



[2023] JMSC Civ. 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 04985

BETWEEN	DESMOND HEPBURN	CLAIMANT
AND	ATTORNEY GENERAL OF JAMAICA	DEFENDANT

Ms Aisha Mulendwe and Mr Patrick Forrester instructed by Patrick Forrester Attorney-at-law for the Claimant

Ms Kristen Fletcher instructed by the Director of State Proceedings Attorney-at-law for the Defendant

October 18, 2022 and March 2, 2023

Assessment of Damages – negligence – application to permit medical reports to be admitted into evidence without the need to call the maker pursuant to sections 31E and 31F of the Evidence Act – whether the lump sum or multiplier-multiplicand approach should be used to determine handicap on the labour market.

T. Mott Tulloch-Reid, J.

The Claimant's evidence

[1] Mr Desmond Hepburn was visiting Jamaica from New York where he resides to attend the funeral of his daughter's uncle. What should have been an uneventful trip turned out to be one that changed his life forever. On April 25, 2008, he was standing in front of a house with family members when he observed four Sports Utility Vehicles ("SUVs") which were heavily tinted drive slowly by. Not long after,

he and some of his family members decided to leave the location and they hopped into a car which was being driven by his uncle and proceeded to do so. What happened next could very well be the scene from a Hollywood action movie for according to Mr Hepburn, while he and his family members were driving out of the community heading towards Old Harbour, three SUVs blocked their path while a 4th drove up from behind and blocked them in. His uncle managed to reverse his motor vehicle so that it passed the 4th vehicle and while in the process of driving away shots were fired at the motor vehicle the family members were travelling in. According to Mr Hepburn, several shots pierced the vehicle but one hit him in his right eye as one of the men who was shooting at them fired into the front windscreen. Mr Hepburn was the front seat passenger. He said when he was shot in his eye, the force of impact pushed his head backward and he immediately felt pain in his eyes and head.

- [2] Notwithstanding all of this his uncle did not stop driving. He called 119 to request help and they were met by a police car on Old Harbour Bay Road. They asked the police officers to transport Mr Hepburn to the hospital but the policemen declined saying they were to proceed to the nearest hospital as they had to go to investigate the shooting. Mr Hepburn's uncle took him to the Spanish Town Hospital and while there, low and behold, the men who had fired shots into the vehicle he was in and shot him in his eye, turned up to the hospital. And who were these men? None other than members of the Jamaica Constabulary Force.
- [3] Mr Hepburn reported the incident to the police while he was still in the hospital.
- [4] Mr Hepburn reports that when he was taken to the hospital he was in distress, his right eye was bulging out of the orbit, his head was swollen and he had extensive blood shots in his eye along with a cut at his right upper lid. He was treated at the Spanish Town Hospital but transferred to the Kingston Public Hospital on the same day. He remained at the KPH for 2 days until he was transferred to Bascom Palmer Eye Institute ("the Eye Institute") in Florida to try to save the left eye which was

now at risk. Mr Hepburn reports having pain in his head while being transported to Miami.

- [5] He had two surgeries while at the Eye Institute to save his left eye. The injury to his right eye resulted in irreversible damage to the right eyeball and permanent loss of vision in that eye. After being treated for his eye injuries and after the healing process had taken place, he was fitted with a prosthetic in his right eye. He says the prosthetic eye costs US\$4,500 and has to be replaced every 5 years.
- [6] Not only did Mr Hepburn lose his eye and expend sums of money in the healing process but the injuries he sustained and the effect it had on his ability to carry on as he had done prior to being shot led him into a state of depression so that he had to be treated by a psychiatrist and a clinical psychologist.
- [7] Mr Hepburn says he still suffers from chronic pain and severe headaches in the area of the injury over his right eye. He carries a scar on the right side of his face close to his eyebrow. He continues to be under medical care and is on several medications for pain and depression. He cannot see from his right eye and has to turn around at least 45-50 degrees to see what is happening on his right side. He reports that he still has fragments of the bullet in the orbit of his eye and right mandible. He says he underwent 2 surgeries already and it has been recommended that he does another.
- [8] Mr Hepburn's evidence is that he has difficulty driving and even doing simple things like crossing the road. He has to turn his entire head and/or body to see things and to be able to judge how close vehicles are to him. He used to play soccer, cricket and volleyball and go to the gym but he can no longer participate in these activities because of his inhibitions because he is blind in one eye. He cannot perform these functions without being anxious and frustrated. His depth perception has been impaired. He cannot tell how fast the ball is coming at him or how close it is to him when it is coming towards him.

- [9] His loss of eyesight has also impacted him on his job. Prior to the incident, he was employed to Doumas Electric, licensed electrical contractors in New York City. He was employed as a junior electrician and worked on average 40 hours per week. He would have completed his apprenticeship in 2011 which would have resulted in his being promoted to Journeyman Electrician and earning higher wages – US\$75 instead of US\$20 per hour as a junior electrician.
- [10] He complains that outside of being an electrician he has no other skill or training. He cannot continue as an electrician because his double vision inhibits his level of accuracy. He wishes to retrain in the field of computer science once he is able to afford to do so.
- [11] Mr Hepburn also states that he finds getting employment difficult and he has had to resort to doing odd jobs since his recovery. He has had some success in the catering business but that success fell through during the Covid-19 pandemic and then in its entirety when the person he assisted with the catering died. He helps his electrician friends from time to time and they pay him out of pocket. He says nobody wants to hire “a *one-eyed man*” but he has not indicated what steps he has taken to try to obtain any work as an electrician since his tenure with Doumas Electric ended.

The medical evidence

- [12] Several medical reports were agreed and admitted into evidence as exhibits 1 – 7c. They include reports from the Spanish Town Hospital prepared by Dr Hugh Bernard and Dr Jacqueline Wright-James, Dr Jennifer Hui from Bascom Eye Institute in Florida, Dr Donovan Calder, Dr Randolph Cheeks, Dr Howard Isaacs and Dr Suad Noah. These doctors were all agreed experts and the medical reports they prepared on behalf of the Claimant were agreed to be experts’ reports. They also include questions and answers to questions posed to some of the doctors by the Defendant’s attorney-at-law. I have relied on these medical reports and the

opinion set out therein only in assessing damages. The evidence as contained in the agreed medical reports is as follows:

- (a) Gunshot wound to right eyebrow
- (b) Patient in mild painful distress
- (c) Gunshot wound to right upper eye lid.
- (d) No exit gunshot wound
- (e) Right eye bulging out of orbit
- (f) Edematous and extensive sub conjunctival haemorrhage
- (g) No visual acuity from right eye (left eye normal)
- (h) 19% whole person PPD
- (i) Flashbacks
- (j) Severe anger and fear leading to diagnosis of recurrent major depressive disorder
- (k) Chronic headaches
- (l) Bullet fragments in the right orbit and head of right mandible

[13] Mr Hepburn was diagnosed with gunshot wound to right eye with loss of vision in right eye. He was given a tetanus shot and transferred to KPH. Although he was treated at the KPH, there was no report from that medical facility. Exhibit 2 is the report prepared by the Eye Institute in Florida. It was in Florida that Mr Hepburn received his operation. Prior to surgery he was diagnosed with

- a. Ruptured globe, right eye
- b. Lid laceration, right eye.

After surgery his diagnosis remained the same. The operation performed was to repair the ruptured globe and the lid laceration. The surgery was performed under general anaesthesia. The justification for the surgery was stated as follows

“...On examination he had no light perception vision in his right eye, as well as a severely distorted globe that on CT scan was distorted with multiple orbital foreign bodies but no intraocular foreign bodies noted. ... The patient desired primary repair and understood that enucleation may be necessary within a short time in order to decrease the risk of sympathetic ophthalmia and loss of vision in the other eye.”

- [14] Dr Cheeks, consultant neurosurgeon, reported that in addition to the injuries noted in the other medical reports already mentioned, Mr Hepburn also complained of impairment of sensation over the right frontal region of his head. This would have been almost 3 years post incident. The scar that Mr Hepburn referred to was ½ inch and was present on the right side of his face close to the right eyebrow. He was wearing a properly fitted prosthetic eye. There was impairment of tactile and pinprick sensation and dysesthesia in the territory of the supraorbital branch of the right ophthalmic nerve the path of which is crossed by the scar at the site of the bullet entry wound. A plain x-ray of the skull revealed bullet fragments in the orbit and head of the right mandible.
- [15] Dr Cheeks' report also indicated that the nerve that had been damaged by the bullet had healed with scarring which resulted in a traumatic neuritis and this was responsible for the right frontal headaches and the impairment of the cutaneous and tactile sensation in the territory of the nerve. The result of this was a whole person disability of 3%. The loss of complete sight in his right visual field and complete loss of visual acuity on his right side as a result of the complete and permanent loss of vision in his right eye amounts to a whole person disability of 16%. Dr Cheeks said that the left eye was compensating to some extent for the loss of function in the injured right eye.

- [16] According to Dr Cheeks, the loss of binocular vision causes impairment of depth perception and this is a dangerous impediment for an electrician because he will be unable to accurately gauge spatial relationships between objects. This is also dangerous for him (and I daresay others) while he is driving. In total Dr Cheeks assessed Mr Hepburn as having a 19% PPD and had this to say in his prognosis

The loss of vision from his right eye is complete and irreversible. The injury to the right supra-orbital nerve is permanent and is not likely to worsen with the passage of time. His ability to continue functioning and to be more competitive at his usual level in his ordinary occupation has been severely impaired."

- [17] Dr Calder, a consultant ophthalmologist, also presented a medical report. His report was helpful in that he stated that Mr Hepburn's prosthesis would degrade over time and as such may cease to fit properly as the lids and orbital content change over time. In addition, he recommended that Mr Hepburn wears protective glasses at all times (for work and for reading) and states that the glasses would have to be changed every two years at an average cost of \$50,000 in 2021. In order to be protective, the glasses should be made of polycarbonate material so that they will not shatter easy. Dr Calder rates Mr Hepburn's disability as 16%.

- [18] Dr Howard Isaacs is a psychiatrist. He also treated the Claimant. He diagnosed him as suffering from Major Depressive Disorder, which he believed to be related to the traumatic injury which Mr Hepburn received. He described Mr Hepburn's symptoms as "*marked loss of energy, interest and enjoyment, low mood and poor concentration.*" He prescribed antidepressants and anti-anxiety medication. The January 19, 2021 medical report states that Mr Hepburn was not currently depressed but he recommended that he took the medication indefinitely because of his diagnosis of major depressive disorder.

- [19] Mr Hepburn was also treated by Dr Suad Vojdany Noah, a clinical psychologist. He too prepared a medical report which is dated December 18, 2020. His report states he began treating Mr Hepburn in September 2013 for severe depression.

Mr Hepburn was diagnosed with post-traumatic stress disorder which caused severe depression. The depression caused Mr Hepburn to not want to get out of bed in the mornings. His depression was as a result of the injuries he sustained, which were so serious and disabling that he would not be able to support himself. He had flashbacks of the incident (I note that this is occurring approximately 5 years post the shooting). He had difficulty leaving the house because of his depression. Psychotherapy was used to decrease the degree of depression. The flashbacks were less frequent but he still had depression with normalcy on medication. He sleeps a lot, is lethargic and is not motivated which are all symptoms of depression. He is not always able to take the prescribed medication as they are expensive.

[20] Dr Noah also reported that Mr Hepburn's condition deteriorated since 2016 and he had a poor prognosis because of the trauma he suffered as a result of him being shot in the face and the ensuing mental suffering that caused permanent change to his life. The evidence is that Mr Hepburn has tried to overcome his depression but because of his constant headaches, loss of vision on the right side and loss of depth perception he is having a hard time functioning. Dr Noah supports Mr Hepburn's evidence that he does odd jobs and does minor jobs. He has double vision which makes it difficult for him to use hammers, screw guns and sharp instruments which are necessary for his trade. The psychologist does not recommend that he works on buildings where he would be exposed to falling. Dr Noah further stated that Mr Hepburn's condition is permanent and that he will be on medication indefinitely and must continue with psychotherapy once per week for the foreseeable future.

[21] Dr Noah's assessment of Mr Hepburn (given in his report dated December 2020) gives a worse diagnosis than Dr Isaacs' (given in his report dated January 2021). Since Dr Isaac's report is the later of the two more weight will be placed on it for a determination as to Mr Hepburn's most recent psychological state. In that report, Dr Isaacs says that Mr Hepburn reported to him that he was not currently depressed.

Analysis

[22] Mr Hepburn sustained serious physical injuries which also have affected him mentally and emotionally. His journey to recovery has been long and arduous. He will not physically be the same as he has lost an eye and is left with a permanent partial disability. His road to mental and emotional recovery has been long. Dr Isaacs in 2021 reported that he was not currently depressed but that he would need to continue on his medications. Dr Noah does not say if Mr Hepburn is better but agrees with Dr Isaacs that medication will have to continue indefinitely. The impact of the injuries on him has contributed not only to his pain and suffering but also to his loss of amenities. He is no longer able to do many of the things he used to do. His inability to take care of his family financially has affected him mentally.

[23] The Claimant's attorneys-at-law have relied on cases out of the United States of America to guide an award. I do not find the cases useful. The incident concerned an incident that happened in Jamaica and which was caused by Jamaicans. The correct *locus* is Jamaica and as such Jamaican cases should guide the Jamaican court albeit that the Claimant resides in the United States of America.

Lost eye

[24] Counsel for the Claimant relied on the case of **Latoya Brown v The Attorney General for Jamaica [2015] JMSC Civ 89** in which the Claimant was shot in the head by police officers, with the result being that she lost sight in both eyes. Her injuries were very similar to that of Mr Hepburn but should be seen as more serious as she was completely blind whereas Mr Hepburn lost sight in only one eye. She too was fitted for prostheses. She also had to consult with a psychiatrist but did so only for 3 months although the psychiatric issue remained unresolved up to the time of the trial. Mr Hepburn however indicates that he is still seeing a psychiatrist for his depression some 14 years post incident. Ms Brown's award of \$45M updates today to \$67M. The loss of both eyes however must be taken into account.

- [25] I am of the view that cases where the aggrieved party lost one eye would be more helpful. Although he has lost an eye, a one eyed man can still see whereas someone who has lost both eyes has lost all his visual abilities. The case of **Roxanne Peart (bnf Venice Peart) v Shameer Thomas (bnf Angella Thomas) and ors [2017] JMSC Civ 60** is instructive. This case was put forward by the Defendant's attorney. It concerns a child who lost vision in her left eye. In that case Roxanne was hit/stabbed in the eye. She had to undergo 4 surgeries and eventually lost vision in the left eye. The injury had a psychological effect on Roxane who was teased in school and called unkind names. She cried a lot and played less with her siblings. She became angry and depressed and had to see a psychiatrist and receive counselling. Her award of \$4M updates to \$5.6M.
- [26] I will say immediately that I believe that the circumstances in which Mr Hepburn was injured are more egregious than those of Roxanne. He has a 19% PPD, he has mental illness which requires continual medical treatment and the evidence given as to the impact the injury has had on him are very strong and as such an award in excess of \$5.6M will have to be considered.
- [27] In the case of **Ruel Ellis v Tristan Wiggins 2007 HCV 04918** a decision of G Brown J on December 8, 2010, the Claimant had lost an eye, was fitted with a prosthesis, had multiple facial lacerations, fracture of 2 teeth and a fracture of his femur. Mr Ellis also had some scarring. All of these injuries would have been taken into account when the award of \$3.5M would have been made. I am not sure how to separate out the injuries since the award was with respect to all the injuries combined. Needless to say however that Mr Ellis has more injuries than Mr Hepburn did. The award of \$3.5M updates to approximately \$7M today.
- [28] The case of **Audley Gilbert v The Attorney General of Jamaica [2017] JMSC Civ 165** falls within the range of awards for loss of a single eye. The award of \$5M updates to \$6.8M. In the **Gilbert case**, the Claimant was struck in his eye with a baton and lost an eye.

[29] Both counsel rely on the case of **Pat Bellifanti v National Housing Trust and ors CL 1993/B-361** the decision of Harrison J on February 3, 1997. The Plaintiff lost an eye in an accident. He was fitted with a prosthesis. He spent one week in hospital after his eye was removed. An award of \$1M was made which updates to \$7.9M. Mr Bellifanti complained about his inability to read as he used to do. He had difficulty driving in particular in the night, had resumed playing lawn tennis but had difficulty with depth perception in much the same way Mr Hepburn explained, except his sports are cricket and football. Mr Hepburn also complained about the driving. Both men had the cosmetic issues to deal with in relation to the prosthetic eye, the threat of infection, the requirement to go to the ophthalmologist twice yearly.

[30] Mr Bellifanti, as a journalist did much reading and required the use of both of his eyes. The same can be said of an electrician. I am of the view that the **Ellis case** and the **Bellifanti** case are useful guides. I note though that the **Ellis case** is more recent. The **Gilbert case** which is the most recent of the three is more aligned with the **Ellis case** in terms of the award for a lost eye. Under normal circumstances, given that Mr Ellis had more injuries than Mr Hepburn his award should be discounted but I believe that Mr Hepburn's case is more akin to Mr Bellifanti's in terms of not only his pain and suffering but also in regard to his loss of amenities as it relates to his personal life, leisure activities and work related activities and an award of \$8M is considered reasonable in the circumstances. I have taken into account the circumstances in which Mr Hepburn lost his right eye, the nerve damage, the surgeries he had to undergo to also save the left eye and the fact that he continues to have bullet fragments in his eye and right mandible in coming to my decision.

Psychological injury

[31] I note that in the **Roxanne Peart case** an award was made for psychological injury. The sum updates to \$697,928.00. Mr Hepburn's evidence is that he is still depressed. I am however guided by the evidence of the expert, Dr Isaacs. Dr

Isaacs reports in 2021 that Mr Hepburn is currently not depressed. Notwithstanding this comment, based on the evidence before me, I am of the view that Mr Hepburn's evidence of the psychological impact his injuries have had on him up to 2021 are more impactful than the evidence of psychological trauma set out in **Roxanne's case**. The amount awarded to Mr Hepburn will therefore have to be increased. There is no evidence that she had to take antidepressants indefinitely.

[32] I have considered the case of **Sharon Greenwood-Henry v The Attorney General of Jamaica CL G 116 of 1999 judgment of Sykes J (as he then was) delivered on October 26, 2005**. In that case Mrs Greenwood-Henry was unceremoniously searched by a police officer at the Norman Manley International Airport. The police officer it was found had inserted her fingers into Mrs Greenwood-Henry's vagina in search of illicit drugs. She was also taken to the Kingston Public Hospital where she was given a laxative. No drugs were ever found on her. Mrs Greenwood-Henry suffered psychologically as a result of that ordeal. She was treated by Dr Aggrey Irons, a psychiatrist who diagnosed her as having depression and posttraumatic stress disorder. An award of \$500,000 was made to Mrs Greenwood-Henry for her psychological injuries. The sum updates to \$1.773M.

[33] While the circumstances that gave rise to the PTSD are different, I am of the view that the result is similar. In fact, Mr Hepburn continues to receive treatment for his depression and it is clear on his evidence that his depression has had somewhat debilitating effects on him.

[34] In 2014 Justice Lawrence-Beswick delivered a judgment in the claim **Troy Huggins v The Attorney General [2014] JMSC Civ 53**. In that case Mr Huggins was standing by his gate with his brother when they were approached by police officers and shot at. Mr Huggins' brother died as a result of the shooting. Mr Huggins himself was not seriously injured physically but he suffered PTSD and was so diagnosed by Dr Irons and also by the Defendant's recommended

psychiatrist. In addition to PTSD, Mr Huggins had insomnia, depression, fear and anxiety. He had a 50% psychological disability and would require treatment “over the next few years”. There was no disability rating for the psychological impact on Mr Hepburn.

[35] The circumstances under which Mr Huggins was shot are similar to those under which Mr Hepburn was shot. The resulting psychological impact were similar but not the same. Mr Hepburn reports severe fatigue and depression, however, his depression is categorised as Major Depressive Disorder. There is some mention of flashback and anxiety but they do not seem to be emphasised by the psychiatrist and so I will say that Mr Hepburn’s psychological damage is not as far reaching/extensive as Mr Huggins’. I do note however that Mr Hepburn’s state of depression has had to be treated for in excess of 14 years and should continue indefinitely, according to the clinical psychologists, whereas Dr Irons reported that Mr Huggins would need treatment for a few years.

[36] Mr Huggins’ award for his psychological injuries amounted to \$6M. This sum updates to approximately \$9.4M. I have already stated the differences between the two cases and will also say that the general rule in assessing damages is not to treat each injury separate and apart from the others. Bearing these factors in mind, I am still of the view that an award for psychological damage is to be awarded to Mr Hepburn as it is clear that he has been negatively affected in this way. I have also considered the case of **Greenwood Henry** and the **Roxanne Peart** case, wherein the Court was more conservative in its award for psychological damage and I will award the sum of \$2.3M to Mr Hepburn for the psychological damage he suffered as a result of the incident. The sum takes into consideration the diagnosis of major depressive disorder as well as PTSD and the continued requirement for medication to manage his disorder. These are not characteristic of the psychological injuries sustained by either Greenwood-Henry or Roxanne Peart.

Handicap on the Labour Market

[37] I am aware that Mr Hepburn resides overseas and was earning an income which was denominated in United States Dollars. He has given evidence of his earnings in USD as a junior electrician. I am aware of the medical evidence that it is recommended that he wears protective eyewear when carrying out his duties as an electrician but most importantly I am aware that Mr Hepburn has indicated the difficulties he encounters when trying to do electrical work because of the issues he has with depth perception. I am aware of the evidence of his earnings as a junior electrician. I am also aware of the medical evidence that he has to take great care when doing electrical work and the need to wear protective eyewear.

[38] This is a case which merits an award for Handicap on the Labour Market. Mr Forrester argues for in excess of US\$1.2M. Ms Fletcher counters with a lump sum of US\$10,000 or \$1.5M. What approach should be used in these circumstances to make the determination. Should the Court utilise the lump sum approach or the multiplier-multiplicand approach. Sykes J in the case of **Andrew Ebanks v Jepther McClymont 2004 HCV 02172 judgment delivered on March 8, 2007**, set out in paragraph 53 set out the approaches to be used in determining handicap on the labour market. Paragraph 53(e) is relevant for our purposes. It reads as follows:

“if the Claimant is not working at the time of the trial and the unemployment is as a 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 of employment or if employment is found but the job is very likely to be less paying than the pre accident job, assuming 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 non-existent.” (my emphasis)

- [39] Mr Hepburn's evidence is that at the time of the incident, he was employed as an electrician. He has not been able to work in that capacity since because of issues of depth perception which his ophthalmologist confirms. He has had a near miss incident on an occasion which made his employers very concerned about his ability to continue in that field even in a less involved manner and that led to his termination (this is the evidence contained in his job letter which is an agreed document – Exhibit 9). He said he tried to work with a friend in catering but that did not succeed as Covid-19 came about and business slowed and then the friend eventually died. He does odd jobs. He has worked with his electrician friends. He has indicated that he wants to do a course in computers as a means of gaining employment in the future. There is no evidence that he has tried to find other jobs with companies who hire electricians.
- [40] Exhibit 9 is the letter from Mr Hepburn's previous employers which states that his weekly income was US\$720 which as at today is the equivalent of \$108,000 per week. This sum will be the basis of the multiplicand. Mr Hepburn is almost 53 years old and so a multiplier of 6 will be used (49-year old Raymond Reid was allowed a multiplier of 7 Khan's Volume 6 Table A page 259). $\$108,000 \times 52 \times 6 = \$33.7M$. If this method is used, I am not of the view that that award would be reasonable or fair. Mr Hepburn may not be able to work as an electrician in the future but in my opinion he may be able to qualify for another job. It is not my view that the ability to find another job would be virtually non-existent. Further, Dr Calder does not appear to be of the view that Mr Hepburn can no longer work as an electrician. He does however recommend that safety glasses be used to protect him on the worksite (see page 3 of his medical report).
- [41] I am of the view that the lump sum approach would be a more just approach in the circumstances and will award the sum of \$1.5M to him under this head. While it is true as Sykes J said in the **Andrew Ebanks case** that the lump sum approach approximates to a Judge's best guess, I have considered cases where persons were seriously harmed and were awarded a sum for handicap on the labour market as a lump sum. The awards when updated are very conservative in nature and

range from a low of approximately \$360,000 to a high of \$1.2M (See the cases of **Kenneth Richmond v Caribbean Steel Co Ltd page 235 of Khan's Volume 5 and Richard Rubin v St Ann's Bay Hospital and anor reported at Khan's Volume 5, page 250**, for example. Taking these decisions into consideration and the facts of the case before me I am of the view that the sum proposed by the Defendant is reasonable under this head of damages. I am also of the view that there are many jobs which Mr Hepburn can in his current state obtain which would earn him a steady income.

Exemplary Damages/Aggravated Damages

[42] I am not of the view that this is a case in which aggravated damages should be awarded. I do however believe that exemplary damages should be awarded because the actions of the police officers in discharging their firearms in the way they did should be frowned on very deeply and the sum of \$1,000,000 is awarded under this head. I relied on the case of **Conrad Gregory Thompson v Attorney General for Jamaica (unreported Claim NO HCV 02530 of 2008 delivered May 31, 2011)** in coming to my decision. Mr Thompson was shot 5 times by police officers, falsely imprisoned and maliciously prosecuted. Although Mr Hepburn lost an eye, I am of the view that the conduct of the police officers in Mr Thompson's case was more egregious. His situation was more serious than Mr Hepburn's and as such the updated award that was made in his favour under this head of damages has to be discounted.

Special Damages

Agreed documents

[43] Mr Forrester has made some very bold claims under this head of damages on behalf of his client. Special Damages must be specifically pleaded and proven. There has been specific pleading of items of special damages. I must now determine whether or not they have been proven. Exhibits 11-23 have been agreed. The total of these exhibits is JA\$136,142 and US\$2,370.90. Domestic

help provided by Yolanda Robinson for the period May 18, 2008 to June 28, 2008 and by Shon Ferguson for the same period was also agreed (Exhibits 10 and 21 respectively). Having agreed the document prepared by Mr Ferguson, Ms Fletcher later submits that the sums claimed for the extra help should not be allowed. Ms Fletcher cannot now “unring” the bell and I will say that with respect to other aspects of her submissions at the appropriate time.

[44] Mr Hepburn’s evidence is that before the accident his wife would do the housework but that after the accident because he was not working she had to pull double shifts so that they could meet their monthly expenses. He explained that Ms Robinson helped with the domestic duties and that Mr Ferguson drove him to his various appointments and assisted with lifting heavy stuff. I believe the explanation given by Mr Hepburn as to why he needed the help at home and to chauffeur him around approximately one and half months after the incident is reasonable. Both worked for US\$350 per week and worked for a total of 6 weeks - $US\$700 \times 6 = US\$4,200$ and I award those sums not only because I believe that on a balance of probabilities these sums were incurred but also because these documents on which the Claimant relies are documents which the Defendant’s attorney agreed.

Loss of Earnings

[45] In contention based on the pleadings are the Loss of earnings and cost of transportation. It is clear that Mr Hepburn lost work as an electrician. The Claimant has pleaded the loss “and continuing” and has also pleaded what he is likely to have gained had he completed his apprenticeship. What he is likely to have earned on completion of his apprenticeship is no more than speculation since no hard evidence except for the Claimant’s say so was garnered. The claim for the initial weekly wage of US\$720 is from May 2008 to March 2010 and continuing. However, the letter from his employer says he was employed up to March 27, 2009. This means he would have been getting his weekly pay up to that time. The claim is post taxes but the employer did not give that indication.

[46] While it is true that the Claimant continues to be out of his job, he has taken steps to mitigate his loss. The evidence does not say when he began working in catering or doing odd jobs so it is impossible to determine the period between March 27,2009 and when he started to work even in an *ad hoc* manner. Without that evidence no award beyond March 2009 can be made. In addition, this is a claim for an incident that happened in 2008. There is absolutely no good reason for this matter taking 11 years to be dealt with. In an ideal world, the issue would have been dealt with in 2013 and the loss of income would have ended then. It cannot be fair that the loss of income should continue to today when the Claimant has himself contributed to the delays in the matter coming to the Court for consideration.

[47] Dr Noah in his medical report stated that the Claimant had returned to work 3 months after the incident (see medical report dated March 9, 2016). That and the fact that he has worked would lead me to take the view that the loss of earnings should be for no more than the 3 months he did not work. Mr Hepburn would have returned to work in July or August 2008 and was so employed up to 2009 when he was terminated (see Exhibit 9). Loss of Income would therefore be from April 25, 2008 to July 28, 2008 for a total of 14 weeks. The loss of income would therefore be US\$10,080.

Amplification

[48] The Claimant made an application to amplify the witness statement. Absolutely no objection to do so came from Ms Fletcher, which surprised me. However, at paragraphs 43 – 63 of her submissions Ms Fletcher raises the point that amplification was allowed for the purposes of tendering certain pieces of hearsay documents into evidence. This is what I referred to in my paragraph 43 above. An objection can be raised on points of law which a party's attorney-at-law takes issue with during the trial or assessment of damages. The objection will be considered by the judge and a ruling made but in instances where no objection is taken and the evidence is before the Court then it is somewhat surprising that the objection

is taken in the submissions. The same is true with respect to Ms Fletcher's concern about leading questions that were asked as set out in paragraphs 43 and 44 of the written submissions.

[49] While it is the Judge's job to ensure the purity of the evidence by disallowing leading questions, it is also true that where the witness statement already sets out the factual background, then a leading question may not necessarily be detrimental to the Defendant's case. Hearsay evidence so elicited is not good evidence but evidence elicited by using leading questions is admissible. I will go further to say that the Judge will weigh the evidence that has been admitted and make a determination as to its relevance or whether it is useful in determining issues of liability or specifically in this case, issues of quantum.

[50] Ms Fletcher complains in her submissions that there was no reference to a medical report in paragraph 21 of the witness statement yet the question with respect to receiving a medical report from Dr Gulati was allowed. Even if she had objected, I believe I would have been minded to allow the question as the purpose of the amplification was to find out whether Dr Gulati had prepared a medical report after he had treated the Claimant. Ms Fletcher's submission would suggest that even though the Claimant could not recall any details of the medical report it was allowed into evidence. This is not correct. The Claimant had difficulty remembering at first and counsel for the Claimant went on to ask about other documents then returned to the issue of Dr Gulati's medical report. The line of questions and answers follow:

Ms Mulendwe: You mention that you recall Dr Gulati's address? What was it?

Mr Hepburn 970 Yonkers, New York

...

My name is on the medical report and the doctor's name as well as well as Dr Cabagnot's name. Dr Gulati's name is on it too."

[51] The Claimant was not allowed to look at the document until he had properly described it to the Court and the report prepared by Dr Gulati was only allowed into evidence after the Claimant had satisfactorily identified it.

Transportation

[52] The evidence concerning transportation came out in amplification. The amplification was meant to explain in detail the how and the why of the costs incurred for transportation. Mr Hepburn's evidence is that he had to travel from New York to Miami for follow up visits to the eye doctor where he was treated initially for the injuries to his eye. I wondered why Mr Hepburn had not asked to be transferred to a hospital in New York so that he could have his follow up treatments there. I am sure that eye doctors with similar skill set are available in New York. Ms Fletcher however did not question Mr Hepburn on this issue nor was the duty to mitigate pleaded in the Defence.

[53] Mr Hepburn's evidence is that he travelled to and from New York to Miami and from New York to Jamaica with his wife. He had to travel with her initially because "he had a lot of issues and problems". He was having "chronic headaches and dizziness". He was "having so much (sic) issues". His wife was always with him, especially at the beginning, to assist him. On the occasions that he came to Jamaica he used the opportunity to see his attorney-at-law and local consultants. Mr Hepburn has supplied bank statements in support of his evidence of transportation costs incurred for travelling to and from New York to Miami and New York to Jamaica.

[54] Ms Fletcher's submissions on the issue of transportation is contained in her written submissions at paragraphs 48 – 56. Ms Fletcher objected to the transportation costs for Mr Hepburn's wife and daughter. She also objected to the transportation costs to see Dr Cheeks and Dr Calder locally since the credit card statements tendered were for a time prior to Mr Hepburn seeing either doctor. At paragraph

51 she submits that the evidence is that the journey to Jamaica was to see Dr Cheeks but the bank statement records a return trip from JFK (New York) to FLL (Fort Lauderdale). She says at paragraph 52 that there should be no reason for the cost of the travel being US\$204.70 on one occasion and US\$209.20 on another. This reasoning is somewhat flawed as ticket prices are not standard and can fluctuate from day to day if not from hour to hour.

[55] I will not allow travel for Mrs Hepburn on these receipts as those costs were incurred in 2009 and 2010 over one year after the incident had taken place and by which time Mr Hepburn would have been on the mend (recall he had returned to work 3 months post incident). If Mr Hepburn was able to return to work, there is no reason he could not have travelled on his own over a year after the incident. I certainly would not be considering the transportation costs for his daughter as there is no evidence with respect to why she would have to travel with him for his medical follow up appointments. I also will not allow the cost of transportation to collect a medical report since medical report could have been emailed or fedexed and there was no reason given as to why it would have to be collected in person. I am also not allowing travel from Jamaica to Miami on attorney's instructions to get information as I am well aware, without evidence to the contrary, that emails and telephone usage could have been helpful especially in circumstances where no reason is given as to why this information had to be collected in person. I agree with Ms Fletcher that the cost to travel to Jamaica to see Dr Calder and Dr Cheeks should not be allowed as they saw Mr Hepburn in 2011 and the credit card statements were dated pre 2011. In addition, Dr Cheeks reports that Mr Hepburn was unaccompanied on his visit and both Dr Cheeks and Dr Calder reported seeing him only once physically. Special Damages must be specifically pleaded and proven. To have received an award for travel to Jamaica to see Dr Cheeks and Dr Calder the Claimant would have had to produce receipts for travel to Jamaica during the period when he was seen by the doctors.

[56] In light of the above, only the following claims will be allowed. The sums represent payment for travel from New York to Florida for follow up treatment as I am of the

view, based on the evidence that these follow up visits were necessary. It is not clear on the bank statements whether the sums were for a single traveller or two but since Mr Hepburn's evidence is that he was accompanied by his wife, I will divide the total cost into two to determine the cost of travel for Mr Hepburn. The following bank statements are considered:

Date of statement	Amount on statement (US\$)	Amount awarded to Claimant (US\$)
6/8/2010 Exhibit 27B	204.70	102.35
8/5/2009 Exhibit 27C	209.20	209.20
August 5, 2020 to September 3, 2010 Exhibit 27A	100.00	100.00
Total		411.55

The total allowed for travel from New York to Florida for Follow up treatment is US\$411.55. Car rental in the amount of US\$517.79 is not being allowed. While it is clear that Mr Hepburn would need the use of a car to get from his hotel to the

medical facility, there would need to be more evidence to indicate the days he travelled by this route and the cost per day for the rental of the motor vehicle. That evidence being absent the claim cannot be allowed.

[57] The Claimant claims costs to see Dr Suad Noah. Dr Noah is one of the experts that was agreed and it is clear from the medical report he prepared concerning Mr Hepburn that he had seen him on several occasions. According to the medical report prepared by Dr Noah, Mr Hepburn had consulted with him since 2013. In 2016, Dr Noah said that Mr Hepburn would continue to require weekly psychotherapy but he does not say whether Mr Hepburn in fact attended those sessions. In his December 2020 report, he says the weekly sessions had commenced but he does not say how many sessions were conducted.

[58] Ms Fletcher raises an interesting point. The document presented is not authentic. It does not bear any stamps from Dr Noah's office or his signature. Any of those identifying marks would distinguish it from a regular word document which anyone could generate. Ms Fletcher cautions me as to my reliance on the invoice which is meant to support a claim for US\$65,000. I am so cautioned especially where there is no physical proof that Mr Hepburn was seen by him on 328 occasions. There are no appointment cards or notifications. I just have an invoice and Mr Hepburn's say so. This is not sufficient. Mr Hepburn says he is still receiving treatment from Dr Noah but the Invoice is only with respect to sessions from September 2013 to December 2020. Where the sessions done after December 2020 free? Special Damages must be specifically pleaded and proven. I accept that there is a lien obtained in favour of Dr Saud but that document offers very little assistance. While I believe that Mr Hepburn saw Dr Noah, the evidence as to the period of time over which he was treated by the said doctor must be clear. The Court cannot without more be called on to engage in speculation and as such the Cost to see Dr Suad Noah in the amount of US\$65,600 will not be awarded.

[59] It is clear that Mr Hepburn will need to change his prostheses over the years. Dr Calder in his medical report indicated at paragraph 5 page 3 that

“prostheses degrade over time as they are made of acrylic, silicone or some other inert material and are painted to resemble the eye. They may cease to fit properly as the lids and orbital content change over time. An ophthalmologist can give more details about this.”

The incident took place in 2008 and based on Dr Calder's evidence, it is very likely that the prosthesis would have had to be replaced already. The cost of the prosthesis as at June 2011 was given as a range. It is a pity that no receipts were put forward for prosthesis that have already been used. Those receipts would have been helpful in determining the current cost of a prosthesis since the document produced by the ophthalmologist which sets out the range of costs was prepared in 2011. There is no evidence as to what resurfacing a prosthesis is and for what benefit or what adjustments may be necessary. No consideration will be given for cleaning or resurfacing and since a range is given to change the prosthesis, I will use the average to make the determination as to what the cost is likely to be. The total would be \$3100 with a multiplier of 6 the cost would be US\$18,600 for the cost of future prostheses.

[60] Several other future expenses were claimed (psychotherapy, medication and doctor's visits). They have not been considered. Damages awarded is to put the Claimant into the position he would have been in had the tort not been committed against him. In my opinion, this means that the sums paid to him are to be used in his rehabilitation or in his recovery process. No one knows how many years Mr Hepburn will need psychotherapy for. The psychiatrist does not say. The same is true for his medication and doctor's visits. What will he be going to the doctor for? His eye issues have already resolved and he is wearing his prosthesis. Those sums claimed as future expenses will not be awarded.

Interest

[61] Interest is awarded in the claim up to July 15, 2021 as this is the date the Assessment of Damages was scheduled to be held but it was postponed because the Claimant was not ready to proceed as doctor's answers to questions were outstanding. I am not of the view that interest should be awarded automatically up to the date of judgment when the Claimant is the reason for the delay in the matter being heard. Why should the Defendant pay interest over an extended period when it was the Claimant who caused the delay of the hearing?

[62] My orders are as follows:

- a. Damages are assessed in favour of the Claimant against the Defendant who is to pay the Claimant General Damages for his pain and suffering and loss and amenities the sum of \$8M, damages for psychological injury in the amount of \$2.3M, Cost of future prostheses in the amount of US\$18,600, Exemplary Damages in the amount of \$1M and Handicap in the Labour Market in the sum of \$1.5M less the sum of \$8.5M which was already paid pursuant to the order for interim payment made by Hutchinson J (Ag) as she then was on April 2, 2020.
- b. Interest at the rate of 3% per annum from April 3, 2020 to July 15, 2021 is payable on General Damages for pain and suffering and loss of amenities and psychological injury.
- c. The Defendant is to pay the Claimant Special Damages in the amount of JM\$136,142 and US\$17,061.55 plus interest at 3% per annum from April 25, 2008 to July 15, 2021.
- d. The Defendant is to pay the Claimant costs in the claim which costs are to be taxed if not agreed.
- e. The Claimant's attorneys-at-law are to file and serve the Judgment.

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**T. Mott Tulloch-Reid
Puisne Judge**