IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2004 HCV 2172

BETWEEN	ANDREW EBANKS	CLAIMANT
AND	JEPHTHER McCLYMONT	DEFENDANT

Janet Taylor instructed by Taylor, Deacon and James for the claimant

Hugh Wilson for the defendant

February 5, 6 and March 8, 2007

REFUSAL OF APPLICATION FOR ADJOURNMENT, RULE 39.7 OF THE CIVIL PROCEDURE RULES, ENTRY OF JUDGMENT, ASSESSMENT OF DAMAGES, LOSS OF EARNING CAPACITY

SYKES J.

1. Mr. McClymont is a recording and performing artist. He has been sued by Mr. Andrew Ebanks in respect of injuries received by Mr. Ebanks when he was struck by a motor vehicle driven by Mr. McClymont. The defendant is absent. When the matter came up for trial on February 5, 2007, Mr. Hugh Wilson, counsel for the defendant, indicated that Mr. McClymont was out of Jamaica. Mr. McClymont was in Australia. I granted an adjournment to February 6, 2007. On that date, Mr. Wilson renewed his application for an adjournment. He said that the defendant was still in Australia. I declined to grant a further adjournment; entered judgment for the claimant and proceeded to the assessment of damages.

Reasons for refusing adjournment

2. Mr. Wilson in applying for the adjournment on both days relied on rule 39.7 (1) of the Civil Procedure Rules ("CPR") which reads:

> *The judge may adjourn a trial on such terms as the judge thinks just.*

3. The rule is cast in very wide terms but that does not mean that it has no boundaries. When exercising any discretion under the CPR, a judge must take into account rule 1.1 which requires that the matter be dealt with justly. It emphasises that dealing with the case justly includes, ensuring that the case is dealt with expeditiously, fairly and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases.

4. Mr. Wilson submitted that this was the first trial date and that the absence of the defendant was not flagrantly intentional. He added that I could include a punitive sanction that would be activated if the defendant fails to appear at the next trial date.

5. The history of the matter is this. The accident occurred on October 28, 2003. The defendant was present at the case management conference held on March 22, 2006, when the matter was set for trial on February 5, 2007. At the pre-trial review held on September 19, 2006, the trial date was confirmed and there was a further pre-trial review set for November 29, 2006.

6. It took the claimant two years from the date of filing his claim to get to case management and fortunately for him he was able to secure a trial date within three years from the year of filing his claim. During these three years, the claimant has been incurring significant legal expense to prosecute his claim. There is no evidence of tardiness or delay on his part. He has done all that he needed to have done to bring the matter to trial. The claimant was a fisherman. For fear that images of large trawlers are raised in the minds of persons let me say that his fishing vessel was a canoe. By all account, he is a man of modest means who needs to have the matter resolved as quickly as possible.

7. When a defendant decides not to attend trial, as Mr. McClymont has done in this case, and there is no satisfactory explanation for his absence the court should be loathe to grant an adjournment. The fact that it is the first trial date is a factor to be taken into account but cannot be conclusive of the matter. We must get to the point where a first trial date is seen as a real trial date and not merely a historical fact to be recited in an application for an adjournment. The court has to have an eye not just on the litigants in the immediate matter but also on other litigants who may be hampered in the prosecution of their claim if a disproportionate amount of the court's resources have been allocated to other cases. The court must not communicate the idea that merely because a trial date happens to be the first one, it is not to be taken seriously. In this particular case, two days were allocated for trial. It would be sending the wrong signal to litigants if I were to grant an adjournment in the absence of some compelling reason why this defendant was absent after confirming the date not once but twice.

8. Were I to grant an adjournment it would increase the expense of the claimant. His anxiety would be heightened because the expected resolution of the matter would be delayed possibly for another two years. We have not yet reached the levels of efficiency where a new trial date can be had readily within weeks of a missed trial date. There is no guarantee that his witness would be available at the next trial date. He would have to live with the stress and anxiety of a pending trial for some additional months possibly years since it is not unknown that any adjournment may mean a trial in late 2008 or early 2009. Costs are not a panacea in a system that still does not have as a norm, a time of twenty four to thirty six months, from the date of filing of claim to judgment after a trial. I have to take into account the possibility of significant delay before the next trial date. I also consider whether there would be an injustice to the defendant. Mr. McClymont has been granted all reasonable opportunity to defend the claim. There was a case management conference and two pre-trial reviews at which he was present and represented by counsel.

9. Mr. Wilson did not advance the argument that his client did not know of the trial date before he went to Australia. I therefore conclude that he went to Australia with full knowledge of the date and the possible consequences should he not return for trial. There is no evidence that Mr. McClymont had to depart on this tour on short notice. Neither is there any evidence that he did not know of the tour before hand. On the face of it, it seems to me that Mr. McClymont decided that the tour of Australia took precedence over his attendance at trial. There was no evidence of the length of this tour and when he would return to Jamaica. Mr. McClymont, it appears, took a calculated risk and he clearly balanced the worst and best possible outcomes and made his choice as a free autonomous adult. That is his right. I conclude that a litigant who deliberately absents himself from the trial cannot legitimately complain of injustice if the matter proceeds in his absence. This cannot be an injustice to him. For these reasons, the adjournment was not granted. I go to the assessment of damages.

The assessment

Special damages

10. Special damages were agreed at $353,532.70. This sum is awarded at 3% interest from October 28, 2003, to February 6, 2007.

General damages

Nature and extent of injuries sustained

11. Mr. Ebanks was hit from his bicycle by a pickup truck driven by the defendant while riding to work at approximately 2:50am on October 28, 2003. He was knocked unconscious and when he regained consciousness, he recalls that he was in a lot of pain and his right leg was being treated by a physician at the Black River Hospital in St. Elizabeth. He lost consciousness again.

12. The report from the Black River Hospital dated January 19, 2004, showed that Mr. Ebanks had a comminuted fracture of the shaft of the femur; an open comminuted fracture of both tibia and fibula. He was transported to the Mandeville Hospital in the adjoining parish of Manchester.

13. On arrival at the Mandeville Hospital, he received further treatment. He testified that at this hospital a pin was placed through his ankle which caused him to scream in pain. It turned out that he had fractured his leg below and above the knee. His leg was placed in a position so that the bones would grow toward each other. In order to promote this growth of new bone, his lower right limb was held in a fixed position. The treatment regime saw him being admitted to the surgical ward and give intravenous fluids, placed on skeletal traction for 140 days. He was kept under close neuro-observation.

14. During the 140 days he had debridement and placement of an external fixator on the right leg. He suffered a pin site infection which was treated with antibiotics. His leg was dressed daily. He developed a fungal rash. The medical report from the Mandeville Hospital spoke of a closed fracture to the right femur and an open fracture involving the right tibia. There was no neurovascular damage. He suffered abrasions to the face and a superficial laceration to the right knee.

15. Consistent x-rays done over the period did not show any evidence of healing and a diagnosis of non-union was made. A decision was therefore taken to send Mr. Ebanks to the Kingston Public Hospital ("KPH") for further operative management. At KPH, he underwent an operation during which a metal bar was placed in his thigh.

The nature and gravity of resulting physical disability

16. After his hospitalisation, Mr. Ebanks was seen at the Mandeville Hospital orthopaedic clinic on March 29, 2004, and was recovering quite well. He was also seen on April 5, 2004, and he had no

complaints and he was instructed to commence physiotherapy and return to the clinic four weeks later. No opinion could be expressed on any disability or impairment he might suffer at the time he was seen at the clinic. Any such opinion would have to await the complete healing of the fracture and ability to weight bear fully. There is no medical report that indicates any permanent disability or impairment but this does not mean that there is none. There is unchallenged evidence from the claimant that he has stiffness of the knee and a shortened right leg.

17. The claimant says that he is suffering from stiffness in his leg. He said that whichever position his leg is in, bent or straight, if it stays in that position for any prolonged period of time he has difficulty straightening or bending the leg as the case may be. He also now hears a knocking sound in his knee.

18. Mr. Ebanks told the court that he is embarrassed by the fact that because of his facial scars persons think that he is some sort of criminal. He added that if he goes for a job, the impression is left that he is "a bad man." He says that he feels badly about this because if he had not had the accident he would have been "an ordinary person right now." By this, he meant he would have been scar free and without anyone thinking he is a criminal.

Pain and suffering endured

19. The claimant said that he experienced great pain when he arrived at the Mandeville Hospital and the pin was being placed in his ankle. His bones had to be drilled and it was an uncomfortable sensation. When he went to KPH, he was still experiencing pain and discomfort. After the surgery at KPH and he had to be immobilised for some time, his skin began to itch.

The loss of amenities suffered

20. Mr. Ebanks has been deprived of the opportunity of playing basketball and football, sports he enjoyed before the accident. He has been reduced to being a spectator. He is unable to play because, he says, he no longer has the balance he had before the accident. This imbalance is the result of a shortened right leg.

21. He testified that he is no longer able to fish in his father's canoe because he can neither lift anything nor stand as required in a fishing canoe.

Quantification of damages

Loss of earning capacity

22. I shall deal with loss of earning capacity first. Mr. Ebanks has tried other forms of employment since his injury. He has tried driving fork lifts and bobcats but the inability to have his leg in one position for any length of time has prevented him from keeping these jobs. The bobcat is a small earth moving equipment that is used in confined spaces.

23. I shall review the case law with three objectives. First, to identify as accurately as possible the type of loss this head of damages addresses. Second, to determine whether any principles exist which assist in determining which of the three assessment methods is used in any given case. Third, to determine the magnitude of the award. I now embark on the first objective.

What is the loss being compensated?

24. The head of damages known as loss of earning capacity seemed to have made its first appearance in England in the case of ***Ashcroft v Curtin*** [1971] 1 W.L.R. 1731. In that case, an engineer was awarded damages for the risk of being placed on the labour market albeit that at the time of the trial the risk was minimal. Edmund Davies L.J. (as he then was) said at page 1738-1739:

> *His capacity to engage himself outside the company, finding the sort of work for which he has been trained since he was a boy of 14, has been virtually extinguished. I agree that the risk of his being placed in such a predicament is not great. But it does exist, and I think it justifies some award being made in respect of it. Doing the best I can, and fully realising that I too am rendering myself liable to be attacked for simply "plucking a figure from the air," I think the proper compensation under this head is £2,500.*

25. The next case of significance is ***Gladys Smith v The Lord Mayor*** (1974) 17 K.I.R. 1. It was this case which provided the name Smith v Manchester damages to this head of damages. In that case, the claimant was still working at the time of the accident. Scarman L.J. (as he was at the time) said:

When the judge stated his conclusion, he said that he was awarding (and now I quote his words) "a notional figure of £300 to compensate her" (i.e. the plaintiff) "for a possible loss of earning capacity". These words, in my judgment and with the very greatest respect, reflect an entirely wrong approach to the very important item of general damages, namely loss of future earnings and earning capacity. There is nothing notional about the damages awarded for this item of loss; and it is quite untrue to describe the loss of earning capacity as only a "possibility": it is in truth a fact with which this woman is going to have to live for the rest of her working life.

Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure. Fortunately in this case there is no such loss sustained by the plaintiff because, notwithstanding her accident, she has continued with her employment at the same rate of pay and, as long as she is employed by the Manchester Corporation, is likely, if not certain, to continue at the rate of pay appropriate to her pre-accident grade of employment. That element of loss, therefore, does not arise in this case.

The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain:-- that, in the event (which one hopes will never materialise) of her losing her employment with the Manchester Corporation, she, with a stiff shoulder and a disabled right arm, is going to have to compete

> *in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a "possible" loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.*

26. A number of things should be noted about this passage. First, Lord Justice Scarman repudiated the idea that there was anything notional about damages for loss of earning capacity. Second, Scarman L.J. decided that loss of earning capacity is loss of something that is permanent. Third, loss of earning capacity is really dealing with a loss of ability to compete in the open labour market, the financial effects of which may be delayed for some time. Scarman L.J. held that the fact that the claimant was unlikely to suffer any loss of earnings in the immediate future, she had in fact lost something of value, namely, the ability to compete in the labour market on equal footing with other persons. That inability was regarded as an existing loss even though there was no evidence in the case that she was at risk of losing her job any time soon. To put it another way, the financial impact of the loss would either be delayed or not occur at all. Fourth, although the Lord Justice spoke of loss of future earning and loss of earning capacity he was using the expressions interchangeably, at this point, which is unfortunate because case law has established beyond all doubt that loss of future earning and loss of earning capacity are distinct head of damages (see Lord Denning M.R. ***Fairley v. John Thompson (Design and Contracting Division) Ltd.*** [1973] 2 Lloyd's Rep. 40). Fifth, his Lordship held that the multiplier/multiplicand method would not be used in the particular case because Mrs. Smith was still working and the Corporation had undertaken to employ her and it was very likely that her pre-accident level of earnings would continue. This is important when I come to decide which method of calculating loss of earning capacity to use in the instant case. From this case, it is clear that once there is evidence that the claimant's competitive position is reduced because of the injuries suffered arising from the negligence of the tortfeasor, the claimant must be compensated even if the financial impact of the loss is delayed or eliminated. The remoteness or immediacy of the risk of losing the job affects only the quantum of the award but not the award itself.

27. It is important to note that Edmund Davies L.J. in ***Smith*** accepted the formulation of the claimant's counsel. Learned counsel submitted that the proper way of looking at the matter was to recognise that the claimant "cannot just walk out into the open labour market, with all its competition, and have anything like the same chance of fresh employment as she would have had before she sustained her injuries". Mrs. Smith's counsel urged on the Court of Appeal that she was tied to the present job, that is to say, she was impaired in her ability to seek alternate employment. To state the matter differently, had the Manchester Corporation not undertaken to continue to employ her she would have had a hard time competing in the open labour market because of her injuries. She had suffered a reduction of employment possibility because of the injuries and this reduction, tethered her to her current job.

28. It is my view that when ***Smith*** is understood in the way I have stated it is apparent that the view that the claimant has to be working at the time of trial to be eligible for this award is not a legitimate deduction from ***Smith***. None of the judge's in ***Smith's*** case said so. Lord Justice Browne who authored what is considered to be the leading judgment in ***Moeliker v A. Reyrolle*** [1977] 1 W.L.R. 132 came eventually to this understanding when he stated in ***Cooke v Consolidated Industries*** [1977] I.C.R. 635, 640 - 641

> *I agree that this appeal should be allowed and the figure increased from £500 to £1,500 for the reasons given by Lord Denning M.R. I only add anything because I was a party to the decisions in Moeliker and Nicholls to which Lord Denning M.R. has referred, and this gives me a chance of correcting something which I now think is wrong which I said in Moeliker's case.*
>
> *This case differs in one respect on the facts from any of the three previous cases cited. In all those cases the plaintiff was in fact in work at the date of the trial. In fact, in all the cases he was still in the employment of his pre-accident employer. This case is different because at the date of the trial the plaintiff was not in work at all, although his previous employer would have been willing to employ him and he could have continued to work as a deckhand if he had ignored the advice of his doctor.*
>
> *In my view, it does not make any difference in the*

circumstances of this case that the plaintiff was not actually in work at the time of the trial. The trial judge said: "Looking ahead as best I can with the information before me, I expect that [the plaintiff] will obtain employment pretty well immediately." The judge turned out to be quite right, because he did. In Moeliker's case at p. 261 of the report in [1976] I.C.R. 253, I said: "This head of damage only arises where a plaintiff is at the time of the trial in employment." On second thoughts, I realise that is wrong. That was what I said, but on second thoughts I realised that was wrong; and, when I came to correct the proof in the report in the All England Reports, I altered the word "only" to "generally," and that appears at [1977] 1 All E.R. 9, 15. Accordingly, in my judgment, the trial judge here was absolutely right to apply the principles of Moeliker's case and Nicholls'; case. Those cases were cited to her by counsel in some detail, and it is plain from the judgment that she did apply those cases.

29. Since Lord Justice Browne is now of the view, as was clearly established in ***Smith's*** case, that whether the claimant is working or not at the time of the trial does not affect the award of loss of earning capacity, then it necessarily follows that what is being compensated is not so much the risk of job loss (since an employed person, by definition cannot lose what they do not have) but rather the inability to compete on the labour market which is a loss in and of itself. The inability to compete on the open labour market, once established, is a fact. If this is so and it is accepted that this inability is an appropriate subject of compensation then the role that the risk of job loss plays in the assessment process must be carefully isolated and analysed. This is consistent with cases before ***Moeliker***.

30. In ***Smith***, Lord Justice Edmund Davies found that loss for which Mrs. Smith was being compensated "*[was] an existing and permanent reduction in earning capacity, but, as there is no present or clearly foreseeable financial loss, we cannot adopt the multiplicand multiplier method of assessment*". The reason for this conclusion was simply that there was no substantial or real risk of the claimant losing her job, which meant that there was no immediate or foreseeable financial loss arising from the reduced earning capacity. Likewise, in the earlier case of ***Ashcroft*** the Court of Appeal expressly found that the risk of the claimant being placed in a position where he would

have to compete in a competitive labour market was not great but it existed.

31. In my view, the role that the risk of losing the current job plays is that of quantification of the loss. In other words, if the claimant is working at the time of the trial and the risk of losing the job is not high then the award is low. Conversely, if the claimant is working at the time of the trial but risk of losing the job is high coupled with difficult in finding an equally paying job, then the award may be high. I have completed my first objective. I now to the second objective.

Which method of calculation is appropriate in this case?

32. The Court of Appeal of Jamaica has indicated that there are three methods of calculating handicap on the labour market. These are (a) the multiplier/multiplicand method; (b) the lump sum method or (c) increasing the award for pain, suffering and loss of amenities to include an unspecified sum for loss of earning capacity (see Gordon J.A. in ***George Edwards v Dovan Pommells*** SCCA 38/90 (delivered March 22, 1991)). For a time, there was some doubt in Jamaica about whether the multiplier/multiplicand method was an acceptable method. The vast majority of cases in which this type of award arises saw a lump sum being awarded. The decision of ***Campbell and Others v Whylie*** (1999) 59 WIR 326, 341 - 342 has laid doubts to rest.

33. As far as I am aware, the Court of Appeal of Jamaica has not established any guidelines indicating when it is appropriate to use any of the methods. The task must now be to develop workable principles that can apply to the majority of cases so that legal advisers can inform their clients when the courts are likely to choose one method over the other. This is not an academic exercise because the settlement of cases is dependent on some certainty in the application of assessment methods. The difference in the award depending on whether the multiplier/multiplicand or the lump sum method is used is simply staggering.

34. In respect of the third method identified by Gordon J.A., there is authority that indicates that this ought not to be done. This authority is ***Moeliker*** which our Court of Appeal has accepted as correctly stating the law. In ***Moeliker*** Browne L.J. said at [1977] 1 W.L.R. 132, 141:

> *It may well be, as suggested in argument, that damages for loss of earning capacity were in the past usually included as an unspecified part of the general*

> *damages for pain, suffering and loss of amenity. But since Jefford v. Gee [1970] 2 Q.B. 130 damages under this head must be separately quantified. This court held in Clarke v. Rotax Aircraft Equipment Ltd. [1975] I.C.R. 440 that no interest is recoverable on damages under this head.*

35. In any event, the third method is not consistent with the modern trend to itemise awards so that the parties can identify the sums the judge awarded to particular heads of damages. This is important in the event of an appeal. The Court of Appeal can know the specific awards made.

36. I shall examine the English and Jamaican cases to see if by combining dicta and case result it may be possible to identify workable criteria that would indicate when the remaining two methods of assessment may be used. It would bring greater certainty to this head of damages.

37. In ***Smith's*** case, the claimant was working at the time of the trial yet her award for loss of earning capacity was increased from £300 to £1000. This was done despite the fact that Edmund Davies L.J. was of the view that there was no evidence of present or foreseeable financial loss from her injuries. In this context, Edmund Davies L.J. held that it would not be appropriate to use the multiplier/multiplicand method. Scarman L.J. shared the same view. An important question is why did the Lords Justices have this view? The answer is to be found more obviously in the judgment of Lord Justice Edmund Davies than in the judgment of Lord Justice Scarman. When Edmund Davies L.J. said that there was no evidence of present or foreseeable financial loss from Mrs. Smith's injuries, what he was saying was that although Mrs. Smith had suffered an immediate loss of earning capacity for which she was to be compensated, the undertaking by her employers protected her from the immediate financial consequence which she would have felt had she been forced to go into the competitive labour market immediately. This is the only rational explanation for using the lump sum method in that case rather than the multiplier/multiplicand method. This reasoning also explains ***Ashcroft***. It will be remembered that in ***Ashcroft***, the court expressly found that the risk of the claimant being placed in the predicament of not being able to work was minimal, yet he received £2,500 for loss of earning capacity.

38. The explanation I have given for ***Smith*** and ***Ashcroft*** holds good for ***Fairley v John Thompson (Design and Contracting) Ltd*** [1973] Lloyd's Rep. 40. The claimant was 40 years old at the time of the accident and approximately 42 years at time of trial. Scarman L.J. looked at the loss of earning capacity more closely than the other judges. His Lordship noted at pages 43 and 44 that the trial judge took the loss of earning capacity into account when awarding general damages. The trial judge had included a sum for loss of earning capacity in the award for pain, suffering and loss of amenity. The Court of Appeal did not comment adversely on this practice. This judgment provides support for Gordon J.A.'s view in ***Pommells*** that one of the methods of awarding damages for loss of earning capacity is to include an unspecified sum in the award for pain, suffering and loss of amenities but for reasons already given this practice is not to be encouraged. The evidence was that Fairley would not be able to climb heights but he could do ground work. Thus while he was unable to climb up on buildings he would be able to find work. His earning capacity was impaired but it had not resulted in any loss of income, loss of employment and there was no evidence that he would have to cease working before the expected retirement age. A lump sum was awarded.

39. My explanation for the use of lump sum method as opposed to the multiplier/multiplicand method meets its first serious challenge in the ***Consolidated Fisheries*** case. Serious challenge because the medical evidence and financial information were present. This would have made the multiplier/multiplicand method open to use but it was not used. The total award was £3,500.00 with £3000 for general damages and £500 for loss of earning capacity. The award for loss of earning capacity was increased from £500 to £1500. The medical evidence was that the injury the claimant received would make it increasingly difficult for him to find jobs in about 10 - 15 years. He was unemployed at the time of the trial. The claimant was 25 years old at the time of the injury and 26 years at the time of trial. His weekly earnings were known. The trial judge held that had she made a higher award for loss of earning capacity she would have reduced the award for pain and suffering. On appeal it was contended that the trial judge erred in that she failed to appreciate that the claimant's competitive position was weakened. Lord Denning M.R. noted that there was no claim for loss of future earnings and if there was, it would have been unlikely to succeed because the claimant had not suffered any diminution of income because it was he that decided to leave his current job even though such jobs were still available. In

dealing with loss of earning capacity the Master of the Rolls said at page 639:

> *For pain, suffering and loss of amenities, he gets damages for the pain he has suffered during the time he was out of work and which he will suffer as he goes on through life; and for the impediment he will have in doing the ordinary things in life. But the loss of earning capacity is a different matter because, on the medical evidence in this case, it is probable that in 10 or 15 or even in 25 years he is going to have arthritis. It is going to incapacitate him in all the ordinary things of life like turning the handle of a door or the key in a lock. It is going to incapacitate him for ordinary work. So much so that, if he should fall out of employment, there is a substantial risk that he will not get employment again as well as other men who are able-bodied. He is entitled to compensation for this loss of his future earning capacity. He is 26 years old now. By the time he is in his middle forties he will be severely handicapped by this arthritis.*

40. His Lordship continued at page 640:

> *There is no doubt in this case that the risk is substantial. In 15 or 20 years' time this man, because of the state of his arm, may be unable to do his work and may be out of employment or at less well paid employment. It will be some years before the end of his working life because he will then only be in his middle forties.*
>
> *The question then is how to quantify now the amount of the loss which will not occur until many years ahead. We were told that if £500 is invested now, in 20 years' time at 10 per cent., it would increase to £5,000 or something of that order. That is a warning not to give big sums on this head. The compensation has to be the present value.*

41. This passage is interesting for a number of reasons. The first is that the court accepted that by the time of his mid-forties the claimant may well be out of work or in less well paid work. The second is that the court was compensating a present loss even though the

effect of the loss would not be felt for another 15 to 20 years. The third is that the court accepted that this would be sometime before his expected retirement. The fourth is that the court declined to use the multiplier/multiplicand method. Lord Denning gave no reasons but in the passage above, he noted that if the money was invested in 20 years, about the time when the claimant would be either out of work or in less paying work, it would have increased in value ten fold. He noted that this increase in value was a warning not to award large sums. The other two members of the court did not indicate why the lump sum method was preferred over other methods. The Master of the Rolls appears to be suggesting that where the risk of job loss is some way into the future then the lump sum method is more appropriate than the multiplier/multiplicand method because the claimant can invest the lump sum now in order to provide for the loss of income that might occur in the future when the financial consequences of the impaired earning capacity might be felt.

42. In ***Nicholls v National Coal Board*** [1976] I.C.R. 266, the claimant was 49 ½ years old at the time of trial. He was injured and could no longer continue his job as a pit man in the defendant's coal mine. He tried three other jobs which the injuries prevented him from keeping but he eventually found employment. The judge awarded £2000.00 for loss of earning capacity. That was a lump sum award which was upheld on appeal. The court agreed that there was a risk of losing the job and he would not be able to find an equally well paying job outside the coal industry.

43. Finally, we come to the case of ***Moeliker*** itself. In that case, the award of £750 for loss of earning capacity was not disturbed because the risk of losing the job was not immediate though the risk existed that the claimant might lose the job in the future. The claimant's employers had undertaken to keep him in employment. This meant that the financial impact of the impaired earning capacity was reduced considerably. This delayed for a considerable length of time the financial loss that might have otherwise arisen. There too, the lump sum method was used.

44. In ***Joyce v Yeomans*** [1981] 1 W.L.R. 549. In that case, the claimant suffered very severe injuries which prevented him from even getting sufficient secondary school qualification that would have enabled him to procure employment. Counsel for the claimant argued on appeal that the multiplier/multiplicand method should be used. Waller L.J. said at page 556 that he would not apply that method because:

I have already said that I do not accept the multiplier/multiplicand method of calculation. There are so many imponderables. For example, how long will the plaintiff live? What job will he in fact get? What sort of job would he have got if he had had the epilepsy later in his life? All of those are capable of a wide variety of answers.

45. Sir David Cairns in ***Joyce*** seemed to have agreed substantially on this point with Waller L.J. when he said at page 558:

If then only £1,500 out of the £7,500 is to be considered as representing loss of earning capacity, I am satisfied that despite all the uncertainties of the case, that figure is substantially too small.

I do not find it useful in this case to make any attempt to work out a multiplier and a multiplicand. I regard it as essentially a case in which the best approach is that of going straight to estimating in the round what the figure should be and I agree that that figure should be £7,500.

46. The third member of the court, Brandon L.J. differed from the other two judges when he said at page 557:

The second matter of general interest is whether and to what extent in a case of this kind the loss of future earning capacity should be calculated on some kind of mathematical basis, that is to say by taking a multiplier and multiplicand. Waller L.J. has expressed the view that, on the facts of this particular case, any attempt to arrive at a figure for damages on a basis of a multiplier and a multiplicand would be inappropriate because of the very great number of imponderables which exist.

I feel it right to express my view that, while a court is not bound to arrive at a multiplier and a multiplicand in a case of this kind in order to assess the damages, it would not be erring in law if it attempted to do so. The basis for finding a multiplicand is slender but judges are often faced with having to make findings of fact on evidence which is slender and much less convincing than would

> *be desirable. Therefore it seems to me to be open to the court to approach the problem by putting a figure upon the loss of earning capacity on a weekly or annual basis and applying a multiplier to that figure. I do however think that, if that method is adopted, then the court should take a very careful look at the ultimate result in the round in order to see whether it seems a sensible figure in general terms or not.*
>
> *In this case, having approached the matter perhaps from a slightly different angle from that of Waller L.J., I nevertheless agree entirely with the figure of £7,500 at which he has arrived by a more general approach.*

47. There are serious difficulties with Brandon L.J.'s view that the multiplier/multiplicand method would not be inappropriate to the facts before him. He noted the great number of imponderables that existed in the case before the court but despite this, he felt able to conclude that the multiplier/multiplicand method was appropriate. The closest that one comes to a justification for this surprising conclusion is that judges have found multiplicands on the slenderest of evidence. That may be true, but in the case before the court, the evidence was not just slender; it did not exist. Brandon L.J. did not indicate how he would have arrived at the multiplicand in that case save to say that the court could do so by *"putting a figure upon the loss of earning capacity on a weekly or annual basis"*. The critical word is *putting*. How would the court do this? Where would the figure come from? Judicial speculation? Lord Justice Brandon needed to explain how the uncertainties identified by Waller L.J. would be addressed in order to arrive at the multiplicand.

48. It is apparent that the sum arrived in the lump sum method is not determined by reference to other cases. In England this position was stated in ***Nicholls*** at page 273 where Browne L.J. said:

> *The judge seems to have based his assessment largely on a comparison with the Smith case which I have said in my judgment in the Moeliker case [1976] I.C.R. 253 is in my view not the right approach.*

49. If truth be told, the lump sum method seems to be nothing more than judicial guesstimate at what is the appropriate figure - an undoubtedly inadequate manner to arrive at a judicially determined award of damages, but there it is.

50. I now go to the Jamaican cases. In ***Campbell***, the Court of Appeal found that the claimant was working at the time of the accident and at the time of the trial. Her expected working life was known. The medical evidence established that there was a serious risk that she would stop working early because of the injuries although the evidence did not indicate how long before retirement she would stop working. The court also found that her income was likely to be reduced in the later years but there was no evidence that her earning would be reduced in those early years. On the face of it, this would suggest that a lump sum method should be used because the claimant was young enough to invest the lump sum to provide for her future income should she have to stop working because of the injuries.

51. Harrison J. (as he was at the time) elected to use the multiplier/multiplicand approach. This method was strongly challenged before the Court of Appeal by counsel who argued that it was the wrong method. Forte J.A. (as he was at the time) rejected the submission and noted that there were several methods of computing the award and then held that the method of computation was "obviously appropriate".

52. The task for me is to find out what is meant by "obviously appropriate". Forte J.A. referred to the judgment of Carey J.A. in ***Kiskimo Ltd v Deborah Salmon*** SCCA 61/89 (delivered February 4, 1991). Carey J.A. noted that the method adopted will depend quite often on the adequacy of the evidence. Gordon J.A., in ***Kiskimo***, agreed with this. Although this does not come out very clearly in ***Campbell*** it appears that the court might have thought that having regard to the potential earning power of the claimant a lump sum even if invested by an investor with the midas touch might not generate enough over the years to adequately compensate the claimant. If ***Consolidated Fisheries*** (where the evidence in terms of expected job loss and the time at which it might occur was even more precise than ***Campbell***) is to be reconciled with ***Campbell*** then one way of doing that would be to say that the claimant in ***Consolidated Fisheries*** was not a person who would have commanded a high income and so the sum generated from investing the lump sum would be sufficient for that particular individual. This way of reconciling the cases is consistent with the common law aim of providing adequate compensation for the person injured. I agree with Lord Scarman in ***Lim Poh Choo v Camden and Islington Health Authority*** [1980] A.C. 174, 190, that "the principle of the common law [is] that a genuine deprivation (be it pecuniary or non-pecuniary in character) is a proper subject of

compensation." Thus, high-income earners may be more likely to benefit from a multiplier/multiplicand method that person with lower incomes.

53. From the cases, the principles that can be derived in order to determine which method is used are as follows. In setting out these principles I shall also address the third objective which is, the factors that determine the size of the award, particularly if the lump sum method is used:

a. if the claimant is working at the time of the trial and the risk of losing the job is low or remote then the lump sum method is more appropriate and the award should be low (***Ashcroft v Curtin***; ***Gladys Smith v The Lord Mayor***);

b. if the claimant is working at the time of the trial and there is a real or serious risk of losing the job and there is evidence that if the current job is lost there is a high probability that the claimant will have difficulty finding an equally paying or better paying job then the lump sum method may be appropriate depending, of course, when this loss is seen as likely to occur. The size of the award may be influenced by time at which the risk may materialise. Admittedly, this is a deduction from what Lord Denning said in ***Cook v Consolidated Fisheries***;

c. It seems that if the claimant is a high-income earner the multiplier/multiplicand method may be more appropriate. This latter point seems to be a principle that is emerging from the Jamaican case of ***Campbell v Whylie***. This proposition is derived from my attempt to reconcile ***Campbell*** and ***Consolidated Fisheries***. Both cases are very close in terms of the actual evidence before the court, the main difference being the earning power of the medical doctor vis a vis a young man working on a trawler and then later on a lorry driver;

d. the lump sum is not arrived by reference to and comparison with previous cases (***Nicholls v National Coal Board***);

e. if the claimant is not working at the time of the trial and the unemployment is the result of the loss of earning capacity then the multiplier/multiplicand method ought to be used if the evidence shows that the claimant is very unlikely to find any kind employment or if employment is found but the job is very likely to be less well paying than the pre-accident job, assuming that the person held a job. The reason is that the financial impact of the loss of earning capacity would have begun already and the likelihood of the

financial impact being reduced by the claimant finding employment would be virtually none existent;

f. if the person has not held a job but there is evidence showing the person is unlikely to work because of the injuries then the lump sum method is to be used (***Joyce v Yeomans***).

54. These principles are not exhaustive but merely an attempt to bring some order to this area of law. Much will depend on the evidence, particularly medical evidence. It seems that a fair conclusion from the cases is that in the absence of specific medical evidence about the likely effect of the injury on the job prospects of the claimant the lump sum method should be the default method. The multiplier/multiplicand method should be reserved, having regard to the principles just stated, for those class of cases in which the impact of the injury is so devastating (backed up by medical evidence) that it is unlikely that prudent investment of the lump sum is likely to provide sufficient income for the claimant.

55. In the case before me, there is evidence of weekly income. The claimant said he earned $10,000 per week from fishing. This is $520,000 per year. The evidence is there for a multiplier/multiplicand method. What is lacking is the detailed evidence that would suggest that Mr. Ebanks is unlikely to find work for the rest of his working life. It is true that he is not working at the moment but that does not mean he is unable to find work for ever and a day. No evidence was given of his education, skills and training. I have the unchallenged evidence of Mr. Ebanks that his injured leg is now shorter than the other with the consequence that he cannot function as effectively as a fisherman. He tried driving earth-moving equipment but driving requires keeping the leg flexed in a particular position for an extended period of time. I also accept that his earning capacity has been impaired. The evidence of this comes from the fact the he could not keep the two jobs he found since his accident because of the stiffness in the knee. He is not able to compete with able bodied persons in a competitive market.

56. Mr. Wilson suggested the quite modest sum of $100,000.00. Mrs. Taylor suggested $700,000.00. No cases were cited on this aspect of the assessment. This is not surprising since the authorities indicated that the figure arrived at in the lump sum method is not a demonstration of great rationality.

57. I would say that a sum of $250,000.00 is appropriate in this case. No interest is to be awarded on this sum for the reasons given by Orr L.J. in ***Clarke v Rotax Aircraft Equipment Ltd*** [19750 1 W.L.R. 1570, 1576:

> *In my judgment, that same principle ought to be applied to the damages awarded for loss of earning capacity. It is true, as stated by Scarman L.J. in Smith v. Manchester Corporation (1974) 17 K.I.R. 1, 8, 9 that the loss of earning capacity has arisen at the time of and in consequence of the accident, but its financial consequences may or may not arise at all and may arise at any future time. If those financial consequences arise during the period before the trial they will be taken into account by way of special damages, and interest will be payable on those damages in accordance with the established rules. But if they have not arisen at the time of the trial, then it seems to me that for the purpose of interest they are in the same position as damages awarded for future loss of earnings as such. It seems to me to be impossible to say as regards future consequences of a loss of earning capacity that the plaintiff in these circumstances will have been kept out of his money. For these reasons, in my judgment, the award of interest in this case under this particular heading was wrongly made*

58. The amount awarded is from the date of judgment and therefore does not attract any interest.

Damages for pain, suffering and loss of amenities

59. I fear that the common practice of making a single award for loss of pain and suffering and loss of amenities has only served to obscure the distinction between the two - a distinction specifically approved by the House of Lords in ***H. West & Son Ltd. v. Shephard*** [1964] A.C. 326 and reaffirmed in ***Lim Poh Choo*** by Lord Scarman. His Lordship said at page 188:

> *The effect of the two cases (Wise v. Kaye being specifically approved in H. West & Son Ltd. v. Shephard) is two-fold. First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former*

depend upon the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation - a substantial loss, whether the plaintiff is aware of it or not.

60. What this means is that although a single figure is awarded for pain, suffering and loss of amenity, the judge should bear in mind that there are two distinct head of damages and so should be careful to make an award that takes this into account. This is the approach I shall take in this case. The claimant now has a shortened leg which is intrinsically a loss of amenity. The shortening of the leg only emphasises why he is unable to participate in sporting activities and underlines his reduced quality of life. Lord Morris in ***H. West and Son Ltd*** reminds us at page 346 that in "the process of assessing damages judges endeavour to take into account all the relevant changes in a claimant's circumstances which have been caused by the tortfeasor."

61. It was Lord Roche in ***Rose v Ford*** [1937] A.C. 826, 859 who said that impairment of health and vitality is loss of good thing in itself and ought to be compensated.

62. Miss Taylor submitted that an award of at least $1,800,000.00 would be appropriate in this case. She relied on ***Barrington McKenzie v Christopher Fletcher and Joseph Taylor*** Suit No. C.L. 1996/M 075 (delivered March 31, 1998) and ***Eric Webb v Donnette Abrahams & Paul Stephenson*** Suit No. C.L. 199/W 181 (delivered July 21, 1999). These cases are found in Khan's Volume 5.

63. Mr. Wilson submitted that an award of $500,000.00 would be appropriate. He relied on ***Wiltshire v Ivy*** SCCA No. 9/91 (delivered February 11, 1992), ***Clarke v Hancel*** SCCA No. 96/89 (delivered December 18, 1992) and ***Delmar Dixon (b.n.f. Olive Maxwell) v Jamaica Telephone Co. Ltd*** SCCA No. 15/91 (delivered June 7, 1994). These cases are found in ***Harrison and Harrison, Assessment of Damages for Personal Injuries*** (1997).

64. I have decided that the ***Webb*** case is too markedly different from the one I am assessing. In that case, the claimant suffered the loss of an arm with a resultant 60% permanent partial disability of the whole person. ***McKenzie*** seems closer to the point. In that case, the claimant had pain, swelling and tenderness of the right leg; a comminuted fracture of the middle third of the tibia and a transverse fracture of the middle right fibula. There was no expectation of

permanent impairment. The general damages awarded were $420,000.00. Using the December 2006 CPI (2425.9) the current value is $913,054.93.

65. The case of ***Hancel*** is perhaps even closer to the one before me. There the claimant suffered head injury with loss of consciousness, 2cm laceration to dorsum right forearm; 3cm laceration to posterior aspect of right elbow; fracture of the right femur and 10% permanent partial disability of the left lower limb. The claimant had one foot shorter than the other. The trial judge made an award of $100,000.00. This award was reduced on appeal to $60,000.00. The current value of that award using the December 2006 CPI would be $346,837.51. In that case, the Court of Appeal stated that it did not have either a written judgment or a note of the oral judgment of Pitter J. and so was unable to say the basis on which the judge made the award. The court therefore examined the evidence and made the award itself. The court found that there was no certification of a permanent limp or permanent disability or intermittent pains. Added to this the medical report showed that the claimant was fully recovered. In short, there was a discrepancy between the oral testimony of the witness and the medical report. It would seem that the court rejected the evidence of the claimant that one leg was shorter than the other. Unless this was done, it is difficult to see how the court was able to conclude that "there was no evidence to support an award for loss of amenities". My conclusion on this point is supported because the court continued in the same sentence by saying that "the damages to be assessed were therefore primarily for pain and suffering occasioned by a fracture of the right femur from which the plaintiff had made a full recovery."

66. In the case before me, I accept the evidence of Mr. Ebanks that one leg is shorter than the other and that he has the stiffness in the leg about which I have already spoken. This fact alone, as Lord Scarman pointed out in ***Lim Poh Choo*** can be a loss of amenity in itself. The medical reports before me stated that the doctor would not comment on any disability or impairment because only at maximum recovery would that be known. Despite the absence of medical evidence of the whole person disability I am of the view that having a leg shorter after the accident than before is a disability. His inability to enjoy sporting activity is a loss of amenity. He no longer has an unimpaired body.

67. I therefore rely on the case of ***Webb*** as the minimum award that could be made in this case. Any award for personal injury has an

objective and subjective component (see ***H. West and Son***). Lord Morris was of the view that the objective part of the assessment should be low so that like injuries receive like award for the objective part of the assessment. The subjective part of the assessment would vary according to the impact on the victim. Lord Reid spoke in similar terms. Compensation is also for the mental anguish suffered. Here the claimant has testified that the scars to his face cause people to think of him as a criminal. Jamaicans are not reticent about letting you know that that is what they think. I have come to the conclusion that a sum of $1,300,000.00 is an appropriate award.

Conclusion

68. Special damages awarded are $353,532.70 at 3% from October 28, 2003 to February 6, 2007.

69. General damages for pain, suffering and loss of amenities are $1,300,000.00 at 3% from the date of the service of the writ to March 7, 2007.

70. General damages for loss of earning capacity is $250,000.00 and no interest is awarded on this sum.