IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 2000W159A

BETWEEN	ALBERT WHITE	CLAIMANT
AND	OFFICE OF DISASTER PREPAREDNESS AND EMERGENCY MANAGEMENT	1ST DEFENDANT
AND	TRESCELIAN WILLIAMS	2ND DEFENDANT
AND	ATTORNEY- GENERAL OF JAMAICA	3RD DEFENDANT

Mrs. Antoinette Haughton Cardenas instructed by Haughton and Associates

for the claimant.

Mr. Jerome Spencer instructed by the Director of State Proceedings

for the defendants.

Heard: March 6, 7, & 13, & July 31, 2008

Negligence- Motor vehicle collision- ankle and shoulder injuries- defendants liable- assessment of damages-whether award should be made for handicap on the labour market- whether award should be made for loss of overtime pay

McDONALD-BISHOP, J (Ag.)

1. I wish to take this opportunity to apologize for the delay in delivering this judgment and to thank the parties for their patience.

INTRODUCTION

2. On October 22, 1994, the claimant, Mr. Albert White, 44 years old, was riding his Honda motor cycle along the Weymouth Drive main road, in the parish of St. Andrew when he collided with a Lada motor car being driven by Mr. Trescelian Williams, the second

defendant, and owned by the Office of Disaster Preparedness and Emergency Management (ODPEM), the first defendant.

3. The claimant is now a wrecker driver but at the material time, he was employed to JAMINTEL as a telegram dispatcher and was conducting duties in and around the Corporate Area. The second defendant is now retired but at the material time he was Director of Finance in the employment of the first defendant and was, admittedly, its servant and/or agent. The third defendant is sued by virtue of the Crown Proceedings Act.

THE CLAIM

4. The claimant's claim is for damages for negligence in that on the day in question, the second defendant negligently drove, managed, and/ or controlled his motor car in a manner that caused the said car to collide with the claimant's motor cycle resulting in the claimant suffering injury, loss and damage. The allegation of negligence against the second defendant has been particularized in the following terms in paragraph 5 of the claimant's statement of claim.

PARTICULARS OF NEGLIGENCE

"(a) Driving too fast in all the circumstances.

(b) Driving whilst his ability to do so was impaired by alcohol.

(c) Failing to keep any or any proper look out or to have any or any sufficient regard for the other users of the said road.

(d) Failing to look ahead to see the claimant and his motor cycle or to heed the Plaintiff's presence upon the said road.

(e) Failing to give any or any adequate warning of his presence or approach upon the said road.

(f) Failing to wait until the Plaintiff had safely made the right turn before attempting to proceed on the right side.

(g) Failing to observe and/or heed the fact that there was another motor car which stopped on the said road waiting to proceed and that it was likely that other users of the road were waiting for an opportunity to make the right turn.

(h) Failing to stop, slow down, to swerve, or otherwise control his said motor car in sufficient time or at all so as to avoid the said collision.

(i) The Plaintiff will further rely on the happening of the said accident as evidence in itself of the negligence of the Defendant."

THE CLAIMANT'S CASE

5. In support of his claim, the claimant gave the following account as summarized. At about 3:15 p.m., having been delivering telegrams throughout the day at various places in St. Andrew, he was making his way to the Kingston 20 area to deliver the remaining telegrams. He was riding southerly along the Weymouth Drive main road heading towards 14 Chovey Avenue where he was to make a delivery. Upon reaching the intersection of Weymouth Drive and Chovey Avenue, he put on his right indicator to indicate that he intended to turn right onto Chovey Avenue. Before turning, he looked through his rear view mirror and he saw that a red station wagon Lada motor car was immediately behind him. He steered his motor cycle to the middle of Weymouth Drive and took a second look in his rear view mirror. He noticed that the red Lada motor car had given a slow down signal to the right and had moved to the left of Weymouth Drive so he could safely turn onto Chovey Avenue. There was no vehicle coming in the opposite direction and he saw no other vehicle behind him and so he started to proceed onto Chovey Avenue.

6. While he was turning to get onto Chovey Avenue, suddenly something slammed into the right side of his motor cycle pinning his right ankle against the engine of the motor cycle. He then fell to the ground hitting his head on the pavement and the impact pushed his motor cycle along the road surface. He felt an instant pain to his shoulder. He was in a state of semi- unconsciousness for a few minutes. On regaining full consciousness, he heard a lady saying, *"driver what are you doing over here, you don't see the man coming cross the road?"* He heard the driver replied, *"I am sorry."*

7. He then noticed the second defendant's white car and realized that it was that vehicle that had collided in him. He saw the second defendant whom he realized to have been the

driver. He asked the second defendant, "*You didn't see me?*" whereupon the second defendant responded, *"I am sorry"*. The second defendant told him that he was rushing to pick up his daughter. While the second defendant spoke he recognized the scent of alcohol on his person and he noticed that he was in a nervous state. He asked the second defendant if he was drinking and the second defendant stated that he only had a few drinks. The lady on the scene then told the second defendant to stop the talking and to take him to the hospital. The second defendant, with the help of the lady, put him in the car and took him to the University Hospital of the West Indies.

8. He sustained several injuries to his body and he was hospitalized for 12 days. He underwent surgery on his ankle. Following his discharge, he was wearing a below knee cast and he was on crutches. He had to return to the hospital for further treatment and follow up care to include physiotherapy. Presently he is still affected by the injuries he sustained in the accident. He also claimed he suffered pecuniary loss and incurred expenses as a result.

9. The claimant was of course subjected to rigorous cross-examination by Mr. Spencer which, despite managing to elicit some further details as to aspects of the claim and also to ferret out one or two inconsistencies (which will be later examined in my analysis of the evidence), did not manage to shake the claimant's resolve that the second defendant was the cause of the collision and that the second defendant spoke to him during the course of which the second defendant apologized. He denied the defendants' suggestion that he was, in essence, 'the author of his own doom'.

THE DEFENCE

10. The defendants have denied in their pleadings that the second defendant was negligent as alleged and that as such no liability should attach to them. It is the defendants' pleadings that it was the claimant who overtook the second defendant on the left side and that he was the one who negligently drove managed and attempted to maneuver his motor cycle into Chovey Avenue thereby colliding into the front of the Lada motor car and damaging it. They counter- charged negligence against the claimant in paragraph 3 of their defence as follows.

PARTICULARS OF NEGLIGENCE

(A) Driving too fast in all the circumstances.

(B) Overtaking on the incorrect side of the road.

(C) Turning unto Covey Drive (sic) at a time when it was manifestly unsafe to do so.

(D) Cutting into the path of the Lada Motor vehicle 3876BA at a time when it was manifestly unsafe to do so.

(E) Failing to observe and/or to heed the presence of Lada motor vehicle number 3876BA.

(F) Failing to stop, slow down, to swerve or to otherwise control the said motor cycle, in sufficient time or at all so as to avoid the collision."

THE DEFENDANTS' CASE

11. The second defendant gave a diametrically opposed version to the claimant's case which, incidentally, also deviated from the defendants' pleadings. His account of the collision is summarized as follows. At the relevant time, he was traveling in his motor car at about 30 miles per hour along Weymouth Drive heading towards Spanish Town Road. He was on his way to deliver a book to a friend who lived on Weymouth Drive. He was coming from seeing his daughter. He did not tell the claimant that he was rushing to pick up his daughter. He saw no other car on the road at the time. While travelling along, he heard a loud noise. He looked in the right side mirror of the car and he did not see anyone. He then looked in the rear view mirror and he saw someone who later turned out to be the claimant riding an X-Trail motor cycle.

12. Just before he reached the Weymouth Drive/Chovey Avenue intersection, the claimant passed him on the left hand side and in so doing hit off the left side mirror of the car. After that he noticed the claimant on the ground. He came out the car and noticed the claimant sitting on the ground with injuries to his hands and leg. The motor cycle was also on the ground. The left front door, left front fender and the front windshield of the car were damaged. A lady whose name he gives as Marlene came on the scene and assisted him in

putting the claimant in the motor car and accompanied him to take the claimant to the University Hospital of the West Indies.

13. He later learnt the name of the motor cyclist to be Albert White and that the motor cycle he was riding was owned by JAMINTEL. That same evening, he went to the Patrick City Police station where he made a report of the accident. Approximately two to three days after the returned to the police station where he saw the motor cycle with a dent to the right hand side of the gas tank.

14. The second defendant was not spared from rigorous cross-examination by Mrs. Haughton- Cardenas. In the end, he managed to hold steadfast to his position that he did not cause the collision. He denied driving under the influence of alcohol or that his judgment and reflexes were affected by the alcohol. He did not tell the claimant that he had a few drinks. In fact, he cannot remember if the claimant had asked him if he was drinking. He also denied that he had a conversation with the claimant about his daughter. He could not remember if he had apologized to the claimant after the collision. He had no conversation with the claimant, he said. He insisted that there was no red Lada motor car on the road at the time and that there was no other vehicle in the vicinity apart from the motor cycle and his vehicle. He did not slam into the claimant's motor cycle while the claimant was turning onto Chovey Avenue. He was on the extreme left while driving about 2ft from the sidewalk and the claimant passed him on the left. He denied every suggestion that he was the cause of the accident.

15. The defence also relied on the testimony of Corporal Clive McLeod who was assigned to investigate the accident. Corporal McLeod did not witness the accident but he said he attended on the scene after the collision but when he got there, none of the parties was present. He saw the motor cycle to the left side of the road. On a subsequent date, he took statements from the parties. The accident file that he had prepared cannot be located following on the relocation of the Patrick Gardens Police Station to Duhaney Park. He stated in his examination- in- chief that based on the information he received from both the claimant and the second defendant, the motor cycle was in the process of turning right onto Chovey Avenue when the collision occurred.

LIABILITY: ANALYSIS

16. It is clear that there is no point of convergence between the accounts of the parties as to how the collision occurred. It is simply a question of fact as to which account is to be believed. The fundamental question is: who is responsible for the collision along Weymouth Drive on October 22, 1994?

17. The resolution of this question hinges totally on the evidence of the claimant and second defendant and is thus a question of fact to be resolved purely on their credibility. In light of this, their demeanour was of critical importance to me and so I have listened to them keenly and observed them closely while giving their testimony from the witness box. I have considered the evidence adduced in this case whilst bearing in mind at all times that it is the claimant who bears the ultimate burden of proof on a balance of probability.

18. I must state too that I have commenced my investigations into the facts being mindful that the accident that has given rise to the claim is not of recent occurrence having taken place almost fourteen years ago. I therefore expect that persons' memory might naturally be affected with the passage of time and so there might be faulty recollection of the event, particularly with respect to minute details. I am therefore aware of the possibility that reliability and credibility may be compromised not necessarily due to deliberate falsehood but due to a genuine lapse of memory. In analyzing the evidence, I find that my task was not an easy one as it was sometimes difficult to discern a deliberate falsehood from an innocent lapse of memory and faulty recollection. I have nevertheless tried to do the best that I can in all the circumstances in my effort to distill the truth from the conflicting accounts.

19. While I do not propose to expressly re-state every aspect of the evidence that has influenced my decision, this is not to say that I have overlooked or ignored any aspect of it but I will only seek to highlight some of the salient features that should sufficiently serve to indicate the bases for the conclusions at which I have arrived. With that said, I will simply now say that having examined all the evidence adduced by both sides and after paying due regard to the submissions of counsel on their behalf, against the backdrop of the relevant principles of law regarding negligence as alleged, I have made the following findings.

(1) The claimant has impressed me as a witness of truth. He seems more credible and reliable than the second defendant. Whatever inconsistencies or discrepancies there are in his testimony are rather few and, in my view, rather minor. They are not of such gravity to go to the root of the claimant's case particularly as it relates to the first issue of liability. I accept his version of how the accident occurred on a balance of probability.

(2) I find that at the time of the collision, the claimant was not speeding. I accept the claimant when he said that at the material time, he knew Weymouth Drive very well and that he had already known before reaching Chovey Avenue that he had to make a right turn at the sixth avenue along Weymouth Drive. I, therefore, accept his evidence that he was driving left along Weymouth Drive until after he had passed the fifth right turn.

(3) I accept that after passing the fifth turn, he slowed down, put on his right indicator and positioned the motor cycle to the middle of the road. This I find to have been a proper step taken by the claimant to indicate to fellow motorists and to other users of the road that he intended to make a right turn.

(4) I believe the claimant's assertion that he saw the red Lada motor car behind him and that when he positioned himself to the middle of the road to turn right, this car gave a slow down signal and moved to the left of Weymouth Drive. I have drawn the conclusion that the claimant, upon seeing this, must have felt that it was safe for him to turn as there was no vehicle coming in the opposite direction to prevent him from doing so. The claimant said before he turned, he looked in his rear view mirror but did not see the defendant's motor car even though he could see three car lengths behind him. Mr. Spencer has taken issue with this assertion on the grounds that if the claimant had looked as he is saying, he would have seen the defendant's car. But my view is that even if the claimant had seen the defendant's vehicle behind him in the line, he would have already had done what was required of him to indicate his intention to go right by slowing down, 'middling' the road and

putting on his right indicator. The vehicle behind him would have been expected to keep a proper look out, to pay due attention and to heed this warning. The Lada motor car that was immediately behind the claimant's motor cycle clearly did so and that motorist expressly indicated the need for the motorists behind to slow down and to proceed with caution. In any event, the defendants' case is not that the claimant had made a right turn on the second defendant but rather that the claimant was the one overtaking on the left. So the question as to whether the claimant should have seen the car behind him or not can do nothing to advance the defendants' case.

(5) I reject the defence that there was no Lada motor car on the road behind the claimant's motor cycle that day. I believe that the defendant failed to heed the warning of this Lada motor car and failed to keep a proper look that caused him not to have seen the claimant making a right turn. I accept that it was while the claimant was in the process of turning onto Chovey Avenue that he was hit by the second defendant's car. The claimant had properly and in good time indicated his intention to turn and was advanced in the process of turning when he was hit.

(6) I find that the claimant had done what was required of him as a prudent motorist making a right turn. I have paid due regard to Section 57 (1) of the **Road Traffic Act** which provides:

> *" The driver of a motor vehicle constructed to be steered on the right or off- side thereof, shall, before commencing to turn to, or change direction towards, the right, give the appropriate signal so as to indicate that direction."*

The fact that the claimant did not give a 'hand signal' does not adversely affect his case. He had properly put on his right indicator which is a permissible signal by virtue of the **Road Traffic Act,** section **57 (4)** and regulations made under that section.

(7) I reject the defence that the claimant had gone to the left of the car and was overtaking it on the off-side when the collision occurred. I can see no plausible explanation for the defendants' assertion that the claimant would go to the left of the motor car when he knew he was to make a right turn onto Chovey Avenue and with no vehicle coming from the opposite direction to hinder such a turn. The defendants' account is highly improbable and incredulous. I reject it as a credible account of the incident.

(8) I must indicate too that my difficulty in accepting the defendants' version being advanced at the trial as the truth is compounded by the conflict between the defendants' pleadings and their evidence. Curiously, the defendants in paragraph 3 of the defence states, *inter alia*:

> *"...The third defendant will say that the second defendant was driving Lada motor vehicle...* ***when the plaintiff overtook the First Defendant (sic) on the left side and so negligently drove managed and attempted to manoeuvre his motor cycle unto Covey(sic) Drive (sic) that he collided into the front of the Lada motor car thereby causing damage to same."*** *(Emphasis supplied)*

This was then repeated in the particulars of negligence:

> *"(C) ...Turning unto Covey Drive (sic) at a time when it was manifestly unsafe to do so.*
>
> *(D) Cutting into the path of Lada motor vehicle 3876 BA at a time when it was manifestly unsafe to do so..."*

(9) In evidence, the second defendant has made no reference, in keeping with the terms of the pleadings, that at the time the collision occurred, the claimant was making a right turn onto Chovey Avenue. His evidence, even upon him being taxed by the claimant's counsel, was that the collision occurred before he reached the intersection with Chovey Avenue. In fact, he strongly denied that he hit the claimant's motor cycle when it was making a right turn onto Chovey Avenue. He said the motor cyclist had passed him on the left hand side and in so doing had hit off the left side mirror and then he noticed the motor cyclist was on the ground. There is no evidence, in keeping with the

pleadings, that the cyclist was turning right onto Chovey when it was unsafe to do so or had cut into the path of the car thereby colliding in the front of it. Indeed, the defendants' witness, Corporal Clive McLeod, said in his evidence that both the claimant and the second defendant told him that the collision occurred when the motor cycle was turning right onto Chovey. This was never challenged. It shows that the second defendant had previously given a different account from what he has now said in his evidence. This goes to his credibility.

(10) Mr. Spencer has further submitted that the damage to the car is inconsistent with the account given by the claimant. I do not agree. The site of the damage on the motor car has not in any way taken away from the plausibility of the claimant's account. I will say that it is by no means consistent with the account given by the second defendant. In their pleadings, the defendants said that the motor cycle had hit into the front of the car when it was turning right, however in court the second defendant said that he only saw when the cyclist hit off the side mirror. He could not say definitively how the other areas of the car got damaged but according to him it must have been from the impact. So at trial, there is no evidence coming from the second defendant that the motor cycle hit in the front of the car as pleaded and in his pleadings no mention was made of the claimant hitting off the side mirror. The second defendant has not stuck to the same story. I believe that he has now included the side mirror in an attempt to lend greater credence to his story that the collision occurred when the claimant was riding beside him on the left. In light of all this, the evidence advanced by the defence is rendered rather suspect and is not accepted as the truth on a preponderance of the probabilities.

(11) The claimant also said that following on the collision there was a conversation between himself and the defendant. The claimant said the defendant apologized to him. The defendant, however, said he cannot remember doing that. Again, I have reminded myself that the incident had

taken place a long time ago and so the defendant might genuinely not remember this particular detail or he might have remembered but does not wish to admit it. I accept the claimant, in light of the manner in which I find the collision to have occurred, that the second defendant did in fact express regret to him. I conclude that the defendant did this because he accepted that he was the one at fault at the material time.

(12) The second defendant also denied that he was drinking or that he told the claimant that he had only a few drinks. I believe there was a conversation about drinking between the parties. However, there is no evidence that he was ever tested for alcohol. I conclude that there is no sufficiently reliable proof upon which I could legitimately make a finding adverse to the second defendant that his judgment was impaired by the influence of alcohol as contended. Even if the defendant had admitted that he had a few drinks, I will not elevate this to say that this contributed to the accident. His nervous state that the claimant spoke to is not, in my view, an unequivocal or conclusive indication of impairment of his judgment by alcohol. His nervous state could simply be as a result of the collision that had occurred. The evidence of the parties hangs in the balance in relation to this aspect of the claimant's contention that the second defendant's ability to drive was impaired by alcohol. The probabilities are equal on this particular matter.

(13) With that aside, I am satisfied on a preponderance of the probabilities that the accident was caused as a result of the second defendants' negligence which would render him liable to the claimant in damages and for which the first and third defendants would be vicariously liable.

DAMAGES

20. Having found that the second defendant is solely responsible for the accident, the next issue to be examined is the extent to which the defendants should be held liable for the injury, damage and loss claimed by the claimant to have been as a result of the accident.

Again, it is for the claimant to prove that he is entitled to damages as claimed. The question of damages now falls to be assessed.

21. In relation to assessing general damages, I will now proceed to do so under the usual headings of pain and suffering, loss of amenities and the extent to which, if at all, the claimant's, pecuniary prospects have been affected by the accident. For convenience, I will embark on this enquiry by resorting to the useful guidelines in assessing damages recommended by Wooding C.J in **Cornilliac v St. Louis** [1964] 7 W.I.R. 491.

PAIN AND SUFFERING

The nature and extent of the injuries sustained

22. The claimant's contention is that he sustained injuries as a result of the accident. These injuries are particularized in his statement of case. The defendants in their defence filed have not admitted the particulars of injuries. The second defendant, however, in his evidence stated that after the collision he saw the claimant on the ground with injuries to his leg and hands.

23. The claimant's assertion that he sustained injuries as a result of the accident is confirmed by medical reports from the University Hospital of the West Indies to which the claimant was taken by the second defendant. The evidence as contained in the medical report of Dr. Mark Minott, Orthopedic Resident at the University Hospital, dated April 19, 1995 confirms that the claimant reported to the Accident and Emergency Department of the University Hospital on the day of the accident with injuries to his head, right shoulder and right foot. Physical examination also revealed that he was in pain.

24. In relation to his head, there were multiple abrasions to the left temporal region, left cheek, left neck and right ear. With respect to his right foot, radiographs revealed that he sustained an undisplaced bi-malleolar fracture of the right ankle associated with a fracture of the neck of the right fibula. Radiographs also showed injury to his right shoulder being a comminuted fracture of the right clavicle. There was tenderness over the right clavicle with a

painful decrease in motion. He had multiple abrasions on the dorsum of the hand, multiple abrasions on the knees and a 20cm laceration along the lateral aspect of the foot.

25. He underwent surgical procedures for debridement of the wound to his right ankle. His wound was dressed on the ward and then dressed daily in hospital until November 4, 1994 when he was discharged from hospital in a below knee cast on the right foot. He was ambulated with crutches. He later had Kirshner wires (K- wires) inserted in his foot which were removed in March 1995. He became an out patient in the Orthopedic Clinic where he had numerous visits after his discharge from hospital. For some time, he had to continue to have his wound cleaned and dressed at the clinic.

26. After his discharge from hospital, the claimant, upon being reviewed on February 9, 1995, complained of difficulty in placing his foot flat on the ground. Physical examination confirmed that he had a limitation of dorsi-flexion due to a stiff hind foot. He was referred to Physiotherapy. On March 17th 1995, upon the removal of the K-wires, he had good ankle movement but had restriction of inversion and eversion. In The opinion of Dr. Minott when the claimant was discharged from his care on March 17, 1995, he had not attained the limit of his recovery.

27. Following on Dr. Minott's review of the claimant, the claimant continued his visits at the University Hospital for treatment. This was confirmed in the report of Dr. A Mansingh, Orthopaedic Resident, dated March 4, 1996. This report indicates that when the claimant was last seen at the hospital in December, 1995, being over a year after the incident, the wound had healed but he was complaining of pain in two areas of the foot corresponding to where the K-wires had been sited. Fibrotic lumps were palpable over these sites and he was advised to apply emulsifying ointments to the foot. That doctor indicated that if the pains persisted then corrective management would be necessary at a later date.

Nature and gravity of the resulting physical disability

28. It is seen that in 1995, Dr. Minott had indicated that based on his findings the claimant had not yet reached maximum recovery but he expected that he would not be left with any worse than a 2% bodily impairment. Dr. Mansingh also found in December 1995,

that there was no worsening in the claimant's condition and that his full bodily impairment due to the accident would remain at 2% as quoted by Dr. Minott.

29. However, the claimant contended that after the accident and his course of medical treatment including physiotherapy, he continued to suffer pain and bodily impairment. His evidence is that presently, he continues to experience pains in his right shoulder and ankle and his right foot is deformed. As a result of the injury to his right foot, he is now forced to walk on the side of his foot as he is unable to place his foot flat on the ground. He drives now but he has to sit in certain positions to move around. If he stands on his foot for prolonged period, he gets a pain in his ankle. He is also unable to balance on his right foot. He gets pain whenever he does long driving. Whenever he goes on a long journey he has to rest.

30. The claimant further relied on the evidence of Dr. Gary Dundas, Consultant Orthopaedic Surgeon, to indicate the extent of his resultant physical disability following the accident. Dr. Dundas gave *viva voce* evidence and was thoroughly cross- examined by counsel for the defence. Dr. Dundas said that that he saw the claimant on November 9, 2000 when the claimant complained of twisted right ankle, inability to dorsi-flex right ankle, painful callosity on the sole of the right foot and intermittent pain in the right shoulder.

31. Doctor Dundas testified that he had the opportunity to refer to the reports of Dr. Minott and Dr. Mansingh which were brought to him by the claimant. The claimant had however said that apart from his statement he took nothing else to Dr. Dundas. I accept Dr. Dundas that he had seen the reports and that they were given to him by the claimant. I find this discrepancy however to be slight and so does not erode the credibility of the claimant in any material respect.

32. Dr. Dundas, upon physical examination of the claimant and upon being assisted by radiographs, indicated the following findings:

(i) Fracture of the junction of the distal and middle thirds of the right clavicle which had healed, with overlap of the fragments.

(ii) Subtular ankylosis with pes cavus.

(iii) Osteopenia on the bones about the ankle and mid tarsal area.

(iv) Well - healed bi-malleolar fractures.

33. He explained that the subtular ankylosis with pes cavus can result from the malleolar fractures. It is not a direct consequence but problems that can develop from malleolar fractures could lead to stiffness to the foot which in turn would lead to ankylosis. In his view, the period of the claimant's immobilization from the wires in his foot contributed significantly to the subsequent stiffness.

34. In relation to the osteopenia on the bone about the ankle, this he said is usually as a result of inflammation and inactivity. This condition can develop from injury to a particular area and is a condition that is found in cases of injuries of the nature suffered by the claimant to his ankle. The symptoms of the conditions of ankylosis and oestopenia include pain, swelling, sometimes, sensations of coldness, dull ache and stiffness. He testified that once a person has ankylosis it is 'nigh impossible' to reverse the condition of oestopenia. He stated that the initiation of the process of ankylosis was due to the accident and is not a condition that he sees regularly in young people. A person can get physiotherapy and nevertheless develop ankylosis.

35. The doctor concluded that using the American Association Guides for the evaluation of Permanent Impairment Fifth Edition, the present residual disability relates to the claimant's right lower extremity and amounts to 46% of the affected extremity or 20% of the whole person. There is no measurable disability in terms of the clavicle.

36. Mr. Spencer, at length, explored the variance between the partial disability rating of Dr. Dundas being 20% whole person and that initially indicated by Dr. Minott as expected to be no worse than 2%. Dr. Minott had clearly indicated that at the time he gave his opinion on this issue, the claimant had not yet reached the limit of his recovery. Dr. Dundas saw the claimant approximately six years after the accident. He said at that time the claimant had reached the limit of his recovery. Having considered the evidence of Dr. Dundas in its entirety, I am sufficiently satisfied that he is an expert in this area. He has sufficiently established to my satisfaction the basis for his conclusions and opinion. I accept his opinion that the claimant's residual disability rating is at 20% the whole person. I find too, based on

the explanation proffered by Dr. Dundas, that the claimant could not have reasonably done anything to substantially avoid the resultant effect of his injuries. I am satisfied that the claimant's has suffered serious resultant disability from the accident for which the defendants should compensate him.

The pain and suffering which had to be endured

37. The claimant in his evidence spoke to feeling pain immediately at the time of the collision. The medical report of Dr. Minott also recorded that the claimant was in pain when seen at the hospital. The claimant has sustained injuries and has undergone some surgical procedures that I accept would result in pain and discomfort to him. Some allowance must be made for pain attendant on treatment. The medical reports all showed that the claimant had been complaining of pain at some time or the other between 1994 and 2000. Dr. Dundas said that when he examined the claimant, he complained then of experiencing pain for six years. The claimant also indicated that over the years he would seek medical treatment for the pain he was experiencing and would be given pain killers.

38. I accept the claimant's evidence that he continues to suffer pain in his ankle and shoulder since the accident. Dr. Dundas has indicated that pain is a symptom of the medical conditions from which the claimant now suffers and will continue to suffer in the future. I find that as a result of the accident, the claimant has suffered pain and endured suffering for which he must be adequately compensated.

Loss of Amenity

39. The law is well settled that damages may be awarded for the loss of pleasures of life or the reduction in the enjoyment of life resulting from a defendant's breach. **Charlesworth on Negligence 4th ed. 1235** puts it this way:

> *"Loss of enjoyment of life and the hampering effect of the injuries in the carrying on of the normal social and personal routine of life with the possible effect on the health and spirits of the injured party are proper to be taken into account."*

Munkman on Damages for Personal Injuries and Death, 11th edn. P.46 at 6.27 explained that such loss of pleasure or amenities may be either permanently, for example, by the loss of

a leg or temporarily such as by mere detention in a hospital or bed for a period. This is distinct from pain and suffering. In the simple routines of standing and walking, the claimant seems to suffer discomfort and inconvenience. He was detained in hospital for a while and rendered immobile by surgical procedures. Even if temporary, there was some loss in the simple pleasures of life to be able to move around freely and unencumbered. Now, he cannot stand for prolonged period. He cannot balance on his right foot and he cannot put his right foot flat on the ground so he has to walk on the side of his foot. This is a deformity that must result in some measure of inconvenience and displeasure for a relatively young man. He cannot go to bed at nights without using some form of pain relief for his back. In short, the claimant's health and vitality has been impaired and will continue to be so. As Lord Roche said in ***Rose v Ford*** [1937] AC 826 at 859:

> *"I regard impaired health and vitality, not merely as a cause of pain and suffering, but as a loss of a good thing in itself."*

The claimant, as a result of his injuries, has lost good health and vitality which is the loss of 'a good thing in itself' for which he must be compensated as far as money can do so. He is therefore entitled to damages for loss of amenity.

Extent to which claimant's pecuniary prospect has been affected

Handicap on the labour market

40. Mrs. Haughton-Cardenas has submitted that an award should be made for handicap on the labour market. She has asked for a lump sum in the region of $700,000.00-$750,000.00. Mr. Spencer raised an objection for an award to be made under this head because according to him, there is nothing to suggest that there is a substantial risk that the claimant will lose his job and would have to, some time in the future, compete on the labour market.

41. The evidence from the claimant is that following on the accident, he was unable to ride a bike and he was given different duties although at the same rate of pay. In 2002, that being eight or so years after the accident, he was made redundant. He has not led any evidence as to the reason for his redundancy to show any nexus between that and his injuries.

He has led no evidence as to any difficulties, if any, he faced in finding employment following the accident. In relation to his current employment, there is evidence that he is a wrecker driver. He states that when he drives for long he gets pain and he has to rest. He did not really say this occurs while he is acting in the execution of his duties. There is no direct evidence placed before the court to say how, if at all, the injuries have affected his ability to carry out his occupation.

42. The basis for an award for handicap on the labour market has been explained time and time again in various authorities. In **Smith v Manchester City Council** (1974) 17 KIR, Lord Scarman noted that the element in this type of loss is the weakening of the claimant's competitive position in the open labour market, that is to say, should the claimant lose his current employment, what are his chances of obtaining comparable employment in the open market?

43. Following on **Smith,** this principle was cemented in **Moeliker v Reyrolle & Co. 1977 1 W.L.R. 132** and has been followed in this jurisdiction. It is now a well established principle of law that for an award to be made under this head, there needs to be shown a real or substantial risk of the claimant losing his job as a result of the injuries before the estimated end of his working life and be thrown on the labour market where he is placed at a disadvantage in getting another job or an equally well paid job as a result of his injuries. In **Tyne v Wear County Council [1986] 1 All ER 567,** Lloyd, LJ stated that the risks that a judge would have to assess under this head are of two kinds: first he would have to consider whether the claimant would be more likely to lose his present job on account of his disability and second, whether the claimant would be less likely to get another job on account of his disability should he lose his present job for whatever reason.

44. The risk of this happening must be sufficiently proved by clear and cogent evidence. There is high authority, by which I am bound, that seems to be saying that the mere fact that the claimant suffers a disability is not, by itself, enough to ground an award under this head. In **Dawnett Walker v Hensley Pink,** Supreme Court Civil Appeal No. 158/01 (Unreported), delivered June 12, 2003, Harrison, P (Ag) (as he then was), reversed the decision of

Campbell, J making an award to the claimant for handicap on the labour market on the ground that there was so evidence of a risk of the appellant losing her job.

45. In **Dawnett Walker** there was evidence that the claimant, a policewoman, who sustained a whiplash injury in a motor vehicle accident was absent from work for one year and four months after the accident and was placed on light duties on her resumption. She was assessed by Dr. Cheeks of having a permanent partial disability of 5% of the whole person. The prognosis was that she would experience *"intermittent episodes of neck and shoulder pain particularly at times of heavy exertions."* Dr. Cheek's medical report, in so far as is relevant at this point, stated that from an occupational standpoint the injury was *"expected to have a mild impact on her ability to function in her present occupation as a police officer."* Harrison, P (Ag), after considering that bit of evidence, said:

> *"This medical opinion placing the injuries as having merely a "mild impact" on her employment, is a contrary indication of any probability of a risk of loss of employment of the appellant. This by itself is sufficient to disqualify the appellant for any consideration of an award for handicap on the labour market..."*

46. The learned President stated that no award should have been made for handicap on the labour market as *"there is no evidence of a chance of a risk of the loss of her job arising in the case of the appellant."* The interesting thing to note, however, is that while the facts of **Dawnett Walker** are distinguishable and the circumstances of her employment might be different from the claimant's in the instant case, the learned President made it quite clear, after restating the principle in **Moeliker v Reyrolle (**as applied in **Monex Ltd et al v. Grimes** SCCA No. 83/96 delivered 15th December 1996 (unreported) that "[T]*here must however be some medical evidence confirming the likelihood of such a risk."* This would mean that there must be medical evidence as to the real or substantial risk which is necessary to ground the award.

47. In this case, there is no indication whatsoever of the impact, if any, that the injury have had or is having or might have had on the claimant's employment to point to a real or substantial risk of him losing his job as a result of his disability and to be thrown on the labour market . None of the medical reports contained any information or opinion on this aspect that would assist in determining the extent to which the claimant's pecuniary prospects

– past and prospective - have been or might be affected by the injuries brought about by the second defendant's negligence.

48. In the absence of medical evidence or any evidence at all pointing to the existence of a real or substantial risk, or indeed any risk at all, that the claimant could lose his employment as a result of the injuries and be thrown on the labour market to compete with other healthy and able- bodied drivers, I am constrained to hold, as submitted by Mr. Spencer, that there is an absence of evidential foundation upon which an award for handicap on the labour market can justifiably be made. In the premises, I would make no award for handicap on the labour market.

QUANTIFYING THE DAMAGES

GENERAL DAMAGES

49. With respect to general damages, I conclude that the claimant is entitled to damages for pain and suffering and loss of amenities as a result of the accident but not to an award for handicap on the labour market. The task at hand is now the difficult one to find that sum of money that would put the claimant in the same position he would have been in if he had not been injured by the second defendant. This must be arrived at as Lord Denning said in **Ward v James** [1966] 1 Q.B. 273 at 275 *"from experience and from awards in comparable cases."* This however does not simplify the task. I can only do the best I can in the peculiar circumstances of this case using previous cases as my guide while at the same bearing in mind that no two claimants are alike.

Pain and Suffering and Loss of Amenities

50. On the question of damages for pain and suffering and loss of amenities, Mrs. Haughton- Cardenas has submitted three cases for my consideration. The first is **Donald Russell v Bruce Bryan et al** Suit No. C.L. 1992/ R079, reported at Khan's vol. 5 p.13. The claimant in that case was 26 years old and suffered multiple fractures to his upper and lower extremities and lacerations to different areas of his body when he was thrown from a motor vehicle. His injuries were attendant with complications to include urinary and skin infection

which would add to the pain and suffering he had to endure. He also had to contend with permanent multiple scarring. His permanent partial disability was assessed by two doctors to be between 18% – 22%. This is in the range of that assessed for the instant claimant. Updated today, the damages awarded in **Donald Russell** for pain and suffering and loss of amenities would translate to somewhere in the region of $2, 520,000.00.

51. The second case submitted on the claimant's behalf is **Oscar Lee v The Attorney General** of Jamaica (Suit No. C.L. 1989/C 139 Khan's Vol. 4, p.58 assessed March 4, 1993. In **Oscar Lee** the claimant was 23 years old and sustained injuries when he was struck from his bicycle by a Police Landover. He sustained a compound fracture to his tibia and fibula with a laceration and bone protruding. Among other things, he suffered continuing pain and swelling of the right leg on walking. He had an obvious deformity, walked with a limp and dragging of his right foot. There was also a 1-1/2 inch shortening of his right lower limb. His partial permanent disability of the right lower limb was assessed at 45% which is in the range of the assessment of the claimant. There is however no indication of a whole person disability rating. He was awarded $400,000.00 for pain and suffering and loss of amenities which translated today would stand at roughly $2,352,000.00.

52. The third case brought to my attention by Mrs. Haughton Cardenas is **Tyrone Morrison v The Attorney- General of Jamaica et al** (Suit No. C.L. 1983/ M031 reported in Harrison revised edition, p. 192. Damages were assessed in 1988. In **Tyrone Morrison** the claimant was a Special Constable who sustained injuries in a motor vehicle accident. He suffered a fracture of medial malleolar of the right tibia, fracture through junction of the distal and middle third of the right fibula and superficial abrasions on the right leg. Four years after the accident, he was reviewed by Dr. Dundas. He had severe deformity of the right ankle with obvious instability and angulation. He also had arthritic degeneration in the tibia. He was assessed at 15% the whole person. He was awarded $60,000.00 which updated today would stand at roughly $1,400,000.00.

53. On behalf of the defendant, Mr. Spencer relied on **Cecil Gentles v Artwell Transport Co. Ltd** Khan's volume 5, p.60. In that case the 70 year old claimant suffered a bi-malleolar fracture of left ankle. The bone healed well and he was likely to develop arthritis

but there was no evidence of arthritis when he was last seen at the clinic. He was awarded $300,000.00 for pain and suffering and loss of amenities in February, 2000. This would translate to roughly $680,000.00. Mr. Spencer concedes that the claimant in this case suffered more severe injury than in **Cecil Gentles** but he would submit that $1,500,000.00 would be a reasonable sum.

54. He also indicated that the case of **Roy Douglas v Reid's Diversified Ltd et al**, Khans, vol. 4 p. 61 would provide a useful guide to the damages to be awarded. In that case, the claimant was 27 years old and was injured when he fell from a truck. He suffered compound fracture of medial malleolar of right ankle; fracture of posterior malleolar of right ankle and spinal fracture of distal of right fibula. He spent nine weeks in hospital where surgical procedures were performed and plates and screws inserted in his foot. He was assessed as having permanent partial disability of function of right leg at 10-15%. He suffered from pain and swelling to his ankle whenever he attempted to do gardening. He was awarded $240,000.00 for pain and suffering and loss of amenities. This award would translate to $846,000.00 today. Mr. Spencer submitted that he will acknowledge that the claimant in the instant case has sustained more serious injury and so he would suggest an upper limit of $1,800,000.00. The range he suggests for pain and suffering and loss of amenities would be between $1,500,000.00 and $1,800,000.00.

55. Having examined the cases submitted by both counsel and having noted the similarities and differences among them when compared and contrasted with the instant case, I conclude that a reasonable and fair sum that would neither be exorbitant nor mean for pain and suffering and loss of amenities is $2, 300,000.00.

SPECIAL DAMAGES

56. The claimant has alleged that as a result of the accident he incurred expenses and has suffered losses for which the defendants should be held liable. The onus is again on him to establish to the court's satisfaction, on a balance of probability, that the defendants' breach has brought about the losses claimed.

Medical expenses

57. The claimant is seeking to recover expenses incurred in obtaining medical reports. He has claimed $1000.00 for this item in his particulars of claim. Two receipts were admitted by consent in the sum $500.00 each. This $1000.00 was pleaded and proved and so is allowed as an expense incurred as a result of the accident.

58. In his particulars of claim, the claimant sets out that all medical expenses were paid by his employer. He did not seek to recover them as they were not particularized. At the trial, the claimant sought an amendment to include expenses he incurred in 1995 but which were not included. Mrs. Haughton –Cardenas explained that the claimant had brought it late to her attention and it took some time to retrieve documentation from him in proof of it given the lapse of time. She claimed, she failed to seek an amendment before trial due to an oversight. While no sufficiently good excuse was given for not seeking the amendment prior to the trial, in the interest of justice, I allowed the amendment because it was felt that the sums claimed would not cause any real prejudice or injustice to the defendants and would cause greater injustice to the claimant.

59. Leave was sought and granted to add $9000.00 costs of medical report received from Dr. Dundas, the sum of $1,390.00 incurred for deposit paid on the hospital bill and $4,390.00 for prescription and dressings obtained at the hospital. In the end, no proof was given for the expenditure of $9,000.00 for medical report from Dr. Dundas. The evidence from the claimant was that he paid $500.00 for medical report from Dr. Dundas. No receipt was shown for this and no confirmatory evidence came from Dr. Dundas. Since a report was indeed furnished and since the reports from the hospital were paid for, I will accept that the claimant in fact paid for Dr. Dundas' report. Given that $500.00 is not an exorbitant sum in light of the fact that the other reports cost that sum, I will allow only $500.00 in respect of Dr. Dundas' report in keeping with the evidence.

60. In relation to the expenses incurred at the hospital by the claimant, these expenditures were proved by receipts issued from the University Hospital of the West Indies

dated February 13, 1995 and September 12, 1995 which were admitted into evidence by consent. These items totaling $5780.00 are allowed.

Police Report

61. The cost of police report in the sum of $1000.00 is also allowed as pleaded and proved by receipt dated February 19, 1999 admitted by consent.

Transportation Costs

62. The claimant has also pleaded $2000.00 for transportation costs for taxi to and from hospital but no evidence whatsoever was adduced at trial in that regard. . It was only pleaded. No effort having been made to prove this item of special damage, it cannot be allowed

Loss of Income

63. The claimant also claims $20,000.00 for loss of income for eight weeks at $2500.00. The evidence in support of this claim is that following the accident he was hospitalized for twelve days and he was unable to work for approximately 8 weeks. This of course is accepted. He said during his illness he was paid his regular pay but he lost his income that he would earn by working overtime as well as meal allowance which he would get each time he goes on the road. He has tendered into evidence a pay advice slip dated November 24, 1994 which shows overtime payment. He explains that the overtime pay reflected there was for the Month of October as overtime would be paid in the succeeding month following the time worked.

64. In establishing his right to recover for his loss of overtime, the claimant could not remember the overtime rate that was paid but he knew it would be by the hour. He said for the nine years he was employed to JAMINTEL before the accident he would work on Saturdays given the nature of the job to deliver telegrams. The evidence of the claimant as to when exactly he would work overtime is not very clear. The only thing useful that could be distilled from the evidence is that he would not work at least one Saturday for the month. He would work on an average for three Saturdays per month. While there is no letter from JAMINTEL showing the entitlements of the claimant, the pay advice slip does show

payment of overtime to him. I accept, on a balance of probability, that given the nature of the job which relates to matters of urgency and emergency and having had to be out on the road in the execution of his duties that he did work overtime for which he would be paid.

65. The pay advice slip exhibited shows two overtime rates one for $101.00 per hour and the other $135.00 per hour. He said Saturdays were treated as overtime. There was an inconsistency in his evidence as to his hours of work but he eventually resolved it by saying that on week days they were required to work from 8:00 a.m. to 5:00 p.m. but that sometimes he would work beyond the time depending on where he had to go. I will accept that on weekends, he would work from 8:30 a.m.- 4:30 p.m. This would be eight hours. At the rate of $135.00 that I will utilize, this would be $1080.00 per Saturday. If one were to say he would work on an average three Saturdays per month then the loss of overtime to him for the period he was unable to work would be $6480.00 for six Saturdays out of the eight weeks. The fact is that overtime in respect of any other day is not capable of computation on the evidence and so no more would be awarded.

66. I would allow $6480.00 for loss to him in overtime pay as a result of his incapacity to work as a result of the defendants' breach. The loss of his income that he could have earned through working overtime is, in my view, a loss for which he should be compensated. The whole notion of damages is *restitutio in integrum*. My task is to put the claimant, as far as money can do so, back in the position he would have been in had the accident not occurred. He would have been able to obtain additional income through overtime had he not been injured. This was taken from him. The defendants must compensate him. I am guided by the dictum of Slesser L.J. in **Liffen** v **Watson [1940]** 1 K.B. 556, 557 that it is a matter of general principle that *"a wrongdoer must recompense a plaintiff for all the damage which naturally flows from the wrongdoing."*

67. In relation to the meal allowance, the claimant has no written confirmation of this entitlement. His pay advice slip does not reflect a meal allowance. Since this is not an entitlement in the ordinary course of work, I believe this would warrant strict proof not only in fact that this was an entitlement but also as to its quantum. This stands on a different footing in terms of proof from the overtime entitlement. Since the claimant has been put to

strict proof of loss of income, I will not venture to award a sum in relation to this item in the absence of some satisfactory documentary proof.

68. The special damages allowed are as follows:

Medical Reports:	$1500.00
Hospital Expenses:	$5780.00
Police Accident Report	$1000.00
Loss of Income	$6480.00
TOTAL	**$14,760.00**

JUDGMENT

69. Judgment for the claimant against the defendants with damages assessed as follows:

General damages: Pain and Suffering and Loss of Amenities in the sum **$2, 300,000.00** with interest at 3% p.a. from July 11, 2001 to July 31, 2008.

Special damages: **$14, 760.00** with interest thereon at 3% p.a. from October 22, 1994 to July 31, 2008.

Costs to the claimant to be agreed or taxed.