[2012] JMSC Civ 185

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 04301

BETWEEN	AKEEM MORGAN (by his next friend KERRY ANN HARRISON)	CLAIMANT
AND	OWEN PORTER	DEFENDANT

Mr. Richard Reitzin instructed by Reitzin & Hernandez for the Claimant

Ms. Tavia Dunn instructed by Nunes Schofield DeLeon & Co. for the Defendant

May 16, 18, 20, 2011; June 7, 2011; November 2 & 30, 2012; December 3, 7 and 20, 2012

Assessment of damages – Pain Suffering and Loss of amenities – Loss of fingers on dominant right hand, loss of teeth and fracture to right leg – Post Traumatic Stress Disorder– applicability of multiplier/multiplicand approach to replacement cost of prosthesis – size of multiplier – young claimant – whether damages for loss of earning capacity to be assessed using multiplier/multiplicand approach or conventional award to be made – validity of Notice of Objection to tendering Hearsay Statement in Evidence

Fraser J

THE ACCIDENT

[1] The claimant Akeem Morgan was born on August 15, 1996. On July 14, 2009 at about 10:30 a.m., the claimant was sitting in a board shop located in the community of Lakes Pen Road Spanish Town, St. Catherine. He heard a noise which sounded to him like a car. When he looked around, he saw a car coming towards him from the direction of Kingston at a very fast speed. It was later established this car was being driven by the defendant Owen Porter.

[2] In the words of the claimant in his witness statement dated April 18, 2011, "From the moment I saw the car coming towards me I don't remember what happened in the next few moments. I became unconscious". When he regained consciousness, he found himself lying down in the back of a van and heard shouts from persons on the scene. He lapsed into unconsciousness again and next became aware of his surroundings when he was in the emergency room of the Spanish Town Hospital where he began receiving treatment for his injuries.

THE CLAIM FOR DAMAGES

[3] Arising from this accident the claimant commenced action by his mother and next friend Kerry Ann Harrison against the defendant by Claim Form filed November 3, 2009 and Particulars of Claim filed March 4, 2010. The acknowledgment of service of the Claim Form filed December 11, 2009, disclosed that service was effected on November 16, 2009. During the hearing, on May 18, 2011, the claimant was given leave to file an Amended Particulars of Claim which was filed on May 20, 2011.

[4] The defendants first Defence was dated April 23, 2010. Thereafter an Amended Defence as to Quantum and Admission of Liability was filed on May 14, 2010. A Further Amended Defence as to Quantum and Admission of Liability was filed on June 15, 2010. On October 14, 2010 the claimant filed an Interlocutory Judgment Against the Defendant on His Admissions which is recorded at Judgment Book 750 Folio 499.

[5] The claimant sought special damages for medical reports and the costs of consultations, the cost of prosthesis related therapy and replacements and the cost of future care. General damages were claimed for pain and suffering and loss of amenities, post traumatic stress disorder, and loss of earning capacity.

[6] At the hearing, reports and receipts attached to Notices of intention to tender in evidence hearsay statements contained in documents filed and served by counsel for the claimant were received in evidence. All these receipts and reports were received in evidence as exhibits.

THE NATURE AND EXTENT OF THE CLAIMANT'S INJURIES

[7] In his witness statement Akeem stated that at the hospital he felt tremendous pain in his right hand and saw that it was cut to pieces and bleeding. He also indicated that he felt unbearable pain in his right leg which was swollen and he could not move it. He noticed that he was bleeding from his right side, right elbow, head and mouth. He could feel that his two front teeth were missing. He had awful pain from all of those areas of his body and he thought he was going to die right there in the hospital.

[8] He was taken to the operating theatre and when he got back on the ward a doctor told him that they had had to amputate one of his fingers completely and remove parts of his middle and index fingers. This information made him very sad and upset and he cried a lot.

[9] Being on the ward at the hospital he stated was awful. He was unable to come off the bed or walk. He had to be fed and required assistance with his bodily functions right there in bed. He was given nightly injections in his buttocks and would get pain killers on request from the nurses during the day. He did not receive any counselling to help him with his feelings about his various injuries.

[10] By the time he left the hospital after an eleven day stay, the pain in his leg and hand had eased but not stopped. Upon his discharge from the hospital he was given crutches to use at home but initially could not use them. At first when he needed to go to the bathroom he had to be carried to and fro. His leg became infected and he had to return to the hospital for treatment. Gradually over a period of several weeks he went from using two crutches, to one, to being able to walk without a crutch. He missed the first two weeks of school in September 2009. Even after he resumed attending school, he had to go to the clinic for his hand three times per week and for his leg every two weeks.

[11] Dr. Mark Minott, Consultant Orthopaedic Surgeon submitted three reports. His first report dated December 8, 2009 was not detailed and need only be mentioned for the opinion that the impairment to the right hand was 30% or 27% of the upper limb or 16% of the whole person. He also noted that the lower limb had healed with no impairment. In his second report dated 2009 March 8, *(this is a clear error and should be read as 2010 March 8)*, he noted that when Akeem was seen on the day of the accident:

> The right hand had a grossly contaminated wound on the dorsum with incomplete severance and maceration of the ring fingers at the level of the middle phalanx and amputation of the distal phalanges of index and middle fingers. The right wrist was swollen and tender and all pulses were palpable. The right thigh was swollen in its middle third.

> He was resuscitated in the Emergency room prior to admission to the orthopaedic surgical ward. Radiographs confirmed fractures of the right femur and of the first, third and fourth metacarpals.
>
> …the right femur was fixed with a rush rod as well as debridement and refashioning of right hand. The ring finger was so crushed, a ray amputation was done, as treatment. He was given antibiotics for the next two weeks intravenously with regular dressing changes.

[12] He also noted in that report subsequent action and treatment of the claimant:

> He was discharged on July 25, 2009.
> On July 30, 2009, he returned to the ward with oozing from the right thigh wound. He was restarted on antibiotics after taking a swab of the wound. He was reviewed weekly in the Orthopaedic clinic with good resolution of the infection. On September 18, 2009 he was reviewed in the Orthopaedic clinic with radiographs. The femoral fracture had healed well with bridging callus. He was therefore allowed to begin bearing weight on the right leg. On October 16, 2009, radiographs confirmed good healing of the femur…
> His hand had healed with a full range of motion in his remaining four fingers. He walked without a limp with no evidence of persistent infection…

[13] In his final report dated 2011 January 20 Dr. Minott stated that the Rush Rod in the femur was removed in August 2010 and that Akeem was discharged September 17, 2010. He noted that his impairment remained unchanged as of January 19, 2011.

THE FUTURE CARE AND REHABILITATION OF THE CLAIMANT

[14] Akeem also saw a range of other specialists concerning the care for injuries suffered to his hand, his face and teeth and for psychological trauma associated with the accident and its aftermath.

[15] On February 19, 2011 Gerald Anthony Boyd, CO., LO Board Certified Orthotist from Orthotics USA examined Akeem at Jamaica Orthotics Pedorthics and Prosthetics (JOPP). After describing the physical findings he noted as follows:

> Although hand strength was decreased, Mr. Morgan was able to carry out activities of daily living including writing. However he was unable to grip large objects. Mr. Morgan also expressed withdrawal from normal peer activities because of his consciousness of the appearance of his hand
>
> **Recommended Management:**
> The Life-like Functional unpowered hand prosthesis to replace missing digits and to assist with limited hand function namely opening and closing and simple gripping.
>
> **Expected Usefulness of the Prostheses:** This prosthesis is not intrinsically powered and can only be operated with the assistance of the sound hand to position the fingers in the open or closed positions. Though mainly cosmetic, some personal daily functions can be more efficiently accomplished using this prosthesis. The device is closely matched to his skin colour, skin type and likeness of the sound limb. This will be of great benefit in enhancing personal confidence and social acceptance, as well as enabling a functional and productive resumption of community activities.

[16] The estimate quotation covering Pre-Manufacturing, Manufacturing and Post-Manufacturing costs of the prosthesis was provided by JOPP and totaled $1,098,200.00.

[17] On February 24, 2011 Akeem was assessed by Dr. Jeffrey Meeks Orthodontist. In his report of the same date he noted that on examination of Akeem he found:

a. Maxillary central incisors missing
b. Anterior open bite
c. Class 1 malocclusion
d. Intrusion of the Maxillary left lateral incisor – Probably a result of trauma.
e. Insufficient space between the Maxillary lateral incisors for the replacement of the central incisors

[18] In his opinion Akeem required three different dental specialties. The first aspect of his treatment would be orthodontics that would be done at his office. This treatment would involve the use of Upper and Lower fixed orthodontic appliances to return the remaining teeth to their pre-trauma positions and to leave the ideal space for the replacement of the missing teeth. Fixed appliance treatment would last approximately 24 months and would be followed by retainers which would hold the teeth in their new positions until they were stabilized. The cost of that treatment was indicated as US$5,720.00. Additionally he indicated that Akeem would need to have dental implants done by an Oral and Maxillofacial surgeon and these implants would in turn need to be restored by a general dentist to look like teeth with porcelain fused to metal crowns. These procedures would incur separate costs.

[19] Akeem was separately assessed on February 24, 2011 by Dr. Pierre-John Holmes, Consultant Maxillofacial Surgeon. In his report dated April 6, 2011, Dr. Holmes noted that from a maxillofacial point of view, Akeem suffered chin laceration and loss of multiple teeth. He assessed

him as having intruded but stable tooth #10, missing teeth numbers 8 and 9 and chin scar approximately 1cm and raised. Dr. Holmes recommended the following treatment:

a. Orthodontic consultation to aid in the active eruption of tooth # 10
b. A temporary removable partial denture that can be used to replace teeth 8 & 9 until growth is complete.
c. Implant retained restorations to replace teeth 8 and 9 after the cessation of growth, which should be complete by his 18th birthday.
d. Scar revision

[20] The estimated cost of the dental implants and the scar revision recommended was $337,000.00. Dr Holmes however noted that Akeem would have to see a general dentist in respect of the temporary removable partial denture and the restoration of the implants.

[21] On March 7, 2011 Akeem was examined by Dr. Andre' H. Foote who observed that Akeem presented with:

a. Maxillary central incisors missing (teeth #s 8 & 9)
b. Intrusion of maxillary left lateral incisor (tooth # 10)

[22] He noted that the treatment he could provide was that of a restorative dentist as the last of three phases of treatment. This third phase would involve placing porcelain crowns on implants inserted where the missing teeth and intruded tooth were. The associated cost he indicated was $210,000.00.

[23] On March 4 and 24, 2011, Dr. Avril Daley Clinical Psychologist and Carole Mitchell PhD Candidate Clinical Psychologist of Contemporary Assessment & Counseling Services (CACS) evaluated Akeem. From

their report dated March 28, 2011 under the heading educational history, the following excerpts are highlighted.

> …In the first term of high school, Akeem had an average of 33.1% in comparison to his class average of 62.9%. Most teachers believed he was a capable student but poorly organized. The end of year report for the 7th grade saw his average dropping to 21.9% in comparison to 61% class average…
>
> In July 2009 Akeem was involved in a motor vehicle accident which prevented him from resuming school at the start of the term for the 8th grade. Mother reported that he was absent frequently due to the effects of the accident. Akeem had an average of 16.3% in comparison to the class average of 26.8%. He was absent from the English Language and Spanish Examinations which further lowered his average…This placement also seemed to have more lower-functioning students than his previous class. As with the previous year many subject teachers thought he was a capable student but poorly organized. The end-of-year 8th grade report saw an improvement in Akeem's average to 24.4% and his class average was 26.1%. His attendance continued to be a concern.
>
> Akeem entered the 9th grade in September 2010. His average basd on the first term was 7.2% as compared to class average 18.3%.He was absent for about 50% of the school sessions, and many subject teachers believed that this has affected his performance….
>
> Akeem does not like school as much as he did before the accident. He also thinks he is performing about the same

> academically….He has also not been able to play cricket since the accident and this is what he loved doing. Akeem also says his dream is to be a (sic) automechanic as he loves cars.

[24] Under the heading, "Summary of Cognitive Performance" it was noted that while Akeem displays below average intellectual ability and an uneven cognitive skills profile he should be able to achieve at a level that would allow him to complete High School and beyond. However he would require assistance with verbal related tasks.

[25] In the section dealing with "Behavioural, Social and Emotional Performance" it was noted that:

> …Overall Akeem is displaying some signs of emotional disturbance associated with his view of his physical appearance and his ability to achieve his future goals. At his current psycho-social stage in development Akeem would be attempting to find his own identity and he would be struggling with social interaction. His injuries appear to be a hindrance of this process and could affect his later adult development.

[26] The final recommendations from Dr. Daley and Ms. Mitchell included the following:

- Akeem has the intellectual ability to pursue his career goal however, his current physical state is a cause for concern as it is affecting him both physically and psychologically. He will need some accommodations in school in order for him to achieve at his potential.

- Akeem will benefit from long-term psychotherapy to deal with the emotional issues that are affecting him and to restore a positive self-image and self-concept
- The use of prosthesis to help his self image may be considered but further psychotherapy sessions may be required to allow him to explore this suggestion and to evaluate his feelings if he decides to accept prosthesis.

[27] Dr. Wendel Abel consultant psychiatrist conducted a psychiatric evaluation on Akeem Morgan by interviewing him for two hours on November 9, 2010. At the interview Akeem's mother was present and provided additional information. A report from Dr Mark Minott was also reviewed. It is not indicated which of the first two of Dr. Minott's reports that would then have been in existence was reviewed. The result of that interview was reduced to a report dated December 9, 2010.

[28] A Notice of Objection to the Report was filed by counsel for the defendant. Later in the judgment the treatment of the notice and the claim for damages due for post traumatic stress disorder will be analysed.

THE SPECIAL DAMAGES AGREED

[29] The amount paid by the claimant for reports from and/or consultations with Drs. Minott, Meeks, Barnes, Daley, Foote, Doonquah and Abel and JOPP that were all supported by exhibited receipts was agreed; the sum being $124,000.00.

THE CONTESTED SPECIAL DAMAGES

The Prosthesis

The Submissions on behalf of the Claimant

[30] In submissions on behalf of the claimant Mr. Reitzin calculated the sum claimed by dividing the remaining life expectancy of the claimant by the life span of the prosthesis and then applying a discount rate to arrive at the present value of the future cost. To arrive at the life expectancy of the claimant he relied on the Life Tables produced by the Statistical Institute of Jamaica in 2006 and referred to in Egerton Clarke, Ph.D. *Population Trends And Challenges In Jamaica*[1]

[31] At the time of the submissions the claimant was 14. That yielded in counsel's submissions a remaining life expectancy of 59 (actually the report indicated 58.05). With the prosthesis expected to last 2-3 years a median replacement period every 2½ years was used which divided into 58.05 would result in just over 23 replacements. Based on the indicated present cost of the prosthesis, counsel used an annual discount rate of 5.84% to arrive at the present value of the future cost of replacements which by his calculations amounted to $12,940,700.42.

The Submissions on behalf of the Defendant

[32] Counsel submitted that the case of ***Kenroy Biggs v Courts Jamaica Limited and Peter Thompson*** 2004HCV00054 (January 22, 2010) was instructive in determining how best to approach the calculation of the future cost of the prostheses that Akeem will need throughout his life. In ***Kenroy Biggs'*** case Sykes J used a multiplier/multiplicand approach and as the replacement would not be required to be purchased annually, divided the multiplier selected by the life span of

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[1] Available at http://www.kent.edu/sociology/resources/jaee/upload/population-trends-and-challenges-in-jamaica.pdf.

the prosthesis. The resultant figure was then multiplied times the unit cost of the prosthesis to obtain the sum to be awarded.

[33] Counsel then proposed the case of ***Tyrone Gregory (by his father and next friend Alton Gregory) and Alton Gregoy v Dervan Blackstock and Richard Kerr*** CL 1998 G 098 (April 6, 2000) where a multiplier of 12 was used for future medical costs in relation to a 15 year old plaintiff who suffered among other horrific injuries an amputated leg and who had been 12 at the time of the accident. Counsel submitted that in the instant case a multiplier of 12 should also be used.

The Submissions of the Claimant in Reply

[34] Counsel in responding to the reliance by counsel for the defendant on the approach in ***Kenroy Biggs's*** case deprecated what he saw as the courts' practice of using a multiplier/multiplicand approach that reflects a discount rate which is high and results in the claimant having to live a number of years of his expected life without the benefit of a prosthesis. He submitted that with a multiplier of 22 chosen in ***Kenroy Biggs*** and the prosthesis to be changed on average every 5 years, only four replacements were allowed. Counsel submitted that if Mr. Biggs who was 19 at the time of the accident and 25 at the time of the hearing survived for more than a further 20 years he would thereafter be without a prosthesis.

[35] He submitted that the life tables which calculate life expectancy already contain a calculation for contingencies so it was unnecessary to further discount the multiplier to take account of contingencies. He therefore commended the approach taken by Straw J in ***Gregory Hamilton v Courtney Barnett*** Suit No. C.L. H-144 of 2001 in which the learned Judge awarded damages to allow replacement prostheses that would cover 35 of the remaining 42.5 years of the claimant's life expectancy He submitted that even though not deliberate, the 71/2 years not

provided for equated to a discount rate of 3.11% which was close to the 3% discount rate laid down by the High Court of Australia in ***Todorovic v Waller*** [1981] HCA 72.

[36] Counsel submitted that in matters of this nature the more appropriate method of calculation to do justice between the parties is that a discount rate should be selected to be used in a "present value" calculation in order to take account of "immediacy of payment" under a judicial system which is presently only empowered to award "once and for all" lump sums. This rate he submitted should be at or around 3% (or possibly even less in Jamaica) given the weight of historical interest rates and the effect of inflation. Counsel submitted that this is the approach that has been adopted in England as reflected in the case of ***Wells v Wells*** [1997] 1 All E R 673 expressly following the principles approved by the Privy Council in ***Lim Poh Choo v Camden Health Authority*** [1980] AC 174.

Analysis

[37] It should first be noted that ***Kenroy Biggs'*** case went on appeal to the Court of Appeal only on the question whether or not the damages of $18M awarded for pain and suffering were excessive. The Court of Appeal held they were not. (***Courts Jamaica Limited v Kenroy Biggs*** SCCA 24/2010 (November 8, 2012)). Of significance for the determination of this matter is that the method for determining the award for replacement of the prosthesis was not challenged.

[38] This court in the matter of ***Omar Wilson v VGC Holdings Limited*** 2010 HCV 04996 (November 21, 2011) expressly relied on the methodology employed by Sykes J in ***Kenroy Biggs'*** case. From paragraph 47 to 52 of the ***Omar Wilson*** judgment the principles in the use of the multiplier/multiplicand approach extracted from ***Kenroy Biggs'*** case were outlined. These include the fact that 1) cost of care multipliers had to be greater than loss of earnings multipliers because

while the latter only sought to compensate for the loss during the claimant's working life the former addressed the lifelong needs of the claimant; and 2) the aim is the establishment of a capital sum that would be invested and increased by interest, but reduced by the expenditure required to meet the future costs; the goal being compensation not enrichment.

[39] The critical factor to ensure that the complainant is not left for years without adequate care and neither is the defendant prejudiced by over compensation of the claimant, is the choice of the appropriate multiplier. It should be noted that the use of the discount rates advocated by counsel for the claimant is linked to detailed actuarial calculations such as those contained in the Ogden Tables *(Actuarial tables for use in personal injury and fatal accident cases prepared by the Government Actuary's Department in the United Kingdom)* and predicated on the anticipated performance of Indexed Linked Government Stocks (ILGS) see for example ***Wells v Wells*** supra. Without the facility of those detailed actuarial calculations and existing in an economic sphere where interest rates, inflation and the value of the currency are significantly different than in the United Kingdom, it appears to this court that the multiplier/multiplicand method is still an appropriate, though not the only, nor in all cases the best approach to be adopted. In this case it is the view of the court that the multiplier/multiplicand approach should be adopted.

[40] What therefore should be the appropriate cost of care multiplier? In ***Kenroy Biggs*** the multiplier used for a 25 year old (19 at the time of the accident) was 22 while in ***Omar Wilson*** the multiplier for a 32 year old (30 at the time of the accident) was 20. In the instant case the claimant is much younger. However bearing in mind that overcompensation should be avoided and given the fact that there will not be annual purchases reducing the capital sum to be invested, but purchases on an average every 2½ years I find that the appropriate multiplier in the instant case where the claimant is now 16, (12 at the

time of the accident), is 25. Using that calculation the number of replacements would be 10.

[41] The sum allowed in respect of the prostheses is therefore as follows:

a.	Future cost of prostheses	($1,032,000 x 10)	$10, 320,000.00
b.	Prosthetic Measurement and Casting		$ 35,000.00
c.	Cost of physiotherapy	($4,450 x 6	$ 26, 700.00
d.	One year follow up and adjustments		$ 10,500.00
e.	Two year follow-up and adjustments		$ 12,500.00

[42] The total amount awarded in respect of the prosthesis is therefore $10, 404, 700.

THE CONTESTED GENERAL DAMAGES

PAIN AND SUFFERING AND LOSS OF AMENITIES OF LIFE

The Submissions of Counsel for the Claimant

[43] Counsel for the claimant made submissions claiming separate amounts for the damage to the claimant's right hand, teeth and right leg.

The Right Hand

[44] In relation to the claimant's right hand the case of ***Keith Rose v Rogers Concrete Block Works Ltd.*** Suit No. CL1989/R 117 (July 23, 1992) reported in Harrison, Karl & Marc – *"Assessment of Damages for Personal Injuries"* page 293 was relied on as being most closely comparable with the instant case. In ***Keith Rose*** the claimant suffered a fracture at the base of the terminal phalanx of his right hand; compound fracture of his right hand and an amputation of the tip of his right middle finger. He suffered a 25% disability of the function of his right hand for 2 months, a 9% final disability of function of his right

hand and a 45% disability of function of his right middle finger. He was awarded $55,000.00 which updates to $626,398.07 using the October 2012 CPI of 189.4. Counsel submitted that Akeem Morgan's injuries and disabilities insofar as his right (dominant) hand is concerned, were significantly more serious than those suffered by ***Keith Rose*** as Akeem Morgan suffered a 30% permanent impairment of his hand compared with ***Keith Rose's*** 9%. Counsel submitted that to compute the appropriate award the 30% disability in the instant case should be divided by the 9% disability in ***Keith Rose's*** case and then the result discounted by 25% to arrive at the figure that should be used to multiply the present value of the award in ***Keith Rose***'s case, which would yield the proper award in respect of the injury to the claimant's hand. Adopting that approach, the calculation would be as follows. 30 ÷ 9 = 3.33 less 25% = 2.5. 626,398.07 x 2.5 = $1,565,995.00.18.

Teeth

[45] Counsel relied on ***Damion Campbell (infant by Sandra Campbell, mother and next friend) and Sandra Campbell vs. Kathleen Dyke and Earl Wilson*** Khan Vol. 4, at page 149. In that case Damion Campbell suffered from having 3 upper permanent teeth knocked out. They were resorbed giving him the appearance of a "mash mouth." He was awarded $225,000 for pain, suffering and loss of amenities which updates to $1,395,840.15.

[46] As Akeem Morgan had his two upper central incisors knocked out and his upper left lateral incisor was traumatically intruded into his upper jaw bone, counsel submitted the cases were very closely comparable and the same damages should be awarded in the instant case.

Right Leg

[47] In ***Terrence Lawrence v Ernest Young & Donald Young*** Khan Vol. 3 at page 75, the claimant suffered from a comminuted fracture of his right femur and loss of consciousness. He was admitted to hospital,

given pain killers and a splint. He had skeletal traction after a Steinman Pin was placed in the right upper tibia. He remained an out-patient for 5 months and was left with a limp due to the shortening of his leg which caused a strain to his hip and back pains. He suffered a permanent partial disability of 15 – 20% of his whole person. For pain and suffering, loss of amenities and handicap on the labour market he was awarded the sum of $70,000 which updates to $2,604,715.12.

[48] Counsel submitted that the leg injuries in ***Terrence Lawrence*** were more serious than those suffered by Akeem Morgan, however, that bearing in mind the excruciatingly painful infection that Akeem developed in his right leg Akeem's suffering was not limited to a straightforward fracture of the femur. He therefore submitted that the award in ***Terrence Lawrence*** should be reduced by 1/3rd –I n which case the claim would be for $1,736,476.75. It should be noted that the award included a sum for handicap on the labour market even though the earnings of the complainant had increased since the accident.

[49] Counsel also urged the court to take into account the importance of athletic prowess to young persons and the effects of disfigurement on them as recognized by Rattray P. in ***Jamaica Telephone Co. Ltd. v Delmar Dixon (bnf Olive Maxwell)*** SCCA 15/91 (June 7, 1994). Further counsel submitted that as the claimant was so young the duration of his suffering could be expected to be concomitantly long.

The Submissions of Counsel for the Defendant

Injuries to the Fingers

[50] Counsel for the defendant relied on ***Mark Scott v Jamaica Pre-Pack Limited*** CL 1992 S 279 (26.10.93) Khan Vol. 4 page 102**,** in which the plaintiff sustained the following injuries and disabilities:

a. Right index finger amputated at base of middle phalanx
b. Index finger had one joint

c. The tendons which controlled flexing were no longer functioning
d. Could not hold anything properly with the right hand as the right index finger is a crucial finger second only to the thumb
e. Though his hand was not rendered useless, its effectiveness was limited because he was unable to lift heavy objects as that required power
f. His disability of 13% of the whole person would reduce to 11% after operation

[51] The award of $125,000.00 for pain and suffering in ***Mark Scott's*** case updates to $1,105,791.68.

[52] Counsel next cited ***Everton Campbell v Minott Services Limited*** CL 1998 C144 (16.12.1998) Khan Vol. 5 page 116 in which the plaintiff sustained the following injuries and disabilities:

a. Crush injury to right hand
b. Multiple open fractures to the 1st and 5th metacarpals
c. Minor bruises to left hand
d. Right thumb was amputated
e. Marked stiffness of fingers
f. Inability to make a strong fist or to have a strong grip
g. Diminished mobility of the fingers of the right hand
h. Little finger had 90 degrees flexion deformity at the proximal interphalangeal joint and normal flexion of the distal interphalangeal joint.
i. The ring finger had 45 degrees flexion deformity at the proximal inter phalangeal and he was unable to fully flex the finger
j. Sensation was diminished in all aspects of the hand with no ulnar nerve sensation for distal third of the forearm to the fingers

[53] The doctors recommended physiotherapy to restore some amount of function followed by pollicization of the index finger and the ulnar nerve. It was opined that if function was not recovered, his permanent

disability would be assessed at a 36% whole person disability. He was awarded $1,000,000 for pain and suffering which updates to $3,839,448.61. Counsel submitted that the injuries in this case were more severe than those sustained by the instant claimant.

[54] Counsel also relied on ***Trevor Woolery v Angella Johnson & Donald Marshall*** CL 1985 W 062 (04.02.99) Khan Vol. 5 page 90 where the plaintiff suffered lacerated wounds to the left leg, severe open fracture of the left humerus with injury to bone, blood vessel, nerves and muscles, loss of several front teeth, laceration to the chin and amputation of the left hand below the shoulder. He was assessed as having a 55% impairment of the whole person as a result of injury to the upper limb. He was awarded $1,300,000.00 for pain and suffering which updates to $5,027,976.31.

Injuries to the Femur

[55] In respect of the claimant's injury to his right leg counsel for the defendant cited ***Cecil Martin v Uncle Sonny's Transport Co. Ltd.*** C.L. 1995 M 035 (19.11.98) Khan Vol. 5 page 68 where the following injuries were sustained and resultant disability noted:

a. Swelling & deformity of right thigh with 10 cm skin deep laceration
b. 13 cm superficial laceration to anterior aspect of left leg
c. Oblique fracture of the right femur at junction of middle and distal third
d. 3% whole person disability
e. Open Reduction surgery
f. Tenderness on palpitation of the femur
g. Range of motion in right knee 0 degrees to 117 degrees with laxity of lateral ligaments
h. Tender scars 3cm x 1 cm along left heel

i. Tender scar along anterior aspect of left lower limb measuring 14.05 x 0.5 cm
j. Scars where pressure sores had developed during traction
k. Approximately 30 degrees postero-lateral angulation of femur

[56] The award for general damages was $300,000.00 which updated is $1,163, 867.26. Counsel submitted the claimant's injuries in the instant case were less severe and had resolved without disability.

[57] In her analysis it was submitted by counsel for the defendant that the injuries suffered by the claimant in the ***Trevor Woolery*** case were far more serious than those of the instant claimant in respect of the damage to the hand and loss of teeth. She argued that the claimant, Akeem Morgan, suffered amputated phalanges the three fingers while Woolery suffered an amputated hand. The only distinguishing feature she submitted was that Woolery did not suffer a fractured femur, however the medical evidence showed the injury to Akeem's femur had healed without any disability.

[58] Counsel also contrasted the 16% whole person disability suffered by the claimant in the instant case with the 55% whole person disability in ***Trevor Woolery's*** case and maintained that the ***Trevor Woolery*** case was overall more serious.

[59] Counsel further took issue with the claimant' assertions in paragraphs 72 to 74 of his witness statement, where it is stated that the accident had affected his daily activities. Counsel submitted there was no medical evidence to support that contention.

[60] In commenting on the authorities relied on by the claimant counsel submitted that the injuries sustained by the plaintiff in ***Damion Campbell's*** case were of greater severity than those suffered by the claimant in the instant matter. Counsel noted that the medical evidence in that case showed that the missing teeth caused the gum to resorb

resulting in the plaintiff having a "mash mouth". Further that Damion Campbell would require a denture that would need changing from time to time with the growth of his jaw. The prosthetic devices used were cumbersome and injurious to the other teeth in the jaw especially as the jaws were still growing. The plaintiff also lost some of his taste for food. There was no evidence in that regard in relation to Akeem Morgan.

[61] Concerning ***Keith Rose's*** case, counsel submitted that the injuries sustained by Mr. Rose were less severe than those sustained by the claimant in the instant case. As such counsel submitted that the court would have to determine the suitable award for the injuries in the instant case. The court was however invited by counsel to look to ***Trevor Woolery's*** case for guidance as the injuries in that matter included an amputation of the hand.

[62] With regard to the case of ***Terrence Lawrence*** counsel highlighted that Mr. Lawrence was placed in traction for over two months, he walked with a limp, and suffered a limb length deficit. He was assessed as having a resultant 10% whole person disability. There was also evidence of resultant disability. In the instant case, counsel submitted, Akeem was not placed in traction and there was no evidence of resultant disability. In fact the report of Dr. Mark Minott dated December 8, 2009 indicated that Akeem's leg had healed with no impairment. It was therefore submitted that this case could provide no assistance to the court.

[63] Counsel noted that it was not the practice of the Supreme Court to total awards for each injury but rather to apply a global figure for the injuries sustained and the loss of amenities. Counsel pointed to the ***Woolery*** case as an example where the plaintiff sustained numerous injuries and a global award was made.

[64] In all the circumstances, at the time of submissions, counsel proposed a sum of $3,000,000 as a suitable award for pain and suffering and loss of amenities. Updated that figure is $3,348,261.63.

The Submissions of Counsel for the Claimant in Reply

[65] In commenting on the submissions of counsel for the defendant on ***Mark Scott's*** case, counsel for the claimant advanced that Akeem Morgan suffered a more severe injury to his right index finger which was amputated at the mid-proximal phalanx. In addition, he lost his entire ring finger as well as his middle finger at the base of the distal phalanx. While Mark Scott's whole person permanent partial disability was anticipated to be 11% after surgery Akeem's was assessed at 16% – i.e. over 45% higher. Furthermore Mark Scott was 19 years of age at the time of the accident while Akeem Morgan was only 12 years old, age being an important factor in assessing damages where the claimant suffers a permanent disability. The damages therefore, counsel submitted, should be higher in the instant case.

[66] In relation to ***Everton Campbell's*** case counsel noted that the plaintiff was 31 years old at the date of the accident, some 19 years older than Akeem Morgan was at the date of his accident. He also highlighted the fact that in the case of ***Trevor Clarke v National Water Commission, Kenneth Hewitt and Vernon Smith*** C.L. 1993 C 71 (25.10.91) Khan Vol. 5 page 21 the plaintiff who was also assessed (as in ***Everton Campbell's*** case), as having a 36% permanent partial disability was awarded the equivalent of almost $8.5M. The court notes here however that ***Trevor Clarke*** can offer no assistance, as the significant injuries and resultant disability, and the effect of that disability were wholly different from those in the instant case; the plaintiff in that case having suffered an open fracture of the lower third of the right tibia, an initial amputation above the right knee and then a further amputation below the knee after the onset of gangrene.

[67] Regarding ***Trevor Woolery's*** case counsel pointed out that at 39 years old at the time of his accident he was 27 years older than Akeem at the time of Akeem's accident. He also highlighted that Trevor Woolery lost his non-dominant hand. Counsel further pointed out some apparent errors in the report, making it difficult to ascertain the true date of the accident relative to the date of hearing. He submitted the case was also not useful given that there was no award for loss of earning capacity though the plaintiff had been a farmer/fisherman at the time of the accident. Finally he argued that the award appeared incongruent when compared to other cases of arm injury where the awards were significantly higher. In support of this contention he cited two examples. ***Sophia Moore v Lynden Forbes, The Attorney General for Jamaica, Sonia Pinnock and Dudley Buchanan*** C.L. 1997 M 206 (08.02.99) Khan Vol. 5 page 17 where the assed whole person permanent partial disability was 41% with the updated award being almost $7,735,348.17. The second case was ***Paul Anthony Collins v Calbros General Security Ltd and Dorrent Colley*** C.L. 1998 C 083 (July 2000) Khan Vol. 5 page 92 where the whole person permanent partial disability was assessed at 57% with the updated award being $8,602,834.

[68] Counsel next took issue with the submission of counsel for the defendant that the assertions made by the claimant in paragraphs 72 - 74 of his witness statement, that the accident had affected his daily activities, were not supported by medical evidence. He submitted that counsel for the defendant having failed to put any suggestions to the claimant in cross-examination that his evidence was untrue, incorrect incomplete or exaggerated; the evidence of the claimant was unchallenged and should be regarded as having been accepted. Counsel for the claimant relied on the rule in ***Browne v Dunn*** (1894) 6 R 67. Counsel cited ***Markem Corp and another v Zipher Ltd; Markem Technologies Ltd and others v Buckby and others*** [2006]

IP & T 102 and ***Dalton Wilson v Raymond Reid*** SCCA 14/2005 (20.12.07) in support.

[69] In ***Markem Corp*** at page 126 Jacob LJ cited a passage from Hunt J in ***Allied Pastoral Holdings Pty Ltd v Federal Commr of Taxation*** 70 FLR 447 at pages 462 - 463 where he quoted Lord Herschell LC in ***Browne v Dunn*** at page 70-71 with commentary as follows:

> "Now my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intended to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses." His Lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where it is "perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling". His speech continued (at p 72): "All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."

[70] In ***Dalton Wilson's*** case Smith JA (with whom McCalla JA (as she was then) and Marsh JA(Ag) agreed) said at p. 11 –

> Generally, where the court is asked to disbelieve a witness, the witness should be cross-examined in that regard. Failure to cross-examine the witness on some material part of his evidence or at all, may be treated as an acceptance of the

truth of that part of the whole of his evidence – See **Markem Corporation and Anor. v Zipher Ltd.** [2005] EWCA Civ. 267 following **Browne v Dunn** [1894] 6 R. 67.

[71] On the basis of these authorities counsel for the claimant invited the court to disregard the submissions of counsel for the defendant questioning any of the evidence in support of the claimant's case, where that evidence had not been challenged during the taking of evidence.

Analysis

[72] It is true as submitted by counsel for the defendant that it is not the practice of the Supreme Court to total awards for each injury but rather to apply a global figure for the injuries sustained and the loss of amenities. Therefore the citing of cases that deal with or include particular injuries are only helpful in so far as they are considered in the context of the overall injuries in the cited case, and compared to and where necessary contrasted with, those in the case for which damages are being determined.

[73] Another factor to be considered is the age of the cases relied on. Even though rebasing of the Consumer Price Indices has been done to attempt to bring the older authorities more in line with current monetary values, it is always preferable to rely on newer cases where possible.

[74] In his submissions in reply, counsel for the claimant highlighted the fact that Akeem is younger than all the other plaintiffs/claimants in the cases cited, and argued that that fact should operate to increase the damages awarded in this case. The reasons for that proposition included the importance of athletic prowess in our culture, and the inhibiting social effects of an obvious deformity especially for young

people. Further, the younger the claimant, the greater the expected duration of suffering from the long term impact of the injuries suffered.

[75] The submission of counsel for the claimant in relation to the rule in ***Browne v Dunn*** is also accepted as applicable in the circumstances of this case. The full weight and effect will therefore be given to all the unchallenged evidence in support of the claimant's case.

[76] The court also bears in mind the involvement of objective and subjective elements in an assessment of damages for pain and suffering and loss of amenities as identified and discussed in the cases of ***H. W. West and Sons v Shephard*** [1964] A.C. 326 and ***Lim Poh Choo v Camden and Islington Health Authority*** [1980] A.C. 174.

[77] These principles form an analytical backdrop against which the cases cited may usefully be examined and discussed.

[78] Both counsel submitted and the court agrees that the injuries to the hand in ***Keith Rose's*** case were less serious than those suffered by Akeem. However the mathematical approach to the determination of damages suggested by counsel for the claimant, whereby the permanent partial disability in the instant case should be divided by that in ***Keith Rose*** and then a discount applied, is inappropriate. There are myriad factors that make each case unique. Added to that the fact that a global award has to be made rather than discrete awards for each injury makes the mathematical or "linear approach" suggested by counsel for the claimant unhelpful.

[79] The injuries in ***Mark Scott*** are less severe than those suffered by Akeem. Again however, the straight mathematical approach based on the fact that the PPD assessed in Akeem's case (16%) is 45% greater than that (9%) assessed in ***Mark Scott's*** case, is not the method that

will yield the appropriate damages. An assessment of all the claimant's injuries through comparing similarities and differences between cases, while making allowance for the unique features of the instant case, does not admit of such a scientific determination of the subjective pain and suffering and loss of amenities endured by the claimant.

[80] I have highlighted and specifically analysed ***Mark Scott*** and ***Keith Rose*** to demonstrate why the method of calculating damages advanced by counsel for the claimant in his analysis of those cases will not be adopted by this court. However it is important to note at this stage, that all the cases cited, with the exception of ***Trevor Clarke***, *(which I already commented on when outlining the submissions of counsel for the claimant in reply),* have provided the court with some assistance towards arriving at the award considered appropriate in this case. To be more particular, the case the court found most useful was ***Trevor Woolery*** despite it being subject to searching questions by counsel for the claimant in his reply. The range of injuries suffered by Trevor Woolery bear some similarity to those suffered by Akeem in the instant case and where they are dissimilar, their wide range is of value given that a composite award was made for several injuries, which is the course that will have to be adopted in the instant case. It is obvious that there is an error in the date of discharge from the hospital recorded. It should read 10/8/93 instead of 10/8/92. Once that error is corrected the supposed anomalies highlighted by counsel for the claimant have much less significance.

[81] Though ***Trevor Woolery's*** case is a useful foundation from which to start, it must be bourne in mind that Trevor Woolery was 27 years older than Akeem at the time of his accident. It is also true that the award, even for a non dominant hand injury seems somewhat low. In addition to the cases cited in reply, I note ***Omar Wilson's*** case where the general damages for pain and suffering agreed in a contested hearing,

for the sole injury of an above wrist amputation of the right dominant hand, the claimant being 30 years old at the time of injury, was $7.5M.

[82] Taking into consideration all the useful cases cited, the particular circumstances of Akeem including his age, the range of injuries he suffered, the course of treatment and healing including setbacks, the further remedial work that needs to be done and his PPD, I find that the appropriate award for pain and suffering and loss of amenities is $7M.

Post Traumatic Stress Disorder (PTSD)

PTSD - The Procedural Issue

[83] This issue arose against the background of section 31 E of the Evidence Act. The relevant parts of section 31 E that are required to address this issue are set out below:

> (1) ...in any civil proceedings a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would have been admissible.
>
> (2) ...the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.
>
> (3) ...every party so notified shall have the right to require that the person who made the statement be called as a witness....

[84] On January 24, 2011 the claimant's attorneys filed and served notice of the claimant's intention to tender in evidence medical reports, including Dr. Abel's report, as well as cheques and receipts. The Document was headed "Notice of Intention to Tender in Evidence Hearsay Statements Contained in Documents". The relevant part of the Notice reads:

> TAKE NOTICE that at the assessment of damages herein, the claimant intends to tender in evidence the statements contained in the following documents namely - .
>
> Medical Report
>
> 1....
>
> 2...
>
> 3. Medical report from Dr. Wendel Abel M.B.B.S. DipPsy, D.M., M.P.H., dated 9 December 2010;

[85] On February 17, 2011 the defendant's attorneys filed, and on 18 February, 2011, served a notice in response on counsel for the claimant. The relevant terms of that Notice are as follows:

> NOTICE OF OBJECTION TO
> THE TENDERING OF STATEMENTS IN EVIDENCE
>
> TAKE NOTICE that at the Assessment of Damages herein, the Defendant intends to object to the following documents listed in the Claimant's Notice of Intention to Tender Evidence in Hearsay Statement contained in a Document dated January 24, 2011 namely:-
>
> 1. Medical Report from Dr. Wendel Abel MBBS, DipPsy, D.M. M.P.H. dated 9 December 2010.

[86] On February 25, 2011 the claimant's assessment of damages came on for hearing before this court. At that hearing counsel for the claimant

made a query concerning the effect and intendment of the notice. Counsel for the defendant in response indicated it was indeed intended to require Dr. Abel to be called as a witness. The assessment of damages was adjourned to May 16, 2011.

[87] Later on the same day February 25, 2011, counsel for the claimant wrote to counsel for the defendant in the following terms:

> You indicated to the court earlier today that your document headed "Notice of Objection" filed on 17 February, 2011 was intended to bring about the result that Dr. Wendel Abel be called as a witness. However, since the document fails to stipulate any such requirement in accordance with the provisions of Evidence (Amendment) Act, 1995, or otherwise, as we pointed out to the court, we shall not be treating it as one which does.

[88] Counsel for the defendant did not respond to this letter.

[89] On May 16, 2011 the assessment of damages in this matter commenced. Counsel for the defendant objected to Dr. Abel's report being admitted in evidence on the basis that a counter notice had been filed requiring his attendance for cross-examination. Counsel for the claimant countered that the purported Notice was deficient and invalid and that the report should be admitted in evidence. The court ruled that the report was admissible without Dr. Abel being called and the hearing proceeded.

[90] After the matter was concluded and judgment reserved the court upon review of the matter invited further submissions on the question of the admissibility of the report and on whether or not the initial ruling admitting the report was correct.

[91] At the resumed hearing for submissions on that issue, counsel for the defendant submitted *in limine* that on the authority of ***Cherry Dixon-Hall v Jamaica Grande Limited*** SCCA 26/2007 (November 21, 2008) in particular paragraph 15 of the judgment of Panton P, the court could not reopen the issue the report having already been received in evidence.

[92] That submission was however not upheld. The ***Cherry Dixon-Hall*** case did not hold as counsel suggested. The decision rather was that the medical reports including that of Dr. Williams having been received in evidence by consent, the learned trial judge was obliged to assess them as expert evidence even though in the case of Dr. Williams he had not been certified as an expert pursuant to part 32 of the CPR.

[93] There are myriad cases which recognise the power of the court to receive further submissions once judgment has not been finally delivered and perfected. Two recent cases decided before the Supreme Court illustrate the point. In ***Dennis Meadows et al v The Attorney General of Jamaica et al*** [2012] JMSC Civ 110 after the hearing was completed and judgment reserved counsel for the claimants located a case which he forwarded to the court and counsel for the defendants. The court invited and heard further submissions on that authority before again reserving and then delivering judgment in the matter.

[94] The second case is even more significant as the process had reached even further. In ***Jamaica Gasolene Retailers v Gasolene Retailers of Jamaica Limited*** [2012] JMSC Civ 63 the court held there was the power to revisit or reopen a judgment when the draft judgment had been delivered but the formal judgment had not yet been drawn up, perfected, signed or entered in the judgment book and sealed. Further submissions were made on evidence which had not been drawn to the court's attention after which final judgment was delivered.

[95] On the above authorities it is manifest that the court had the jurisdiction to invite and receive further submissions prior to delivering judgment.

The Submissions of Counsel for the Claimant on the Validity of the Defendant's Notice

[96] Counsel for the claimant submitted that the modern test of the validity of a Notice is outlined in the leading case of ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co. Ltd.*** [1997] AC 749. Lord Steyn at page 772 outlined the test as, *"Does the notice construed against its contextual setting unambiguously inform a reasonable recipient how and when the notice is to operate under the right reserved?"*

On page 773 he noted, *"That test can only be satisfied where the reasonable recipient could be left in no doubt whatever"*

[97] Earlier at page 767 Lord Steyn opined, *"The question is not how the landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene."* On the following page he went on to note that, *"It is important not to lose sight of the purpose of a notice under the break clause. It serves one purpose only: to inform the landlord that the tenant has decided to determine the lease in accordance with the right reserved. That purpose must be relevant to the construction and validity of the notice. Prima facie one would expect that if a notice unambiguously conveys a decision to determine a court may nowadays ignore immaterial errors which would not have misled a reasonable recipient."*

[98] Lord Hoffman in framing what he thought the test should be at page 782 adopted the test stated by Goulding J. in ***Carradine Properties***

Ltd v Aslam [1976] 1 W.L.R. 442 as *"Is the notice quite clear to a reasonable tenant reading it? Is it plain that he cannot be misled by it?*" In the next paragraph Lord Hoffman went on to say, *"The notice should be construed against the background of the terms of the lease."*

[99] Lord Clyde's formulation at page 782 was, *"The standard of reference is that of a reasonable man exercising his common sense in the context and in the circumstances of the particular case. It is not an absolute clarity or an absolute absence of any possible ambiguity which is desiderated. To demand a perfect precision in matters which are not within the formal requirements of the relevant power would in my view impose an unduly high standard in the framing of notices such as those in issue here. While careless drafting is certainly to be discouraged the evident intention of a notice should not in matters of this kind be rejected in preference for a technical precision."*

[100] Counsel next pointed out that in ***Ravenseft Properties Ltd and Brigid Agatha Hall*** [2001] EWCA Civ 2034 Mummery LJ. accepted that the test outlined in ***Mannai Investment Co Ltd*** in respect of contractual notices was also to be applied in determining the validity of statutory notices.

[101] In applying these principles to the facts of this case counsel submitted that the defendant's notice was firstly unclear because:

a. The notice simply did not require Dr. Abel to be called as a witness.
b. viewed objectively, in the relevant objective contextual scene, the defendant's notice contained no requirement at all, let alone a requirement that Dr. Abel be called as a witness.

[102] Counsel submitted that section 31E (3) of the Evidence Act gives the notified party a right. That right being to **require** that the maker of the statement that was sought to be put into evidence should be called as a witness. That counsel submitted is the notified party's only right insofar as the s. 31E notice itself is concerned.

[103] Counsel contended that an indispensable condition of the exercise of that right was that the notified party make that requirement. He submitted that the notice could not be said to be sufficiently clear when it did not make the very requirement that was a condition of the exercise of the right.

[104] Importantly counsel pointed out that section 31E (3) did not prescribe the manner in which the requirement that the maker of the statement be called as a witness should be communicated. He acknowledged that such a requirement could even be made orally. The benefit of a written notice he maintained was that it afforded certainty and ease of proof that the requirement had been activated.

[105] Counsel continued that not only was the defendant's notice unclear it was also ambiguous given that:

a. As a notice of intention to object, simplicter, the defendant's notice could, possibly, have foreshadowed a myriad of objections as to the report itself and the evidence contained in the report. There might have been an objection as to the form of the report. There might have been an objection as to one or more of the statements in the report - either as to the form of those statements or as to their substance.
b. As a notice intending to require Dr. Abel to be called as a witness, the defendant's notice was as "sloppily drafted" as it was possible to imagine.

c. It was grossly unfair to a recipient of a notice to assert that the notice means one thing when it states a very different (and plausible and possible) other thing. That creates a trap for the recipient of the notice.

The Submissions of Counsel for the Defendant in Response

[106] Counsel for the defendant submitted that the spirit and intent of the amendment of the evidence act that created section 31E was to allow documents to go into evidence without calling the maker of the document. The claimant filed a notice on Jan 24, 2011 and outlined the documents to be so treated.

[107] Counsel continued that given that a Notice of objection was filed in reliance on the spirit and intention of the Evidence Act any notice which objected to the tendering of the document meant there was an objection to the document being received in evidence without the maker of the document attending.

[108] Counsel advanced that the reasonable person had to be viewed in terms of the skill and knowledge of the person who received the document. Counsel submitted that the intent of the notice must have been clear and that the Evidence Act does not specify the manner in which the objection ought to be raised, neither was there any requirement to indicate why the party wished the maker of the document to be called.

[109] Counsel noted that the Evidence Act did not specifically outline that once a counter notice is served the person whose document it was being sought to tender is required to attend. However implicit in section 31E and in the notice of objection, is that once there is an objection to

the tender, it follows that there is the requirement that the maker be required to attend.

[110] Counsel cited Page 810 of Civil Procedure vol. 1 2004 para 33.4.1 – "The White Book" to support the contention that as where a hearsay notice is served that shows there is no intention to call the witness it follows that where a notice of objection to the tendering was filed that would mean the witness the maker of the document was required to be present.

[111] Counsel further submitted that it was communicated to the court and counsel for the claimant on February 25, 2011 that the intention of the Notice was to have the doctor called. Counsel noted that the letter from counsel for the claimant of February 25, 2011 alluded to the statements in court made by her. From that letter counsel submitted even if the Notice was invalid the oral statement made in court would have supplemented the Notice and adequately stipulated the requirement that Dr. Abel be called as a witness. Counsel continued that the absence of a response from her to the letter of February 25, 2011 was of not moment, because ultimately it was for the court to determine whether or not the Notice given by the defendant in whatever form was valid.

The Ruling

[112] It should be stated at the outset that the Notice of Objection filed by counsel for the defendant was unhappily worded. The question for determination however is whether the notice either by itself, together with the oral statement of counsel for the defendant made in court on February 25, 2011, or that oral statement by itself was sufficient to put counsel for the claimant on notice that the defendant required Dr. Abel to be called as a witness.

[113] To properly apply the test outlined in ***Mannai Investment Co Ltd*** identification of the appropriate contextual framework is critical. A major part of that contextual framework is the purpose of section 31E of the Evidence Act. That purpose may be shortly stated as, by appropriate notice to allow documents to go into evidence without the makers of those documents being called unless the other side objects to the documents being received in evidence in the absence of the maker.

[114] The reasonable recipient has to be judged as a lawyer with knowledge of the prevailing practice and procedure in assessment matters. The relevant objective contextual scene, which is the purpose of the Evidence Act, also has to be considered in assessing the understanding of the reasonable recipient.

[115] It should be noted that neither the claimant's Notice nor the Notice in response from the defendant were expressed to have been issued pursuant to the Evidence Act, though the claimant's Notice satisfied the conditions stipulated in section 31E (2). Would a notice in response to the claimant's Notice in those circumstances, given the relevant objective context be reasonably and objectively construed as being a response pursuant to the Evidence Act?

[116] Put another way could the Notice of the defendant reasonably have been construed to be in relation to the form of the report or to statements made in the report as contended by counsel for the claimant? I think not.

[117] However the evidence did not stop there. Counsel for the claimant was actually put on notice as to what the Notice was intended to mean when he specifically sought to have it clarified in court and it was clarified orally by counsel for the defendant on February 25, 2011.

[118] The oral statements either supplemented any deficiency in the Notice or by themselves operated as a Notice requiring Dr. Abel to be called as a witness. Significantly as submitted and acknowledged by Mr. Reitzin the Evidence Act does not stipulate the form in which the Notice requiring the witness to be called should be given.

[119] Accordingly the court ruled after hearing the further submissions that the report of Dr. Abel was wrongly received into evidence in light of what the court now held, in a reversal of the earlier ruling, to be the valid Notice of Objection filed or made by counsel for the defendant.

[120] In light of the court's ruling counsel for the claimant indicated that he would wish an opportunity to call Dr. Abel. Counsel for the defendant however stated that having taken instructions from her client, given the length of time that had elapsed and the stage the matter had reached, the requirement that Dr. Abel be called as a witness would be withdrawn. The court was therefore, the second time around, able to properly receive Dr. Abel's report in evidence.

PTSD - The Substantive Issue

The Submissions of Counsel for the Claimant

[121] Counsel for the claimant relied on the cases of ***Angeleta Brown v Petroleum Company of Jamaica Limited and Juici Beef Limited*** Claim No 2004 HCV 1061 (April 27, 2007) Khan Vol. 6, 174 and ***Sharon Greenwood-Henry v The Attorney General For Jamaica*** Claim No. C.L. 1999 G 116 (October 26, 2005) Khan Vol. 6, 208. In ***Angeleta Brown*** the claimant was injured when a liquid petroleum gas cylinder exploded causing her severe burns all over her body. Her cosmetic disfigurement was 100% for her legs and she had permanent unsightly scars. She became depressed and was seen by Dr. Wendel Abel who concluded that she was suffering from major depression-moderate and post traumatic stress disorder (PTSD). The degree of

disfigurement to her nostrils and upper and lower limbs had affected her body image and was a source of emotional distress. For PTSD she was awarded $340,000 which updates to $625,203.88.

[122] In ***Sharon Greenwood-Henry*** the claimant who was scheduled to depart from the Norman Manley International Airport for London was pulled from the line at 10:05 p.m., subjected to invasive searches and taken to the Kingston Public Hospital where she was X-Rayed and "laxitised". She was not released until midday the following day. No drugs were found. Medical reports of Dr. Irons indicated that the claimant showed evidence of insomnia, appetite disturbance, phobic avoidance behaviour specific to the incident, depression, anxiety and psychophysical bowel and bladder disturbances – meeting the criteria of post traumatic stress disorder. She was awarded $500,000.00 for PTSD which updates to $1,004,241.78.

[123] Counsel submitted that the route to the appropriate award under this head should start with an average of the updated awards in the two cited cases which is $814,722.83. Counsel however further advanced that the claimant in the instant case had suffered horrific injuries at a tender and formative age. The stress related to the aftermath of the injuries must have a strong impact on him given that at his age his mechanisms for coping with the stresses of life would be underdeveloped. Accordingly counsel at the time of submissions submitted that $1M for post-traumatic stress disorder and the disabilities produced by its sequelae would be appropriate. That sum now updates to $1,116,087.21.

The Submissions of Counsel for the Defendant

[124] Counsel submitted that there was insufficient evidence to establish a link between the accident and the post-traumatic stress disorder

diagnosed by Dr. Wendel Abel. The link was also not established in counsel's view in relation to the loss of memory and Akeem's poor academic performance.

[125] Counsel pointed out that in their witness statements the claimant and his mother had stated that his memory has been worse since the accident. The claimant also indicated in his statement that he used to have recollections of the accident which gradually got less frequent. He also used to have nightmares at night, but he had not had one in several months.

[126] Counsel submitted the memory loss was not borne out by Dr. Wendel Abel in his medical report on Akeem dated November 9, 2010 in which it was stated that there was "no evidence of defect of memory and he was correctly oriented in time, place and person. His speech was well organised. He did not show any defect in short or long term memory".

[127] Counsel further submitted that the allegation that the claimant's academic performance had deteriorated was also unsupported by the evidence. Counsel noted that the claimant's two report cards for the summer terms of the academic years 2008-2009 and 2009-2010 were tendered in evidence. These reports were reviewed by CACS, the report from which in outlining the claimant's educational history notes at page 3 that:

> In the first term of high school, Akeem had an average of 33.1% in comparison to his class average of 62.9%...The end of year report for the 7th grade saw his average dropping to 21.9% in comparison to 61% class average.

[128] Counsel highlighted that this academic performance would have predated the accident on July 1, 2009. Counsel further noted that the

report for the summer term 2008-2009 also showed that Akeem had been absent from 50 sessions of school. Counsel also highlighted that for the first term of 8th grade, the Claimant's average was 16.3% in comparison to class average of 26.8%. The end of 8th grade report saw an improvement in the Claimant's average 24.4% the class average was 26.1%. He was absent from school for 164 sessions. Given that the medical report of Dr. Minott dated March 8, 2009 (2010) showed that both his hand and leg had healed, counsel submitted that the claimant's absences from school for the summer term 2009-2010 could not be attributed to the effect of the accident. Neither, counsel argued, could the claimant's irregular school attendance which continued into the 9th grade, be in any way attributable to the accident.

[129] Based on the above, counsel contended that the claimant's educational history showed a pattern of non-attendance and poor or consistently low performance prior to the accident. Counsel therefore submitted that the reports do not support the view that Akeem's academic performance had been impacted by the accident. Counsel also pointed out that the claimant was described in the CACS report as having below average intellectual ability. CACS had however concluded that the claimant should be able to achieve at a level that would allow him to complete High School and beyond.

[130] Counsel also thought it noteworthy that at page 4 of the CACS report it was indicated that after his return to school after the accident the claimant thought that he was performing about the same academically as prior to the accident.

[131] On the strength of the above analysis counsel submitted that no award should be made for PTSD as the complaints by the claimant were limited to nightmares and his recollection of the accident which may be considered normal in most cases. Further it was the claimant's

evidence in cross examination that he had ceased having those dreams.

[132] In the alternative if the court thought that an award for PTSD should be made, counsel relied on the case of ***Marva Protz-Marcocchio v Ernest Smatt*** (April 22, 2002) Khan Vol. 5, 284. In this case the claimant was attacked by dogs and suffered PTSD which materially affected her mental and physical health. Her stress and phobic response was worsened by the nature of her work which required calling on individuals at home which caused her to regularly relive her stress. She was awarded $100,000.00 for PTSD which updated is $309073.10.

[133] In commenting on the authorities relied on by the claimant, counsel first submitted that the PTSD suffered by the claimant in ***Sharon Henry-Greenwood's*** case were more severe than that of the claimant in the instant case. Ms Greenwood-Henry suffered from insomnia, appetite disturbance, phobic avoidance behaviour specific to the incident, depression, anxiety and psychophysical bowel and bladder disturbances. She also had insomnia and dietary difficulties. Counsel also submitted that there was no medical evidence to support the claim by counsel for the claimant that the claimant's duration of suffering would be concomitantly long.

[134] In respect of ***Angeleta Brown*** counsel also submitted that the PTSD resulting from the nature and effect of her injuries was more severe than that suffered by the instant claimant. Counsel noted that Dr. Abel had found that the claimant was able to function on the job but that the incident had impacted her ability to undertake some role functions such as cooking and the degree of disfigurement to her nostrils and upper and lower limbs had affected her body image and was a source of emotional distress.

[135] At the time of submissions counsel put forward a sum of $300,000 as a suitable award if the court found that an award for PTSD was indicated by the evidence. That sum would now update to $334,826.16.

The Submissions of Counsel for the Claimant in Reply

[136] No cross-examination having been directed to the claimant or the claimant's mother on any part of the claim, whether post-traumatic stress disorder or memory or otherwise, it was not now open for counsel for the defendant's attorney to challenge any part of the evidence adduced in these proceedings: ***Browne v Dunn*** supra.

[137] In any event, when examined carefully and considered in its proper context, Dr. Abel's report was perfectly consistent with the entirely of the claimant's evidence and, indeed, that of the claimant's mother.

[138] The case of ***Marva Protz-Marcocchio*** cited by the defendant was not genuinely comparable with the instant. ***Marva Protz-Marcocchio's*** stress disorder and associated phobic response were worsened when she called on individuals at their homes when she regularly re-lived her stress. In comparison Akeem's post-traumatic stress disorder was overwhelmingly more invasive, affecting him virtually every moment of every day of his life. His personality had changed and his perception of himself had been dramatically and detrimentally affected. This was a natural consequence of his devastating, permanent and incurable injuries.

Analysis

[139] Dr. Abel in his report noted that the claimant complained of having frequent disturbing memories images and thoughts of the accident and had nightmares about the accident. The report from the claimant's

school considered by Dr Abel spoke to a decline in his school work and that he had become reclusive and “lost”. His mother indicated to Dr Abel that sometimes the claimant behaved as if he had no sense. His mother’s concern extended to the fact that he seemed to be forgetful and had become noticeably very irritable towards his siblings

[140] Dr. Abel concluded that the interview data was consistent with a diagnosis of Post Traumatic Stress Disorder based on:

a. Exposure to a recognizable stressor as noted by the incident of July 14, 2009;
b. Re-experiencing of the trauma;
c. Persistent avoidance of stimuli associated with the trauma (not preset before the trauma); and
d. Persistent symptoms of increased arousal (not present before the trauma)

[141] Dr. Abel recommended treatment to facilitate the amelioration of the claimant’s symptoms and rehabilitation.

[142] Having considered Dr. Abel’s report and the submissions of counsel I am satisfied and accept Dr. Abel’s diagnosis that the claimant suffered from PTSD. While it is true that in cross-examination the claimant indicated he had not had nightmares in several months and Dr. Abel at the time of his examination did not find any defect of memory, nothing has been advanced that would cause the court to reject the doctors overall diagnosis and conclusion based on his interview of the claimant and his mother and the supporting medical and school documentation. The indication from his school report that his performance had declined is also consistent with the fact that he had after the accident been placed in a group of lower performing students. The court does not however place great store by the assessment of the academic

performance as it is clear that the claimant was never a consistent performer prior to the accident. There does not appear to be any significant change in either direction in his academic performance since the accident.

[143] In assessing the cases cited it appears to this court that the PTSD suffered by the claimant's in the cases cited by counsel for the claimant, ***Sharon Henry-Greenwood*** and ***Angeleta Brown*** was more severe that that suffered by the claimant in the instant case. I also find that the instant claimant's suffering in this regard is greater than that which occurred in the case of ***Marva Protz-Marcocchio*** cited by counsel for the defendant.

[144] In arriving at the appropriate figure for this head of damage the court is also mindful of the sums the court will allow for the treatment of the claimant's PTSD recommended by Dr. Abel. In all the circumstances including the age of the claimant and the effect of this trauma on the claimant's development the court finds that the sum of $450,000.00 for PTSD should be awarded. The following sums for treatment as outlined in the report of Dr. Abel will also be awarded:

a. Initial assessment and preparation of reports	$ 60,000.00
b. Psychotherapy	$200,000.00
c. Medication review and treatment	$240,000.00
d. Cost of Medication	$180,000.00
e. Neuropyschological assessment	$ 60,000.00

Loss of Earning Capacity/Handicap on the Labour Market

The Submissions of Counsel for the Claimant

[145] Counsel for the claimant made detailed and exhaustive submissions under this head. In light of the decision at which I have arrived based on the evidence and the law, I will not go into the submissions in full detail nor refer to all the cases that were cited. I will however highlight some of the main points advanced.

[146] Counsel submitted that earning capacity is a faculty or skill which is a capital asset. Therefore damages for loss of earning capacity ought not to be assessed on the basis that the estimated earnings which might have been earned by the utilization of that capital asset are subject to a deduction to take account of notional taxation. (***Atlas Tiles v Briers*** (1978) 144 CLR 202 not following ***British Transport Commission v Gourley*** [1956] AC 185).

[147] He also submitted that the multiplier/multiplicand approach to assessing damages, even where there are imponderables, may be appropriate (***Monex Limited and Derrick Mitchell v Camille Grimes*** SCCA 83/96 (December 15, 1998)). Further, that though assessing damages for loss or impairment of a child's earning capacity is especially difficult, that is no bar to recovery. See ***Earl Allen and Conley Suddeal v Lascelles Watt (by his next friend Alice Vernon)*** [1990] JLR 134; ***Jamaica Telephone Co. Ltd. v Delmar Dixon (bnf Olive Maxwell)*** SCCA 15/91 (July 6, 1994), ***Jamil bin Harun v Yang Kamsiah*** [1984] AC 529 (PC) and the ***Monex*** case.

[148] It is useful to highlight the passages from the ***Monex*** case referred to by the Claimant in his submissions. He noted that at page 13 of the judgment Harrison JA said –

> . . . in a case where an infant victim, not yet employed, is injured and suffers a disability and the risk exists that

> subsequently he will be unable to work or will obtain employment at a level below that which he would have, with normal development, but for his incapacity, this deficit in earnings represents a handicap on the labour market. It attracts an award and is quantifiable, whether by way of a global sum or by the use of the multiplicand and multiplier principle. This is so despite the fact that there is not yet any actual earnings attributable to the said infant.

[149] At page 14 the learned Judge said –

> The award of damages for loss of earning capacity in respect of an infant victim not yet earning a wage and disabled by the act of the defendant, although speculative, represents to the victim a real loss which a court has a duty to examine and quantify, if material is provided by evidence.

[150] At page 15 His Lordship continued

> The method by which such estimate is arrived at, whether the use of the multiplicand/multiplier means or the global sum, depends on the circumstances of each case. Where the imponderables are numerous and the projections have not reasonably crystallized, the multiplicand/multiplier method is rarely used . . .

[151] Counsel next cited the cases of ***Joyce v Yeomans*** [1981] 1 WLR 549, ***Campbell & Ors. v Whylie*** (1999) 59 WIR 326 and ***Marcella Clarke v Claude Dawkins & Leslie Palmer*** C.L. 2002 C-047 (June 16, 2004) which were all instances where the multiplier/multiplicand as opposed to the global sum approach was utilized and or approved. He also cited the case of ***Dawnett Walker v Hensley Pink*** CL W123/2000 (December 7, 2001) where a global sum was awarded.

[152] Relying on ***McGregor on Damages*** 17th Edition paragraph 35-070 and the ***Monex*** case counsel further submitted that the multiplicand should be arrived at by using the earning power of Akeem's parents or the

national average wage. Concerning the multiplier, counsel submitted that Akeem's expected working life would be from 17 – 65 a total of 48 years. Based on the case of ***Elaine Russell (by next friend Ilene Griffiths) and Ilene Griffiths v Bancroft Broomfield*** CL 1978 R 137 (October 6, 1983) Khan vol. 2 page 206, which counsel submitted was the closest on the facts to the instant case, he argued that the appropriate multiplier should be 16. He additionally advanced that multipliers already have vicissitudes built into their calculation and hence no further "taxing down" would be appropriate. Relying on and adopting the dictum from Carey, JA in ***Kikismo Ltd v. Deborah Salmon*** SCCA 67/89 he submitted that, *"It is the multiplier that has to be adjusted to take account of immediate lump sum payments and contingencies."*

[153] Finally counsel submitted that once the ordinary onus was satisfied, it was unnecessary for the claimant to satisfy the court of the extent of the loss, in the sense of proving what employment the claimant is *not* incapacitated from performing. See Harold Luntz *"Assessment of Damages for Personal Injuries & Death – General Principles"* 4th ed. (Supplement 2006) para 9.24 and ***State of NSW v Moss*** (2000) 54 NSWLR 536 (CA). He argued that a defendant who contends that the claimant has a residual capacity has an evidentiary onus of adducing evidence of what the claimant is capable of performing and what jobs are open to a person with such a residual capacity. He relied on ***Arthur Robinson (Grafton) Pty Ltd v Carter*** (1967) 122 CLR 649.

The Submissions of Counsel for the Defendant

[154] Counsel for the defendant urged the court to be guided by the Jamaican authorities which have dealt with this head of damages rather than the cases cited from Australia. She submitted that the principles outlined in the ***Monex*** case were applicable. She argued that for an award to be made under this head using the multiplier/multiplicand approach, there must be supporting medical

evidence that the injury complained of will have an impact on the claimant's ability to perform his job and due to this impact, there exists a risk that he may lose his job. This position she argued was supported by the decision of the Court of Appeal in ***Dawnett Walker.***

[155] Counsel submitted that there is no medical evidence to support a contention that Akeem would never be able to work. She pointed in fact to the CACS' report where it was stated at page 10 under the heading Diagnostic/Clinical Impression that *"...His performance is indicative of an adolescent who will be able to function adequately at a skills job such as an auto-mechanic as his strength in his non verbal abstract reasoning is more suited for technological subjects or careers".*

[156] Counsel argued that that statement combined with the CACS' recommendations show that he could be trained for careers with a technological leaning. What it did not reveal was that the injuries sustained would prevent him from gaining employment. She noted that Akeem's evidence was that he wanted to become an auto mechanic but that as a result of the accident he felt he was unable to realise that dream.

[157] Counsel submitted that the state of the evidence was such that the imponderables in this case have not reasonably crystallised. Counsel cited in support ***Jamaica Telephone Company Limited v Delmar Dixon (by his next friend Olive Maxwell)*** SCCA 15/91 (June 7, 1994) where it was held that whilst this particular item of damages is always speculative, there must also be some basic fact or facts upon which the Court can make a forecast. It was noted that when an infant is involved the amount of speculation is high as there are many imponderables.

[158] Counsel submitted that whilst there is the basic fact of injuries as disclosed which will affect the claimant in his working years, the effect of the injuries as it relates to his future area of employment, (which is unknown), and his capacity to earn are imponderables. Save for an

expression of an interest in auto-mechanics, counsel argued that it was speculative as to whether the Claimant would have entered into that field. Further the evidence was that he would be suited for other areas.

[159] Counsel also highlighted the fact that from the report of Gerald Anthony Boyd of Orthotist USA dated March 18, 2011, Akeem was now writing. Counsel submitted that there was no evidence that the Claimant would never be employed, therefore any award under this head would be speculative. However were the court minded to make such an award, counsel submitted a conventional sum should be awarded on the basis of the cases of ***Vincent Schoburgh v Michael and Robert Fletcher*** C.L. 2001 S 124 (September 23, 2004) and ***Christopher Gayle v Mark Wright and Ronham & Associates*** CL 2001 G 050 (September 20, 2004)**.** In ***Vincent Schoburgh*** the sum of $150,000.00 was awarded for loss of earning capacity which updates to $359,438.25. It should be noted that Mr. Schoburgh, 54 at the time of the award, had serious injuries which caused him to have to abandon his job at National Water Commission as well as his farming. In addition to other awards, he also received $1,235,000 for loss of future earnings which updates to $2,959,375.00. In ***Christopher Gayle*** the claimant who was also seriously injured was awarded the "low and moderate" figure of $300,000.00 for loss of earning capacity which updates to $718,876.51. This sum was used as the learned judge also made an award for loss of future earnings where the multiplier/multiplicand method was used. Mr. Gayle was 38 years old at the time of the assessment and a multiplier of 10 was used. He was awarded $952,120.00 for loss of future earnings which updates to $2,281,522.36.

[160] Counsel submitted that in the circumstances a conventional sum of $200,000 should be awarded. At the time of judgment this sum updates to $223, 217.44.

[161] Counsel further submitted in the alternative that, should the court be minded to use the multiplier/multiplicand approach, the national minimum wage of $4,700.00 per week and a multiplier of 10 as was used in the ***Tyrone Gregory*** (a case in which there was clear medical evidence that the plaintiff's earning capacity was grossly and severely affected) could be considered. That would make the total payable $2,444,000.00.

[162] Counsel however also cited ***Campbell and Others v Whylie*** (1999) 59 WIR 326 a case where it was held that as the respondent would not entirely lose her ability to earn the multiplier should be discounted to take that fact into account. Consequently the Court of Appeal reduced the multiplier of 12 used by the learned trial judge to 7.

[163] Adopting the analysis in ***Campbell and Others,*** counsel submitted that in the instant case, the multiplier ought to be reduced to 5 as there is a possibility that the Claimant could still be employed in other areas. That would then reduce the award to $1,220,000.00

The submissions of counsel for the Claimant in reply

[164] Counsel submitted that the observation in ***Dawnett Walker's case*** that medical evidence must confirm the risk of the claimant losing his/her present employment had no application to the instant case; the claimant here being 14 years old at the time of hearing and not yet in any employment. This reality counsel submitted was recognized by Sykes J in the ***Kenroy Biggs*** case at paragraphs 93 and following of that judgment.

[165] Counsel also distinguished ***Campbell and Others*** on the basis that the claimant was 26 years old at the date of the first instance hearing and in full time employment as a medical doctor. Accordingly, counsel

submitted that that case had no real bearing on the selection of the appropriate multiplier in the instant circumstances.

[166] Counsel concluded that the simple fact emerging from all of the above analysis is that if an appropriate discount rate is selected and it is coupled with as close an estimate of the claimant's likely earning power as the court can make in the admittedly difficult circumstances, the multiplier "selects" itself automatically in arriving at the result of the "present value" mathematical calculation. The court could then look at the result and using all of its knowledge and experience and taking all of the known factors into account as far as is possible, make a judgment as to the value of the loss of the claimant's earning capacity.

Analysis

[167] The critical evidence in relation to this head of damage comes from Dr. Mark Minott, the claimant himself, Gerald Boyd and Dr. Avril Daley. Dr. Minott indicated that the claimant was left with impairment to the right hand of 30% or 27% of the upper limb or 16% of the whole person.

[168] In addition to the matters already highlighted from his witness statement, paragraphs 72 - 74 of the claimant's statement are also important to outline. He stated as follows:

> 72. I can only hold some tools now. For example I can hold a machete in my right hand but I cannot use it
> 73. I cannot use a pair of pliers. I tried to fix a wire on my fan cord once. That was after the accident. I wasn't able to use them at all.
> 74. I have to use two hands whenever I want to manipulate a tool. Most times I cannot even manage to do so using both hands.

[169] As counsel for the defendant noted in her submissions Mr. Boyd indicated that Akeem was able to write. Mr. Boyd however also noted that Akeem's hand strength was decreased and that he was unable to grip large objects. The recommended prosthesis would assist with some daily functions though it was mainly cosmetic.

[170] In addition to the fact that Dr. Daley from her assessment indicated that Akeem would be suited for technological careers she went on to opine also at page 11 of her report that, *"…Akeem's current emotional state brought on by his involvement in a MVA and his current physical image, may be the biggest hurdle for him to overcome in order to achieve his career goal."*

[171] The court of course views that opinion only in the context in which it could properly be given – a comment on Akeem's emotional state – and recognises that Dr. Daley was not seeking to comment on nor would she have been qualified to proffer an opinion concerning whether or not his physical injuries might affect his career prospects.

[172] It is clear from the evidence that there are some things that Akeem could do before the accident which he either cannot now do or cannot do as well as before. The challenge arises in determining how that impairment will affect his earning capacity. He has expressed an interest in auto-mechanics. It is impossible to say with certainty if he would have gone into that field had the accident not occurred. It is also by no means certain that even with his impairment that he cannot still go into the auto-mechanic field.

[173] While he may not be able to do everything he would like to do with his hands, the court takes judicial notice of the fact that the skill of auto-mechanics involves the acquisition of expertise in diagnosing and addressing problems that arise in automobiles. The use of the hands is important, but not the only component in a successful auto-mechanic career. The claimant has lost significant strength and dexterity in his

dominant hand but that does not automatically mean that with the remaining utility in his right hand and with his fully functioning left hand he would not still be able to become an auto-mechanic. Further there are other careers with a technological leaning that the claimant may well be able to engage in if the demands of auto-mechanics prove to be out of his reach due to his current impairment. Other pursuits that may well equal or exceed what he might have earned as an auto-mechanic.

[174] Counsel for the claimant cited the case of ***Arthur Robinson (Grafton) Pty Ltd v Carter*** (1967) 122 CLR 649 to support the proposition that if the defendant maintains that the claimant retains some residual capacity to earn the onus shifts to the defendant to prove that capacity. He cited a passage from page 657 where Barwick CJ said, *"…too little attention it seems to me is paid to the possibilities which have and will yet open up for paraplegics and quadriplegics : but this ought to be the subject of evidence and not of mere suggestion on the part of judge or advocate."* However the Learned Chief Justice also one sentence later went on to say that, *"Again, too little attention is paid in these cases to the capacity of human beings to accommodate themselves to changed circumstances and to the great readjustments which are made by persons in the situation of the respondent: these elements are, I think, sufficiently within common knowledge for them to be available for the consideration of the jury without evidence of them. But no doubt the evidence of those with special knowledge and experience in this field could assist."* These comments were made in the context of a case where due to serious injury the plaintiff was almost a quadriplegic. If it was recognized in that case as common knowledge that humans accommodate themselves to changed circumstances that realization is even more apposite in the instant case where mercifully the injuries are not as severe. Even without resort to "common knowledge" it is manifest on the evidence which has been put before the court by the claimant himself that the claimant retains earning capacity. The issue

the court has to determine is the appropriate measure of the extent to which that capacity has been compromised.

[175] The ***Jamaica Telephone Company Limited*** case cited by counsel for the defendant I find to be quite instructive in guiding the court to the resolution of this issue. At page 6 Rattray P said,

> Whilst there is the basic fact of injury as disclosed which will affect the respondent in his working years the effect of the injuries as it relates to his future area of employment (which is unknown) and his capacity to earn is an imponderable both in terms of the nature of the employment itself and also in relation to an assessment under this heading in calculable terms. If the proposition is that any residual injury, in this case a permanent partial disability of between 15-20% of the right lower limb can result or probably will result in a loss of earning capacity then a nominal sum of $20,000.00 taken out of the air may be permitted as part of an award. However this proposition would falter when the nature of the employment is unknown since it may apply in one type of employment but not in another. It falters, but does it fall flat on its face?
>
> If the infant on arriving at an age when he probably would be in employment is likely to find such employment in an area that calls for some agility and standing for long periods of time it must be accepted that he would be suffering some handicap on the labour market. If his occupation is purely cerebral it would not. It is necessary however to bear in mind the fact that it is common practice in Jamaica for school boys to engage in holiday work in business places, like dry goods stores, supermarkets, warehouses, etc which work requires the movement of articles from place to place, long hours of standing and a certain amount of agility. Such employment is in a segment of the labour market as known to our experience in Jamaica. Although the element of speculation exists and the imponderables are many we identify a basis on which a sum

> can properly be awarded and the sum of$20,000.00 is not so excessive as to be considered outside the limits of a conventional sum awarded when the relevant factors defy precise calculation.

[176] Applying that passage to the facts of this case it is clear that the claimant's injury has resulted in some loss of earning capacity. As was the anticipation in the cited case, in Akeem's case, it is not expected that he will engage in an occupation which is purely cerebral. His performance in and attendance at school were not very good before the accident and neither has improved since. He has stated an interest in auto-mechanics. Apart from auto-mechanics, the general nature of technological careers to which the evidence has indicated he is suited is that they usually involve significant use of the hands both in terms of strength and dexterity. Whatever technological career he does pursue despite all the imponderables previously identified, it can reasonably be anticipated that the accident will have resulted in some diminution of his earning capacity. Therefore to quote from Rattray P in the ***Jamaica Telephone Company Limited*** case, "Although the element of speculation exists and the imponderables are many", a basis can be identified on which a conventional sum can be awarded.

[177] The above analysis necessarily leads the court to a conclusion that the imponderables not having sufficiently crystallized, this is not an appropriate case to utilize the multiplier/multiplicand approach to calculate damages due for loss of the claimant's earning capacity. The cases where conventional sums were awarded cited by counsel for the defendant on their face appear to involve more serious losses in earning capacity than in the instant case based on the injuries suffered. There is however one significant factor in the instant case that compels the court to make a conventional award above the updated figures in both of those cases. That factor is the youth of the claimant who likely has some 48 years of working life ahead of him and who undoubtedly has suffered some handicap, some loss of earning capacity that will

affect his working life. Taking all the factors into consideration, including the necessary contingencies which may reduce the length of his working life, a conventional award of $1M under this head appears appropriate.

ORDER

[178] Accordingly the court on December 7, 2012 made the following order:

1. Judgment for the Claimant as follows:-

General Damages

Pain and Suffering and loss of amenities	-	**$7, 000, 000.00** with interest at 3% from November 16, 2009 to December 7, 2012
Loss of Earning Capacity	-	**$1, 000, 000.00** *(no interest)*
Post Traumatic Stress Disorder	-	**$450, 000.00** with interest at 3% from November 16, 2009 to December 7, 2012

Special Damages

Medical Reports/Consultations	-	**$124, 000.00** with interest at 3% from July 14, 2009 to December 7, 2012
Facial and oral surgery	-	**$337,000.00** *(no interest)*
Dental Expenses	-	**$210,000.00** *(no interest)*
Orthodontal Treatment	-	**US$5,720.00** *(no interest)*

Cost of prostheses *(initial cost, physiotherapy, one year and two years basic follow up and adjustments plus replacements)*	-	**$10, 404, 700.00** *(no interest)*
Psychiatry – initial assessment and preparation of reports	-	**$60,000.00** *(no interest)*
Psychotherapy	-	**$200,000.00** *(no interest)*
Medication review and treatment	-	**$240,000.00** *(no interest)*
Cost of medication	-	**$180,000.00** *(no interest)*
Neuropsychological assessment	-	**$60,000.00** *(no interest)*

2. Costs to the Claimant to be taxed or agreed.