figure for loss of earning capacity in respect of his primary career is JA$900,000.

Mr. Green submits that an award should be made for handicap on the labour market in respect of secondary career. He submits that there is a real risk of losing his current job at KFC. It is not clear why Mr. Green says this. He seems to be saying that the nature of the injuries to the dominant hand of the claimant in and of itself creates the risk, however small, that he may lose his current job before the end of his working life.

In my view one cannot conclude from the fact of injury and nothing more that there is a risk of unemployment as a casual worker. He has been in the current job for almost nine years. There is no evidence that Mr. DeSouza is substantially at risk or there is a real risk of losing his present job before the end of his working life because of his injuries. There was no evidence of what is involved in his job at KFC so that the court

could have some idea of how the injury might impact on his ability to do the job which may have helped to show that there was a real or substantial risk that he may lose the present job.

CONCLUSION

There is no award for pre-trial loss of income in respect of the farm work programme and his pre-trial loss of income claimed for his secondary career was reduced and included in the figure for special damages. There is also no award for handicap on the labour market in respect of the claimant's secondary career. The award for handicap on the labour market is for his farm work career.

The damages awarded is set out below and itemized because interest is now awarded on different parts of the assessment.

Special damages	JA$38,297.60 at six percent interest from December 16, 1993 to June 18, 2004.
Pain, suffering and loss of amenity	JA$1,200,000 at six percent interest from date of service of the writ to June 18, 2004.
Loss of earning capacity	JA$900,000 – no interest.
Loss of future earnings	JA$2,904,132 – no interest awarded.

Cost to the claimant. Costs of the claimant, the third and fourth defendants to be paid by the first and second defendants.