[2017] JMSC Civ 218

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 06005

BETWEEN	**ROBERT MINOTT**	**CLAIMANT**
AND	**SOUTH EAST REGIONAL HEALTH AUTHORITY**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Stacey Knight, Nieoker Junor, Juronel Smalling, Bianca Samuels and Able-Don Foote, instructed by Knight, Junor and Samuels for the Claimant

Diedre Pinnock and Dale Austin, instructed by the Director of State Proceedings, for the Defendant

HEARD: NOVEMBER 9, 10, 11& 22 and DECEMBER 12, 2016 and OCTOBER 20, 2017

CLAIM FOR DAMAGES FOR NEGLIGENCE – CLAIM FOR HANDICAP ON THE LABOUR MARKET – CLAIM FOR LOSS OF FUTURE EARNINGS – MULTIPLIER/MULTIPLICAND APPROACH – LUMP SUM APPROACH – DISTINCTION BETWEEN A CLAIM FOR LOSS OF FUTURE EARNINGS AND A LOSS OF EARNING CAPACITY – HANDICAP ON THE LABOUR MARKET – GENERAL DAMAGES FOR PAIN AND SUFFERING AND LOSS OF AMENITIES – CLAIMANT WAS A WELDER – CLAIMANT'S LEG WAS AMPUTATED DUE TO THE CROWN'S NEGLIGENCE – LOSS OF EARNINGS UP UNTIL DATE OF TRIAL TO BE TREATED AS AN ITEM OF SPECIAL DAMAGES – LOSS OF EARNINGS EXPECTED AFTER TRIAL TO BE TREATED AS AN ITEM OF GENERAL DAMAGES

ANDERSON, K. J

INTRODUCTION

[1] On December 26, 2009, the claimant fell into a gully and suffered, as a consequence, a puncture wound to his right leg. He was taken to the Kingston Public Hospital and developed gas gangrene which ultimately resulted in his right leg having been amputated. He filed a claim form and particulars of claim, on September 27, 2011 and claimed damages for personal injuries and financial loss, as a result of the defendants' negligence.

[2] The trial began on November 9, 2016, but on November 11, 2015, crown counsel conceded and the parties agreed that liability of the 2nd defendant was admitted. That was, to my mind, a wise decision on the part of crown counsel. The court then entered judgment against the 2nd defendant and proceeded to assess damages.

[3] The parties agreed on the following:

a) That the claimant suffered 36% permanent partial impairment, as testified to, by Dr. Philip Waite

b) Taxi fare - $25,000.00

c) Claim for prosthesis - $184,800.00

d) Cost to repair prosthesis - $35,000.00

e) Medical reports of Dr. Philip Waite - $55,000.00

f) Medical reports of Dr, D.L. Arscott - $36,000.00

g) Cost for disability identification card - $200.00

h) Cost for consultation and medical report of Dr. Waite - $107,000.00

[4] Upon the assessment of damages hearing, submissions were made by the opposing parties, on special damages, general damages for pain and suffering

and loss of amenities and loss of earning capacity – or in other words and as it will hereafter be referred to, 'handicap on the labour market.' On December 12, 2016, however, the claimant's lead counsel informed the court that the claimant is also seeking damages for loss of future earnings and future medical care, pertaining to replacement of the prosthesis over several years. Those latter-mentioned two (2) items of damages are items of special damages, whereas a claim pertaining to handicap on the labour market, is an item of general damages.

Special damages claimed for

[5] This court accepts and understands it to be the law, that as a general rule, special damages must be specially pleaded and specially proven. In appropriate cases however, where there exists a proper basis to do so, that general rule will give way to common-sense, which is that in some circumstances, to insist on strict proof of each and every item of special damages, by means of documentation in particular, would be, as has been stated in at least one reported judgment, 'the vainest form of pedantry.' See: **Desmond Walters v Carlene Mitchell** – [1992] 29 JLR 173; and McGregor on Damages, 12th ed. at paragraph 1528; and **Radcliffe v Evans** – [1892] 2 QB 524.

[6] That general rule therefore, must to my mind, give way to common-sense, in circumstances wherein, items of special damages are not particularized, but yet the claimant, during trial, seeks to recover for those alleged losses and the defendant agrees to permit recovery for same. In circumstances such as that, for all of those items of special damages that the claimant is seeking recovery of, by means of an award of damages, since the defendant has consented to the claimant's recovery of same, then, even though some of those items were not particularized in the claimant's particulars of claim, the claimant ought to be and will be able to recover for same. If the absence of notice does not perturb the opposing party and thus, the failure to particularize does not perturb that party and in addition, the opposing party consents to claims for items of special

damages which either could or ought to have been particularized, but which were not, then the trial court should award same to the claimant.

[7] In this claim for special damages, as set out in his particulars of claim, the claimant had claimed for, *inter alia*, the cost of obtaining a food handler's permit - $500.00; and the cost of a motorized wheelchair - $249,836.16, and the cost of a specially adjusted motorcar - $2,000,000.00. All of those aspects of his claim were subsequently abandoned. They were abandoned by the claimant, during the claimant's counsel's presentation to the court, of her oral closing submissions. They were wisely, in my view, then withdrawn, as either no evidence at all, or no sufficient evidence was led during trial, in support of those items of damages, as were initially being claimed for.

The claimant's claim for 'loss of income'/loss of future earnings

[8] The parties' counsel, had, at my request, filed and served written submissions regarding various matters pertaining to the claimant's claim for damages for loss of income and also, his claim for handicap on the labour market. This court has read and carefully considered all of that which has been stated therein, along with all of the pertinent caselaw, which was appended to those submissions and thanks counsel for same, as they have been helpful to the court. This court has also carefully considered the oral closing submissions made on behalf of the parties.

[9] As was helpfully elucidated by Harrison, J.A in: **Monex Ltd. v Mitchell and Grimes** – SCCA 83/96 (judgment delivered December 15, 1998), '*loss of future earnings represents a distinctive different set of circumstances where the victim who, earning a settled wage has suffered a diminution in his earnings on resuming his employment or assuming new employment due to his disability. The net annual monetary loss in terms of the reduction in earnings is easily recognizable and quantifiable in such circumstances.*' Thus, as was stated in

Fairley v Thompson – [1973] 3 All ER 677, by Ld. Denning, '*compensation for loss of future earnings is awarded for real assessable loss proved by evidence*.'

It is very important to note that, as was stated by Browne J in **Moeliker v A. Reyrolle and Co. Ltd.** – [1977] 1 All ER 9, '*As I have said, this problem generally arises in cases where a plaintiff is in employment at the date of the trial. If he (the claimant) is earning as much as he was earning before the accident and injury, or more, he has no claim for loss of future earnings. If he is earning less than he was before the accident, he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But in either case he may also have a claim, or an additional claim, for loss of earning capacity, if he should ever lose his present job.'*

[10] In some of the caselaw *vis-a-vis* claims for loss of future earnings, such claims are set out as a sub-head of the overall special damages items/sums being claimed for. In other cases though, such claims are treated with, as an item of general damages and therefore, are not specifically particularized.

[11] What, to my mind, ought to be done as a matter of practice, is to claim for loss of earnings up to the date of trial, as an item of special damages and to particularize same accordingly. At the commencement of the trial, the particulars of claim can be amended, to specify what the specific sum of loss has been to the claimant, in terms of his earnings, from the time of the defendant's alleged wrong done to him, up until the date when the trial of that claim, has actually commenced. That is in fact, a claim for, 'loss of earnings.' That is a claim which is specifically calculable and ought, to my mind, to be specified in the special damages particulars, in terms of the precise calculation thereof, once the trial has commenced.

[12] That is not though, what was done in respect of this claim. What was done in respect of this claim, was that a sum was specified for loss of income and there was specified, 'and continuing.'

[13] The 'continuing' aspect of that claim for that item of damages is general damages, to the extent that beyond the trial date, no one knows what the future will bring about. Will the claimant remain alive, once the trial of his claim has ended? What will the economy be like, after the trial has ended? Will there be a shortage or an over-abundance of labour in certain fields of employment, after the trial and if so, in what fields of employment will those conditions then exist? All of these are matters of uncertainty.

[14] As such, the claim for loss of future earnings, refers to my mind, to a claim for anticipated loss of earnings, after the trial of the claim has concluded. Considered in that context, the claim for loss of future earnings is, in reality, an item or aspect of the claimant's overall claim for general damages.

[15] I am fortified in my view as expressed above, by dicta from the case earlier cited in these reasons, which for ease of reference, will now simply be referred to as, 'the **Monex** case.' Rattray P, who delivered the Court of Appeal's judgment in that case, stated, as recorded at page 21, that, '*it is worthy of note that from the date in 1991 when the respondent commenced her working life until the date of trial, real quantifiable losses were sustained, which could have been claimed as loss of earnings, an item of special damages.'*

[16] In further support of that position of mine, I refer to paragraph 35-061 of the text – Mcgregor on Damages, 18th ed., 2009, where the following is stated: 'The claimant is entitled to damages for the loss of his earning capacity resulting from the injury; catastrophic injuries, where cost of care predominates, apart, this generally forms the principal head of damage in a personal injury action. Both earnings already lost by the time of trial and prospective loss of earnings are included. While the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage, there would appear to be no substantive difference between the two (2), the dividing line depending purely on the accident of the time that the case comes on for hearing. Thus it has been accepted that the rule in **British Transport Commission v**

Gourley in relation to the incidence of taxation applies equally to the loss of income till judgment and the loss of earning capacity in the future. Similarly, the courts must take account of relevant changes of circumstances occurring before and after judgment, the only difference being that the former are a reality and the latter a matter of estimate. However, interest is to be awarded on the past loss but not on the prospective loss of earnings.' See: **Jefford v Gee** – [1970] 2 QB 130.

[17] **British Transport Commission v Gourley** – [1956] AC 185, is authority for the proposition, as stated by the author in his quotation above, that, *'the rules of procedure require that the past loss be pleaded as special damage and the prospective loss as general damage'.* See per Ld. Goddard, at 206.

[18] As stated at paragraph 35-065 of the same text, 'the courts have evolved a particular method for assessing loss of earning capacity, for arriving at the amount which the claimant has been prevented by the injury from earning in the future. This amount is calculated by taking the figure of the claimant's present annual earnings less the amount which he can now earn annually, and multiplying this by a figure which, while based upon the number of years during which the loss of earning power will last, is discounted so as to allow for the fact that a lump sum is being given now, instead of periodical payments over the years. This latter figure has long been called the multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in the annual earnings, the so-called contingencies of life and the incidence of inflation and taxation. There are, exceptionally, situations in which the court is entitled because there are too many imponderables in the case, to regard this conventional method of computation as inappropriate and to arrive simply at an overall figure after consideration of all the circumstances.' See: **Blamire v South Cumbria Health Authority** – [1993] P.I.Q.R Q1.

[19] Applying my understanding of the law as regards a claim for, *inter alia*, 'loss of future earning,' to the circumstances of this claim, I must at this stage primarily for the benefit of those persons who are reading this judgment, set out the facts underlying this claim and as regards the consent judgment as to liability, which has now been entered by this court, in respect hereof.

The background

[20] The claimant's evidence was that he is a skilled welder and that on December 26, 2009, while he was sitting on a chair near the gully, that chair broke and as a result, he fell into the gully and the broken chair then fell on him, resulting in a puncture wound to his right leg.

[21] The claimant was, as a consequence, in pain and was taken to the Kingston Public Hospital for treatment. Upon his arrival at the Kingston Public Hospital, the claimant was not given immediate attention. He had to register before he was treated and that registration process took approximately thirty (30) minutes. It was only after he had been registered that he was taken to the casualty department, where his wound was cleaned and he received an injection for the pain.

[22] The claimant was then taken to the waiting area, where about six (6) persons were ahead of him. At that time, despite the injection that he had been given, the claimant remained in pain and his wound was bleeding very badly.

[23] The claimant had to wait until the doctor on call had returned from lunch and the six (6) other persons had been attended to, before he was attended to, by that doctor on call. By that time, the claimant had been in severe pain for about four (4) hours. The surface of the wound was then cleaned and the wound stitched up and drugs were prescribed.

[24] The claimant returned home at approximately 4:00 pm that day, when he noticed that his wound was still bleeding and that he was in even more pain than before.

The claimant also noticed that the blood from the wound was darker in colour than before. The claimant did not take any of the prescribed medications because the pharmacies were, he testified, all closed on that day.

[25] By 11:00 pm that night, the claimant was in terrible pain, it was worse than it had been before and the claimant returned to the Kingston Public Hospital at about 11:30 pm. The claimant then was admitted to ward and given an injection for his pain. That injection did little to help ease the pain and thus, soon after, the claimant pleaded for assistance. At that time, the claimant observed that there were multiple doctors and nurses on the ward.

[26] The claimant's wound was bleeding very badly and he was then in so much pain that he was crying. That notwithstanding, the claimant was left in that state of terrible pain and received no further treatment until the afternoon of the following day.

[27] The claimant was attended to, by a doctor, during that following afternoon, which was December 27, 2009. That doctor only cleaned the defendant's wound and then instructed a nurse to bandage the wound. The claimant was then sent back to bed. During the following day – December 28, 2009, the claimant was approached by three (3) doctors, who then told him that he needed to have surgery to remove infected tissues and that if it was a drastic situation, then his leg would have to be amputated.

[28] The claimant underwent surgery and awoke to find that his leg was amputated below the knee. On the following day, the claimant was once again, medically assessed and was then told that there were bubbles gathering in his leg and that he would have to undergo a second surgery. The claimant underwent that second surgical operation and later, awoke to find that his leg was now amputated above the knee.

[29] Other testimony given during the trial, by the defence witness – Dr. Richard Aitken, made it clear that the claimant had, while undergoing treatment at the Kingston Public Hospital, for his initial injury, developed a medical condition known as, 'gas gangrene,' as a result of which, his leg had to be amputated.

[30] It was the claimant's contention as to liability, that if he had been treated in a timely and/or reasonably skilful manner by the hospital staff – Crown servants or agents, gas gangrene would either not have developed at all, or, at least, would not have developed to the extent that amputation became necessary.

[31] The Crown, as represented for the purposes of this claim, by the Attorney-General, eventually accepted that contention and therefore, at that stage, a consent judgment as to liability was entered by the court, against the 2nd defendant.

[32] That which has been set out above, in detail, as to the factual scenario, in terms of evidence presented to this court during trial, has been accepted by this court as being both accurate and truthful, save and except in one respect, which is, as was testified to, by Dr. Aitken and accepted as also being both accurate and truthful, by this court. That is that, when the claimant was initially treated at the hospital, prior to his having initially left there, he (the claimant) was prescribed oral antibiotics. There was no evidence given to this court by anyone, to even remotely suggest, either that the claimant purchased that medication, or had it purchased for him, much less that he had actually ever commenced taking same, in an effort to improve his health at that time.

[33] Somewhat surprisingly though, the defendant had not alleged contributory negligence on the part of the claimant, in the cause of his loss of his leg and consequential financial loss. As a consequence therefore, the defendants were not able to rely on same. See: **Section 3 (1) of the Law Reform (Torts) Act** and **Fookes v Slaytor** – [1979] 1All ER 137.

[34] Solely for the sake of completeness in enabling a proper understanding of the facts underlying this claim, it should be stated, as it was in evidence, by Dr. Aitken, that, '*though uncommon, gas gangrene is a highly virulent and aggressive infection as exemplified in this case. Based on the clinical observation made during the wound exploration and the rapidity of the infection, an amputation had to be done to salvage the life of the claimant.'* (paragraph 19 of Dr. Aitken's witness statement)

[35] It is worthy of note that in very large measure, the claimant's evidence given during trial and as recounted above, was unchallenged by defence counsel and therefore, was treated with, by this court, as having been accepted by the defendants.

[36] Whilst a particular witness/litigant though, may have been truthful in the giving of evidence during a court proceeding, at least in terms of the evidence which he actually gave to the court, that does not mean that said witness has told that court, the whole truth. Sometimes, things/details left unsaid by a witness are of just as much importance to understanding and knowing everything which needs to be known by the fact – finding tribunal/Judge, in order for that fact – finding tribunal/Judge to make a fair and properly reasoned assessment of how all pertinent issues in that case, ought to be legally resolved, as is the evidence actually presented to that tribunal/Judge, in that case.

The analysis of the claim for loss of income/future earnings

[37] The claimant has, in his particulars of claim, itemized as an item of special damages, his claim for loss of future earnings, as follows: *'loss of income for 18 months and continuing $1,152,000.00.'*

[38] Accordingly, by using the words, *'and continuing,'* it is apparent that the claimant is, in respect of that item of his overall claim, seeking to recover for actual loss, as well as anticipated loss. The actual loss of income will, if it is awarded at all,

be awarded to compensate the claimant for loss of income from the time of his treatment at the Kingston Public Hospital, up until the date of judgment on the claim – as that is when the trial of the claim would have concluded.

[39] The anticipated loss, which is that which, to my mind, can properly be categorized as, *'loss of future earnings*,' would pertain to the anticipated income losses of the claimant between the time, post-trial and his expected date of retirement, based upon evidence as to his date of birth or, at the very least, his age at the time when trial was underway. That anticipated loss is typically to be calculated using the multiplier/multiplicand method and no interest is payable on any damages sum awarded in respect of such anticipated loss. On the other hand though, interest is to be awarded, in respect of the claimant's actual loss of income.

[40] The claimant's lead counsel – Ms. Stacey Knight, had strongly contended, both orally and in writing, that the claimant is entitled to recover for loss of income, both in terms of his past, or in other words, actual loss as well as his anticipated, or in other words, future loss. Counsel – Ms. Knight, has not though, at all times remained consistent in her contentions in that regard.

[41] It was her contention that in Jamaica, just at it is in England and Wales, the multiplier/multiplicand approach is the typical and also, preferable means, of calculating loss of future earnings. See: **Ward v Allies and Morrison Architects** – [2012] EWCA Civ 1287, at paragraph 20, per Aitken LJ; and **Kenroy Biggs v Courts Jamaica Ltd. and anor.** – Claim No. 2004 HCV 00054; and **Curlon Lawrence v Channus Block and Marl Quarry Ltd. and anor.** – [2013] JMSC Civ 6 and **The Attorney General v Phillip Granston** – [2011] JMCA Civ 1.

[42] In England, the 'Ogden tables' are used to determine the multiplier. Those are actuarial tables created by a team of experts in the United Kingdom and which pertain to persons who live there. Since that cannot be usefully applied in

Jamaica, what is done here, is that the court draws its conclusion as to the appropriate multiplier, by considering the expected retirement age and adjusting, depending on the claimant's age at the time of the injury/tort and the nature of the claimant's disability and the vicissitudes of life.

[43] As stated by the claimant's attorneys in written submissions, 'when determining the multiplicand, that is, the annual loss of earnings, it is required that the court first settle on what is the likely pattern of employment and earnings that the claimant would have had if it were not for the tort. Then the likely pattern of employment and earnings in the circumstances of the case is decided, in order to determine the loss.' See: **Ward v Allies and Morrison Architects** (*op. cit.);* and **Leesmith v Evans** – [2008] EWHC 134.

[44] Thus, to determine both actual loss of earnings and loss of future earnings, it is very clear that what must be provided to the court, first and foremost, is evidence as to the claimant's earnings up until the time when he either ceased altogether, to earn at all, any income, or alternatively, ceased to earn as much income as he or she used to earn, prior to the commission of the tort, in relation to him, by the defendant.

[45] What was the evidence, if any at all, in that regard, will shortly hereafter be addressed. Prior to addressing same though, it is worthy of note at this juncture, that it is the claimant's counsel's submission, that the claimant's pre-accident earnings was $37,272.50 per fortnight (every two weeks).

[46] On the other hand, the defence counsel have in writing, submitted that there exists absolutely no evidence from the claimant as to his having in fact been earning an income, immediately prior to the accident, or in other words, immediately prior to his having been taken to hospital as a consequence of the accident, which is where the tort in relation to him, was committed by the Crown, as represented by the 2nd defendant.

[47] Following on that submission, it is also the defence counsel's submission that no award should be made to the claimant, for loss of earnings, whether up until the time of trial, or after the trial has concluded.

[48] That written submission was made after the oral closing submissions had ended and after this court had ordered the parties' counsel to provide to the court and to opposing counsel, written submissions on various issues pertaining to the claimant's claim for, 'loss for income for 18 months and continuing,' which is what their lead counsel has termed as a claim for, 'loss of future earnings.'

[49] During the parties' oral closing submissions, which this court has given careful consideration to, during the claimant's lead counsel's initial presentation/making to this court of that submission, the claimant's lead counsel had, initially, specifically stated that the claimant is not claiming for loss of future earnings. Upon the continuation of her oral closing submissions however, which took place on a separate date from the date when those submissions began, Ms. Knight made it clear to the court that the claimant is in fact claiming for loss of future earnings, separate and apart from handicap on the labour market. She then told the court that any suggestion to the contrary earlier made by her, was made in error and is therefore incorrect.

[50] It is now, therefore, very clear that the claimant is claiming for loss of future earnings, in addition to and as a separate head of damages, from handicap on the labour market.

[51] In her oral closing submissions on that latter date, Ms. Knight submitted that six (6) payslips are in evidence for the claimant, arising from his employment until 2007. She is correct in terms of her restatement of the evidence in that regard. It is to be recalled though and it is of importance to note that, the incident which led to the claimant having been taken to the Kingston Public Hospital on that same day, occurred on December 26, 2009. It was the negligent treatment of the claimant, at that hospital, which has led to this claim.

[52] Ms. Knight went on to contend, that the median/average of those six (6) payslips, is $37,727.08 and that the claimant's annual income in 2007, would have been: $850,904.17. Her submission is that said sum ($850,904.17) represents the multiplicand. The multiplicand, it will recalled, as was submitted in writing, by the claimant's counsel, should be the earnings that the claimant would have had, if it were not for the tort. I have corrected that submission somewhat though, by stating earlier in these reasons, that the multiplicand is the earnings that the claimant would *likely* have had, if it were not for the tort. That must be so, since no one can predict the future with certainty.

[53] In her oral closing submission, Ms. Knight submitted that the multiplier to be used, is 13. The claimant's counsel maintained that submission, as part and parcel of their written submissions.

[54] Accordingly, it is the claimant's counsel's submission, that the sum of $850,904.17 (the multiplicand) is to be multiplied by the multiplier of 13, thus giving a total of $11,061,754.20 – which is the sum that is now being claimed by the claimant, for loss of future earnings.

[55] The claimant's evidence as to his date of birth, is that he was born on March 6, 1981 and that he is a welder. That evidence has been accepted by this court as being both accurate and truthful.

[56] The claimant's evidence went further as to his training as a welder, his employment in 2007, his unemployment between 2010 and 2013 and what has been his employment status since November, 2013. It is worthwhile to recount that evidence in some detail and that will be done, immediately hereafter.

[57] He gave evidence that he is a skilled welder and that he has a level 2 welding certificate from the Heart Trust (NHT), a National Contract Certificate in Welding and a pass, as an American Welding Society (AWS) test result.

[58] He also, gave evidence that, 'back in 2007,' when he, 'was at Carib Cement,' he, 'used to earn almost $30,000.00 per fortnight, but from 2010 until the end of 2013,' he was unemployed. During those four (4) years, he had to take groceries and other necessary goods, on credit. He was doing odd jobs like selling books to pay his bills, but there was no profit in that.

[59] There were entered into evidence, at the onset of the trial, several agreed documents. Among those documents were payslips from Schrader, Camargo, Ingenieros – the parent company for Carib Cement. Those were the payslips given to the claimant by his then employer and are payslips issued every two (2) weeks (fortnight). They are respectively dated as follows: March 2, 2007, March 16, 2017, March 30, 2017, April 13, 2017 and May 11, 2017.

[60] No enquiry was made of him, by either lead counsel at trial, on behalf of either party, as to the whereabouts of any of the other payslips which he should have, if he had continued working at Carib Cement until he had become injured and been taken to the hospital, on December 26, 2009.

[61] It is not surprising though, that defence counsel would not have asked that question, because lead defence counsel is to my knowledge, sufficiently experienced as an attorney, to know that when cross-examining a witness, it is a strong general rule, that one should never ask a question in respect of which one does not know the answer. I am prepared to afford to lead defence counsel, the benefit of the doubt in that regard. As to why the claimant's counsel did not make that enquiry, I would rather not even hazard a reasoned guess, lest, my hypothesis is faulty. Suffice it to state for present purposes though, that no evidence was given either as to whether any payslips either from Carib Cement or any other business place, was/were ever issued to him at any time between May 2007 and December 2009, and if so, what has happened to those payslips, and whether any effort was made to either locate same, or perhaps, to obtain copies of same, from Carib Cement, or any other business place.

[62] Actually, the claimant gave no evidence as to when it was that he lost his employment with Carib Cement and also, gave no evidence that he had been granted sick leave, either by Carib Cement, or any other possible employer of his, at the time when he was in hospital, as a consequence of the relevant injury. He also gave no evidence as to why it was that in 2010, he was not then employed.

[63] Furthermore, he gave no evidence that he was in fact employed by Carib Cement, or any business place, entity or person, or even self-employed, as at the date when he was injured and went to hospital, that being December 26, 2009.

[64] That omission and lack of evidence, is of great significance, as regards the claimant's claim for loss of earnings up until trial and loss of earnings up until trial and loss of future earnings, beyond trial, which have been collectively referred to, in his particulars of claim, as an item of special damages – '*Loss of income for 18 months and continuing.'*

[65] The same is of great significance for a few reasons, one of the main ones of which being, that it was the lead defence's counsel's oral submission, in her closing address, that the claimant is not entitled to recover any sum for loss of future earnings, because there exists no evidence whatsoever, that the claimant was in fact employed or earning any income whatsoever, at the time when he went to the hospital in December, 2009. The claimant's counsel repeated that submission, in their written submissions on the claimant's claim for loss of future earnings and handicap on the labour market.

[66] I will return to the effect of the lack of such important evidence, on the claimant's claim for loss of future earnings, shortly hereafter, but at this stage, will next go on to referring to the claimant's evidence as to what he had been doing between 2010 and 2013, in an effort to obtain income and as to what employment he has been engaged in, since November, 2013 and as to what he was earning, if and when earning at all, between then and the date when he gave evidence at trial.

[67] According to the claimant, in 2010, months after his leg had been amputated he went to Heart Trust NTA, to apply for a job. They put his name on an overseas program, but he has not yet got a position. His disability is preventing him from getting a job. He is no longer able to weld as efficiently, because his balance and steadiness are not as they were. He cannot do overhead welding like he used to do. If he was to weld vertically, he had to lean on something, in order to get himself steady. He can still do Tungsten Inert Gas (TIG) welding, but that is a very expensive process and although he has tried, he cannot find any work doing that.

[68] He gave evidence that since November, 2013 he has been doing 'contract work' at the tyre shop, but he is not on the payroll and is earning 'way below,' his skill level. This court had accepted as truthful and accurate, the claimant's evidence as regards what he has been doing between 2010 and 2013, both in an effort to actually obtain employment and also, income and as to whether he has ever regained employment or carried out any activity, in an effort to earn an income. What this court knows is that at the time when he certified his witness statement, which was March 3, 2014, the claimant was then employed and earning income.

[69] Accordingly, some sum would have to be deducted from the sum which his attorneys have urged this court to apply as the multiplicand in calculating the claimant's alleged loss of future earnings. Additionally, some sums would have to be deducted from the claimant's alleged actual loss of earnings up until the time of trial. The fact that no evidence as to the claimant's income between November, 2013 and the time of trial, was given to the court, would not serve to prevent this court from assessing same, as part of its overall assessment as to any future earnings loss, or actual earnings loss.

[70] In that regard, see the comments of Phillips, J.A. as made in the case – **Jamaica (Clarendon Alumina Works) v Lunette Dennie** – [2014] JMCA Civ 29, where, at paragraph 60, it is stated that a person claiming damage must be prepared to prove their damage. If the damage sustained is clear and substantial, but the

assessment of the same is difficult, the court must do the best it can in the circumstances. That dicta was adopted and applied again by the Court of Appeal in its recent judgment, in the case: **Garfield Segree and Jamaica Wells and Services Ltd. and National Irrigation Commission Ltd**.– [2017] JMCA Civ 25.

[71] Bearing in mind though, that the burden of proof rested on the claimant's shoulders, to prove the losses that he has claimed for, the claimant has failed to prove that he lost any income as a consequence of the defendant's commission of the relevant tort. Instead, it is in fact far more clear, on a balance of probabilities, based on the actual evidence presented to this court, that the claimant had, at least as of November, 2013 been earning an income, whereas he was not, as of the date when the tort was committed, then earning any income.

[72] This court recognizes that it is always open to a court to draw reasonable inferences from the facts found to have been proven to the requisite standard, which is, proven as being more probable than not; or in other words, proven on a balance of probabilities. This court also recognizes and has applied the requisite standard of proof, that being proof on a balance of probabilities.

[73] The claimant's counsel, in submissions, clearly took the view that the claimant had proven, to the requisite standard, his loss of income. The defence counsel have submitted that the contrary is true.

[74] I take the view that the claimant has failed to meet the requisite standard of proof, in proving that he lost income as a consequence of the commission of the relevant tort.

[75] I recognize that the claimant is a trained welder. That though, does not mean that he was in fact employed in any capacity, or actually earning an income in late December, 2009, which is the date when the tort was committed. I do not believe that it is a reasonable inference from the proven facts, that the claimant

was in fact earning any income, or that he was at all, employed at the time when the relevant tort was committed.

[76] Having reached that conclusion, it follows that no award ought to be made to the claimant, with respect to the loss of income which he has claimed for, whether that claimed loss of income is up until the date of trial and /or beyond then.

[77] It must be recalled, what was stated by Browne J in **Moeliker v A. Reyrolle & Co. Ltd**. (*op. cit.),* which is that – *'... If the claimant is earning as much as he was earning before the accident and injury, or more, he has no claim ...'* Also, it must be recalled what was stated in **Fairley v Thompson** (*op. cit.),* by Ld. Denning, that being that, '*compensation for loss of future earnings is awarded for real assessable loss proved by evidence.'*

[78] Since the claimant gave no evidence as to his earning any income at any time either in 2008 or 2009, it is this court's view that he deliberately omitted to give any such evidence, or any evidence pertaining thereto, because he did not wish this court to know that he was then unemployed. That is the inference which has been drawn by this court.

[79] I have drawn that inference because, the claimant's complete lack of evidence as to whether he was employed at any time during either 2008 or 2009, is very stark. It stands in stark contrast to the very detailed evidence which the claimant has provided to this court, about every other pertinent matter for the purposes of this trial, that including, but by no means limited to his employment with Carib Cement in 2007, which he provided payslips, to prove.

[80] I have also carefully borne in mind that it by no means follows that persons with skills, such as for instance, welding skills, particularly in Jamaica, are not oftentimes, unemployed. That will often be the case in Jamaica, where it is well known, that our nation's economy has, for a very long time now, been weak.

[81] The onus was on the claimant to prove to the requisite standard, that he was earning an income as of December, 2009 and that, as a consequence of the commission of relevant tort, by the defendant, he was negatively impacted to the extent that amongst other losses suffered by him, he also suffered the loss of the income that he was earning prior to the commission of that tort. The claimant has wholly failed to prove same and accordingly, no award will be made by this court to him, either for loss of earnings up until trial, or for loss of future earnings, which in reality, should relate to loss of earnings, post-trial.

Conclusion as regards special damages

[82] What will be awarded to the claimant as special damages therefore, will be those items of loss that were claimed for, in the claimant's particulars of claim, as well as for those items which were not itemized in the claimant's particulars of claim, as being claimed for, and which have been agreed to, by defence counsel. The sum of those items is $452,000.00. That would be the aggregate sum for the following items which were claimed as special damages: Taxi fare, medication, consultation and medical reports – Drs. Waithe and Arscott, cost of prosthesis and cost of repairing prosthesis, cost of disability identification card, consultation and medical report – Dr. Waithe, cost of crutch. On that aggregate sum, interest will be awarded from as of the date when the claimant's particulars of claim was served on the defendants up until the date of judgment. The sum to be awarded to the claimant as special damages therefore, is $452,000.00.

[83] The claimant's lead counsel has urged this court to also award to the claimant, as special damages, the sum of $300,000.00 arising from the attendance at court, during trial, of Dr. Waithe. Crown counsel have not agreed to that item of claim and that item was not specifically itemized in the claimant's particulars of claim, as being an item of damages that was being claimed for. It is though, undisputed and this court accepts that Dr. Waithe was in fact present in court throughout the liability phase of the trial.

[84] It is my view that the general rule which requires special damages to be not only specifically proven, but also, specifically pleaded – which the claimant failed to do, must apply to this item of claim and that as a consequence, with there having been no claim for that item, made in the claimant's particulars of claim and with there having been no amendment of the particulars of claim, so as to claim for that item and with the Crown not being in agreement as to that item, then the end result must be that said item cannot be recovered by the claimant. If it were otherwise, then the general rule as aforementioned, would be an exceptional rule, or a rule that is never applied at all. That to my mind, ought not to be. That reasoning applies equally to the claimant's counsel's contention that the claimant ought to be awarded damages for future medical care, which also was not particularized and not agreed to, by defence counsel.

General Damages – Pain and Suffering and Loss of Amenities

[85] On the matter of general damages, there was a great deal of pertinent evidence provided at trial, by the claimant. All of that evidence has been accepted by this court, as being both accurate and truthful. That evidence will, in large measure, be summarized, immediately below and it is to be noted that even though there may be aspects of the pertinent evidence in that regard, which are not hereafter referred to, in these reasons, nonetheless, this court has carefully reviewed and considered all of the claimant's evidence and all of the evidence of the expert witness whose testimony was relied on, by the claimant.

[86] Firstly, there is no doubt that the claimant went through a dreadful and traumatic experience in terms of the overall manner of his medical treatment on the two (2) occasions when he was at the Kingston Public Hospital, between December 26 and 28, 2009.

[87] At no time before or after the amputations of his leg – the first amputation having been below his knee and the second, above his knee, was the claimant provided with any counselling. Overall therefore, bearing in mind what he had underwent

in terms of two (2) surgeries and ultimately, the loss of his leg and his knee, the failure to provide counselling to him, must have left him traumatized and despondent. He testified that after the second amputation, he really felt as though his life was over.

[88] Subsequent to his having been discharged from the Kingston Public Hospital, it is his testimony that, *'his life afterwards has been a crisis. There is a stigma against persons who have missing limbs. People look at me differently as if to say that I wanted my leg to be cut off, or that they are disgusted with me. Some people have no sympathy and will curse even me. Another set of people will promise me things because they initially feel sorry for me, but when I ask them to follow through on the promise they say they do not have it and will act as if I am begging and pressuring them. People also question me about my leg to the point where it is very irritating.'*

[89] He gave evidence that he was in a relationship at the time of the accident, but as a result of his having lost his leg, the girl left him and since then he has had no confidence in approaching a woman. His life is, '*nothing like it used to be*.'

[90] He also gave evidence that while at home thinking about how things have changed, he has felt like taking his own life. He also testified that he gets flashbacks and anxiety attacks whenever he passes a gully.

[91] According to the claimant, he gets tired if he has to be standing for a long period of time and his left leg feels numb. On several occasions he has been walking and tripped, because it is harder to gauge his walk and ground clearance, with the prosthesis that he now uses. The 'prosthesis' is a scientific term for an artificial limb and is thus, the claimant's artificial leg.

[92] He gave evidence that he has not been able to sleep well at nights. Before he lost his leg, he used to play basketball and football. Sports was everything to him and was his means of recreation every day. According to him, now, when the

other guys are playing basketball, he feels embarrassed and inadequate, so that most times, he cannot even watch. One day in 2012, he was trying to play basketball and was making an attempt to dribble the ball. The prosthetic leg was unable to flex in the way that a normal leg would. His left leg alone, could not support him and he slipped and fell, as a consequence of which, his prosthetic leg, broke and he had to repair it.

[93] Since then, he has stayed away from trying to play any sports. He also used to go to the beach and swim, but he has not done that since he lost his leg. He has taught himself how to ride a bicycle with only one leg and sometimes he rides to the beach and merely looks at the waves. He does not know whether he can swim anymore. He is too afraid and embarrassed to try.

[94] Based on the expert evidence given to this court by Dr. Waithe and also based on the agreement of counsel for the parties in that respect, the claimant is assessed as having suffered a permanent partial disability of 36%, as a consequence of the Crown's negligence, in respect of which, the 2nd defendant has accepted liability.

[95] The claimant's counsel has submitted that the claimant should be awarded by this court, an appropriate sum as damages arising from his handicap on the labour market. In written submissions, the claimant's counsel has contended that the sum to be awarded to the claimant, as general damages, under the head: *'Handicap on the labour market,'* is to be calculated using the multiplier/multiplicand approach, rather than by using the lump sum approach.

[96] Interestingly, even though counsel who signed the claimant's written submission as regards loss of future earnings and handicap on the labour market, namely: Stacey Knight, on behalf of the claimant's attorneys: Knight, Junor and Samuels, made it clear in those submissions, that an award for handicap on the labour market is, if it is to be made by a court in this jurisdiction, is to be calculated taking into account different considerations/criteria, than are to be taken into

account, for the purpose of possibly making an award as to loss of future earnings, nonetheless, submitted in those written submissions, that the claimant's annual loss of earnings should be multiplied by a multiplier of 13.

[97] That was in fact the same submission which learned counsel for the claimant had made, as regards the multiplier/multiplicand to be used in calculating the award which she has strongly contended, ought to be made by this court to the claimant, for loss of future earnings. She made that particular submission during the latter stages of her oral closing submissions.

[98] There were other oral submissions which learned counsel – Ms. Knight, then made, which were either erroneous as a matter of law and/or not based on evidence presented to this court during trial and therefore, need not and will not be referred to, with any specificity. Suffice it to state though that none such, save and except for relying on the same multiplier/multiplicand, in calculating loss of future earnings, as in, calculating handicap on the labour market, which is, in my view, an erroneous legal approach to matters of this nature, were repeated by the claimant's counsel, in their written submissions.

Handicap on the labour market

[99] In that context, it would undoubtedly be useful at this stage, to distinguish between court awards for loss of future earnings and for handicap on the labour market. The former-mentioned of the two (2) having already been addressed in detail, in these reasons, it is the latter which will now be addressed.

[100] On the other hand, as far as the submissions made by defence counsel, both orally and in writing are concerned, what is perhaps most interesting, is that in her oral submissions, lead counsel for the defendants had initially contended that in order for the claimant to properly be able to recover damages for handicap on the labour market, the claimant would have had to have led evidence as to the income which he was earning at the time of the trial. Very shortly thereafter

though, while continuing her oral submissions, lead counsel for the defendants submitted to the contrary, stating that the claimant can recover damages for handicap on the labour market and that in calculating that award, the multiplier/multiplicand approach can be used. It was then also her submission that the multiplier to be used, should be: 7 and the multiplicand, should be: $1500 x 52 weeks – $78,000.00 per annum.

[101] There was in fact, admitted into evidence at trial, as an agreed document, a correspondence written by the claimant's employer at the date of trial and that correspondence confirmed that the claimant was then employed at a business place known as, '*Steve Cook Shop'* and earning $1500.00 a week.

[102] Of further interest, is that in their written submissions, in response to the question as to how an award for handicap on the labour market is to be calculated, it was correctly then stated as follows, in paragraph 25 of those submissions: '*The courts tend to discourage the use of the mathematical calculation for those awards of damages hence the lump sum approach is normally used.'*

[103] In the final analysis, in their written submissions, the defence counsel submitted that the claimant should not be awarded damages for handicap on the labour market, because, there having been led at trial, no evidence as to the claimant's earnings prior to, 'the accident,' the court cannot properly make such an award, since, in order to properly make such an award, the court needs to be able to compare the claimant's earnings before, 'the accident' with the claimant's earnings at the time of trial, so as to determine the extent (if any), of the claimant's disadvantage in the labour market. Reliance has been placed by the defence counsel, on the case: **George Edwards and anor. v Pommells and anor**. – SCCA 38/90. This submission will be addressed in detail, further on in these reasons.

[104] Handicap on the labour market is a term used interchangeably in the case law, along with loss of earning capacity. For present purposes, I will refer to this head of damages, as counsel have, which is as, '*handicap on the labour market.'*

[105] That head of damages is a head under the ambit of general damages. No interest can properly be awarded for handicap on the labour market. See: **Kenroy Biggs v Courts Jamaica Ltd. and anor.** – [2004] HCV 00054; and **Clarke v Rotax Aircraft Equipment Ltd.** – [1975] 1 WLR 1570.

[106] Whilst it is not uncommon for awards for loss of future earnings and handicap on the labour market to be made in the same case, it is clear that, as the claimant's counsel have submitted in writing, just as has the defence counsel, those awards, if they are to be made at all, ought to be and usually are, separately analyzed, calculated and treated. See: **Ronan v Sainsbury's Supermarkets Ltd. & anor**. – [2006] EWCA Civ. 1074; **Kenroy Biggs v Courts Jamaica Ltd. & anor.** *(op. cit.)* per Sykes J, at paragraph 93; **Monex Ltd. v Derrick Mitchell and anor.** – SCCA 83/96; and **Curlon Lawrence v Channus Block and Marl Quarry Ltd. and anor.** – [2013] JMSC Civ. 6. As stated by the claimant's counsel, in their written closing submissions, *'an award for handicap on the labour market compensates the claimant for future financial loss which arises because of his diminished value on the labour market due to his or her injuries. Handicap on the labour market is compensation for capital loss or put another way for diminution of a capital asset.'* That is certainly how it was described in the case: **Atlas v Briers** – 144 C.L.R. 202. I accept that as being an apt description. As also stated in the claimant's counsel's written closing submissions, '*The loss being compensated is that of the diminution in the capacity to earn in the future. This diminution is a loss of capital because the capability to earn a return on the asset of one's labour is diminished.'*

[107] As was stated in **Cook v Consolidated Fisheries Ltd**. – [1977] ICR 635, at 638, in reference to what the tort had caused to the plaintiff (claimant), '*It is going to incapacitate him for ordinary work. So much so that, if he should fall out of*

employment, here 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.'

[108] It was stated in one of the leading cases in this area of the law: **Smith v Manchester** – [1974] EWCA Civ. 6, that even though handicap on the labour market has been described as a risk, there is, *'nothing notional about the damages to be 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 (claimant) is going to have to live for the rest of (their) working life.'*

[109] The distinction between an award for loss of earning capacity, or in other words, handicap on the labour market, was made clear in the case of **Moeliker v Reyrolle** – [1977] 1 W.L.R. 132, at 140, per Browne L.J., where it is reported as stated: *'It seems to me that guidance can only be on very broad lines, because the facts of particular cases may vary almost infinitely... As I have said, this problem generally arises in cases where a plaintiff in employment at the date of the trial. If he is then earning as much as he was earning before the accident and injury... or more, he has no claim for loss of future earnings. If he is earning less than he was earning before the accident, ... he has a claim for loss of future earnings which is assessed on the ordinary multiplier/multiplicand basis. But in either case he may also have a claim, or an additional claim, for loss of earnings capacity if he should ever lose his present job.'*

[110] Thus, as there is a clear distinction between these two (2) heads of damages, it should come as no surprise, that in respect of an award for handicap on the labour market, such an award can be made, even if the claimant has never worked at all. That has occurred in several cases involving child claimants, such as for instance **Monex Ltd. v Mitchell and Grimes** – *(op. cit.).* On the other hand, in respect of a claim for loss of earnings and/or loss of future earnings, the claimant must prove that he was earning an income immediately prior to the

commission of the tort and that as a consequence of that tort, he is now no longer earning as much income as he was, before that tort was committed.

[111] Handicap on the labour market involves assessing two (2) risks. I will adopt from that which has been succinctly stated by the claimant's counsel in their written submission in that regard. 'The first is that the claimant will be out of work in the future for any reason and the second is, if he should be, that because of the accident he will be less able to obtain fresh employment or employment at equivalent pay.'

[112] Applying all of this law as expounded upon herein, to the case at hand, it is very clear that the claimant is already suffering from a handicap on the labour market and that he is entitled to an award under that head, within the rubric of general damages and that in addition, he is entitled to recover for pain and suffering and loss of amenities.

[113] The claimant gave unchallenged evidence which has been accepted by this court, that he can no longer carry out his welding tasks as he used to do, before the commission of the tort and that he was, at the time when he gave his evidence at trial, earning, 'well below his skill level.' He has also given evidence as to how difficult it has been for him to obtain employment or earn any income at all, since the commission of the tort. He has clearly proven that he has suffered from an actual, recognizable loss, as a consequence of the commission of the tort, that being, that he is presently handicapped on the labour market.

[114] The Crown, in their written submission, submitted that since there is no evidence that the claimant was actually employed or earning any income, prior, to the commission of 'the accident,' this court will be unable to determine whether he is handicapped on the labour market. I respectfully disagree with that submission.

[115] Whilst it is correct to state that the claimant gave no evidence as to his employment, or any income earned by him, immediately prior to the commission

of the tort and indeed, it is this court's considered view that he never gave such evidence because he was unemployed at that time and therefore could not truthfully have given such evidence, there is evidence from the claimant as to what he was earning in 2007 and that at the time of trial, he was then earning, 'well below his skill level.' There is evidence that the claimant is a skilled welder. As already stated, evidence was given as to the claimant's earnings as at the date of trial.

[116] The Crown has relied on dicta from the case: **George Edwards and anor. v Pommells and anor.** – SCCA 38/90 in which case it is reported that Gordon J.A stated as follows:

> *'In arriving at an award for loss of earning capacity there must be some amount of speculation but there must also be some basis fact or facts upon which a court can make a forecast ... while the authorities show that in the assessment of damages under this head there must be some speculation, they also show that there must be some evidential support for the excursion into the realms of conjecture. The principles to be applied are clearly set out in the judgments in* ***Moeliker's*** *case and the starting point should be the plaintiff's earnings at the time of trial. The learned trial judge used the pre-accident earnings as a base figure. But with what did he compare this figure to ascertain that there was substantial risk that the plaintiff would be at a disadvantage in the labour market in the future? The deliberate decision of the plaintiff not to adduce any evidence of his earnings in the United States of America cannot lead to an inference in his favour that his earnings are likely to fall in the future or that he will be able to obtain or retain future employment. When the authorities refer to substantial or real risk of the plaintiff losing his job this risk must be occasioned by the handicap the plaintiff has suffered as a result of the injury. This case is starved of evidence from the plaintiff in support of these essential aspects of his case.*
>
> *The medical evidence did not disclose the percentage extent of the permanent disability caused by the injury to the plaintiff's vocal chords. There was no evidence of the types of employment for which the plaintiff would be unsuited in the United States, except that he would have to avoid lifting heavy objects. I am therefore of the opinion that this is adverse to the plaintiff and must result in the substantial award for loss of earning capacity being set aside.'*

[117] It is very important to note though, that Browne, L.J. corrected what he had stated in the **Moeliker** case *(op. cit.)*, that a claim for loss of earning capacity could only be available in circumstances where the plaintiff was in employment at the date of trial and that evidence as to the claimant's earnings at the date of trial, is the starting point for the assessment of damages under this head. That correction was made by Browne, L.J. in the case: **Cook v Consolidated Fisheries Ltd.** *(op. cit.).*

[118] Sykes J. (as he then was) recognized the correction made by Browne, L.J. to his judgment in the **Moeliker** case and that our Court of Appeal has previously applied the uncorrected version of Browne, L.J.'s judgment in the **Moeliker** case. One such instance of that application, is in the case: **Edwards and anor. v Pommells and anor.** *(op. cit.).* See **Biggs v Courts Jamaica Ltd. and anor.** – Claim No. 2004 HCV 00054, at paragraphs 93-96. Thankfully though, our Court of Appeal, in the case: **Gravesandy v Moore** – [1986] 40 W.I.R. 222, accepted and applied the restated principle vis-à-vis this head of damages. The claimant's attorneys have stated accordingly, in their written submissions, but it is apparent to this court, that the defence attorneys had not appreciated this important point, at the time when they filed their written submissions.

[119] This court has no doubt though, that as was also clearly stated in the **Edwards** case *(op. cit.*), there must be some evidence enabling the trial court to properly conclude that the claimant is handicapped on the labour market, as a consequence of the commission of the tort.

[120] In the case at hand, the claimant was employed as at the date of trial. He gave evidence as to that. There is also evidence as to the extent of his permanent partial disability and his difficulty in carrying out his welding activities, due to the tort. There is also evidence that he is now earning well below his skill level. It is true though, that there is no evidence as to the nature and prospects of the employer's business, or as to the intention of his employer as to his future

employment. The failure to have led such evidence though, cannot prevent this court from awarding damages under this head.

[121] Other pertinent evidence given, which will enable this court to make an award under this head, is as to the claimant's age and qualifications and his length of service with his employer as at the date of trial.

[122] In the final analysis, as regards this head of damage, this court has concluded that there is a substantial or in other words, a real risk that the claimant will, at some time before the end of his working life, lose the job that he had at the time of trial and be thrown on the labour market. That is, of course, the most critical factor to be considered by a court whenever that court is called upon to consider whether or not an award for handicap on the labour market, ought to be made. What should also be appreciated is that whilst the factors mentioned are all pertinent factors to be considered, they are not to be considered as constituting an exhaustive list, as the list of pertinent factors can vary almost infinitely with the facts of each particular case. In having so stated, I am merely echoing dicta from the **Moeliker** case (*op. cit.),* per Browne, L.J., at 141.

[123] At this juncture therefore, it must be reiterated that I disagree with the claimant's counsel's submission as to how the award which ought to be made to the claimant, arising from his handicap on the labour market, ought to be calculated.

[124] I disagree firstly, because the calculation approach as to same which they have suggested, essentially equates with the same calculation approach that ought typically to be adopted with respect to the calculation of an award for loss of future earnings. That should not be so, because the heads of damage – loss of future earnings and handicap on the labour market, are utilized to compensate a claimant for entirely different aspects and types of loss.

[125] Secondly, I disagree, because it was stated in **Moeliker** by Browne, L.J. that where the risk of the claimant losing his job is not imminent, then the

multiplier/multiplicand method of calculation should not be used. Also, in one of the leading cases from England and Wales, in this area of the law: **Smith v Manchester** – [1974] EWCA Civ. 6, Edmund Davies, L.J opined that though there was an existing and permanent reduction in earning capacity, but there was no present or clearly foreseeable financial loss, the judges who delivered the judgment in that case, could not adopt the multiplicand/multiplier method of assessment. Instead, as he stated, the court had to do the best that it could, in the interests of justice, for the defendant and the plaintiff.

[126] That is precisely what this court will do in this case. The imponderables as to the likely time when the claimant will, in all likelihood, lose the employment which he was engaged in, as at the date of trial, are too many, to properly enable this court to use the multiplier/multiplicand approach.

[127] If the multiplier/multiplicand method of calculation were to be used, it is important to note that the multiplicand would, in a case such as this, where there is evidence of the claimant's earnings as, at the time of trial, be the claimant's annual estimated earnings as at time of trial and the multiplier must be the number of years that the court estimates that the claimant will be unable to find either any employment at all, or any employment of and equivalent nature, to that which the claimant was engaged in, as at the date of trial.

[128] What the claimant's counsel submitted in writing, was that in calculating the claimant's loss of earning capacity award which ought to be made in the present case, the claimant's earnings as at 2007 should be the multiplicand and the number of years remaining in terms of the claimant's working life should be the starting point for the multiplier, but that number should be reduced, taking into account that which is termed as, 'the vicissitudes of life.'

[129] To my mind, that would not be either an appropriate multiplicand or multiplier to be used in respect of the determination of an award to be made for handicap on the labour market, based on the evidence given in this case. In addition, for

reasons already given, I do not believe that the multiplier/multiplicand approach should be used in calculating the award to be made to the claimant under this head.

[130] There is evidence as to what the claimant was earning, as a contract worker, at the time of trial. That evidence was not given orally, but was given in a document which was admitted into evidence as an agreed document and marked by this court, as Exhibit 15. It is also marked as 'Tab G' in the claimant's supplemental bundle of documents.

[131] That document is dated November 7, 2016 and is under the hand of one Steven Clarke, the owner of 'Steve Cook Shop.' It confirms the employment of Robert Minott at Steve Cook Shop, *'for a week now, earning $1500.00 a week based on the job he is doing.'* This court takes it that the claimant was earning that amount of pay, based on the job he was doing and it is therefore inferred that he is a contract worker and therefore not employed as an employee, but instead as an 'independent contractor' – which is the precise legal term. As such, he would not be entitled to earn that which is known as a minimum wage, pursuant to the Minimum Wage Act**.**

[132] His employment status as such is all the more perilous than it would have been, if he was an employee – as that term is legally understood. Thus, it is unsurprising that at the time when the claimant certified his witness statement, he testified that since November, 2013, he has been doing contract work at a tyre shop, but he was not then on the payroll and was then earning well below his skill level. Clearly, the claimant did not have that job when he testified at trial, if the contents of Exhibit 15 are accepted as truthful and accurate, which this court has done. Why he did not have that job though, at the time of trial, is unknown, as is, how much the claimant was earning between November, 2013 and March 3, 2014 – when the claimant's witness statement was certified.

[133] This court believes that an appropriate sum to be awarded to the claimant, for handicap on the labour market is $2,000,000.00.

[134] As regards pain and suffering and loss of amenities, there was a number of cases cited and relied on, by the parties' counsel. For the sake of brevity only, I will not refer to all of those cases, but instead will only briefly refer to the only case which has been actually relied on by me, in assessing same.

[135] That case is: **Trevor Clarke and N.W.C. & Kenneth Hewitt and anor**., - Suit No C.L. 1993 C371, as reported in Khan's Assessment of Damages, Vol. 5, at p. 21. The Consumer Price Index (C.P.I.) for September, 2017, is: 245. That is the latest C.P.I.

[136] The plaintiff in that case was a farmer and fisherman and was injured in a motor vehicle accident when he was 54 years old. That accident was caused by a National Water Commission truck having reversed onto a main road and collided with a car in which he was a passenger.

[137] As a consequence, he suffered an open fracture of lower third of right tibia bone and had to undergo two (2) surgical amputations of his leg. Ultimately, his leg was amputated above his knee. The plaintiff had developed gas gangrene infection while undergoing treatment at the Black River Hospital.

[138] He spent two (2) months in hospital and was sent home with part of his wound unhealed. He attended an out-patient clinic. The accident occurred on November 10, 1992 and total healing was not achieved until June of 1993.

[139] He had been fitted with an artificial lower limb prosthesis but had difficulty using that. He had been using crutches. He had pain in his right limb and endured phantom limb sensation – as at night, his leg would 'jump and bite' a lot. His artificial leg (prosthesis), pained him when he put it on.

[140] Since the accident and as a consequence of same, he could no longer carry out his occupation of fisherman and farmer. He could no longer play cricket or swim as before. His impairment had also affected his marriage as things were not the same in bed with his wife as prior to the accident.

[141] The plaintiff was 63 years old when the trial of his claim was ongoing. For pain and suffering and loss of amenities, he was awarded as general damages – $3,000,000.00 with interest at 3%. He also was awarded for loss of earning capacity, using a multiplicand of $7,000.00 a week for 52 weeks – to determine his estimated annual income and multiplier of 4. For loss of earning capacity, he was thus awarded the sum of $1,456,000.00, with no interest thereon and as a separate head of damages. That judgment and award of damages was made in October 2001. At that time the C.P.I was: 60.4

[142] Accordingly, the sum of $3,000,000.00 when updated is: $12,168,874.17. That sum should be increased somewhat, because, as has been submitted by the claimant's lead counsel in her oral submissions, the diminution in enjoyment of amenities by the claimant in this case, is greater than it was in the **Clarke** case, bearing in mind that the claimant in the **Clarke** case was 54 years old when the tort was committed, whereas in this claim, the claimant was 28 years old when the tort was committed.

[143] Accordingly, the sum which will be awarded to the claimant as general damages for pain and suffering and loss of amenities, is: $14,000,000.00. That sum will be awarded with interest at the rate of 3% with effect from the date when the tort was committed, that being December 26, 2009.

[144] The Judgment orders as regards damages, will therefore be as follows:

i. There is no order as to costs in respect of the claimant's claim against the 1st defendant.

ii. General damages for pain and suffering and loss of amenities is awarded to the claimant in the sum of $14,000,000.00 with interest at the rate of 3% with effect from December 26, 2009.

iii. Damages for handicap on the labour market is awarded to the claimant, in the sum of $2,000,000.00.

iv. Special damages is awarded to the claimant, in the sum of $452,000.00, with interest at the rate of 3% with effect from September 28, 2011.

v. The costs of the claim against the 2nd defendant are awarded to the claimant, with such costs to be agreed or taxed.

vi. This order shall be filed and served by the claimant.

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Hon. K. Anderson, J.